Morals from the Courthouse: A Study of Recent Texas Cases Impacting the Wills, Probate, and Trusts Practice

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Instructor of Law, University of Illinois (1980-81)
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Visiting Professor, Boston College Law School (1992-93)
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Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
Visiting Professor (virtual), Boston University School of Law (2014 & 2016)
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SELECTED HONORS
Order of the Coif
ABA Journal Blawg 100 Hall of Fame (2015)
President’s Academic Achievement Award, Texas Tech University (2015)
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Chancellor’s Council Distinguished Teaching Award (Texas Tech University) (2010)
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Professor of the Year – Phi Delta Phi (St. Mary’s University chapter) (1988) (2005)
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MORALS FROM THE COURTHOUSE:
A STUDY OF RECENT TEXAS CASES IMPACTING THE
WILLS, PROBATE, AND TRUSTS PRACTICE

I. INTRODUCTION
This article discusses judicial developments relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. The reader is warned that not all recent cases are presented and not all aspects of each cited case are analyzed. You must read and study the full text of each case before relying on it or using it as precedent. Writ histories were current as of February 18, 2019 (KeyCite service as provided on WESTLAW). The discussion of each case concludes with a moral, i.e., the important lesson to be learned from the case. By recognizing situations that have led to time consuming and costly litigation in the past, estate planners can reduce the likelihood of the same situations arising with their clients.

II. INTESTATE SUCCESSION
No cases to report.

III. WILLS
A. Testator’s Signature
1. Alleged Forgery

*Matter of Estate of Zerboni, 556 S.W.3d 482 (Tex. App.—El Paso 2018, no pet.).*

After Husband died, Wife probated his will. Daughter later intervened claiming that Husband’s signature on the will was a forgery and thus she would be a beneficiary under a prior will. Daughter brought forth evidence of a handwriting expert who examined dozens of Husband’s documents and who concluded that the signature on the will was a forgery. Nonetheless, the trial court granted Wife a no evidence motion for summary judgment dismissing Daughter’s claim. Daughter appealed. The appellate court affirmed holding that the expert’s report did not raise a genuine issue of material fact regarding the authorship of the signature which would preclude summary judgment. The court explained that the dozens of samples were never proved up as admissible and that the expert’s opinion was conclusory. The expert merely said he compared the exemplar signatures to the will signature and concluded that the signature on the will was a forgery. The expert failed to explain the perceived differences between the signatures.

*Moral:* A will contestant alleging forgery needs to bring forth clear evidence from an expert who explains the reasons for the conclusion that the will is forged to prevent losing to a no evidence summary judgment motion.

2. Proxy Signature

*Estate of Luce, No. 02-17-00097-CV, 2018 WL 5993577 (Tex. App.—Fort Worth Nov. 15, 2018, no pet.).*

Testator was severely injured in an accident rendering him a quadriplegic and unable to speak. However, he was able to communicate by responding to “yes” and “no” questions by blinking his eyes. Using this blinking system, Testator’s attorney drafted a will and Testator directed a notary to sign the will for him.

After Testator died, his estranged wife attempted to probate an earlier will and his sister filed an application to probate the new will. The trial court admitted the new will to probate but also awarded the estranged wife $200,000 in attorney’s fees although the jury had found that she did not act in good faith and with just cause in attempting to probate the earlier will. The
estranged wife appealed the probate of the new will and the sister appealed the award of fees.

The appellate court determined that the new will was valid. The new will was signed by a designated proxy in Testator’s presence and by his direction as required by Estates Code § 251.051(2)(B). The court thought the blinking system was sufficient to establish Testator’s directions. In addition, Government Code § 406.0165 authorizes a notary to sign a document when directed to do so by a person unable to sign. (The court also examined the evidence that supported the trial court’s determination that Testator had testamentary capacity and was not subject to undue influence.)

[The attorney’s fee issue is discussed on page 9.]

**Moral:** A will of someone with limited physical ability has an enhanced chance of being contested and thus the drafting attorney should take extra precautions to solidify testamentary capacity, testamentary intent, and compliance with will formalities.

### B. Contractual Wills

*Estate of Faccibene*, No. 05-17-01072-CV, 2018 WL 5725324 (Tex. App.—Dallas Nov. 1, 2018, no pet.).

The testator and his wife executed a joint will leaving property to their four children. After the testator’s wife died, the testator executed a new will leaving property to only two of the children. Later, the testator died and the new will was admitted to probate. The trial court granted a summary judgment that the testator’s original will was a contractual will under Estates Code § 254.004.

The appellate court reversed. The court examined the testator’s original will and found that it neither stated that a contract exists nor the material provisions of the contract as required by Estates Code § 254.004. In addition, there was no separate written agreement that the will was contractual. Instead, the will was merely a joint will, that is, one document containing the wills of both the testator and his wife. The Estates Code expressly states that the execution of a joint will “does not constitute by itself sufficient evidence of the existence of a contract.” *Id.*

**Moral:** If a client desires to execute a contractual will, make certain that either (1) the will states that a contract exists and its material provisions, or (2) there is a written binding and enforceable agreement relating to the will.

### C. Interpretation and Construction

1. **Defeasible Devise**

*In re Estate of Hernandez*, No. 05-16-01350, 2018 WL 525762 (Tex. App.—Dallas Jan. 24, 2018, no pet.).

The key issue in *Hernandez* is what interest Testatrix devised in her will when she said:

> The rest and residue of my estate *** to my husband *** to do with as he desires. Upon the death of my husband ***, I give *** any of the rest and residue of my estate *** that he may own or have any interest in to my son ***.”

After the husband died, a dispute arose over the ownership of the property. The son asserted the husband received a life estate and that he (the son) was the remainder beneficiary and thus he is now the fee owner of the property. On the other hand, the executor of the husband’s estate claimed that the husband received a fee simple absolute in the property. The trial court held that this provision was ambiguous and that the husband received a life estate with the remainder to the son.

The appellate court determined that the provision is unambiguous. The court explained that merely because litigants have different opinions on the meaning of the provision does not make it ambiguous. The court then determined that the trial court was incorrect in finding that the husband received a life estate. The court pointed out that the devise did not use any term traditionally associated with a life estate such as “for life.” Thus, the husband received a fee simple but one that was subject to defeasance, that is, any property remaining after he dies, passes to the son. Accordingly, the court held that
the husband received a fee simple determinable and the son an executory interest so that son now owns the remaining property in fee simple absolute.

**Moral:** The court did not correctly identify the interest husband received. After the condition is violated in a fee simple determinable, the property returns to the grantor or, if the grantor is deceased, to the grantor’s successors in interest. The grantor retains a possibility of reverter. What the testatrix actually created was a fee simple subject to an executory limitation because upon breach of the condition, the property would divest a prior vested interest and pass to another grantee, that is, the son who holds the executory interest.

2. Life Estate


The key issue in *Knopf* is what interest Testatrix devised in her will when she said:

> Now [Son] I leave the rest to you **...**. Understand the land is not to be sold but passed on down to your children **...**. TAKE CARE OF IT AND TRY TO BE HAPPY.”

_Id.* at 544. The trial and appellate courts held that the will unambiguously granted Son a fee simple interest. The language regarding passing the property to Son’s children was merely precatory or invalid as an undue restraint on alienation.

The Supreme Court of Texas reversed holding that the devise created a life estate in Son and a remainder in his children. The court also rejected the argument that the direction that the land not be sold was an invalid disabling restraint on alienation. Instead, the court explained that one of the inherent traits of a life estate is a restraint on the life tenant’s ability to alienate the remainder interest.

**Moral:** The language points towards a lay drafted will. Thus, the lesson to learn is that wills should be prepared by an experienced estate planning attorney to reduce the likelihood of this type of issue arising.

3. Life Estate and Statute of Limitations

*Gutierrez v. Stewart Title Co.*, 550 S.W.3d 304 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

The testatrix’s will devised certain real property to two of her children and then provided that:

> None of the real property is to be sold or mortgaged, all property is to be kept in the Gutierrez family. When one of my children dies, that individual’s property is to be divided among the survivors. When the last of my children is the only one remaining, then the property can be sold or do whatever that individual desires, without restrictions.

_Id.* at 308. Despite this provision, the two devisees conveyed the property. After one of the devisee’s died, another sibling claimed an interest in the property asserting that the sales of the properties were void as the devisees did not have the authority to sell the property. This sibling then sued the title company asserting that the company misrepresented to the devisees that they could actually sell the properties despite the will provision. The trial court granted the title company’s request for a summary judgment finding that the statute of limitations to raise a claim that the sale was void had elapsed.

The appellate court affirmed. The court began its analysis by recognizing that the testatrix’s grant potentially created a (1) fee simple, (2) determinable fee subject to an executory limitation, or (3) life estate. Using the logic of the 2018 Texas Supreme Court case of *Knopf v. Gray*, 545 S.W.3d 542 (Tex. 2018), the court held that the grant created a life estate in the devisees with a remainder interest in the other siblings regardless of whether they were named devisees.

The court then examined whether the complaining sibling’s claim was barred by the statute of limitations. The statutory period for the
misrepresentation claim was two years. Tex. Civ. Prac. & Rem. Code § 16.003(a). The alleged misrepresentation occurred in 2000 and suit was filed in 2015 well beyond the two-year period. The sibling, however, claimed that the discovery rule should apply to give her two years from when she discovered the conveyance. The court did not have to resolve this issue because even if the discovery rule did apply, the sibling’s suit was brought more than two years after the discovery.

Note: The court did not discuss the sibling’s claim against the purchasers of the properties as that issue was severed into a separate case which was not the subject of this appeal.

Moral: First, grants of property that have restrictions or other conditions should be clearly stated using well-established language to avoid interpretation and construction issues. Second, lawsuits should be brought before the applicable statute of limitations expires.

D. Will Contest

1. Undue Influence

Yost v. Fails, 534 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

The jury determined that Testatrix signed her will because of undue influence. The trial court granted the proponent of the will a judgment notwithstanding the verdict. The appellate court reversed.

The court began its analysis by setting forth the traditional elements of undue influence: “(1) an influence existed and was exerted, (2) the exertion of the influence subverted or overpowered the mind of the testator at the time she signed the will, and (3) the testator would not have made the will but for the influence.” Id. at 524. The court determined that the legal sufficiency of the evidence supported the jury’s finding of undue influence. Facts the court discussed included how Testatrix became dependent on the beneficiary of her new will, the beneficiary became her agent under a power of attorney and depleted Testatrix’s assets for his own purposes, and the shenanigans that occurred during the preparation and execution of the will.

Moral: An appellate court will carefully examine the evidence to determine whether sufficient proof exists to support a jury’s finding of undue influence.

2. Testamentary Capacity and Undue Influence

Estate of Danford, 550 S.W.3d 275 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Contestants claimed that Decedent’s will was invalid on the grounds of lack of testamentary capacity and undue influence. The trial court granted summary judgment in favor of Proponent and Contestants appealed.

The appellate court reversed. The court examined the record and determined that there were fact issues making the summary judgment improper that Decedent had testamentary capacity. For example, none of the people with Decedent at the time of will execution indicated that Decedent knew she was signing a will, understood the effect of making a will, was aware of the general nature of her property, or knew the identity of her next of kin.

With regard to the undue influence claim, the court focused on the fact that Proponent of the will who was a beneficiary thereunder was also named as Decedent’s agent under a durable power of attorney. This caused the burden of proof to shift to Proponent to show the fairness of the transaction and lack of undue influence.

Moral: Summary judgment of testamentary capacity or lack of undue influence is hard to uphold on appeal as any fact issue is likely to cause the appellate court to reverse.

3. Standing

Estate of Lee, 551 S.W.3d 802 (Tex. App.—Texarkana 2018, no pet.).

Beneficiary of a trust created in Testatrix’s will that was subsequently amended by two codicils under which he does not benefit attempted to contest the latter codicil. The trial court held that
Beneficiary lacked standing because even if the contest were successful, he would not receive property under the earlier codicil. Beneficiary appealed.

The appellate court affirmed. The court determined that merely because Beneficiary was a beneficiary of a revoked testamentary trust does not give him standing to contest the latter codicil. First, Beneficiary is not an “interested person” under Estates Code § 22.018(1) because he has no property right or claim against Testatrix’s estate. Instead, he only has a potential right because he would need to successfully contest both codicils to be entitled to estate property. Second, Beneficiary does not have standing under case law because his alleged pecuniary interest is too far removed.

The court also rejected Beneficiary’s claim that he has standing because he and a beneficiary under the earlier codicil and original will entered into an agreement under which Beneficiary agreed to contest the latter codicil in exchange for 40% of what the other beneficiary recovers. The trial court determined that this agreement was invalid because the other beneficiary’s interest, if obtained, would be controlled by a spendthrift provisions in both the will and earlier codicil preventing her from conveying any interest in the property. Thus, Beneficiary could not rely on this agreement to provide standing to contest the latter codicil.

Moral: A party to a will contest must be certain to have a pecuniary interest in the outcome of the litigation which is not too far removed. In other words, a successful contest should put property in the contestant’s pocket.

E. Tortious Interference with Inheritance Rights

_Archer v. Anderson_, 556 S.W.3d 228 (Tex. 2018).

The jury determined that Defendant tortiously interfered with Plaintiffs’ rights to inherit from their uncle and the court awarded over $2.5 million in damages. Defendant appealed.

The intermediate appellate court reversed holding that Texas does not recognize a cause of action for tortious interference with inheritance. _Anderson v. Archer_, 490 S.W.3d 175 (Tex. App.—Austin 2016). The court conducted a detailed review of the numerous Texas cases discussing tortious interference and determined that although they may have discussed the tort, they never actually recognized it. The court also refused to interpret Estates Code § 54.001 as a legislative admission that the tort exists merely because this provision provides that filing or contesting a will is not tortious interference. The court then explained that express legislative action or a decision of the Texas Supreme Court is needed to recognize the tort.

The court also noted that Plaintiffs had already received the property with which they alleged Defendant tortiously interfered. The main component of their damages was not the recovery of the uncle’s property but rather attorneys’ fees incurred to receive their inheritance. Thus, Plaintiffs were actually using the tort as a fee-shifting mechanism to recover fees otherwise unrecoverable due to Texas following the American Rule that the winning party cannot recover attorneys’ fees unless authorized by statute.

On appeal to the Supreme Court of Texas, the court affirmed holding, “The tort of intentional interference with inheritance is not recognized in Texas.” _Archer_, 556 S.W.3d at 239. The court reasoned that “existing law affords adequate remedies for the wrongs the tort would redress” such as a constructive trust. See _id._ at 229. In addition, “the tort would conflict with Texas probate law.” _Id._ The court closed the door on this issue which was left open by the court’s opinion in _Kinsel v. Lindsey_, 526 S.W.3d 411 (Tex. 2017).

Note that the concurring and dissenting opinion agreed that in this case, the tort should not be recognized but would have left the issue open for a subsequent case with more appropriate facts.

Moral: A claim of tortious interference with inheritance rights will fail in Texas. It is up to the legislature to create this cause of action.
IV. ESTATE ADMINISTRATION

A. Serving as Executor and Attorney for Executor

Ethics Opinion No. 678 (Sept. 2018).

The Professional Ethics Committee for the State Bar of Texas has clarified the ethical rules which apply when the same person serves as both the executor and the attorney for the executor:

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is not prohibited from serving as both executor and as counsel for the executor; however, the lawyer must evaluate whether there are conflicts of interests before and during the representation including any arising from the lawyer serving in the dual roles. If the representation of the executor will be adversely affected by the lawyer’s or law firm’s own interests, then the lawyer may not serve as counsel for the executor unless the lawyer can obtain the consent required under the Texas Disciplinary Rules of Professional Conduct. If a lawyer cannot serve as counsel for the executor because of such a conflict, the other lawyers in the lawyer’s law firm are also prohibited from representing the executor. Finally, additional limitations can arise if the lawyer, serving as executor, should or may be a witness in a probate or other legal proceeding related to the estate, which limitations may affect whether the lawyer can be both a fact witness and an advocate before a tribunal in the same proceeding.

Id.

Moral: Although this opinion authorizes the same person to serve as the executor and the attorney for the executor under proper circumstances, prudent practice would be, IMHO, to avoid dual roles.

B. Determination of Heirship

*Matter of Estate of Casares, 556 S.W.3d 913 (Tex. App.—El Paso 2018).*

The court granted a motion to determine heirship and that administration of the decedent’s estate was unnecessary. The decedent’s neighbor then filed a claim against the decedent’s estate for damages incurred because the decedent’s estate had not been administered in a timely fashion; the decedent had died over ten years prior. For example, the claimant had to remove trash and weeds from the property and was bothered by pigeons, bees, and hornets.

The court affirmed the determination of heirship because the decedent’s neighbor lacked standing as he was not an “interested person” under Estates Code § 22.018. The decedent’s neighbor did not have a claim that was against an estate being administered because the estate was not under administration. In addition, the neighbor’s claim is not against the estate because the damage was alleged to occur after the decedent’s death.

Moral: A person in the decedent’s neighbor’s position needs to seek other remedies for problems caused by estate property not being maintained properly.

C. Power of Sale

*Graff v. 2920 Park Grove Venture, Ltd., No. 05-16-01411-CV, 2018 WL 2949158 (Tex. App.—Dallas June 13, 2018, pet. filed).*

Independent Executor contracted to sell some of the testator’s real property to pay the estate’s debts. Beneficiary objected asserting that the Independent Executor lacked the authority to sell the property. Nonetheless, the sale was completed and Beneficiary brought suit on a variety of grounds, including lack of authority to sell, all of which the trial court rejected. Beneficiary appealed.

The appellate court affirmed. The court first held that claims based on fraud and conspiracy were barred by the statute of limitations. The court then focused on Beneficiary’s argument that Independent Executor lacked the power to sell.
The court examined the will and noted that there was no express “power of sale” clause. However, the will did not restrict the sale and an independent executor has the authority to do any act which a dependent executor could do under court order. The existence of estate debts provided the independent executor with the needed authorization to sell estate property.

Moral: To avoid a claim that an independent executor lacks the authority to sell estate assets, the testator should include a power of sale clause in the will.

D. Application to Compel Distribution


Brother and Sister battled over Mother’s estate. Brother petitioned the court two times for an accounting and distribution of the estate from Sister who was Mother’s independent executrix. See Estates Code § 405.001. The trial court denied Brother’s request and he appealed.

The appellate court affirmed with regard to the first petition. The court held that the trial court’s denial of the petition was not an abuse of discretion. The trial court had a sufficient basis for its determination that a necessity for the continuation of the administration of Mother’s estate existed.

However, the appellate court reversed with regard to Brother’s second petition. After reviewing the pleadings, the court determined that no necessity for administration existed after Brother had nonsuited his claims against Sister. Thus, the court reversed and remanded to the trial court to resolve remaining issues regarding the amount of expenses and attorneys’ fees and then to order distribution of the estate. The court pointed out that Brother could specify neither how the estate assets are to be divided nor the date on which estate composition is to be determined.

Moral: A personal representative should distribute estate property as soon as possible and be careful about asserting creative excuses for not doing so.

E. Arbitration Provision


Testator’s will contained a provision requiring arbitration of all disputes which read as follows:

If a dispute arises between or among any of the beneficiaries of my estate, the beneficiaries of a trust created under my Will, the Executor of my estate, or the Trustee of a trust created hereunder, or any combination thereof, such dispute shall be resolved by submitting the dispute to binding arbitration. It is my desire that all disputes between such parties be resolved amicably and without the necessity of litigation.

_Id. at 758_ Successor Administrator sued Former Executor for several alleged breaches of fiduciary duty. Former Executor moved to compel arbitration. The trial court denied the motion and Former Executor appealed.

The appellate court affirmed. The court recognized that the Texas Supreme Court in _Rachal v. Reitz_, 403 S.W.3d 840 (Tex. 2013), enforced an arbitration clause in a trust against the beneficiaries because although they did not affirmatively consent to the clause, they were deemed to do so based on the theory of direct-benefits estoppel. The court rejected the argument that Successor Administrator’s actions of attempting to enforce the will by suing him for breach of duty and accepting payment of attorney fees triggered direct-benefits estoppel. The court explained that Successor Administrator’s claims are not based on allegations that Former Executor violated the terms of the will. Instead, the breach of fiduciary duty claims against Former Executor were derived from statutes and common law, irrespective of the will itself. In addition, Successor Administrator’s entitlement to fees is based on Texas Estates Code § 352.051, not the will.
A dissenting judge would enforce the arbitration provision believing that by accepting the appointment as a personal representative of the estate, each party should be deemed to have assented to the arbitration provision. This result would also be consistent with Testator’s intent that all disputes be resolved without litigation.

**Moral:** The enforcement of a mandatory arbitration clause in a will is problematic.

F. Settlement Agreements

*Estate of Mathis,* 543 S.W.3d 927 (Tex. App.—Eastland 2018, no pet.).

The parties to a contested probate proceeding solved their issues by entering into a family settlement agreement. This agreement provided for the disposition of the decedent’s estate and released all claims and causes of action between them involving the decedent “from the beginning of time through the date of the execution of this Agreement.” Subsequently, one of the parties attempted to bring claims based on conduct which occurred prior to the date of the agreement. The trial court dismissed the claims and the unhappy party appealed.

The appellate court affirmed. The court explained that the agreement barred claims which predated the agreement especially because the party did not even seek revocation of the agreement in the first place. However, the appellate court reversed the trial court’s determination that the party was not responsible for reasonable attorney’s fees because Texas Rule of Civil Procedure 91a mandates that the prevailing party recover attorney fees unless a governmental entity or public official is involved. Thus, the case was remanded to the trial court to determine the amount of the reasonable and necessary attorney fees.

**Moral:** If a party to a settlement agreement seeks to pursue matters already settled, the party must first set aside the agreement.

G. Fee Awards Generally

*In Estate of Larson,* 541 S.W.3d 368 (Tex. App. – Houston [14th Dist.] 2017, no pet.).

Husband’s Executor, while Husband was still alive, opened a guardianship on Wife with the assistance of Lawyers. Wife died and then Husband died. Husband’s Executor and Lawyers requested fee payments from Wife’s estate for various expenses, including those relating to Wife’s guardianship. The trial court granted the requests. Beneficiaries of Wife’s estate then challenged these awards on appeal.

The appellate court reversed. The court first addressed Lawyers’ claims which were for payment for services rendered to someone other than Wife in a different proceeding. Lawyers claimed that Estates Code § 1155.054 authorizes the court to award reasonable and necessary attorney fees relating to Wife’s guardianship. This authorization is, however, for the “court that creates a guardianship.” The probate court handling Wife’s estate is not the court that created the Wife’s guardianship and thus it had no authority to approve those fees as valid claims against Wife’s estate. The court rejected Lawyers’ claim that the statute does not prevent other courts from making the award. Lawyers could have presented their fee requests when Wife’s guardianship was closed but they failed to do so.

The court next agreed with Beneficiaries’ claim that the trial court erred in ordering payment of Executor’s claim. Executor did not timely file suit contesting the rejection of the claim by Wife’s Administrator under Estates Code § 355.064 which imposes a ninety day period from the date of rejection and thus the claim was barred.

**Morals:** A perfectly “valid” claim may go unpaid if the claimant does not follow proper procedures: (1) An attorney seeking fees for work on a guardianship of a ward who has died should have those fees approved by the court that created the guardianship. (2) A claimant whose claim is rejected in a dependent administration should file suit contesting that rejection within ninety days of the rejection.
H. Attorney Fees

1. Good Faith Finding

_Yost v. Fails_, 534 S.W.3d 517 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

The jury determined that Proponent did not probate Testatrix’s will in good faith and with just cause because Proponent exercised undue influence over Testatrix to get her to execute the will. The trial court granted Proponent a judgment notwithstanding the verdict thus entitling Proponent to recover his attorney’s fees from the estate under Estates Code § 352.052(a). The appellate court reversed.

The court explained that the existence of good faith is a question of fact for the jury. The court will uphold the jury finding unless the evidence conclusively established Proponent’s good faith. The court held that such evidence did not exist and thus the trial court erred in disregarding the jury’s finding.

_Moral:_ A jury’s finding of lack of good faith in a will proponent’s attempt to probate a will is difficult to set aside as conclusive evidence of good faith is needed to do so.

2. Reasonable and Necessary Finding


Brother and Sister battled over Mother’s estate. Sister, the independent executor, used estate funds to pay her attorneys using the authority in Estates Code § 404.0037. Brother claimed Sister is not entitled to the fees because her attorneys committed malpractice and breached duties owed to Sister and the estate. See _Burrow v. Arce_, 997 S.W.3d 229 (Tex. 1999). The trial court held that this fee payment was proper, and Brother appealed.

The appellate court first addressed whether Brother could assert a fee forfeiture claim. The record did not show that Brother pled for a fee forfeiture against Sister’s attorneys. Even if Brother had so pled, he lacked standing to assert the claim because Brother was not the attorneys’ client. The court also rejected Brother’s assertion that as a beneficiary of the estate, he could seek fee forfeiture under Texas Civil Practice and Remedies Code § 37.005. Brother has no claim against the attorneys who represented Sister.

Brother also argued that Sister should not be allowed to use estate funds to pay the fees because she did not plead for fees, defend the lawsuit to remove her as executrix in good faith, and the fees were not reasonable and necessary. The court held that Sister’s amended answer prayed for the legal fees and that Sister was in good faith. However, Sister paid the fees without a court finding that the fees were both necessary and reasonable. Estates Code § 404.0037 does not permit the executor to pay the fees without a proper court finding. Thus, the court remanded to the trial court for a determination of the amount of the reasonable attorneys’ fees.

_Moral:_ Before an executor pays attorney fees from estate funds for fees incurred for estate litigation to which the executor is a party, a finding that the fees are reasonable and necessary is first needed.

3. Good Faith and Just Cause

_Estate of Luce_, No. 02-17-00097-CV, 2018 WL 5993577 (Tex. App.—Fort Worth Nov. 15, 2018, no pet.).

Testator was severely injured in an accident rendering him a quadriplegic and unable to speak. However, he was able to communicate by responding to “yes” and “no” questions by blinking his eyes. Using this blinking system, Testator’s attorney drafted a will and Testator directed a notary to sign the will for him.

After Testator died, his estranged wife attempted to probate an earlier will and his sister filed an application to probate the new will. The trial court admitted the new will to probate but also awarded the estranged wife $200,000 in attorney’s fees although the jury had found that she did not act in good faith and with just cause in attempting to probate the earlier will. The
estranged wife appealed the probate of the new will and the sister appealed the award of fees.

[The validity of the will is discussed on page 1.]
The court examined the award of attorney’s fees despite the jury finding that the estranged wife did not act in good faith with just cause. The court agreed that the trial court has the power to overturn a jury verdict but that in this case, it was improper to do so because the evidence did not establish estranged wife’s good faith and just cause as a matter of law.

Moral: It will be difficult to uphold a judgment notwithstanding the verdict unless the issue can be established as a matter of law.

I. Bill of Review

*Thomas v. 462 Thomas Family Properties, LP*, 559 S.W.3d 634 (Tex. App.—Dallas 2018, pet. denied.).
The losing party at trial sought, among other things, a statutory bill of review under Estates Code § 55.251. The underlying issue was whether an undisclosed personal relationship between the judge and the opposing party’s attorney influenced the decision. The trial court dismissed the petition for a bill or review.
The appellate court affirmed the dismissal. The court explained that the appellant’s brief failed to reference the Estates Code bill of review provision and failed to cite any legal authority applicable to the Estates Code. Thus, the court held that the appellant did not present “any error with respect to the petition for a statutory bill of review for our consideration.” *Id.* at 644.

Moral: A party appealing the dismissal of a statutory bill of review should reference the applicable Estates Code section and demonstrate how each of the elements to obtain a bill of review were satisfied.

V. TRUSTS

A. Standing

*MAYFIELD v. PEEK*, 546 S.W.3d 253 (Tex. App.—El Paso 2017, no pet.).
Beneficiary alleged that Trustee violated his fiduciary duty when he convinced his mentally impaired mother to transfer assets out of the trust and into another trust for his benefit. The trial court determined that because the trust was revocable, Beneficiary did not have a vested interest to give her standing. Beneficiary appealed.
The appellate court reversed. The court explained that Property Code § 115.001(a) provides that any interested person may bring an action and “interested person” is defined in Property Code § 111.004(7) to include a beneficiary. The definition of “beneficiary” includes a person for whose benefit the property is held in trust regardless of the nature of the interest. Property Code 111.004(2). “Interest” is defined in Property Code § 111.004(6) to include both vested and contingent interests. Accordingly, Beneficiary had standing even though her interest was subject to defeasement by a trust revocation or modification. However, the court pointed out that the contingent nature of her interest could make it difficult to prevail on the merits of her claim.

Moral: A contingent beneficiary of a revocable trust has standing to bring an action against the trustee for breach of fiduciary duty.

B. Interpretation & Construction

*ARCHER v. MOODY*, 544 S.W.3d 413 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).
Upon death of his last grandchild, the settlor provided for the property to be distributed “in equal shares per stirpes” to the settlor’s then living great-grandchildren and surviving issue of his deceased great-grandchildren. When the last of the three grandchildren died and the trust terminated, a dispute arose regarding how to distribute the property – does each great-
grandchildren receive an equal share (per capita) or do the great-grandchildren divide the share his or her parent would have received (per stirpes)? This difference is important because the grandchildren had different numbers of children (two had two and one had four). The trial court held that each great-grandchild received an equal share (1/8). The great-grandchildren who came from the two children families appealed claiming that they were each entitled to 1/6.

The appellate court reversed. The court determined that the trust instrument was not ambiguous and thus it may ascertain its meaning as a matter of law. The court explained that “per stirpes” contemplates a distribution to the great-grandchildren based on the share of their deceased ancestor. The trial court erred in giving no meaning to the per stirpes language and only focusing on the per capita phrase. The court stated, “We presume the settlor placed nothing superfluous or meaningless in the trust instrument and that the settlor ‘intended every part, sentence, clause, and word to have a meaning and to play a part in the disposition of his property.’” Id. at 417.

Moral: To avoid confusion, a will or trust should not combine terms that could arguably lead to different distributions. Instead, use only one phrase, such as “per capita,” “per stirpes,” “per capita with representation,” or “per capita at each generation.” To further reduce potential problems, provide a definition of the term used which explains in a step-by-step format how to make the distribution.

C. Legal Fees

_In re Cousins_, 551 S.W.3d 913 (Tex. App.—Tyler 2018, orig. proceeding [mand. pending]).

Beneficiary (also a co-trustee) sued Trustee for breach of fiduciary duties. Beneficiary requested that the court order payment of his legal fees and litigation expenses from the trusts under Property Code § 114.063. The court denied the request. Beneficiary then brought a mandamus action against the judge.

The appellate court denied mandamus relief. The court explained that mandamus is an “extraordinary remedy” and is not warranted in this case. Mandamus is neither “essential to preserve important substantive and procedural rights from impairment or loss” nor is it needed to give direction on how Property Code § 114.063 operates that would “otherwise prove elusive in an appeal from a final judgment.” Accordingly, the court concluded that “an ordinary appeal of the order denying [Beneficiary’s] motion for court ordered litigation expenses from the Trust estates serves as a plain, adequate, and complete remedy.” Id. at 920.

Moral: Without clear facts showing the mandamus relief is vital, the court is unlikely to grant the writ.

D. Breach of Duty


Residual trust beneficiaries filed suit alleging that the trustees breached their fiduciary duties when they transferred real property to themselves thereby depleting trust assets. The deed was dated in 2003 and recorded in 2010. The appellate court upheld summary judgment in favor of the trustees because the statute of limitations had run prior to the beneficiaries filing suit in 2015.

A claim for breach of fiduciary duty is normally governed by a four-year limitation period which begins to run from the date “the claimant knows or in the exercise or ordinary diligence should know the wrongful act and resulting injury.” Id. at *3. The court agreed that the beneficiaries had both constructive and actual notice of the alleged self-dealing conveyance when the deed was filed in 2010.

Moral: Lawsuits need to be filed before the statute of limitations expires.
E. Trustee Removal


The alternate trustee, rather than the primary trustee, began administering a trust in 1993. The alternate trustee had authority to do so because the primary trustee failed to act as the trustee. Over two decades later, the primary trustee filed an action to remove the alternate trustee from office. The alternate trustee did not receive notice of this proceeding. A trustee is a necessary party to a proceeding involving a trust under Property Code § 115.011(b)(4). Accordingly, the appellate court held that the lower court’s order removing the alternate trustee and appointing the primary trustee was void.

*Moral:* In all trust actions, the trustee must be given proper notice.

VI. OTHER ESTATE PLANNING MATTERS

A. Attorney-Client Privilege

*In re Rittenmeyer*, 558 S.W.3d 789 (Tex. App.—Dallas 2018, no pet.).

After Husband’s death, Widow claimed that a pre-nuptial agreement was not enforceable. To acquire evidence to prove her claim that the agreement is unenforceable because Husband failed to make a fair and reasonable disclosure of his property, she sought discover of will drafts, trust documents, and communications reflecting on Husband’s intent to provide for her. Husband’s independent executrix objected claiming that this information was privileged. The trial court rejected the privilege argument holding that the exception in Rule 503(d)(2) of the Texas Rules of Evidence applied, that is, the attorney-client privilege does not apply “if the communication is relevant to an issue between parties claiming through the same deceased client.”

The appellate court conditionally granted the independent executrix’s request for a writ of mandamus holding that the Rule 503(d)(2) exception does not apply. For example, the court explained that the existence of will drafts is not relevant to whether Husband executed a new will or that the independent executrix destroyed a later will.

*Moral:* Although certain evidence involving a decedent could be very relevant to resolving estate litigation, the attorney-client privilege may prevent that material from being discovered.

B. Durable Power of Attorney

*Fletcher v. Whitaker*, No. 02-17-00138-CV, 2018 WL 4924944 (Tex. App.—Fort Worth Oct. 11, 2018, no pet.).

Three individuals, Bob, Toby, and Geneva, opened a joint account with right of survivorship. Bob provided all the funds for the account. Toby died, and Geneva used some of the funds for his funeral. Bob executed a durable power of attorney which, among other things, permitted Gary to deal with banking transactions. Gary withdrew $25,000 via a cashier’s check. Before it was cashed, both Gary and Bob signed the check. A few months later, Bob died. Bob’s executors then attempted to recover the funds Geneva used for Toby’s funeral and Geneva sought the funds Gary withdrew using Bob’s power of attorney. The trial court held that the Geneva did not have to repay the funeral withdrawal but that Gary along with the person to whom Gary gave some of the money, were responsible for paying Geneva the $25,000.

The appellate court agreed that Geneva’s conversion judgment for $25,000 was correct. Gary did not dispute that he breached his fiduciary by withdrawing the money, depositing it in his account, and using those funds for things other than Bob’s care. The court explained that Gary was not acting in Bob’s interest when he made the withdrawal and, despite Bob signing the check, he had “wrongfully exercise[d] dominion and control over the money to the exclusion of, or inconsistent with, Geneva’s rights.” *Id.* at *4.

*Moral:* An agent may not withdraw funds from the principal’s account and then use them for the agent’s own purposes.
C. Life Insurance


Mark Sveen married Kaye Melin in 1998. Sveen had previously purchased a revocable life insurance policy from Metropolitan Life Insurance Company (MetLife). Sveen named Melin as the primary beneficiary and his children, Ashley Sveen and Antone Sveen, from a previous relationship, as contingent beneficiaries if Melin were to die first. Sveen and Melin divorced in 2007. Sveen never updated the Metlife policy to reflect Sveen and Melin’s divorce so Melin remained as the designated beneficiary when Sveen died in 2011.

After Sveen purchased the insurance contract but before he died, Minnesota enacted a revocation upon divorce statute in 2002. Minnesota Statute § 524.2-804 operates to automatically revoke an ex-spouse as the beneficiary. The ex-spouse is treated as if he or she predeceased the insured. This remains true unless the policyholder redesignates the ex-spouse as the beneficiary or reaffirms the ex-spouse as the beneficiary after the divorce.

After Sveen died, Melin filed a claim with MetLife for the insurance proceeds as she was still named as the primary beneficiary on the policy. MetLife filed an interpleader to determine the identity of the proper beneficiary: Melin, the originally-named beneficiary, or Antone and Ashley Sveen, the contingent beneficiaries.


_Moral:_ The Texas equivalent statutes, Family Code §§ 9.301 (life insurance) and 9.302 (retirement benefits), will be effective even if the designation of the ex-spouse as a beneficiary occurred prior to the effective dates of the statutes.

D. Lady Bird Deeds


The decedent executed a warranty deed in which she “reserved during her life, the full possession, benefit and use” of the property “as well as the rents, issues, and profits thereof and the unilateral power of sale of any or all of the [property] with on the law at the time the contract—the insurance policy—was made.

The Eighth Circuit relied heavily on its earlier ruling involving a revocation-upon-divorce statute from Oklahoma that it found violated the Contracts Clause. In the Oklahoma case, the court held that the statute, when applied retroactively, would substantially impair a life insurance contract and would undermine the purpose of the contract itself—to provide for the financial needs of a person designated by the insured. The court explained that the statute would be a fundamental change to the very essence of the contract itself and could not be justified as a “reasonable way to advance a significant and legitimate purpose.” _Sveen v. Melin_, 138 S. Ct. at 1822 (internal quotations omitted). The court also stated it would be possible that the policyholder would want his or her ex-spouse to remain as the beneficiary and would have taken steps to change the beneficiary designation if the insured no longer desired the ex-spouse to be the beneficiary.

The Supreme Court of the United States reversed in an 8-1 decision holding that the statute’s automatic revocation on divorce feature did not substantially impair pre-existing contractual arrangements. Accordingly, applying the statute to void a pre-enactment life insurance beneficiary designation did not violate the Contracts Clause of the United States Constitution.

_Moral:_ The Texas equivalent statutes, Family Code §§ 9.301 (life insurance) and 9.302 (retirement benefits), will be effective even if the designation of the ex-spouse as a beneficiary occurred prior to the effective dates of the statutes.
or without the consent of [the remainder beneficiary]” [a Lady Bird deed]. Id. at *1. Several years later, the decedent conveyed the same property to her sole member L.L.C. After the decedent’s death, the remainder beneficiary claimed an interest in the property. The trial court granted a summary judgment that the remainder beneficiary had no interest.

The appellate court affirmed. The court rejected the remainder beneficiary’s contentions that the deed was an impermissible restraint on alienation and violated Property Code § 5.041 which authorizes an inter vivos conveyance that commences in the future. The court explained that the deed unambiguously granted a contingent remainder interest and by exercising the power of sale that the decedent reserved in the deed, this remainder interest terminated.

**Moral:** A Lady Bird deed operates as intended, to transfer a contingent interest to a remainder beneficiary which the grantor may unilaterally terminate.

### E. Beneficiary Designations on Non-Probate Assets


Decedent named Caregiver as a beneficiary on several non-probate accounts. After Decedent’s death, Independent Executor claimed that Decedent lacked the capacity to name Caregiver as the beneficiary of these accounts and that if Decedent did have capacity, he was subject to Caregiver’s undue influence. The trial court granted a Caregiver’s request for a summary judgment finding that although Caregiver was in a position to exercise undue influence, there was no evidence that she did. In addition, the court held that a true fiduciary relationship did not exist between Decedent and Caregiver which would shift the burden of proof on Caregiver to show lack of undue influence. Independent Executor appealed.

The appellate court affirmed. The court reviewed the evidence and concluded there was no genuine issue of material fact. The record had “no indication of force, intimidation, duress, persistent requests or demands, or deceit by” Caregiver. Caregiver had assisted Decedent and his predeceased wife for seventeen years. In the later years of Decedent’s life, Caregiver worked for Decedent seven days a week. They had a close relationship. For example, Decedent would spend holidays with Caregiver’s family instead of his distant relatives (Decedent had no children). An employee of the one of the institutions holding a non-probate asset testified that she had never seen Caregiver exert any influence over Decedent or Decedent had any of the traits of a vulnerable client.

**Moral:** Mere opportunity to exert undue influence is insufficient to place the existence of undue influence into question. In this case, distant relatives (nieces and nephews) were upset that a long-time caregiver received over $1.5 million. To reduce the chance of litigation, the estate attorney should take steps during the planning process to prevent contests based on undue influence or lack of capacity.

### F. Funerals


A funeral home delivered the wrong body to the decedent’s family. The mistake was noticed just before the service was to start when the decedent’s widow and son were to preview the body. When the casket was opened, they were shocked to find the body of another man, an additional victim of the same car accident that killed the decedent. The widow and son filed suit against the funeral home for negligent infliction of emotional distress and prevailed at the trial court.

On appeal, the court rejected the claim that the funeral home did not have a contract or other relationship with the widow and son which would thus prevent them from recovering for mental anguish damages. After a detailed review of the Texas law regarding a cause of action mental anguish, the court followed the Texas Supreme Court case of **SCI Texas Funeral**
*Services v. Nelson*, 540 S.W.3d 539 (Tex. 2018), which held that the “relationship between a person disposing of a decedent’s remains and the next of kin is special, even without a contract.” Accordingly, the widow and son did not need contract privity and could prevail based on the independent legal duty the funeral home had not to mishandle the decedent’s remains.

**Moral:** A funeral home should have someone who knows the decedent, but who would not be upset upon seeing a different body, check the contents of the casket prior to allowing family members to view the casket’s contents.
THE TAX RAMIFICATIONS OF CRYPTOCURRENCY

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Estate and Business Planning
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Education

University of Louisville, J.D., 1994
Smith College, A.B., Economics and Spanish Language and Literature, 1991

Admitted to Practice

Supreme Court of Kentucky, 1994
United States District Court, Western District of Kentucky, 1997
United States District Court, Eastern District of Kentucky, 1997
United States Court of Appeals, Sixth Circuit, 1997
United States Tax Court, 2002
United States Supreme Court, 2002

Professional Memberships

Listed, The Best Lawyers in America (Woodward/White Publisher)
  Trusts and Estates and Litigation – Trusts and Estates
Fellow, American College of Trust and Estate Counsel
  (Member: Digital Property Committee and Fiduciary Income Tax Committee)
Listed as one of the Top 25 Women Lawyers in Kentucky Super Lawyers 2008, 2009, 2010
Estate Planning Council of Louisville (President, 2007-2008)
Louisville Bar Association (Probate and Estate Planning Section, Chair 2005)
Kentucky Bar Association (Probate and Estate Planning Section)
Women Lawyers Association of Jefferson County (President, 1999-2000)
**Achievements / Recognitions**

Leadership Louisville Class of 2012  
“The Climb” feature article, *Business First*, July 30, 2004  
2000 Young Careerist Candidate, Business and Professional Women of River City  
Focus Louisville Class of 2000  
Karen Allen Bickham Scholar, University of Louisville School of Law  
University of Louisville *Journal of Family Law* Best Note Award, Volume 31  
1994 Samuel L. Greenebaum Award (legal writing)

**Community Involvement**

Let’s Dance Louisville to benefit the Feed My Neighbor program of the Cathedral of the Assumption  
(2018 “celebrity” competitor)  
St. Joseph Children’s Home (Board of Trustees 2013-present, Recording Secretary 2013-2015)  
Nativity Academy at St. Boniface (Board of Directors 2017-present)  
SJ Kids Foundation (Board of Directors 2013-2017)  
St. Joseph Child Development Center (Parents Advisory Committee, Chair 2009-2011)  
Best Buddies of Kentucky 2010 Champion of the Year Candidate  
Kentucky Opera Camerata Development Board (2009)  
Junior League of Louisville  
Kentucky Derby Museum Gala Committee (2004)  
Louisville Antique Show Committee to benefit the Louisville Deaf Oral School (2003, 2004)  
Norton Hospitals Foundation Planned Giving Committee (2003-2005)  
Spalding University Planned Giving Committee (2001)  
Kentucky Hemophilia Foundation (Board of Directors 1998-2001, President 2000-2001)

**Professional Publications and Presentations**

“Digital Property Planning and Administration,” (American College of Trust and Estate Counsel audio webcast/telephone seminar, October 2015) (Co-presenter).


“Stay Linked with Your Younger Clients (and Your Younger Colleagues) by Forever Friending the Latest Digital and Social Media Technology,” (American College of Trust and Estate Counsel conference, November 2015) (Co-presented).
Counsel 2014 Summer Meeting CLE Stand-Alone Program, Dana Point, California, June 2014 (Co-presenter).

“Estate Planning – Current Developments,” (17th Annual Estate Planning Institute, Louis D. Brandeis School of Law at the University of Louisville, May 2014) (Co-presenter).


“Establishing Tax-Exempt Status with the IRS,” (Tax Exempt Organizations from Start to Finish, National Business Institute Seminar, Louisville, Kentucky, June 2013).

“(GST) Reasons Not to Skip the Kids Even Though the Grandchildren Are Really Your Favorites,” (Stock Yards Bank & Trust Company Estate & Tax Seminar, Jeffersonville, Indiana, October 2012).


“Final Regulations under Section 2053,” (Louisville Bar Association, December 2009).


“Charity Begins at Home (But Not Without an Allocation Clause),” (11th Annual Estate Planning Institute, Louis D. Brandeis School of Law at the University of Louisville, April 2008).

“Problems and Issues When You Try to Avoid Probate,” (34th Annual Midwest/Midsouth Estate Planning Institute, University of Kentucky College of Law, July 2007).

“Recent Developments of Interests to Estate Planners,” (34th Annual Midwest Estate, Tax & Business Planning Institute, Indiana Continuing Legal Education Forum, June 2007).


“Planning for the Generation Skipping Transfer Tax,” (9th Annual Estate Planning Institute, Louis D. Brandeis School of Law at the University of Louisville, April 2006).

“Drafting for and Making Discretionary Trust Distributions,” (32nd Annual Midwest/Midsouth Estate Planning Institute, University of Kentucky College of Law, July 2005) (Co-presenter).


“Understanding and Dealing with the Generation Skipping Transfer Tax,” (31st Annual Midwest/Midsouth Estate Planning Institute, University of Kentucky College of Law, July 2004).


“Generation-Skipping Transfer Trusts,” (28th Annual Midwest/Midsouth Estate Planning Institute, University of Kentucky College of Law, July 2001).


“When in Doubt, Spell It Out (Or How to Write an Effective Engagement Letter),” (Stock Yards Bank & Trust Company Estate & Tax Seminar, Jeffersonville, Indiana, October 1999) (Co-presenter).

“Gilding the Golden Years: Saving Time, Trouble and Money for Yourself and Your Heirs,” (University of Louisville, May 1999) (Co-presenter).


THE TAX RAMIFICATIONS OF CRYPTOCURRENCY

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“If something stands to be gained, nothing will be lost.”
– Miguel de Cervantes

I. Introduction to Cryptocurrency

The concept of “cryptocurrency” was first described in 1998 by Wei Dai on the cypherpunks mailing list. It is a new form of money that uses cryptography to control its creation and transactions, rather than a central authority.²

Bitcoin is the first implementation of that concept. Bitcoin is “a consensus network that enables a new payment system and a completely digital money.”³

The concept of Bitcoin was first explained in a white paper by Satoshi Nakamoto⁴ which was published in 2009 in a cryptography mailing list.

Abstract. A purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution. Digital signatures provide part of the solution, but the main benefits are lost if a trusted third party is still required to prevent double-spending. We propose a solution to the double-spending problem using a peer-to-peer network. The network timestamps transactions by hashing them into an ongoing chain of hash-based proof-of-work, forming a record that cannot be changed without redoing the proof-of-work. The longest chain not only serves as proof of the sequence of events witnessed, but proof that it came from the largest pool of CPU power. As long as a majority of CPU power is controlled by nodes that are not cooperating to attack the network, they'll generate the longest chain and outpace attackers. The network

¹ All references to the “Code” refer to the Internal Revenue Code of 1986, as amended. All references to “sections” refer to sections of the Code.


³ Id.

⁴ Satoshi Nakamoto is a pseudonym.
itself requires minimal structure. Messages are broadcast on a best 
effort basis, and nodes can leave and rejoin the network at will, 
accepting the longest proof-of-work chain as proof of what 
happened while they were gone.\(^5\)

Very little is known about Satoshi who left the Bitcoin project in late 2010.\(^6\)

From a user perspective, Bitcoin is simply a program that provides the user with a personal 
Bitcoin wallet and allows the user to send and receive Bitcoins. Behind the scenes, Bitcoin is a 
network which shares a public ledger – called the “block chain” – which contains every 
transaction every processed, and which allows the user’s computer to verify the validity of each 
transaction. Each transaction is protected by a digital signature which corresponds to the sending 
address.\(^7\)

A. Terminology

For many people, terminology with respect to cryptocurrency is similar to a foreign 
language. Understanding a few key terms makes interpreting that language much easier.

1. **Blockchain**: A block chain is a shared public ledger which includes all verified 
   transactions of the network. The integrity and the chronological order of the 
   blockchain are enforced with cryptography.\(^8\)

2. **Transaction**: A transaction is a transfer of value between Bitcoin wallets. 
   Bitcoin wallets keep a secret piece of data – called a “private key” – which is used 
   to sign transactions and provides mathematical proof that the Bitcoins have come 
   from the owner of the wallet. All transactions are broadcast to the network 
   through a process called mining.\(^9\)

3. **Mining**: Mining is the process that is used to confirm pending transactions by 
   including them in the blockchain. Miners get paid in cryptocurrency to solve 
   complex mathematical equations using special software to confirm the validity of 
   the transactions. Transactions are packed into a block that fits very strict

\(^5\) Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electric Cash System*, Bitcoin, 

\(^6\) Frequently Asked Questions, *supra*.

\(^7\) *Id*.


\(^9\) *Id*. 
cryptographic rules and are verified by the network.\textsuperscript{10} Mining is intentionally designed to be resource-intensive and difficult so that the number of blocks found each day by miners remains steady.\textsuperscript{11}

B. The Importance of Keys\textsuperscript{12}

In the realm of cryptocurrency, the effect of losing one’s wallet is to remove money out of circulation. Lost Bitcoins still remain in the blockchain like other Bitcoins, but they become forever dormant because – without the private key(s) – they cannot be spent again. As a result, when fewer Bitcoins are available, the remaining Bitcoins become more value.\textsuperscript{13}

II. What, Exactly, Is Cryptocurrency?

As of May 2018, there were over 1,600 types of cryptocurrency or “virtual currency,”\textsuperscript{14} and that number continues to increase. Only a small number of virtual currencies, including Bitcoin, Ethereum and Litecoin, are considered “base currencies” which can be purchased or sold in exchange for cash. However, for federal tax purposes, what, exactly, is virtual currency?

A. Is It Currency?

In March 2014, the Internal Revenue Service first addressed the issue of transactions involving virtual currency. In Notice 2014-21, the Service defined virtual currency as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.” Although it may operate like “real” currency, have an

\textsuperscript{10} Id.


\textsuperscript{13} Frequently Asked Questions, supra.

equivalent value in real currency, or act as a substitute for real currency, it does not have the legal tender status of the United States or of any other country.\textsuperscript{15}

1. Nebraska Ethics Opinion. In 2017, the Nebraska Ethics Advisory Opinion issued the first significant opinion to address whether attorneys may accept virtual currency as payment for legal services.\textsuperscript{16} The opinion addressed three issues. First, an attorney may receive and accept virtual currency for the payment of legal services. However, given the risk of volatility of virtual currency, the attorney must convert the virtual currency into U.S. dollars immediately upon receipt through the use of a payment processor and credit payment to the client’s account accordingly. Second, an attorney may receive virtual currency as payment from third-party payors as long as there is no possible interference with the attorney’s independent relationship with the client. And, third, because virtual currency is property and not currency, it may not be deposited into a trust or escrow account for clients.

B. Is It a Security or a Commodity?

Given the global investment craze over virtual currency, there is bipartisan support in the Senate and the House of Representatives to address the risks posed by virtual currencies to investors and the financial system. Globally there is concern that virtual currencies may aid money laundering and terrorist financing, hurt consumers and undermine trust in the global financial system. For U.S. lawmakers, the primary focus of concern is speculative trading and investing. For regulation purposes, virtual currency falls into a gray area of jurisdiction: is it a security that should be regulated by the Securities and Exchange Commission (“SEC”) or is it a commodity that should be regulated by the Commodity Futures Trading Commission (“CFTC”)?\textsuperscript{17}

1. Securities and Exchange Commission. The SEC is cracking down on transactions known as “initial coin offerings ("ICOs")” which are similar to initial public offerings (“IPOs”) in that they provide a means for the broad investment community to invest in new ventures. With an IPO, the investor receives shares in the now-publicly traded company in exchange for funding. With an ICO, the investor receives token tied to the company or network. Unlike an IPO, no intermediary such as a bank is involved in an ICO.\textsuperscript{18}

\begin{footnotes}
\item[16] Nebraska Ethics Advisory Opinion for Lawyers No. 17-03 (September 11, 2017).
\item[18] Rebecca Patterson, The Hype and Hope of Bitcoin and Blockchain, Bessemer Trust Quarterly Investment Perspective (Second Quarter 2018).
\end{footnotes}
In September 11, 2018, three notable developments occurred involving the SEC and cryptocurrency. First, a federal judge made an initial ruling that an ICO could constitute securities for purposes of federal securities laws thereby allowing a criminal case to move forward. Second, the SEC announced two settled orders extending provisions of the securities laws over ICOs and other digital assets – the first-ever SEC enforcement actions relating to cryptocurrency.

a. **U.S. v. Zaslavskiy.** The U.S. District Court for the Eastern District of New York denied the defendant’s motion to dismiss the government’s criminal indictment on the ground that the ICOs at issue did not involve the sale of “securities” for purposes of securities laws.

Maskin Zaslavskiy was the owner and founder of two companies – REcoin Group Foundation, LLC (“REcoin”) and DRC World, Inc., a.k.a. Diamond Reserve Club (“DRC”) – that sought to raise funding through ICOs. The marketing materials for each ICO highlighted their respective potential as an investment opportunity, marketed potential returns from the appreciation in value of the companies’ investments (i.e., real estate for REcoin and diamonds for DRC), and highlighted the appreciation in value of the digital tokens themselves. According to the Department of Justice, the companies did not have established business operations, did not hire or consult with professional advisors to facilitate the investments, and did not provide investors with any digital tokens for their investments because the companies lacked the technology and expertise to develop and deliver the tokens. Accordingly, prosecutors charged Mr. Zaslavskiy with conspiracy to commit securities fraud. The court found that the government’s indictment alleged sufficient facts to support a conclusion that the digital tokens offered constituted securities allowing the criminal case to proceed.

b. **In the Matter of Crypto Asset Management.** Crypto Asset Management, LP, a hedge fund manager, created a pooled investment vehicle, Crypto Asset Fund, LLC, to invest in digital assets. The fund was marketed as the “first regulated crypto asset fund in the United States” although neither the fund nor the manager were registered with the SEC. In addition, the fund failed to register as investment county even though it invested more than 40% of its assets in crypto assets, which the SEC deemed to be “securities.” Pursuant to the settlement order, the manager and its founder and sole principal, Timothy Enneking, were censured, issued a cease and desist order, and assessed a $200,000 penalty for willful violations of the Securities Act, the Investment Company Act, and the Advisers Act.

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20 In the Matter of Crypto Asset Management, LP, File No. 3-18740 (September 11, 2018).
c.  **In the Matter of TokenLot, LLC.** TokenLot, LLC, a broker-dealer which called itself the “ICO Superstore,” sold digital tokens in connection with ICOs on the secondary market. The SEC concluded that the digital tokens were securities and therefore, the owners violated the Securities Act and Exchange Act by selling securities without registering with the SEC. The matter was settled by TokenLot and its two owners agreeing to pay $471,000 in disgorgement (plus interest), $90,000 in civil penalties ($45,000 against each owner), and a temporary bar from certain trading activities.

2. **Commodity Futures Trading Commission.** Regardless of whether virtual currency is a security for SEC purposes, it could also be treated – and in fact, has been treated – as a commodity for CFTC purposes.

   a.  **CFTC v. McDonnell.** In *CFTC v. McDonnell*, the Eastern District of New York became the first federal court to hold that virtual currencies are commodities subject to the Commodity Exchange Act and the jurisdiction of the CFTC.

      The CFTC alleged that Patrick McDonnell and his company CabbageTech, Corp., d/b/a Coin Drop Markets (“CDM”), offered fraudulent trading services related to virtual currencies, including Bitcoin and Litecoin. The court found that McDonnell and CDM engaged in a deceptive and fraudulent scheme to induce its customers to send money and virtual currencies to CDM, purportedly in exchange for real-time trading advice and purchasing and trading under McDonnell’s direction. The court entered a final judgment ordering CDM to pay over $290,000 in restitution and over $871,000 in civil penalties, plus post-judgment interest.

   b.  **CFTC v. My Big Coin Pay, Inc.** On September 26, 2018, the U.S. District Court for the District of Massachusetts denied the defendants’ motion to dismiss the CFTC’s case alleging a fraudulent “virtual currency scheme” on the ground that virtual currency involved was not a “commodity” for purposes of the Commodity Exchange Act.

      The CFTC alleged that My Big Coin Pay, Inc., which created the “My Big Coin” virtual currency, enticed customers to buy My Big Coin by making false statements such as that My Big Coin was “backed up by gold,” could be used anywhere Mastercard was accepted, and was being “actively traded” on several currency exchanges. The court agreed with the CFTC.

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21 *In the Matter of Tokenlot, LLC*, File No. 3-18739 (September 11, 2018).


that the Commodity Exchange Act defines “commodity” broadly and that there is futures trading in virtual currencies (specifically noting Bitcoin trading), and that, as a result, My Big Coin is a “commodity” subject to CFTC jurisdiction.

c. In the Matter of Joseph Kim. On October 29, 2018, the CFTC released a settled order relating to violations of the Commodity Exchange Act involving virtual currency. Joseph Kim was employed as a trader with a proprietary trading firm in Chicago. Between September and November 2017, Mr. Kim misappropriated approximately 980 Litecoins and 339 Bitcoins from his employer to cover personal trading losses in his own personal virtual currency trading accounts. After being terminated by his employer, Mr. Kim made a number of false statements to solicit approximately $545,000 from at least 5 individuals between December 2017 and March 2018 to continue trading virtual currencies to cover his previous losses. Mr. Kim’s employer suffered a loss of approximately $601,000 and his customers lost all $545,000 of their funds. Pursuant to the settlement order, Joseph Kim was issued a cease and desist order, was permanently prohibited from engaging in trading, and ordered to pay $1,146,000 in restitution, plus post-judgment interest.

III. IRS Guidance – Notice 2014-21

Despite recent requests for more guidance from the American Bar Association, the American Institute of CPAs, and the House Ways and Means Committee, Notice 2014-21 is the only formal guidance that the Service has issued to date on the taxation of virtual currency.

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The overarching rule of Notice 2014-21 is that, for federal tax purposes, virtual currency is treated as property and, therefore, the general tax principles applicable to property transactions apply to virtual currency transactions.

A. **Issues Addressed by Notice 2014-21**

Notice 2014-21 describes how existing general tax principles apply to virtual currency transactions via answers to frequently asked questions.

1. **Inclusion in Gross Income.** A taxpayer who receives virtual currency as payment for goods or services must include the fair market value of the virtual currency (measured in U.S. dollars as of the date of receipt) in the taxpayer’s gross income.

2. **Basis and Fair Market Value.** A taxpayer’s basis in virtual currency received as payment for goods or services is the fair market value of the virtual currency in U.S. dollars as of the date of payment or receipt.

3. **Gain or Loss on Exchange.** If the fair market value of property received in exchange for virtual currency exceeds the taxpayer’s adjusted basis in the virtual currency, the taxpayer will have a taxable gain. If the fair market value of the property received is less than the taxpayer’s adjusted basis, the taxpayer will have a loss.

4. **Capital v. Ordinary Gain.** The general rules which determine the character of a gain or loss on the sale or exchange of an asset apply to virtual currency. Capital gain or loss will be recognized if the virtual currency is a capital asset in the hands of the taxpayer (e.g., it is held for investment). Ordinary gain or loss will be recognized if the virtual currency is not a capital asset in the hands of the taxpayer (e.g., it is held as inventory).

5. **Mining.** A taxpayer who successfully “mines” virtual currency will recognize the virtual currency received as gross income at its fair market value on the date of receipt. An individual who “mines” virtual currency as a trade or business (and not as an employee) is subject to self-employment tax.

6. **Withholding and Self-Employment Taxes.** Virtual currency received by an independent contractor for services performed is self-employment income and is

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subject to the self-employment tax. Virtual currency received by an employee for services performed is wages and is subject to federal income tax withholding.

7. **Reporting Requirements.** Payments made using virtual currency are subject to the same information reporting as other payments of property. Payments of wages must be reported on Form W-2, payments of more than $600 to an independent contractor must be reported on Form 1099-MISC, and certain payments are subject to backup withholding.

8. **Transactions Prior to March 25, 2014.** Taxpayers may be subject to underpayment penalties, accuracy related penalties, and penalties for failure to timely or correctly report virtual currency transactions prior to the date of the Notice. However, penalty relief may be available if due to reasonable cause.

B. **Issues Not Addressed**

Although Notice 2014-21 addresses several issues regarding the tax consequences of virtual currency transactions, there are several issues that it does not address.

1. **Nonconvertible Virtual Currency.** Notice 2014-21 only addresses transactions involving “convertible” virtual currency, that is, virtual currency “that has an equivalent value in real currency, or that acts as a substitute for real currency,” such as Bitcoin. The Notice does not address nonconvertible virtual currency such as Pokécoins from the Pokémon Go game.

2. **Tangible v. Intangible Property.** Although Notice 2014-21 provides that virtual currency is treated as “property” for tax purposes, it is silent on whether it should be treated as tangible property or intangible property.


4. **Charitable Income Tax Deductions.** Notice 2014-21 does not address charitable income tax deductions under Code sections 170 and 642(c).

**Note:** Several charities accept donations of Bitcoins and other virtual currencies. Fidelity Charitable (Fidelity’s nonprofit donor advised fund) received $7,000,000 in virtual currency donations in 2016 and $70,000,000 in virtual currency donations.

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donations in 2017.\textsuperscript{30} In 2018, Fidelity Charitable had received $22,000,000 in virtual currency donations as of late June.\textsuperscript{31}

5. \textbf{Valuation Issues.} Although Notice 2014-21 states that the fair market value of virtual currency must be reported in U.S. dollars as of the date of payment or receipt, it provides very little guidance on how to determine fair market value. If a virtual currency is listed on an exchange and the exchange rate is established by market supply and demand, the exchange rate may be used to determine fair market value if it is used in a reasonable manner and consistently applied.

IV. \textbf{Reporting Requirements}

A. \textbf{Form 8949 (Sales and Other Dispositions of Capital Assets)}

Sales and exchanges of virtual currency are reported on Form 8949. The overall gain or loss from the transactions reported on Form 8949 is reported on Schedule D.

However, it appears that many taxpayers may have failed to report such transactions in prior years. According to the Service, in 2015, only 802 individuals reported a property description likely related to Bitcoin on Form 8949. Only 893 individuals reported such a description in 2014, and only 807 reported such a description in 2013.\textsuperscript{32}

1. \textit{United States v. Coinbase, Inc.}\textsuperscript{33} In November 2016, the Service issued a “John Doe” summons\textsuperscript{34} to Coinbase, one of the world’s largest virtual currency exchanges located in San Francisco, seeking records of all of its United States customers who at any time from January 1, 2013 through December 31, 2015 conducted transactions in virtual currency. After Coinbase failed to comply with the summons, the Service filed a petition to enforce the summons and later agreed to narrow the scope of the summons to information regarding accounts “with at least the equivalent of $20,000 in any one transaction type (buy, sell, send or receive) in any one year during the 2013-2015 period.” The narrowed summons

\textsuperscript{30} Comments from Ryan Boland, Fidelity Charitable Fundraising Manager Eastern Division, to the Digital Property Committee during the 2018 Annual Meeting of the American College of Trust and Estate Counsel (“ACTEC”) in San Antonio, Texas (March 8, 2018).

\textsuperscript{31} Comments from Tony Oommen, Fidelity Charitable Vice President and Charitable Planning Consultant, to the Digital Property Committee during the 2018 Summer Meeting of ACTEC in Chicago, Illinois (June 24, 2018).


\textsuperscript{33} \textit{United States v. Coinbase, Inc.}, 2017 WL 5890052 (N.D. Cal., November 28, 2017).

\textsuperscript{34} I.R.C. §7602(a).
also excluded customers who only bought and held Bitcoin during the period and those for which Coinbase had filed Forms 1099-K during the period. According to Coinbase, the information requested in the narrowed summons covered 8.9 million transactions and 14,355 account holders. Coinbase refused to comply with the narrowed summons and discussions between the Service and Coinbase regarding scenarios under which Coinbase might agree to provide user records were ultimately unsuccessful.

On November 28, 2017, the U.S. District Court for the Northern District of California ordered Coinbase to produce to the Service the following documents for accounts with at least the equivalent of in any one transaction type (buy, sell, send or receive) in any one year during the 2013-2015 period:

(1) the taxpayer ID number,

(2) name,

(3) birth date,

(4) address,

(5) records of account activity including transaction logs or other records identifying the date, amount, and type of transaction (purchase/sale/exchange), the post transaction balance, and the names of counterparties to the transaction, and

(6) all periodic statements of account or invoices (or the equivalent).

In March, Coinbase informed approximately 13,000 of its customers that it would be giving information about their accounts to the Service in compliance with the court order. On March 23, 2018, the Service issued a News Release to remind taxpayers that income from virtual currency transactions is reportable on their income tax returns, and taxpayers who do not report such transactions can be audited and potentially liable for penalties and interest. Finally, speaking to the Tax Controversy Institute in Beverly Hills, California on October 23, 2018, Darren Guillot, director (field collection) for the Small Business/Self-Employed Division of the Service noted that he had had access to Coinbase’s response to the


summons for the last two months and had shared that information with revenue agents across the country.\textsuperscript{37}

\textbf{B. Foreign Reporting Requirements}

On June 4, 2014, Rod Lundquist, a senior program analyst for the Small Business/Self-Employed Division of the Service, confirmed during an IRS webinar that for purposes of the Reports of Foreign Bank and Financial Accounts (“FBAR”), Bitcoin is not reportable “. . . at this time.” He also commented that the Financial Crimes Enforcement Network (“FinCEN”) “has said Bitcoin is not reportable on the FBAR, at least for this filing season.” He cautioned that this FBAR policy could shift in the future as the Service continued to scrutinize virtual currency and how it is being used.\textsuperscript{38}

However, many investors use a cryptocurrency “wallet” such as Coinbase or Blockchain to hold their virtual currency in much the same way that a brokerage account is used to hold stocks and bonds. If a cryptocurrency wallet is with a foreign financial firm, it is a foreign financial account subject to the FBAR reporting requirements. Coinbase is located in San Francisco and Poloniex is located in Boston. Blockchain is based in Luxembourg and Binance is based in China and Japan. Taxpayers with foreign cryptocurrency wallets must note on Form 1040 that they have a foreign financial account and they may have to disclose such account by filing Form 114 (Report of Foreign Banks and Financial Accounts). In some instances, Form 8938 (Statement of Specified Foreign Financial Assets) may also be required.\textsuperscript{39}

\textbf{V. 2017 Tax Cuts & Jobs Act}

Several changes made by the 2017 Tax Cuts and Jobs Act, most notably the change to section 1031 and like-kind exchanges, caught many taxpayers and Major League Baseball teams by surprise.\textsuperscript{40}


\textsuperscript{38} Alison Bennett, IRS: No Bitcoin Reporting on FBARs for This Filing Season, but Future Changes Possible, Bloomberg Daily Tax Report (June 5, 2014), available at https://www.bna.com/irs-no-bitcoin-n17179891056/ (last accessed February 15, 2019).


A. Section 1031 – Like-Kind Exchanges

Prior to the 2017 Tax Cuts and Jobs Act, with some exceptions, if certain requirements were met, no gain or loss was recognized on the exchange of property held for use in a trade or business or for investment if the property was exchanged solely for property of like kind.\textsuperscript{41} The 2017 Tax Cuts and Jobs Act changed that. Effective for exchanges completed after December 31, 2017, the non-recognition treatment of section 1031 only applies to like-kind exchanges of real property.

SEC. 13303. LIKE-KIND EXCHANGES OF REAL PROPERTY.

(a) IN GENERAL—Section 1031(a)(1) is amended by striking “property” each place it appears and inserting “real property”.\textsuperscript{42}

In an effort to lessen the impact of this proposed change on the exchange of virtual currencies, Coin Center, a non-profit blockchain advocacy group in Washington, D.C., proposed, and Representatives David Schweikert (R-Arizona) and Jared Polis (D-Colorado) introduced H.R. 3708\textsuperscript{43} to amend the Code to exclude from gross income de minimis gains (i.e., $600 adjusted for inflation) from certain sales or exchanges of virtual currency. This change was not included in the 2017 Act.

B. Chain Splits, Hard Forks, and Atomic Swaps

1. Chain Splits and Hard Forks. In programming terms, a “fork” is an open-source code modification. The forked code is similar to the original but with important modifications. A “hard fork” is a fundamental change to the protocol software which makes older versions invalid. A protocol change resulting from a soft fork will still work with older versions.\textsuperscript{44}

With virtual currency, a hard fork occurs when there is a change to the software of a digital currency that creates two separate versions of the blockchain, also known as a “chain-split.”\textsuperscript{45} A chain-split creates new coins with new rules associated

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\textsuperscript{41} I.R.C. §1031(a) (as enacted August 16, 1954 and last amended by Pub. L. No. 110-248, June 18, 2008).


with those coins. Recent examples of Bitcoin chain-split include Bitcoin Cash on August 1, 2017, and Bitcoin Gold on October 24, 2017.\textsuperscript{46}

Since virtual currency is treated as property for federal income tax purposes, the dominion and control doctrine which applies to property received but not paid for applies to coins received as part of a chain-split. Chain-split coins are not gifts and they are not found property. Chain-split coins are unsolicited property that may (but do not have to) be claimed with the right credentials. No income will be realized by the taxpayer until the taxpayer exercises dominion and control over the chain-split coins.\textsuperscript{47}

2. **Atomic Swaps.** In 2017, Lightning Labs began working on technology that would allow cross-chain trading between Bitcoin and altcoins through the Lightning Network through what is known as an “atomic swap”.\textsuperscript{48} An atomic swap allows users of the network to cross-trade different virtual currencies (for example, Bitcoin for Ethereum) without relying on centralized parties. The users can agree to a fixed trading price and complete the transaction immediately. Finally, after much anticipation, on March 14, 2018, Lightning Labs announced the beta release of its Lightning Network Daemon software to access Bitcoin’s Lightning Network.\textsuperscript{49}

C. **Determining Gain or Loss from Sales or Exchanges**

When a taxpayer acquires stocks, bonds or mutual funds on different dates or at different prices, and later sells only a portion of that property, the taxpayer generally has three options for determining what was sold: 1) the taxpayer may record the transaction on a “first in, first out” basis (“FIFO”); 2) the taxpayer may record the transaction on a “last in, first out” basis (“LIFO”); or, 3) the taxpayer may record the transaction on a “specific identification” basis by specifically identifying which shares are sold.\textsuperscript{50} Treasury


\textsuperscript{47} Id.


Regulations authorize these methods for the sale or exchange of stock, but do they also apply to virtual currency?

Treasury Regulation § 1.1012-1(a) sets forth the general rule for determining cost basis in a sale or exchange: the basis of the property is its cost, i.e., the amount paid for such property in cash or other property. If a taxpayer sells stock that was acquired on different dates or at different prices, by default, the taxpayer must use the FIFO method for determining gain – i.e., the earliest stock purchased is the earliest stock sold – if the taxpayer “does not adequately identify the lot from which the stock is sold or transferred.” Adequate identification is made if:

1. **for stock certificates held by the taxpayer** – it is shown certificates representing shares of stock from a lot which was purchased or acquired on a certain date or for a certain price were delivered to the taxpayer’s transferee;

2. **for stock held in a brokerage account** – at the time of sale, the taxpayer specifies to the broker the particular stock to be sold and, within a reasonable time thereafter, the taxpayer receives written confirmation of such specification from the broker; or,

3. **for stock held by book-entry** – the taxpayer specifies by written instruction the unique lot number which is assigned to the lot which contains the stock being sold.

Can “adequate identification” ever be made for virtual currency? Possibly. A definitive answer may depend upon whether virtual currency is treated as a commodity or a security for federal income tax purposes. If treated as a commodity, the identification rules for commodities positions would apply. If treated as a security, virtual currency

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51 Treas. Reg. §1.1012-1(c).
52 Treas. Reg. §1.1012-1(a).
53 Treas. Reg. § 1.1012-1(c)(1).
54 Treas. Reg. § 1.1012-1(c)(2).
55 Treas. Reg. § 1.1012-1(c)(3).
56 Treas. Reg. § 1.1012-1(c)(4).
58 *Id. See also, Perlin v. Commissioner*, 86 T.C. 388 (1986) (the Tax Court held that a taxpayer could specify commodity futures positions to close).
transactions are as unique as physical stock certificates and if a taxpayer controls the private keys, actual delivery of the private keys could be adequate identification.  

In the absence of further guidance from the Service, there are three basic approaches that a taxpayer could take in determining gain. First, the taxpayer could adopt FIFO universally. This is the most conservative method and the method used by Coinbase. Second, the taxpayer could segregate virtual currency purchased at separate times in separate wallets and apply FIFO on a per-wallet basis. This method is less conservative than the pure FIFO method. Finally, the taxpayer could use LIFO or adequate identification assuming that the Treasury Regulation applies to virtual currency and that virtual currency is an asset which can be adequately identified.

D. 2018 Proposed Legislation

On December 20, 2018, two bills were introduced in the House of Representatives to address virtual currency.

1. **H.R. 7361.** Introduced by Representative Ted Budd (R-North Carolina), H.R. 7361 would simply add a provision to section 1031 to treat like-kind exchanges of virtual property in the same manner as like-exchanges of real estate.

2. **H.R. 7356.** Introduced by Representatives Warren Davidson (R-Ohio) and Darren Soto (D-Florida), H.R. 7356 is a much broader bill entitled the “Token Taxonomy Act.” This bill would exclude digital tokens from the definition of a “security” for purposes of the securities law, direct the SEC to enact certain regulatory changes regarding digital units secured through public key cryptography, adjust the taxation of virtual currencies held in IRAs, treat qualified exchanges of virtual currency as tax-free exchanges, and exclude from gross income the gain of up to $600 (adjusted for inflation) from the sale of virtual currency.

No action has been taken on either bill since their introduction.

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59 Id.

60 Vandrew, supra.


VI. State Tax Laws

States have started to enter into the virtual currency tax arena, mostly in the area of sales and/or use tax. However, few states have enacted laws or issued concrete guidance on point to date. New York and California have both written guidelines on calculating sales tax when using virtual currency for purchases. Other states such as Kentucky, Michigan, New Jersey and Wisconsin have followed suit.

A. Kentucky

For online retailers who decide to accept virtual currency, one of the most significant state tax issues they face is the issue of record keeping. Like California and Wisconsin, the Kentucky Department of Revenue requires retailers to maintain sufficient records to verify the sales price at the time of the transaction.

Bitcoin is a form of Internet virtual currency gaining popularity as an accepted form of payment by many online retailers. However, please note that the IRS has recently ruled that for federal income tax purposes this product is treated as property and not currency. For Kentucky sales and use tax purposes, Bitcoins are the “consideration” provided by the purchaser in the transaction. Any business that accepts Bitcoins as a form of payment must convert the Bitcoin into U.S. dollars, and charge 6 percent Kentucky sales and use tax on any taxable transaction for which Bitcoin represents the financial instrument of consideration. Documentation must be maintained to verify the value of Bitcoin at the time of transaction.

B. Nevada

On June 5, 2017, the Nevada state legislature became the first state to approve a bill which blocks local government entities from taxing blockchain transactions.


64 Id.


C. Arizona

On March 29, 2017, Arizona Governor Doug Ducey signed HB 2417 which recognized the legality of the use of blockchain signatures and smart contracts, particularly with respect to transactions relating to the sale of goods, leases, and documents of title under Articles 2, 2A and 7 of the Uniform Commercial Code. Once thought of as one of the blockchain-friendliest states, a newly proposed bill in Arizona, HB 2702, would amend HB 2417 and subject blockchain technology development to Arizona sales tax.

D. New York – Mining Tariff

In March 2018, the New York Public Service Commission granted permission for 36 upstate municipal power companies to impose an extra charge on companies that engage in cryptocurrency mining. Permission for the tariff was granted to prevent a sharp increase in utility rates for residential and existing commercial customers. The tariff applies to companies that have a maximum electric demand exceeding 300 kilowatt hours. According to the Commission, in some cases, one-third of the electricity generated by a municipal electrical company is attributable to a single mining company.

VII. Conclusion

Not surprisingly, cryptocurrency technology continues to develop faster than most of us – including Treasury and the Service – can keep up. More guidance is needed so that taxpayers who are daring enough to enter into the world of virtual currency are not met with unexpected tax consequences when they leave.


Photograph taken November 30, 2018, Cincinnati Premium Outlets, Monroe, Ohio.
GONE MISSING: MINERAL RECEIVERSHIPS REDUX

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College of the State Bar of Texas, 1989-Current
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Member, Oil, Gas & Energy Resources Law Council, 2003-2006
Charter Member, Advisory Council, Kay Bailey Hutchison Center for Energy, Law, and Business, The University of Texas at Austin, 2014-Current
Adjunct Professor, University of Texas School of Law; Texas Wind Law 2012-2018; Courses: Wind Law and Texas Wind Law
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Author/Speaker for the 1995 Advanced Oil, Gas & Mineral Law Course, “How to Obtain a Receivership Oil and Gas Lease”
Author/Speaker for the 2002 Advanced Oil, Gas & Mineral Law Course, "Receiverships Revisited"
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Author/Speaker for the 2004 Oil, Gas and Wind - Leases and Disputes Seminar, Midland, Texas, sponsored by St. Mary's University School of Law, “Wind Leases in Texas”
Author/Speaker for the 2004 Agricultural Law Seminar, Texas Tech School of Law, sponsored by the State Bar of Texas, “Wind Leases in Texas”

Author/Speaker, Dallas Bar Association, Energy Law Section, October 20, 2004, “Wind Leases and Ownership of Wind Rights in Texas”

Author/Speaker, 2005 Southwest Land Institute, Dallas, Texas, April 7, 2005, “Wind Leases and Ownership of Wind Rights in Texas”

Program Director, 32nd Annual Ernest E. Smith Oil, Gas & Mineral Law Institute, Houston, Texas, 2006, sponsored by The University of Texas School of Law

Author/Speaker, 2006 Agricultural Law Seminar, Texas Tech University School of Law, Lubbock, Texas, April 7, 2006

Co-Author/Speaker, 2006 Wind Energy Institute, Wildcatting for Wind, Texas State Technical College, Sweetwater, Texas, sponsored by The University of Texas School of Law and The Oil, Gas and Energy Resources Law Section of the State Bar of Texas, “Current Issues in Texas Wind Energy Law 2006: Leases, Tax Abatements, Ownership of Wind Rights and Litigation”

Co-Author/Speaker, Ector County Bar Meeting, Odessa, Texas, September 14, 2006, “Current Issues in Texas Wind Energy Law”

Co-Author/Speaker, Midland County Bar Meeting, Midland, Texas, November 16, 2006, “Current Issues in Texas Wind Energy Law”


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Speaker/Co-Author, 20th Annual Advanced Real Estate Drafting Course—Texas Bar CLE (Houston, Texas, March 5-6, 2009) “Current Issues in Wind Energy Law 2009”

Co-Speaker, (with Steven K. DeWolf, Bellinger & DeWolf, Dallas, Texas), Texas Bar CLE Live Webcast, April 9, 2009, “Wind Energy Law Update”


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Co-Author with Ernest E. Smith and Steven K. DeWolf, Texas Wind Law (2011 by LexisNexis Matthew Bender)

Speaker/Author, 37th Annual Ernest E. Smith Oil, Gas & Mineral Law Institute, Houston, Texas, April 8, 2011, “Mineral Receiverships and Beyond”


Speaker, Halfmoon Seminars, HalfMoon, LLC, July 12, 2012, Midland, Texas, “Conflicts between Wind Developers and Oil and Gas Companies”


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Lecture to U. S. Department of State, “Advanced Energy Course,” The University of Texas, September, 2017, Austin, Texas

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Editor, Roderick E. Wetsel, Ernest Smith, Becky H. Diffen and Melissa Powers, Wind Law (LexisNexis Matthew Bender 2019)
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I. INTRODUCTION

In 1995, the author presented a paper at the Advanced Oil, Gas and Mineral Law Course entitled: “How to Obtain a Receivership Oil and Gas Lease.” The primary purpose of the article was to provide a complete set of forms for a mineral receivership suit, as none existed at that time. Then, in 1999, the Texas Legislature amended Chapter 64, Subchapter F of the Texas Civil Practice and Remedies Code to add Section 64.093, “Receiver for Royalty Interest Owned by Non-resident or Absentee.” The amendment to the Texas Civil Practice and Remedies Code could be utilized to obtain a lease of a nonparticipating royalty interest owned by a “non-resident or absentee” in a pooled unit. Thereafter, in 2002, the author revised the paper under the heading “Receiverships Revisited” for the 2002 Advanced Oil, Gas and Mineral Law Course. Since then, Section 64.091 has been amended only once, in 2009, and the amendment was a very minor one. Although over fifteen years have passed, there still remain no published forms for a mineral receivership in Texas.

Following the resurgence of the oil and gas industry in 2010 and 2011, this paper was again revised as a resource to provide practitioners with a step-by-step approach as to how to obtain a receivership under both the mineral and royalty statutes. The 2011 paper also included updates on the rapidly expanding renewables market, as well as the need for a similar receivership statute for missing surface owners.

Over the years since its first publication in 1995, I have had frequent requests for copies of the paper. With the recent rise in oil price in 2018 and 2019, the trend continues. The only irony I might mention in this revision of the previous version of this paper is that despite the monumental advances in search engines and technology over the last 23 years, mineral owners in Texas still “go missing.”

II. PREREQUISITES TO FILING A RECEIVERSHIP SUIT

A. Statutory Requirements

1. Jurisdiction and Venue

Suit must be brought in the district court of the county in which the land is located.

2. Parties

Suit is brought by a person claiming or owning an undivided mineral interest in land in this state, or an undivided leasehold interest under a mineral lease of land in this state. Additionally, the suit must

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1 I would like to gratefully acknowledge the assistance of my law clerk, Laura M. Leese, in the rewriting of this paper. Her research and writing skills are outstanding and with her inspiration and encouragement, I decided to dust off the old version of “Mineral Receiverships and Beyond” (2011) and give it a “redux.”
2 TEX. CIV. PRAC. & REM. CODE ANN. § 64.091(b) and (d)(3), as amended, 2009 (West).
4 This article does not address the procedure for obtaining a receivership for contingent interests in minerals set out in Section 64.092 of the Texas Civil Practice and Remedies Code. See Kemp v. Hughes, 557 S.W.2d 139 (Tex. Civ. App.—Eastland 1977, no writ).
5 TEX. CIV. PRAC. & REM. CODE ANN. § 64.091(b), TEX. CIV. PRAC. & REM. CODE ANN. § 64.093(a) and TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (West).
include one or more defendants who have, claim, or own an undivided mineral (or royalty) interest in that property.\textsuperscript{6}

The mineral receivership statute also covers an action brought by a person claiming or owning an undivided leasehold interest under a mineral lease of land in this state that has one or more defendants who have, claim, or own an undivided leasehold interest under a mineral interest of the same property.\textsuperscript{7} Thus, the mineral receivership statute applies not only to the missing mineral owner, but also to the missing lessee of an undivided mineral interest.

Under both statutes, the plaintiff is almost always the oil and gas lessee, and the defendant is the owner or purported owner of an undivided mineral or royalty interest in the same property.

3. The Defendant

The defendant for whom a receiver is sought must be a person whose residence or identity is unknown, or a nonresident, and not have paid taxes on the interest or rendered the property for taxes during the five-year period immediately preceding the filing of the action.\textsuperscript{8}

Most often, the defendant in a receivership suit is identified from the deed, probate proceedings, or other document of record by which he or she acquired title. As a result, his or her current address or county of residence is often not available. In this regard, it is interesting to note that the statutes require that the defendant “be a person whose residence or identity is unknown or a nonresident.” Although it is not explicitly stated, it is clear that the address of the nonresident must also be unknown.

Compliance with the second part of this requirement necessitates checking the ad valorem tax records in the county in which the land is located for a period of at least five years prior to filing suit. Unless the land is currently productive of oil and gas or has been in the recent past, it is unlikely that the defendant will have either paid taxes or rendered the interest for taxes during that period. This is also an opportunity to check and see if the defendant owns other mineral or royalty interests in the county which are currently producing oil and gas, possibly supplying the missing address.

4. The Petition, Allegations and Proof

The plaintiff must allege by verified petition and prove that he has made a diligent, but unsuccessful, effort to locate the defendant, and that he will suffer substantial damage or injury unless the receiver is appointed.\textsuperscript{9}

At a minimum, the landman, or other person charged with fulfilling the requirement of making a “diligent but unsuccessful effort to locate the defendant,” should do the following:

a. Check the grantor and grantee indices in the offices of the county and district clerks.

b. Check the county clerk’s register book for the time period of the conveyance. The register will show the name and address of the person to whom the original instrument was returned.

\textsuperscript{6} TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(b)(1) and 64.093(a)(1)(2) (West).

\textsuperscript{7} TEX. CIV. PRAC. & REM. CODE ANN. § 64.091(b)(2) (West).

\textsuperscript{8} TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(b-1) and 64.093(b) (West).

\textsuperscript{9} TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(c) and 64.093(c) (West).
c. Check the tax rolls in the office of the central appraisal district or county tax office.

d. Check current and prior voter registration lists, if the person lived in the county where the interest is found.

e. Check the telephone records and city directory for the city or town of the defendant’s last known residence. If you have a phone number, you can type the number into a search engine to reverse search for associated names.

f. Check social media pages such as Facebook, Instagram, LinkedIn, and Twitter. Facebook alone has 2.2 billion registered users, with the ability to send personal messages, for free, to any unblocked user.\(^{10}\)

g. Check the internet for websites offering searches for missing persons. Google is an obvious choice along with many similar sites now available. Many of these sites offer addresses, phone numbers, aliases, and associated persons for a nominal fee.

h. Check the probate records of the county and state of the last known address of the defendant.

i. Check the death records in the county or state where the person died, or is believed to have died, as well as the past obituaries in local newspapers. Some of these will documents will be available on the internet for free or a nominal fee. Using www.familysearch.org and www.findagrave.com will direct you to a county and cemetery for a deceased person.

In addition, and if the above efforts prove futile, the landman should attempt to locate the grantor from whom the defendant acquired title, who might have information as to the defendant’s whereabouts.

Due to the fact that the minimum standards for a “diligent but unsuccessful effort” may vary from county to county, a question of ethics may arise. Clearly, the attorney has a duty both to his client and to the court to ensure that due diligence is exercised in the search for the defendant. It is important, therefore, that the endeavor be a legitimate effort by a person capable of conducting the proper investigation, such as an experienced landman. This person should be prepared to testify at the receivership hearing.

The plaintiff must also prove that he “will suffer substantial damage or injury.” This showing is often made by the plaintiff alleging that if he is unable to drill, his mineral or leasehold interest in the tract will suffer drainage or potential drainage from an offset operator or operators. He may also be able to show that if the interest in question is not leased, he will not be able to drill and as a result will lose his leasehold interest in the property. Since the matter is not contested, normally the only proof of these allegations will be through the testimony of the plaintiff or his landman. The expert testimony of a geologist or petroleum engineer would be helpful, but is probably unnecessary in most cases.

It is important to note that the plaintiff does not need to prove that the mineral or royalty interest in question is in danger of being lost, moved, materially injured, or that the appointment of a receiver is ancillary to other relief.\(^{11}\)

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\(^{11}\) Scott v. Sampson, 333 S.W.2d 220, 222 (Tex.Civ.App.—Fort Worth 1960, writ ref’d n.r.e.).
III. THE RECEIVERSHIP SUIT

A. Petition and Bond

The verified petition must name, as the defendant, the last known owner or the last record owner of the interest. As shown above, the last known or record owner is most often identified through the document by which he or she acquired title. Neither the plaintiff nor the receiver is required to post bond.

B. Notice

The plaintiff must serve notice upon the defendant by publication, as provided by the Texas Rules of Civil Procedure. The statute does not identify the appropriate rule or rules in the Texas Rules of Civil Procedure to follow.

The procedure recommended by most practitioners is as follows:

1. Affidavit for Citation by Publication

An affidavit should be prepared which states that the residence of the defendant is unknown, that the defendant is a resident or nonresident of the state, and that the affiant has made a diligent but unsuccessful effort to locate the defendant. This affidavit should be filed in the cause.

2. Issuance of Citation; Form and Requisites

The citation should be prepared in accordance with Rules 114 and 115 of the Texas Rules of Civil Procedure. It must contain the names of the parties, a brief statement of the nature of the suit, a legal description of the land involved, a statement of the interest of the named defendant, and shall command the defendant to appear and answer at or before 10:00 a.m. on the first Monday after the expiration of 42 days from the date of issuance thereof, specifying the day of the week, the date, and the time of day the defendant is required to answer.

3. Service of Citation by Publication

The citation, when issued, shall be served by the sheriff or any constable of any county of the State of Texas or by the clerk of the district court of the county in which the case is pending, by having the same published once each week for four (4) consecutive weeks, the first publication to be at least twenty-eight (28) days before the return day of the citation. The publication shall be made in the county where the land, or a portion thereof, is situated if there be a newspaper in such county. If not, then in an adjoining county to the county where the land or a part thereof is situated, where a newspaper is published.

a. Appointment of Process Server. Although Rule 116 of the Texas Rules of Civil Procedure states that the citation, when issued, shall be served by the “sheriff or any

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12 TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(d)(1) and 64.093(d)(1) (West).
13 TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(d)(4)(5) and 64.093(d)(4)(5) (West).
14 TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(d)(2) and 64.093(d)(2) (West).
15 See Gray v. PHI Res., Ltd., 710 S.W.2d 566 (Tex. 1986).
17 TEX. R. CIV. P. 114, 115.
18 TEX. R. CIV. P. 116.
constable” or “by the clerk of the court in which the case is pending,” it appears nevertheless that a process server may be appointed by the district judge. The primary advantage of using a private process server is to ensure that the newspaper receives proper instructions for publication at the time of service. In rural counties, the same advantage may be had by direct contact with the sheriff’s office.

b. **Instructions to the Newspaper.** It is advisable that written instructions be given to the newspaper as to how and when the citation should be published, so as to lessen the chances for error. A form to use for this purpose is attached as Appendix 5. The cautious practitioner should make arrangements with the newspaper in advance and should monitor the publication each week until it is completed.

4. **Return of Citation by Publication.**

The return of the officer executing the citation shall be endorsed or attached to the same, and shall show how and when the citation was executed, specifying the dates of publication. It should be signed by him or her officially, and must be accompanied by a printed copy of the publications. Note that the return must be dated more than twenty-eight (28) days after the date of first publication in the newspaper.

C. **Selection of Receiver**

The receiver may be the county judge or any other resident of the county in which the land is located. It is not required that the receiver post bond. A good practice is to select the county judge, if he or she is willing to undertake the job. In most rural counties, this is the common practice. Since in most counties the county judge will usually be unfamiliar with mineral receiverships, it is recommended that you contact him or her in advance to discuss the proceedings.

D. **Setting the Hearing Date**

Once the receiver is selected, set the hearing date at a time when the receiver is available, which is after the return date of the citation, and which is on or after the appearance date (i.e., the first Monday after the expiration of forty-two (42) days from the date of issuance of the citation). Further, the order setting the hearing should be signed by the district judge and filed in the cause, with a copy delivered to the receiver.

E. **Pre-hearing**

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20 TEX. R. CIV. P. 117.
21 TEX. R. CIV. P. 116.
22 TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(d)(3) and 64.093(d)(3) (West). This portion of the statute was amended in 2009 to delete reference to “the county clerk and his successors,” following “the county judge and his successors.” Although arguably the county clerk would still fall into the category of “any other resident of the county,” the legislative intent of the amendment appears to define the duties of the county clerk so as to eliminate the possibility of the clerk serving as a mineral receiver. (H.B. 3002, “Bill Analysis” www.capitol.state.tx.us (last visited June 19, 2018)).
23 TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(d)(5) and 64.093(d)(5) (West).
24 In most counties, the district clerk is often reluctant to serve as a receiver, so the county judge is the best choice.
1. Preparation of Receivership Oil and Gas Lease or Ratification

The oil and gas lease or ratification of the pooling agreement should be prepared in proper form prior to the hearing. The lease or ratification should be dated as of the date of the hearing. The lessor or grantor will be the county judge or other person selected, acting in his or her capacity as receiver for mineral or royalty interests under appointment by the district court in the cause, for the named mineral or royalty owner defendant. In the case of a mineral receivership, the following procedures are recommended:

a. The receivership lease should be prepared on the same form, with the same terms, as leases taken from the other mineral owners in the tract. A separate lease for each defendant is not required.

b. The royalty reserved in the lease should be the same as the royalty given to other mineral lessors in the same tract. For example, if the average royalty reserved by the other lessors in the same tract is three-sixteenths (3/16), the receivership lease should reserve a 3/16 royalty. If in that instance, the receivership lease reserved a one-eighth (1/8) royalty, obvious legal and ethical concerns could arise if the proceedings are later brought under attack.

c. Like the royalty, the amount of bonus money paid for the receivership lease should be set by an average of the bonuses paid to the other mineral lessors in the tract.

d. Similarly, the primary term of the lease should be consistent with the other leases taken by the plaintiff/lessee in the same tract.

With regard to a royalty receivership, note that Section 64.093(g) provides that a lease ratified by a receiver under this section may authorize the lessee to pool and unitize land subject to the lease with adjacent land into a unit not to exceed 160 acres for an oil well or 640 acres for a gas well, plus 10% tolerance, or into a unit that substantially conforms to a larger unit prescribed or permitted by governmental rule. It states that a pooling agreement ratified by a receiver under this section may allow a pooled unit not to exceed 160 acres for an oil well or 640 acres for a gas well, plus 10% tolerance, or into a unit that substantially conforms to a larger unit prescribed or permitted by governmental rule. Note, however, that these acreage restrictions should not apply to a unitization agreement approved by the Railroad Commission of Texas, which is executed by a receiver under Section 64.093(f)(3).

2. Preparation of Witnesses for the Hearing

Normally the only witnesses will be the landman and, perhaps, the plaintiff. The landman will testify as to the due diligence used by him in seeking to locate the defendant mineral or royalty owner. He will also testify as to the interests owned by the plaintiff and the defendant in the subject property. In the case of a mineral receivership, he will need to show that the bonus paid and the royalty reserved, as well as the other terms of the receivership lease, are reasonable. In a royalty receivership, he should be prepared to testify concerning ratification of the pooling provisions in the lease or the terms of the pooling agreement, as well as that the pooled unit is within the acreage restrictions set out in Section 64.093(g).

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25 TEX. CIV. PRAC. & REM. CODE ANN. § 64.093(g) (West).
26 TEX. CIV. PRAC. & REM. CODE ANN. § 64.093(f)(3) (West).
27 TEX. CIV. PRAC. & REM. CODE ANN. § 64.093(g) (West).
The plaintiff or the landman, as the case may be, will also need to testify in some detail that the plaintiff will suffer substantial damage or injury unless the receiver is appointed. In a royalty receivership, the testimony of a geologist or engineer might also be helpful to the court on this issue.

3. Selection of Attorney Ad Litem

An attorney ad litem should be selected to represent the defendant mineral or royalty owner at the hearing. Usually, the plaintiff nominates an attorney ad litem to be appointed by the court. The attorney ad litem is typically a member of the local bar familiar with courthouse procedures, such as the county attorney. The fee charged by the attorney ad litem, like the filing fee and the publication cost, is paid by the plaintiff. The fee should be agreed upon in advance of the hearing. Although neither the mineral nor royalty statute requires the appointment of an attorney ad litem, this additional step may prevent future problems if the proceedings are attacked.

F. The hearing

1. Statement of Facts

The proceedings should be transcribed by a court reporter. The lack of statement of facts may have serious consequences if the case is appealed.

2. Evidence; Testimony

Introduce certified copies of the leases held by the plaintiff in the subject property to show his undivided interest in the leasehold. In a royalty receivership, also introduce copies of the leases and the pooling agreement, if any, to be ratified by the receiver. Present the testimony of the landman, the plaintiff and the geologist or engineer, if necessary. As previously stated, the landman must testify concerning his “diligent but unsuccessful effort” to locate the defendant, and the landman, plaintiff, geologist or engineer must also show that the plaintiff “will suffer substantial damage or injury” if the receiver is not appointed.

3. Order Appointing Receiver

At the conclusion of the hearing, have an order appointing receiver signed by the district judge.

G. Post-hearing

1. Payment of Bonus

In a mineral receivership, immediately following the hearing, the plaintiff should pay the bonus money to the district clerk. It must be paid to the clerk of the court in which the case is pending before the receiver executes the lease.

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28 Tex. Civ. Prac. & Rem. Code Ann. §§ 64.091(c)(2) and 64.093(c)(2) (West).
30 See Appendix 9. Some attorneys include language in the order which extends the receivership to cover any land owned by the defendant in the county in an effort to prevent the necessity of bringing a separate receivership application for the interest of the same defendant in other lands in the same county.
The royalty receivership statute also requires that the monetary consideration, if any, due for the execution of a ratification, pooling agreement, or unitization agreement be paid to the clerk of the court in which the case is pending before the receiver executes the instrument. That statute goes on to state; however, that “because ratifications, pooling agreements and unitization agreements are typically entered into in consideration of the future benefits accruing to the grantor thereof, an initial monetary consideration is not typically paid for the execution of such instruments.”

In both instances, the court shall apply the bonus money to the costs accruing in the case, and retain any balance for the use and benefit of the defendant mineral or royalty owner. Payments made at a later time under the lease, assignment, or unitization agreement (in the case of a mineral receivership), or under the lease, pooled unit, or unitization agreement (in the case of a royalty receivership) shall be paid into the registry of the court and impounded for the owner of the interest. “Costs accruing in the case” should include the filing fee, publication cost, and the ad litem fee, some or all of which may have been paid in advance by the plaintiff.

2. Oath of Receiver

The receiver should execute an oath of receiver, which is filed with the district clerk.

3. Report of Receiver

After taking the oath, the receiver then executes the oil and gas lease or leases, or the ratification, as the case may be, along with a report of receiver. The report of receiver recites that after the bonus money, if any, was paid to the district clerk of the county, the receiver, acting pursuant to the authority granted, executed the receivership oil, gas and mineral lease or the ratification of a mineral lease or pooling agreement covering the described land, on behalf of the defendant or defendants. Copies of the oil and gas lease, ratification and/or unitization agreement are attached to the report. Once signed by the receiver, the report is filed in the cause.

4. Order Approving Report of Receiver

The district judge signs an order approving the receiver’s report. In the case of a mineral receivership, the order should state, among other things, that the terms of the receivership lease are fair and reasonable. It should direct the receiver to deliver the lease to the plaintiff for filing in the county. With regard to a royalty receivership, the order should state that the lease or pooling agreement ratified by the receiver complies with the acreage restrictions set out in Section 64.093(g) of the Code, or that the unitization agreement executed by the receiver has been authorized by the Railroad Commission of Texas. It should direct the receiver to deliver the ratification or unitization agreement to the plaintiff for filing in the county.

5. Recording of Lease or Ratification

The receivership lease or ratification is filed for record in the county clerk’s office. This final step must be followed. It is not sufficient for the lease or ratification to simply be of record in the district clerk’s office as part of the receivership proceedings.

32 TEX. CIV. PRAC. & REM. CODE ANN. § 64.093(h) (West).
33 TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(h) and 64.093(h) (West).
34 TEX. CIV. PRAC. & REM. CODE ANN. § 64.022 (West).
H. Duration of Receivership: Payment of Royalty

The receivership continues as long as the defendant or his heirs, assigns or personal representatives fail to appear in court in person or by agent or attorney to claim the defendant’s interest. Both the mineral and royalty receivership statutes provide that royalty payments shall be paid into the registry of the district court and impounded for the use and benefit of the owner of the interest.

IV. MOTIONS FOR NEW TRIAL AND OTHER ATTACKS ON THE JUDGMENT; CASE LAW

A detailed discussion pertaining to attacks upon receivership proceedings is beyond the scope of this article. The following brief discussion of these issues; however, should be helpful to the attorney who seeks and obtains a mineral or royalty receivership.

A. Motion for New Trial

The time period for filing a motion for new trial in a mineral or royalty receivership proceeding is two (2) years from the date of judgment.

B. Direct and Collateral Attacks

An order appointing a mineral or royalty receiver must be attacked directly in the cause in which the appointment was made. It may be collaterally attacked only where the court was without jurisdiction to issue the order, or where the order is void on its face.

C. Case Law

The Texas courts hold that every reasonable presumption will be indulged by the appellate court in support of an order appointing a receiver for a mineral or royalty interest, and in the absence of some contrary showing, it will be presumed that the judge acted fairly, properly and according to law, and that the petition and evidence were sufficient, and that proper and sufficient grounds existed for the order.

Although there are few reported cases, it appears that most attacks upon mineral or royalty receiverships concern improper notice. In this regard, it should be noted that the absence of proper notice merely makes the appointment of the receiver voidable, but not void. In Gray v. PHI Resources, Ltd., on the date the petition for receivership was filed, the trial court, acting under the provisions of Section 695 of the Texas Rules of Civil Procedure, signed an order requiring posting of a copy of the petition at the county

35 TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(e) and 64.093(e) (West); see also infra note 44.
36 TEX. CIV. PRAC. & REM. CODE ANN. §§ 64.091(h) and 64.093(h) (West).
39 See supra note 11; see also Johnson, 391 S.W.2d at 782.
40 See Helton, 621 S.W.2d at 678.
41 Rule 695 of the Texas Rules of Civil Procedure provides as follows:

“Except where otherwise provided by statute, no receiver shall be appointed without notice to take charge of property which is fixed and immovable. When an application for appointment of a receiver
courthouse for a period of three (3) days prior to a hearing on the matter.\textsuperscript{42} No citation was issued. Although the case was decided on other grounds, the Texas Supreme Court stated:

“It is a fundamental tenet of our law that a plaintiff must properly invoke the jurisdiction of a trial court by valid service of citation on a defendant … Furthermore, the notice provision of Rule 695 will not confer jurisdiction absent some type of citation or appearance by the named defendant(s).”\textsuperscript{43}

In 1989, subsection (k) was added to Section 64.091 of the Code, which provided that to the extent that subsection (d)(2) (requiring notice on the defendant by publication as provided in the Texas Rules of Civil Procedure) conflicts with the Texas Rules of Civil Procedure, subsection (d)(2) controls. An identical provision also appears in subsection (k) of Section 64.093. Thus, it now seems clear that notice by publication in a mineral or royalty receivership proceeding should be in accordance with Tex. R. Civ. P. 109 et seq., rather than as provided in Tex. R. Civ. P. 695.

In 2014, the Houston Court of Appeals examined scope of authority given to a receiver, holding that a receiver is only allowed to lease what court’s order explicitly states.\textsuperscript{44} The appeals court reiterated that receiver is only granted the authority to execute and deliver the mineral lease originally contemplated in the appointment order.\textsuperscript{45} Without an amendment to an appointment order, a receiver does not have the ability to execute another lease for the benefit of the missing mineral holder, something for practitioners to bear in mind for future maintenance on the leasable interest.\textsuperscript{46}

V. THE FUTURE: THE MINERAL AND ROYALTY RECEIVERSHIP AND THE NEED FOR A SIMILAR STATUTE IN RENEWABLE ENERGY

A. Continued Need for Mineral and Royalty Receiverships

Despite technological advances in our society in recent years that have made it easier to find missing persons, there are still many mineral and royalty owners in Texas that cannot be located. With advances in technology and continued development across many previously untapped regions in Texas, it appears that receivership suits will continue to be filed on a regular basis.

B. Rise of the Wind and Solar Industries in Texas

Along with the continued growth of the oil and gas business since this paper was first published in 1995, has been the explosive development of the wind and solar industries in Texas. During the period from

\textsuperscript{42} Gray v. PHI Res., Ltd., 710 S.W.2d 566 (Tex. 1986).
\textsuperscript{43} See Gray, 710 S.W.2d at 567.
\textsuperscript{44} Clay Expl., INC., v. Santa Rosa Operating, LLC, 442 S.W.3d 795, 797 (Tex. App.—Houston [14th] 2014, no pet.)
\textsuperscript{45} Id. at 801
\textsuperscript{46} Id.
2003 to 2018, developers constructed wind farms throughout the western half of the state, with three of the largest wind farms in the world being built in Nolan and Taylor Counties, and with Texas ranked #1 in the United States with over 22,000 MWs installed. In recent years, solar energy has boomed as well in Texas with 1,973 MWs of solar energy installed.

C. Ownership of Wind and Solar Rights; Leases

In Texas, the right to harvest wind or solar energy from the land is vested in the surface owner. Depending on the instrument, the lease of this right to a developer may be in the form of a tenancy for years (containing a grant of multiple easements on the land) or simply as an easement. In either case, it is given for a long term of usually 30 to 50 years.

D. Co-tenancy Issues

In a surface lease transaction, each owner in a co-tenancy acts for himself and no one is the agent of another or has any authority to bind him merely because of the relationship.

Likewise, with an easement, absent consent or subsequent ratification by the other co-tenants, the general rule is that one co-tenant cannot impose an easement upon the common property in favor of third persons.

E. The Missing Surface Co-tenant

Incredible as it may seem, in some instances, just as with oil and gas interests, there are owners of undivided surface interests that cannot be found. Since there is no receivership statute for wind or solar leases, developers have found that it is difficult, if not impossible, to finance the building of a wind or solar farm unless all of the owners are located and leased. In this regard, because a wind lease is typically classified as an easement or as a lease which grants multiple easements, many developers fear that a lease of less than 100% of the surface is not a valid lease.

F. Need for a Surface Receivership Statute

The rapid growth of the Texas wind and solar industries over the last twenty years has opened new horizons for energy development. When this paper was last amended in 2011, Texas had 9,000 megawatts of renewables installed. Now megawatts of renewables installed has ballooned to 22,000 megawatts, with approximately 3,500 more megawatts expected by the end of 2018. These new industries will need the tools with which to facilitate further exploration and development. It thus appears that the time has arrived for Texas to enact a surface receivership statute, using the mineral and royalty statutes as a model.

48 See supra note 8.
51 See Elliott, 597 S.W.2d at 802.
52 See supra note 8.
VI. CONCLUSION

Obtaining a mineral or royalty receivership under the provisions of Section 64.091 or Section 64.093 of the Texas Civil Practice and Remedies Code is a relatively simple process. However, the requirements of the statutes must be strictly followed. The lack of case law in this area suggests that if the proceedings are conducted fairly, with proper notice, and with due regard to the legal and ethical issues involved, the chances of a successful attack upon the judgment are remote. Hopefully, this paper will serve as a guide in the successful preparation and prosecution of mineral and royalty receivership suits in Texas. It is also hoped that Texas will enact a surface receivership statute for renewable energy in the near future.
APPENDIX

FORMS AND INSTRUCTIONS

Insofar as the author is aware, there is no complete set of published forms for a mineral or royalty receivership suit. The following forms have been developed and used by the author.

As with all forms, these forms are included for illustrative purposes only and should not be used unless independent analysis and consideration is given by a licensed attorney as to the applicability to a given fact situation.
APPLICATION FOR APPOINTMENT
OF RECEIVER FOR [MINERAL] [ROYALTY] INTERESTS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes LUCKY OIL COMPANY, hereinafter referred to as Plaintiff, complaining of JOSEPH R. DOAKES, WILLIAM A. (BILL) BECK, FORREST GUMP and WILLIAM BONEY and THEIR HEIRS, KNOWN OR UNKNOWN, IF ANY OF SAID PERSONS ARE DECEASED, hereinafter referred to as the Defendants, and for cause of action would show this Honorable Court the following:

I. Plaintiff, LUCKY OIL COMPANY, is a Texas corporation, whose principal offices are located at 1712 Country Club Drive, Sweetwater, Texas 79556.

Defendants, JOSEPH R. DOAKES, ET AL., are former residents of the State of Texas, the State of New York, Georgia, Illinois, and perhaps other states, all of whose residences and present whereabouts, as hereinafter described, are unknown to Plaintiff.

II. Plaintiff is engaged in oil and gas exploration and development in Nolan County, Texas, and is the owner of certain undivided leasehold interests in and under the following described lands in Nolan County, Texas, to-wit:

A tract of 160 acres, more or less, being the Southeast Quarter (SE/4) of Section ABC, Block XYZ, T&P Ry. Co. Surveys, Nolan County, Texas.

III. Plaintiff would show that the interests owned by the Defendants and their heirs, if any of them is deceased, in the [oil, gas and other minerals] [royalty] in and under the above described lands, and their last known addresses, if any, are as follows:

(A) Defendant JOSEPH R. DOAKES, whose last known address is Room 1313 in the Baker Hotel, Commerce Street, Dallas, Texas, and whose interest is 9/2560;

(B) Defendant WILLIAM A. (BILL) BECK, whose last known address was 1001 Fifth Avenue, New York, New York 00000, whose interest is 9/512;

(C) Defendant FORREST GUMP, whose last known address is Atlanta, Georgia, and whose interest is 9/512; and

(D) Defendant WILLIAM BONNEY, whose last known address is ________ and whose interest is 18/512.

IV. Plaintiff would show that the present residences of all of the above named Defendants, some of whom are non-residents of this state, are unknown. Plaintiff would further show that none of the Defendants or their heirs, have paid taxes on the [mineral] [royalty] interests owned by them, nor have they rendered said interests for taxes during the five-year period immediately preceding the filing of this action.

V. Plaintiff would show that for a period in excess of ___________ [time period], its landmen and attorneys have made diligent but unsuccessful efforts to locate each of the above named Defendants, or their heirs.
VI.

Plaintiff seeks to explore and develop the above described lands for the production of oil and/or gas [which can only be accomplished by the creation of a pooled unit].

Unless Plaintiff can secure a valid [oil and gas lease of the mineral interests] [ratifications of the nonparticipating royalty interests] owned by each of the Defendants listed above, or their heirs, Plaintiff will not be able to properly explore and develop said land [by creation of a pooled unit] and, therefore, will suffer substantial injury and damage thereby. Plaintiff has invested substantial sums in purchasing leasehold interests in said land, which sums will be lost if Plaintiff is unable to proceed. Further, Plaintiff would show that activities for the exploration and development of oil and gas are now being conducted in the vicinity of the above described lands, which activities may give rise to a possibility that the above described lands will suffer drainage therefrom. Such drainage will result in substantial damage or injury not only to Plaintiff, but also to Defendants, or their heirs, unless the [mineral/royalty interests of the Defendants are properly leased to Plaintiff] [ratifications of the pooled unit are obtained from the Defendants] so that Plaintiff may explore and develop said lands.

VII.

Plaintiff would show that in accordance with the provisions of Section [64.091(d)(3)] [64.093(d)(3)] of the Texas Civil Practice and Remedies Code, it is in the best interests of both Plaintiff and Defendants, and their heirs, if any be deceased, that the County Judge of Nolan County, Texas, and his successors, be appointed receiver for the undivided [mineral] [royalty] interests owned by the Defendants herein, with the following powers:

[AS TO A MINERAL RECEIVERSHIP]

1. To negotiate, execute and deliver to the Plaintiff oil, gas and mineral leases, with pooling and unitization clauses, under such terms and conditions as may be prescribed and approved by this Court, and as are set out in Section 64.091 of the Texas Civil Practice and Remedies Code; and to execute any renewals or extensions thereof;
2. To manage the above described mineral interests for the duration of the receivership;
3. To render the mineral interests for taxation purposes and to pay any taxes upon the same as they become due.]

[AS TO A ROYALTY RECEIVERSHIP]

1. To negotiate, execute and deliver to the Plaintiff ratifications of mineral interests executed by persons owning an undivided mineral interest in the above described property, or ratifications of a pooling agreement covering the property, or enter into a unitization agreement authorized by the Railroad Commission of Texas;
2. To manage the above described royalty interests for the duration of the receivership;
3. To render the royalty interests for taxation purposes and to pay any taxes upon the same as they become due.]

VIII.

Plaintiff respectfully requests that the [oil and gas leases] [ratifications] granted by the receiver appointed herein cover the entire [mineral] [royalty] interests owned by the Defendants, or their heirs, in the above described lands (or County). Plaintiff further requests under the provisions of Section [64.091(e)] [64.09(e)] of the Texas Civil Practice and Remedies Code that the receivership, once created, continue as long as said Defendants, or their respective heirs, assigns or personal representatives, fail to appear in this Court in person or by agent or attorney to claim their interests.

WHEREFORE, premises considered, Plaintiff prays that the Defendants be cited to appear and answer herein by publication, as provided by the Texas Rules of Civil Procedure and Section [64.091] [64.093] of the Texas Civil Practice and Remedies Code, and that upon final hearing hereof, Plaintiff have the following:

1. Judgment appointing the County Judge of Nolan County, Texas, and his successors, or such other person that the Court deems qualified, as receiver of Defendants’ [mineral] [royalty] interests, as specified above, with the powers specified above;
2. Judgment directing the receiver to execute and deliver to Plaintiff, as Lessee, [oil, gas and mineral leases containing pooling and unitization clauses] [ratifications of Plaintiff’s mineral lease or leases and/or ratifications of a pooling agreement covering the described property], and other provisions as are prescribed by this Court and by law covering the lands described in this petition;

3. [If appropriate] Judgment directing the receiver to enter into a unitization agreement covering the described property authorized by the Railroad Commission of Texas.

4. Judgment that all money consideration paid for the execution of said [leases] [ratifications] be paid to the Clerk of this Court before the receiver executes said [leases] [ratifications], which funds shall be applied by the Court to the costs accruing in this case, and the balance retained for the use and benefit of said Defendants and/or their respective heirs; and further, that any payments made at a later time under said [leases] [ratifications] shall also be paid into the registry of this Court and impounded for the use and benefit of such Defendants, and/or their heirs; and

5. Judgment providing that the Plaintiff have such other and further relief to which it may show itself justly entitled, at law or in equity.

Respectfully submitted,

WETSEL, CARMICHAEL, & ALLEN, L.L.P.
207 Oak Street, P. O. Box 78
Sweetwater, Texas 79556
Phone: (325) 235-3999
Fax: (325) 235-3526

By: ________________________________

ROD E. WETSEL
State Bar No. 21235400
ATTORNEYS FOR PLAINTIFF,
LUCKY OIL COMPANY
VERIFICATION

THE STATE OF TEXAS

COUNTY OF NOLAN

BEFORE ME, the undersigned authority, on this day personally appeared HERMAN PACE, who after being by me duly sworn, upon his oath stated the following:

"My name is Herman Pace. I am the President of Lucky Oil Company, the Plaintiff in the above styled and numbered cause. I have read the foregoing Application for Appointment of Receiver for [Mineral] [Royalty] Interests, and I am authorized by Lucky Oil Company to make this verification. All of the statements contained therein are within my personal knowledge and are true and correct."

EXECUTED this the _____ day of ______________, 2019.

____________________________________
HERMAN PACE

SWORN TO AND SUBSCRIBED BEFORE ME by the said HERMAN PACE on this the _____ day of __________, 2019, to certify which witness my hand and seal of office.

____________________________________
NOTARY PUBLIC, STATE OF TEXAS
My commission expires:__________________
APPENDIX 2

[CAPTION]

AFFIDAVIT FOR CITATION BY PUBLICATION

THE STATE OF TEXAS )
COUNTY OF NOLAN )

BEFORE ME, the undersigned authority, on this day personally appeared SAMUEL SLEUTH, known to me to be a credible person, who after being by me duly sworn, on oath deposed and said:

"My name is SAMUEL SLEUTH. My address is 123 Alamo Avenue, Sweetwater, Texas 79556. I am over the age of eighteen years, have never been convicted of a felony, and I am competent in all respects to make this affidavit.

"I am an Independent Petroleum Landman in Sweetwater, Nolan County, Texas. I have been employed by Lucky Oil Company concerning the subject matter of the above law-suit, and in such regard, I am the duly authorized agent of Lucky Oil Company in this proceeding and have authority to make this Affidavit.

"Over a period of ________ [months] [weeks], I have made the following diligent efforts to locate each of the Defendants in the above styled and numbered cause, or their heirs, but all such efforts have been unsuccessful. [Specify efforts undertaken, e.g.:

“(1) checked all records in the offices of the County and District Clerks in Nolan County, Texas;
“(2) checked the tax rolls in the office of the Central Appraisal District of Nolan County, Texas;
“(3) checked the city directory for Sweetwater, Roscoe, Blackwell, Maryneal and Nolan, and instituted a nationwide search of telephone records on the internet; and
“(4) conducted a nationwide search for missing persons through websites on the internet; ETC;
“(5) conducted a thorough search of the internet, including social media, ancestry searches, and databases of public records.]

“Despite all of my efforts, the whereabouts of each of the Defendants in this case, some of whom are non-residences of this state, are and remain unknown.”

EXECUTED this the _____ day of _______. 2019.

____________________________________
SAMUEL SLEUTH

SWORN TO AND SUBSCRIBED BEFORE ME by the said SAMUEL SLEUTH, on this the _____ day of ______, 2019, to certify which witness my hand and seal of office.

____________________________________
NOTARY PUBLIC, STATE OF TEXAS
My commission expires:______________
APPENDIX 3
CITATION BY PUBLICATION

CLERK OF THE COURT:  PLAINIFF’S
ATTORNEY:  [NAME AND ADDRESS]

[NAME AND ADDRESS]

THE STATE OF TEXAS

NOTICE TO DEFENDANTS:  “You have been sued.  You may employ an attorney.  If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of forty-two (42) days after the date of issuance of this citation and petition, a default judgment may be taken against you.”

TO:  JOSEPH R. DOAKES, WILLIAM A. (BILL) BECK, FORREST GUMP and WILLIAM BONNEY, and THEIR HEIRS, KNOWN OR UNKNOWN, IF ANY OF SAID PERSONS ARE DECEASED, Defendants in the cause herein described.

You and each of you are hereby commanded to appear and answer before the 32nd Judicial District Court in the Nolan County Courthouse in Sweetwater, Nolan County, Texas, at or before 10:00 a.m. on the first Monday after the expiration of forty-two (42) days from the date of issuance hereof, being at or before 10:00 a.m. on Monday, the ____ day of __________, 2019, then and there to answer the petition of LUCKYOIL COMPANY, in Cause No. ______, styled “LUCKYOIL COMPANY vs. JOSEPH R. DOAKES, ET AL.,” wherein the said LUCKY OIL COMPANY is Plaintiff, and the said JOSEPH R. DOAKES, WILLIAM A. (BILL) BECK, FORREST GUMP and WILLIAM BONNEY, and THEIR HEIRS, KNOWN OR UNKNOWN, IF ANY OF SAID PERSONS BE DECEASED, as Defendants.  The said petition, filed on the ____ day of __________, 2019, discloses that the nature of said suit is as follows:

This suit is brought to have a receiver appointed under the provisions of Section [64.091] [64.093] of the Texas Civil Practice and Remedies Code for undivided [mineral] [royalty] interests owned by the Defendants in the following described lands in Nolan County, Texas, to-wit:

A tract of 160 acres of land, more or less, being the Southeast Quarter (SE/4) of Section ABC, Block XYZ, T&P Ry. Co. Surveys, Nolan County, Texas;

And to execute [Oil, Gas and Mineral Leases] [ratifications of oil, gas and mineral leases] thereof to the Plaintiff [OR ratifications of a pooling agreement covering said land], and take such other action deemed necessary under the provisions of said statute.

If this citation is not served within ninety (90) days after the date of its issuance, it shall be returned unserved.
 ISSUED AND GIVEN UNDER MY HAND AND THE SEAL OF SAID COURT on this the ____ day of __________, 2019, at Sweetwater, Nolan County, Texas.

PATTI NEILL,
Clerk of the District Court of Nolan County, Texas

By:_________________________ Deputy
OFFICER’S RETURN

Received this Citation on the _____ day of ________, 2019, at _____ o’clock __.m. Executed by publishing the same in the “Sweetwater Reporter,” a duly qualified newspaper for legal publications, published in Nolan County, Texas, the county in which suit is pending and the county in which the property the subject of such suit is situated.

The said publication was made once each week for four (4) consecutive weeks prior to the return day hereof, to-wit: One __________, __________, __________ and _________, 2019, the first such days being at least 28 days before the return day hereof. Attached hereto is a printed copy of such publication, duly verified by the publisher.

The distance actually traveled by me in serving such process was ____ miles, and my fees are as follows:

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To certify which witness my hand this ____ day of _______, 2019.

DAVID WARREN, SHERIFF,
NOLAN COUNTY, TEXAS

By:_________________________, Deputy
APPENDIX 4

[PUBLISHER’S AFFIDAVIT]

THE STATE OF TEXAS

COUNTY OF NOLAN

I solemnly swear that the foregoing Citation by Publication was published in the “Sweetwater Reporter,” a newspaper printed in Sweetwater, Nolan County, Texas, and of general circulation in said county, as provided in the Texas Rules of Civil Procedure for the service of citation or notice by publication. Said publication was made once each week for four (4) consecutive weeks prior to the return day thereof, to-wit: On _______, _______, _______, and __________, 2019, the first of such days being at least twenty-eight (28) days before the return day thereof. A copy of such notice as published, which was clipped from the newspaper, is attached hereto.

________________________________________
PUBLISHER
By:_____________________________________(Title)

SWORN TO AND SUBSCRIBED BEFORE ME by ______________ on this the ____ day of __________, 2019, to certify which witness my hand and seal of office.

(SEAL)

________________________________________
NOTARY PUBLIC, STATE OF TEXAS

THE STATE OF TEXAS

COUNTY OF NOLAN

This instrument was acknowledged before me on the ___ day of ______, 2019, by _______________, ______________ of the “Sweetwater Reporter.”

(SEAL)

________________________________________
NOTARY PUBLIC, STATE OF TEXAS
APPENDIX 5

SAMPLE LETTER TO EDITOR OF THE NEWSPAPER

[Date]

Mr. Editor
Sweetwater Reporter
P. O. Box 750
Sweetwater, TX 79556

In the 32nd Judicial District Court, Nolan County, Texas

Dear Mr. Editor:

We represent Lucky Oil Company, of Sweetwater, Texas, and have filed on behalf of our client an Application for Appointment of Receiver or [Mineral] [Royalty] Interests, which requests that the defendants named in the suit be cited by publication. In accordance with the requirements of Rule 116 of the Texas Rules of Civil Procedure, pertaining to citation by publication, we are writing this letter to offer guidelines for publishing the Citation by Publication, which will be served upon you by the Nolan County Sheriff’s Office.

The statute requires that the citation be published once each week, for four (4) consecutive weeks, the first of said publication dates to be at least 8 days before the return day of the citation (______, 2019). Therefore, in order to meet your publication deadline, and in order for us to strictly comply with the statute, we hereby request that this citation be published on the following dates:

- Wednesday, April 13, 2019
- Wednesday, April 20, 2019
- Wednesday, April 27, 2019
- Wednesday, May 4, 2019

Failure to publish the citation for four consecutive weeks will invalidate the citation and necessitate repetition of the publication.

Immediately following the last publication on Wednesday, May 4, 2019, we will appreciate your forwarding to the service officer copies of the tear sheets for each of the four required publications, along with a publisher’s affidavit. Please either include with these documents or forward directly to us a statement for your publication charges, and we will see that it is promptly paid.

Should you have any questions concerning this matter, please do not hesitate to contact us. Thank you for your attention to this matter.

Very cordially yours,

WETSEL, CARMICHAEL, & ALLEN, L.L.P
By: Roderick E. Wetsel

REW:1ml
[Date]

The Honorable Whitley May
Nolan County Judge
Nolan County Courthouse
Sweetwater, TX  79556

In the 32nd Judicial District Court, Nolan County, Texas

Dear Judge May:

In accordance with our discussions concerning the referenced matter, we are enclosing a copy of the Application for Appointment of Receiver for [Mineral][Royalty] Interest, with citation by publication, which has today been issued by the District Clerk.

Please note that the hearing in the District Court will be scheduled on or after the ____ day of ______, 2019, at 10:00 o’clock a.m. [i.e., the appearance date, which is the first Monday after the expiration of 42 days from the date of issuance of the citation]. At the hearing, we will ask that you be appointed Receiver for these interests.

As soon as we have a hearing date and time, we will let you know. In the meantime, please review the enclosed pleadings and the accompanying statutes and rules, and call if you have any questions.

We sincerely appreciate your help in this matter. Best personal regards.

Very cordially yours,

WETSEL, CARMICHAEL, & ALLEN, L.L.P
By:  Roderick E. Wetsel

REW:ml

cc:  Mr. Herman Pace
     Lucky Oil Company
     1712 Country Club Drive
     Sweetwater, TX  79556
It has been brought to the Court’s attention that JOSEPH R. DOAKES, WILLIAM A. (BILL) BECK, FORREST GUMP and WILLIAM BONNEY, and THEIR HEIRS, KNOWN OR UNKNOWN, IF ANY OF SAID PERSONS BE DECEASED, Defendants herein, have been cited by publication, and that no answer has been filed and no appearance has been entered by any of such parties within the prescribed time.

Accordingly, IT IS ORDERED, and the Court hereby appoints BONNIE BARRISTER, Attorney at Law, who is licensed to practice law in this Court and this state, to defend the suit on behalf of said Defendants.

SIGNED and entered this the ____ day of ___________, 2019.

GLEN HARRISON,
DISTRICT JUDGE PRESIDING
APPENDIX 8

[CAPTION]

ORDER SETTING HEARING

IT IS ORDERED that the Plaintiff's Application for Appointment of Receiver for Mineral Interests on file herein be, and the same is hereby set for hearing on __________, the ____ day of __________, 2019, at 10:00 o'clock a.m.

ENTERED this ____ day of ___________, 2019.

____________________________________
GLEN HARRISON,
DISTRICT JUDGE PRESIDING
ORDER APPOINTING RECEIVER FOR [MINERAL] [ROYALTY] INTERESTS

On the _____ day of _______, 2019, came on to be heard the Application for Appointment of Receiver for [Mineral] [Royalty] Interests in the above styled and numbered cause, brought by the Plaintiff, LUCKY OIL COMPANY.

The Plaintiff, LUCKY OIL COMPANY, appeared by and through his attorney of record, ROD E. WETSEL. The Defendants, JOSEPH R. DOAKES, WILLIAM A. (BILL) BECK, FORREST GUMP and WILLIAM BONNEY, although duly cited by publication, as provided by the Texas Rules of Civil Procedure, and as prescribed in Section [64.091] [64.093] of the Texas Civil Practice and Remedies Code, failed to appear and wholly made default. BONNIE BARRISTER, an attorney practicing before this Court, was appointed by the Court as Attorney Ad Litem to represent the interests of the Defendant, his heirs and assigns.

The case was called for trial, and the Plaintiff, by and through his attorney of record, and the Defendants, by and through their Attorney Ad Litem, announced ready for trial. No jury having been demanded, all matters of fact and of law were submitted to the Court. The Court found and does find that it has jurisdiction of the parties hereto and of the subject matter hereof, and after having examined the pleadings, heard the evidence and arguments of counsel, the Court finds further as follows:

I

(A) Plaintiff, LUCKY OIL COMPANY, is engaged in oil and gas exploration and development in Nolan County, Texas, and is the owner of certain undivided leasehold interests in and under the following described lands in Nolan County, Texas, to-wit:

A tract of 160 acres, more or less, being the Southeast One-fourth (SE/4) of Section ABC, Block XYZ, T&P Ry, Co. Survey, Nolan County, Texas.

(B) Defendants own [undivided interests in the oil, gas and other minerals] [undivided interests in the royalty] [nonparticipating royalty interests] in and under the above described lands, as is more particularly set out in Plaintiff's Application for Appointment of Receiver for [Mineral] [Royalty] Interests filed herein.

(C) The Defendants have been cited by publication in the manner and for the length of time required by the Texas Rules of Civil Procedure, and as prescribed by Section [64.091(d)(2)] [64.093(2)] of the Texas Civil Practice and Remedies Code. The return of citation is on file herein, and is in all things proper and in accordance with the law.

(D) The residences and/or whereabouts of the Defendants, who of whom are non-residents of this State, are unknown. Neither the Defendants nor their heirs have paid taxes on the undivided interest owned by him in the above described lands, nor have they rendered said interests for taxes during the five-year period immediately preceding the filing of this action.

Plaintiff has made diligent efforts to locate each of the above named Defendants or their heirs, all of which efforts have been unsuccessful.
(E) Plaintiff has proved to the satisfaction of the Court that he will suffer substantial damage or injury unless a Receiver is appointed, as requested herein. The Court finds that the allegations of substantial injury and damages that will be suffered by Plaintiff if a Receiver is not appointed are true. The Court further finds that the appointment of a Receiver, as requested herein, for oil, gas and mineral development purposes will inure to the benefit of the Defendants and their heirs, as well. Under the provisions of Section [64.091] [64.093] of the Texas Civil Practice and Remedies Code, it is, therefore, in the best interests of the Plaintiff and the Defendants that the County Judge of Nolan County, Texas, and his successors, be appointed Receiver for the undivided [mineral] [royalty] interests owned herein by the Defendants herein, with the following powers:

(1) To negotiate, execute and deliver to the Plaintiff [oil, gas and mineral leases with pooling and unitization clauses] [ratifications of oil, gas and mineral leases] [ratifications of a pooling agreement] [enter into a unitization agreement authorized by the Railroad Commission of Texas] under such terms and conditions as may be prescribed and approved by this Court (and any renewals or extensions thereof); it being ORDERED that such [leases] [ratifications] [unitization agreements] shall cover the entire undivided [mineral] [royalty] interests owned by the Defendants in the above described lands (or in the County);

(2) To manage the said [mineral] [royalty] interests for the duration of the receivership which, once created, shall continue as long as said Defendants, or their heirs, successors, assigns or personal representatives, fail to appear in this Court in person or by agent or attorney to claim their interests;

(3) [If appropriate:] To enter into a unitization agreement authorized by the Railroad Commission of Texas; and

(4) To render said interests for taxation purposes and to pay the taxes upon the same as they become due.

(F) The Court further finds and is satisfied that the Plaintiff has fully complied with all the terms, conditions and provisions of Section [64.091] [64.093] of the Texas Civil Practice and Remedies Code.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that WHITLEY MAY, the County Judge of Nolan County, Texas, and his successors, be and is hereby appointed Receiver of the [undivided interests of the Defendants in the oil, gas and other minerals] [royalty or nonparticipating royalty interests of the Defendants] in and under and that may be produced from the above described lands, with all of the powers set out above, and acting in such capacity, is AUTHORIZED and DIRECTED to execute and deliver to Plaintiff, [as Lessee, an oil, gas and mineral lease or leases containing pooling and unitization clauses, and other provisions] [ratifications of oil, gas and mineral leases or ratifications of a pooling agreement], as prescribed by this Court and by law, covering all of the lands described in Plaintiff's Application.

IT IS FURTHER ORDERED that upon commencing the duties as Receiver in this cause, the County Judge of Nolan County, Texas shall take the oath required by law, and such appointment shall be effective upon the filing of such Oath in this proceeding.

IT IS FURTHER ORDERED that as provided in Section [64.091(d)(4)] [64.093(d)(4)] of the Texas Civil Practice and Remedies Code, the Receiver is not required to post bond.
IT IS FURTHER ORDERED that the Attorney Ad Litem appointed herein be and is hereby granted an attorney's fee in the amount of ______________________ AND NO/100 DOLLARS ($__________), to be taxed as part of the costs of this proceeding.

IT IS FURTHER ORDERED that all other costs incurred in this proceeding be taxed against and paid out of the money consideration paid for the [execution of the leases of these interests by the Receiver] [money consideration paid for the execution of ratifications by the Receiver, or funds later accruing to these royalty interests], and the balance retained for the use and benefit of the Defendants.

IT IS FURTHER ORDERED that the Receiver shall report the execution of the [leases of the interests of the Defendants [ratifications executed on behalf of the Defendants] to this Court for approval, and that this cause be subject to further orders made by the Court herein.

SIGNED this the ____ day of ______, 2019.

____________________________________
GLEN HARRISON,
DISTRICT JUDGE PRESIDING
APPENDIX 10

[CAPTION]

OATH OF RECEIVER FOR [MINERAL] [ROYALTY] INTERESTS

THE STATE OF TEXAS  )
COUNTY OF NOLAN  )

I, WHITLEY MAY, County Judge of Nolan County, Texas, being the Receiver for [Mineral] [Royalty] Interests appointed in the above styled and numbered cause by the District Court of Nolan County, Texas, do solemnly swear that I will well and truly perform the duties of a Receiver herein, according to law and the Orders of this Court appointing me, and any further Orders of this Court that may be hereafter entered in this cause.

_______________________________
WHITLEY MAY

SWORN TO AND SUBSCRIBED before me on this the _____ day of ______, 2019, WHITLEY MAY, to certify which witness my hand and seal of office.

_______________________________
PATTI NEILL, DISTRICT CLERK
Nolan County, Texas

By: ______________________________
   Deputy
REPORT OF RECEIVER FOR [MINERAL] [ROYALTY] INTERESTS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes WHITLEY MAY, Receiver for Mineral Interests in the above styled and numbered cause, and reports to the Court the following:

On the ___ day of _____, 2019, after money consideration was first paid to the District Clerk of Nolan County, Texas by the Plaintiff, LUCKY OIL COMPANY, as prescribed by Section [64.091(h)] [64.093(h)] of the Texas Civil Practice and Remedies Code, [OR, no initial bonus money having been paid], and pursuant to the authority granted to me as a Receiver in these proceedings, acting as Receiver, I did execute [Oil, Gas and Mineral Leases] [Ratifications of Oil, Gas and Mineral Leases] [Ratifications of a Pooling Agreement], dated ____, 2019, to LUCKY OIL COMPANY, Lessee, covering the following lands in Nolan County, Texas, to-wit:

A tract of 160 acres of land, more or less, being the Southeast Quarter (SE/4) of Section ABC, Block XYZ, T&P Ry. Co. Surveys, Nolan County, Texas;

on behalf of each of the Defendants in this cause: JOSEPH R. DOAKES, WILLIAM A. (BILL) BECK, FORREST GUMP and WILLIAM BONNEY, and their heirs, known or unknown, if any of said persons are deceased.

True and correct copies of the [Oil, Gas and Mineral Leases] [Ratifications] are attached hereto as Exhibit "A," and made a part hereof for all purposes.

WHEREFORE, premises considered, your Receiver prays that this Report and the execution by him of the attached [Oil, Gas and Mineral Leases] [Ratifications], be approved and confirmed; that your Receiver be directed to deliver said [Oil, Gas and Mineral Leases] [Ratifications] to LUCKY OIL COMPANY for recording the same in Nolan County, Texas.

Respectfully submitted,

______________________________
WHITLEY MAY, RECEIVER

SWORN TO AND SUBSCRIBED before me on this the _____ day of ________, 2019, by WHITLEY MAY.

______________________________
PATTI NEILL, DISTRICT CLERK
Nolan County, Texas
By:________________________, Deputy
APPENDIX 12

OIL, GAS AND MINERAL LEASE

Note: The lease will be the same as other landowners in the area, with the receiver listed as the Lessee.
APPENDIX 13

RATIFICATION OF OIL, GAS AND MINERAL LEASE

STATE: Texas

COUNTY: Nolan

ROYALTY OWNER: WHITLEY MAY, County Judge of Nolan County, Texas, acting in his capacity as Receiver for Royalty Interests under appointment by the 32nd Judicial District Court of Nolan County, Texas, in Cause No. 1234 for Joseph R. Doakes, William A. (Bill) Beck, Forrest Gump, and William Bonney, and their heirs, known or unknown, if any of said persons are deceased (whose address is c/o Office of the District Clerk of Nolan County, Texas, P. O. Box 1236, Sweetwater, Texas 79556).

LESSEE: LUCKY OIL COMPANY, a Texas corporation, with offices at 1712 Country Club Drive, Sweetwater, Texas 79556.

EFFECTIVE DATE: (Date of the Oil and Gas Lease being ratified)

On the ____ day of __________, 2019, __________, as Lessor, executed and delivered to the Lessee, named above, an Oil, Gas and Mineral Lease (the “Lease”), recorded in Volume ___, Page ___, Official Public Records, Nolan County, Texas, covering the following described lands (the “Lands”):

[Description of Lands included in the lease]

The royalty owner(s) named above own(s) a nonparticipating royalty interest(s) in and under the Lands.

For adequate consideration, WHITLEY MAY, County Judge of Nolan County, Texas, citing in his capacity as Receiver for royalty interests, as described above, for Joseph R. Doakes, William A. (Bill) Beck, Forrest Gump and William Bonney, and their heirs, known or unknown, if any of said persons be deceased, RATIFIES, CONFIRMS and ADOPTS the terms of the lease and acknowledges and agrees that the interests of the above described nonparticipating royalty owners in the Lands may be pooled and unitized, under the terms of the Lease, on the same basis as all other mineral and royalty interests in the Lands.

EXECUTED this the ____ day of ________, 2019.

________________________________________
WHITLEY MAY, County Judge, Nolan County, Texas, Receiver for JOSEPH R. DOAKES, WILLIAM A. (BILL) BECK, FORREST GUMP, and WILLIAM BONNEY, AND THEIR HEIRS, KNOWN OR UNKNOWN, IF ANY OF SAID PERSONS ARE DECEASED

[Acknowledgment]
APPENDIX 14

RATIFICATION OF POOLING AGREEMENT

STATE: Texas

COUNTY: Nolan

ROYALTY OWNER: WHITLEY MAY, County Judge of Nolan County, Texas, acting in his capacity as Receiver for Royalty Interests under appointment by the 32nd Judicial District Court of Nolan County, Texas, in Cause No. 1234 for Joseph R. Doakes, William A. (Bill) Beck, Forrest Gump, and William Bonney, and their heirs, known or unknown, if any of said persons are deceased (whose address is c/o Office of the District Clerk of Nolan County, Texas, P. O. Box 1236, Sweetwater, Texas 79556).

LESSEE: LUCKY OIL COMPANY, a Texas corporation, with offices at 1712 Country Club Drive, Sweetwater, Texas 79556.

EFFECTIVE DATE: (Date of the Pooling Agreement being ratified)

On the ____ day of __________, 2019, __________ and __________ entered into a Pooling Agreement (the “Agreement”), recorded in Volume ___, Page ___, Official Public Records, Nolan County, Texas, concerning the creation of a pooled unit for the production of oil and/or gas covering the following described lands (the “Lands”):

[Description of Lands included in the lease]

The royalty owner(s) named above own(s) a nonparticipating royalty interest(s) in and under the Lands.

For adequate consideration, WHITLEY MAY, County Judge of Nolan County, Texas, citing in his capacity as Receiver for royalty interests, as described above, for Joseph R. Doakes, William A. (Bill) Beck, Forrest Gump and William Bonney, and their heirs, known or unknown, if any of said persons be deceased, RATIFIES, CONFIRMS and ADOPTS the terms of the above described Pooling Agreement and acknowledges and agrees that the interests of the above described nonparticipating royalty owners in the Lands may be pooled and unitized, under the terms of said Pooling Agreement, the same as if said Owners had executed, acknowledged and delivered the original or a counterpart of the Pooling Agreement.

EXECUTED this the ____ day of ________, 2019.

________________________________________

WHITLEY MAY, County Judge, Nolan County,
Texas, Receiver for JOSEPH R. DOAKES,
WILLIAM A. (BILL) BECK, FORREST GUMP,
and WILLIAM BONNEY, AND THEIR HEIRS,
KNOWN OR UNKNOWN, IF ANY OF SAID
PERSONS ARE DECEASED

[Acknowledgment]
ORDER APPROVING RECEIVER’S REPORT

On this the ___ day of _______, 2019, came on to be heard the Report of Receiver for [Mineral] [Royalty] Interests, filed in this proceeding on this date, and the Court having examined the Report and the evidence submitted in connection therewith, is of the opinion and finds that the facts stated therein are true; that each of the [Oil, Gas and Mineral Leases executed by the Receiver to LUCKY OIL COMPANY, as Lessee] [Ratifications executed by the Receiver] covering the lands made the subject of this proceeding and on behalf of the Defendants in this proceeding and their known or unknown heirs, are in proper form; that the terms and provisions thereof are fair and reasonable; and that said [leases] [ratifications] have been executed pursuant to the Orders of this Court. The Court further finds that said Report should be in all things approved and confirmed, and that the Receiver, therefore, should be directed to deliver said [Oil, Gas and Mineral Leases] [Ratifications] to LUCKY OIL COMPANY, as Lessee, for filing the same of record in Nolan County, Texas.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Report of Receiver for Mineral Interests on file herein be, and the same is in all things APPROVED and CONFIRMED, and that WHITLEY MAY, as the appointed Receiver herein, be and is hereby directed to deliver to LUCKY OIL COMPANY the [Oil, Gas and Mineral Leases covering the lands made the subject of this action and covering all of the interests owned by the Defendants and their heirs, known or unknown, in said lands] [Ratifications of Oil, Gas and Mineral Leases or Ratifications of a Pooling Agreement] covering the nonparticipating royalty interests owned by the Defendants and their heirs, known or unknown, in said lands.

SIGNED this the ___ day of __________, 2019.

____________________________________
GLEN HARRISON,
DISTRICT JUDGE PRESIDING
Is There Meat in Those Beans?

The 2019 Texas Estate and Trust Legislative Update

(INCLUDING DECEDENTS’ ESTATES, GUARDIANSHIPS, TRUSTS, POWERS OF ATTORNEY, AND OTHER RELATED MATTERS)

Author and Alternate Presenter: William D. Pargaman
Saunders, Norval, Pargaman & Atkins, LLP
Past Chair, REPTL Estate and Trust Legislative Affairs Committee
(See Contact Info and Bio on Page i.)

Legislative Liaison and Principal Presenter: Craig Hopper
Hopper Mikeska, PLLC
Chair, REPTL Estate and Trust Legislative Affairs Committee
(See Contact Info and Bio on Page iii.)

This version was updated February 15, 2019. You can check for a more recent version at:
www.snpalaw.com/resources/2019LegislativeUpdate

Or go to the Resources page at snpalaw.com and scroll to “2019 Texas Estate and Trust Legislative Update.”

(See the note on page 1 about hyperlinking to the online version of this paper.)
Legal Experience
Bill Pargaman has been a partner in the Austin law firm of Saunders, Norval, Pargaman & Atkins since July of 2012. He has been certified as a specialist in Estate Planning and Probate Law by the Texas Board of Legal Specialization (since 1986) and has been a Fellow in the American College of Trust and Estate Counsel (since 1994). He is very active in the Real Estate, Probate and Trust Law Section of the State Bar of Texas, having served as REPTL’s Chair for the 2015-2016 bar year, as chair of its Estate and Trust Legislative Affairs Committee for the 2009, 2011, and 2013 legislative sessions, and as a Council member and chair of REPTL’s Trusts Committee from 2004 to 2008.

Bill’s practice involves the preparation of wills, trusts and other estate planning documents, charitable planning, and estate administration and alternatives to administration. He advises clients on the organization and maintenance of business entities such as corporations, partnerships, and limited liability entities. He represents nonprofit entities with respect to issues involving charitable trusts and endowments. Additionally, he represents clients in contested litigation involving estates, trusts and beneficiaries, and tax issues.

Education
- Doctor of Jurisprudence, with honors, University of Texas School of Law, 1981, Order of the Coif, Chancellors
- Bachelor of Arts, Government, with high honors, University of Texas at Austin, 1978, Phi Beta Kappa

Professional Licenses
- Attorney at Law, Texas, 1981

Court Admissions
- United States Tax Court

Prior Experience

Speeches and Publications
Mr. Pargaman has been a speaker, author, or course director at numerous seminars, including:
- Real Estate, Probate and Trust Law Section Annual Meeting
- University of Texas Estate Planning, Guardianship, and Elder Law Conference
- South Texas College of Law Wills and Probate Institute
- Estate Planning & Community Property Law Journal Seminar
- Texas NAELA Summer Conference
William D. Pargaman (cont.)

- University of Houston Law Foundation General Practice Institute, and Wills and Probate Institute
- Austin Bar Association Estate Planning and Probate Section Annual Probate and Estate Planning Seminar
- Austin Bar Association and Austin Young Lawyers Association Legal Malpractice Seminar
- Dallas Bar Association Probate, Trusts & Estate Section
- Houston Bar Association Probate, Trusts & Estate Section
- Tarrant County Probate Bar Association
- Hidalgo County Bar Association Estate Planning and Probate Section
- Bell County Bench Bar Conference
- Midland College/Midland Memorial Foundation Annual Estate Planning Seminar
- Austin Chapter, Texas Society of Certified Public Accountants, Annual Tax Update
- Texas Bankers Association Advanced Trust Forum
- Texas Credit Union League Compliance, Audit & Human Resources Conference
- Estate Planning Councils in Austin, Amarillo, Corpus Christi, Lubbock, San Antonio, and Tyler
- Austin Association of Life Underwriters

Professional Memberships and Activities
- American College of Trust and Estate Counsel, Fellow
- State Bar of Texas
  - Real Estate, Probate and Trust Law Section, Member (Chair, 2015-2016)
    - Real Estate, Probate, and Trust Law Council, Member, 2004-2008
    - Estate and Trust Legislative Affairs Committee, Member, 2000-Present (Chair, 2008-2013)
  - Public Service Committee, Chair, 2013-2014
  - Trusts Committee, Member, 2000-2010 (Chair, 2004-2008)
  - Uniform Trust Code Study Project, Articles 7-9 & UPIA, Subcommittee Member, 2000-2003
  - Continuing Legal Education Committee, 2018-2021
  - Texas Board of Legal Specialization (Estate Planning and Probate Law), Examiner, 1995-1997
- Estate Planning Council of Central Texas, Member (President, 1991-1992)
- Austin Bar Association, Member
  - Estate Planning and Probate Section, Member (Chair, 1992-1993, Board Member, 1997-1999)

Honors
- Recipient, Texas Bar CLE STANDING OVATION award, 2014
- Listed in The Best Lawyers in America® (2019 Trusts & Estates “Lawyer of the Year” in Austin, TX)
- Listed in Texas Super Lawyers (Texas Monthly)
- Listed in The Best Lawyers in Austin (Austin Monthly)

Community Involvement
- St. Stephen’s Episcopal School Professional Advisory Council, Past Member
- City of Austin, XERISCAPE Advisory Board, Past Member
- Volunteer Guardianship Program of Family Eldercare, Inc. of Austin, Past Member, Advisory Board
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AREAS OF PRACTICE
Probate litigation, probate administration, guardianship administration, trust administration, and estate planning law.

EDUCATION
Bachelor of Arts degree with high honors, Plan II program, University of Texas at Austin, 1990

PROFESSIONAL HISTORY
Hopper Mikeska, PLLC, 2012-Present
Hopper & Associates, P.C., 2005 - 2012
Shareholder, Graves, Dougherty, Hearon & Moody, 1998 - 2005
Law Clerk, Honorable Guy Herman, Travis County Probate Court No. 1, 1996-1998

PROFESSIONAL AFFILIATIONS
Board Certified in Estate Planning and Probate Law, Texas Board of Legal Specialization
Fellow, American College of Trusts and Estates Counsel
Member, Austin Bar Association
Member, State Bar of Texas
Member, SBOT Real Estate, Probate and Trust Law (REPTL) Section Council Member 2010-2014; Chair of Estate and Trust Legislative Affairs Committee 2014-Present
Member, Estate Planning Council of Central Texas; Director 2008-2014; Chair 2012-2013
Member, Travis County Bar Association Probate and Estate Planning Section; Director, 1999- 2004; Chair, 2003

PUBLICATIONS
O’Connor’s Texas Probate Law Handbook, 2018-Present
Texas Guardianship Manual, State Bar of Texas, Manual Committee 2013-Present
O’Connor’s Estates Code Plus, co-author, 2012-Present

RECENT PRESENTATIONS/PAPERS
• Speaker, 2017 Trusts and Estates Legislative Update, numerous locations in 2017
• Panelist, “Peace Treaties: Considerations when Negotiating, Drafting & Enforcing Settlement Agreements and Releases,” SBOT Estate Planning and Probate Drafting Course, Houston 2015
• Speaker, 2015 Trusts and Estates Legislative Update, numerous locations in 2015-2016
• Author/Speaker, “Extraordinary Remedies in Probate Proceedings,” SBOT Probate and Estate Planning Drafting Course 2014, Dallas
• Speaker, “Basic Guardianship,” Docket Call in Probate Court, San Antonio, Texas 2014
• Speaker, “Ask the Experts” panel 15th Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2013
• Author/Speaker, “Creating a Travis County Guardianship,” Austin Advisors Forum, Austin 2013
• Course Director, SBOT Advanced Guardianship and Elder Law Courses, Houston, 2013
• Speaker, “Alternatives to Guardianship” and “Ask the Experts” panel 14th Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2012
• Author/Speaker, “Drafting the Estate and Trust Distribution Documents,” SBOT Advanced Drafting Course, Dallas 2011
CRAIG HOPPER (cont.)

- Speaker, “Contested Guardianships,” SBOT Advanced Guardianship Course 2011, Houston; South Texas College of Law 26th Annual Wills and Probate Institute, Houston 2011
- Speaker, “Call in the Sheriff: Handling Overzealous Ad Litems and Other Outlaws,” SBOT Advanced Guardianship Course 2010, Houston
- Author/Speaker, “Extraordinary Preparation for Mediation in Guardianship Disputes,” SBOT Advanced Guardianship Course 2009, Houston
- Author/Speaker, “Extraordinary Remedies in Probate Proceedings,” SBOT Advanced Estate Planning and Probate Course 2008, Dallas
- Panel Member, “Ask the Experts,” and “Former Statutory Probate Court Staff Attorneys Panel” 9th Annual Intermediate Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 2007
- Author/Speaker, “Using Independent Facilitators to Resolve Probate Disputes,” Guardianship and Elder Law Conference, Galveston, Texas, August 2004
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1 For those who care and are viewing an electronic version of this paper, the color of the horizontal lines is “Living Coral” (Pantone 16-1546), Pantone’s 2019 “Color of the Year.”

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1. The Preliminaries.

1.1 Introduction and Scope. The 86th Regular Session of the Texas Legislature spans the 140 days beginning January 8, 2019, and ending May 27, 2019. This paper presents a summary of the bills that relate to probate (i.e., decedents’ estates), guardianships, trusts, powers of attorney, and several other areas of interest to estate and probate practitioners. Issues of interest to elder law practitioners are touched upon, but are not a focus of this paper. (And, to be honest, sometimes I go off on a tangent and discuss a bill of interest to me that has nothing to do with any of the areas mentioned above.)

1.2 CMA Disclaimers. While reading this paper, please keep in mind the following:

- I’ve made every reasonable attempt to provide accurate descriptions of the contents of bills, their effects, and in some cases, their background.
- Despite rumors to the contrary, I am human. And have been known to make mistakes.
- In addition, some of the descriptions in this paper admittedly border on editorial opinion, in which case the opinion is my own, and not necessarily that of REPTL, Craig Hopper, or anyone else.
- I often work on this paper late at night, past my normal bedtime, perhaps, even, under the influence of strategic amounts of Johnnie Walker Black (donations of Red, Black, Green, Gold, Blue, Platinum, or even Swing happily accepted!). Craig Hopper has informed me that he’s also happy to accept donations of Scotch.
- As companion bills make their way through the legislative process, I usually base descriptions on the most recently approved version in either chamber. In the case of REPTL bills, I sometimes have access to drafts of substitutes before they are officially posted, in which case the descriptions may be based on what we think the bill will look like, rather than what the currently-online version looks like.
- As a consequence, while the descriptions contained in this paper are hopefully accurate at the time they are written, they may no longer accurately reflect the contents of a bill at a later stage in the legislative process.

Therefore, you’ll find directions in Section 1.6 on page 2 for obtaining copies of the actual bills themselves so you may review and analyze them yourself before relying on any information in this paper.

1.3 If You Want to Skip to the Good Stuff … If you don’t want to read the rest of these preliminary matters and want to skip to the legislation itself, you’ll find it beginning with Part 6 on page 7.

1.4 A Note About Linking to the Electronic Version. Feel free to link to the electronic version of this paper if you’d like. If you do, use the URL found on the cover page to link to the most recent version of the paper:

www.snpalaw.com/resources/2019LegislativeUpdate

Once you click on that link, you’ll open a PDF version of this paper. However, don’t copy the URL that you’ll find in your browser’s address bar when you open the PDF! That’s likely to be a 100+ character web address that will take you to that particular version of the paper only, and only so long as that version remains posted. Trust me – the link I’ve given you will take you to the right version each time.

And note that you can bring up my previous legislative updates going back to 2009 by substituting the appropriate odd-numbered year for “2019” in the URL.

1.5 Where You’ll Be Able to Find the Statutory Language After the Session’s Over. In previous legislative updates, after the session was over and we knew what had passed, I added attachments to the update that included the actual language of bills marked to show what had been added or deleted. But this was quite lengthy. It took over 100 pages in the 2017 update, more than doubling the size of the paper. So, in an effort to be green (for anyone getting a hard copy), we’re going to change things up. Sometime after the session is over, I’ll publish a separate supplement that
will contain all of that statutory language. You’ll be able to download it by pointing your browser to: www.snpalaw.com/resources/2019LegislativeSupplement

I anticipate it will be posted mid-June of 2019. If you try going there before it’s posted, you’ll get a message that the page you’re looking for wasn’t found.

1.6 Acknowledgements. A lot of the effort in every legislative session comes from the Real Estate, Probate & Trust Law Section of the State Bar of Texas (“REPTL”). REPTL, with over 9,000 members, has been active in proposing legislation in this area for more than three decades. During the year and a half preceding a session, the REPTL Council works hard to come up with a package that addresses the needs of its members and the public, and then works to get the package enacted into law. In addition to myself, others who have been deeply involved in this legislative process include:

- Craig Hopper of Austin, Chair, Estate and Trust Legislative Affairs Committee; and principal presenter of this paper
- Eric Reis of Dallas, Chair-Elect/Secretary of REPTL (and Chair beginning in July of 2019)
- Tina Green of Texarkana, Immediate Past Chair of REPTL
- Melissa Willms of Houston, Chair, Decedents’ Estates Committee
- Catherine Goodman of Fort Worth, Chair, Guardianship Committee
- Shyla Buckner of Amarillo, Chair, Trusts Committee
- Lora Davis of Dallas, Chair, Powers of Attorney and Advance Directives (PAADs) Committee
- Clint Hackney of Austin, Lobbyist
- Barbara Klitch of Austin, who provides invaluable service tracking legislation for REPTL

REPTL is helped along the way by the State Bar, its Board of Directors, and its staff (in particular, KaLyn Laney, Assistant Deputy Director).

Other groups have an interest in legislation in this area, and REPTL tries to work with them to mutual advantage. These include the statutory probate judges (Judge Guy Herman of Austin, Presiding Statutory Probate Judge) and the Wealth Management and Trust Division of the Texas Bankers Association.

Last, but of course not least, are the legislators and their staffs. You’ll note the names of our authors and sponsors1 in the parenthetical following the first mention of a bill in this paper. These are the legislators who have volunteered their time and effort to help REPTL get its bills passed. Thanks go to all of these persons, their staffs, and the many others who have helped in the past and will continue to do so in the future.

Hopefully, the effort that goes into the legislative process will become apparent to the reader. In the best of circumstances, this effort results in passing good bills and blocking bad ones. But in the real world of legislating, the best of circumstances is never realized.

1.7 Obtaining Copies of Bills. If you want to obtain copies of any of the bills discussed here, go to www.legis.state.tx.us. Near the top of the page, in the middle column, you’ll see Search Legislation. First, select the legislative session you wish to search (for example, the 2019 regular legislative session that spans from January through May is “86(R) - 2019). Select the Bill Number button, and then type your bill number in the box below. So, for example, if you wanted to find the Decedents’ Estates bill prepared by the Real Estate, Probate, and Trust Law Section of the State Bar of Texas (“REPTL”), you’d type “HB_______” and press Go. (It’s fairly forgiving – if you type in lower case, place periods after the H and the B, or include a space before the actual number, it’s still likely to find your bill.)

Then click on the Text tab. You’ll see multiple versions of bills. The “engrossed” version is the one that passes the chamber where a bill originated. When an engrossed version of a bill passes the other chamber without amendments, it is returned to the originating chamber where it is “enrolled.” If the other chamber does make changes, then when it is returned, the originating chamber must concur in those amendments before the bill is enrolled. Either way, it’s the “enrolled” version you’d be interested in.

2. The People and Organizations Most Involved in the Process.

A number or organizations and individuals get involved in the legislative process:

2.1 REPTL. REPTL acts through its Council. Many volunteer Section members who are not on the Council give much of their time, energy and intellect in formulating REPTL legislation. REPTL is not allowed to sponsor legislation or oppose legislation without the approval of the Board of Directors of the State Bar. There is no provision to support legislation offered by someone other than REPTL, and the ability of REPTL to react during the legislative session is hampered by the necessity for Bar approval. Therefore, REPTL must receive prior permission to carry the proposals discussed in this paper that are identified as REPTL

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1 See Sec. 2.5 on page 3 if you want to learn the difference between an author and a sponsor.
proposals. REPTL has hired Clint Hackney, who has assisted with the passage of REPTL legislation for many sessions.

2.2 The Statutory Probate Judges. The vast majority of probate and guardianship cases are heard by the judges of the Statutory Probate Courts (18 of them in 10 counties). Judge Guy Herman of the Probate Court No. 1 of Travis County (Austin) is the Presiding Statutory Probate Judge and has been very active in promoting legislative solutions to problems in our area for many years.

2.3 The Bankers. There are two groups of bankers that REPTL deals with. One is the Wealth Management and Trust Division of the Texas Bankers Association (“TBA”), which tends to represent the larger corporate fiduciaries, while the other is the Independent Bankers Association of Texas (“IBAT”), which tends to represent the smaller corporate fiduciaries, although the distinctions are by no means hard and fast.

2.4 The Texas Legislative Council. Among other duties, the Texas Legislative Council\(^2\) provides bill drafting and research services to the Texas Legislature and legislative agencies. All proposed legislation must be reviewed (and usually revised) by Leg. Council before a Representative or Senator may introduce it. In addition, as part of its continuing statutory revision program, Leg. Council was the primary drafter of the Texas Estates Code, a nonsubstantive revision of the Texas Probate Code.

2.5 The Authors and Sponsors. All legislation needs an author, the Representative or Senator who introduces the legislation. A sponsor is the person who introduces a bill from the other house in the house of which he or she is a member. Many bills have authors in both houses originally, but either the House or Senate version will eventually be voted out if it is to become law; and so, for example, the Senate author of a bill may become the sponsor of a companion House bill when it reaches the Senate. In any event, the sponsor or author controls the bill and its fate in their respective house. Without the dedication of the various authors and sponsors, much of the legislative success of this session would not have been possible. The unsung heroes are the staffs of the legislators, who make sure that the bill does not get off track.

2.6 The Committees. All legislation goes through a committee in each chamber. In the House, most bills in our area go through the House Committee on Judiciary and Civil Jurisprudence, or “Judiciary.” In the Senate, most bills in our area go through the Senate Committee on State Affairs, or “State Affairs.”

3. The Process.

3.1 The Genesis of REPTL’s Package. REPTL\(^3\) begins work on its legislative package shortly after the previous legislative session ends. In August or September of odd-numbered years – just weeks after a regular legislative session ends, the chairs of each of the main REPTL legislative committees (Decedents’ Estates, Guardianship, Trust Code, and Powers of Attorney) put together lists of proposals for discussion by their committees. These items are usually gathered from a variety of sources. They may be ideas that REPTL Council or committee members come up with on their own, or they may be suggestions from practitioners around the state, accountants, law professors, legislators, judges – you name it. Most suggestions usually receive at least some review at the committee level.

3.2 Preliminary Approval by the REPTL Council. The full “PTL” or probate, guardianship, and trust law side of the REPTL Council reviews each committee’s suggestions and gives preliminary approval (or rejection) to those proposals at its Fall meeting (usually in September or October) in odd-numbered years. Draft language may or may not be available for review at this stage – this step really involves a review of concepts, not language.

3.3 Actual Language is Drafted by the Committees, With Council Input and Approval. Following the Fall Council meeting, the actual drafting process usually begins by the committees. Proposals may undergo several redrafts as they are reviewed by the full Council at subsequent meetings. By the Spring meeting of the Council in even-numbered years (usually in April), language is close to being final, so that final approval by the Council at its June annual meeting held in conjunction with the State Bar’s Annual Meeting is mostly pro forma. Note that items may be added to or removed from the legislative package at any time during this process as issues arise.

3.4 REPTL’s Package is Submitted to the Bar. In order to obtain permission to support legislation, the entire REPTL package is submitted to the other substantive law sections of the State Bar for review and comment by June. This procedure is designed to assure that legislation with the State Bar’s “seal of approval” will be relatively uncontroversial and will further the State Bar’s goal of promoting the interests of justice.

\(^2\) We usually refer to the Texas Legislative Council as simply “Leg. (pronounced “ledge”) Council.”

\(^3\) Note that the “RE” or real estate side of REPTL usually does not have a legislative package, but is very active in monitoring legislation filed in its areas of interest.
3.5 Legislative Policy Committee Review. Following a comment period (and sometimes revisions in response to comments received), REPTL representatives appear before the State Bar’s Legislative Policy Committee in August to explain and seek approval for REPTL’s legislative package. By letter dated August 20, 2018, the Legislative Policy Subcommittee notified REPTL that it would recommend approval of all of REPTL’s proposals to the State Bar’s Board of Directors.

3.6 State Bar Board of Directors Approval. Assuming REPTL’s package receives preliminary approval from the State Bar’s Legislative Policy Committee, it is submitted to the full Board of Directors of the State Bar for approval in September. At times, REPTL may not receive approval of portions of its package. In these cases, REPTL usually works to satisfy any concerns raised, and then seeks approval from the full Board of Directors through an appeal process. REPTL’s 2019 legislative package will be submitted for final approval by the full Board of Directors at its September 28, 2019, meeting.

3.7 REPTL is Ready to Go. After REPTL receives approval from the State Bar’s Board of Directors to carry its package, it then meets with appropriate Representatives and Senators to obtain sponsors, who submit the legislation to Leg. Council for review, revision, and drafting in bill form. REPTL’s legislation is usually filed (in several different bills) in the early days of the sessions that begin in January of odd-numbered years.

3.8 During the Session. During the legislative session, the work of REPTL and members of its various committees is not merely limited to working for passage of their respective bills. An equally important part of their roles is monitoring bills introduced by others and working with their sponsors to improve those bills, or, where appropriate, to oppose them (in their individual capacities – not on behalf of REPTL without State Bar approval).

3.9 Where You Can Find Information About Filed Bills. You can find information about any of the bills mentioned in this paper (whether or not they passed), including text, lists of witnesses and analyses (if available), and actions on the bill, at the Texas Legislature Online website: www.legis.state.tx.us. The website allows you to perform your own searches for legislation based on your selected search criteria. You can even create a free account and save that search criteria (go to the “My TLO” tab). Additional information on following a bill using this site can be found at: http://www.legis.state.tx.us/resources/FollowABill.aspx

3.10 Where You Can Find Information About Previous Versions of Statutes. I frequently see requests on Glenn Karisch’s Texas Probate E-Mail List for older versions of statutes, such as the intestacy laws applicable to a decedent dying many years ago. You can find old law on your own (for free) rather than asking the list, and I’ll use our intestacy statutes as an example.

- Former Texas Probate Code Sec. 38 had the rules for non-community property. If you’ve got a copy of it with the enactment information, you’ll see that it came from “Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.” That means it was part of the original Probate Code, and was never amended. The key information you’ll need is that it was from the 54th Legislature, and it’s found in chapter 55.

- Next, go to the search page of the Legislative Reference Library: http://www.lrl.state.tx.us/legis/billsearch/lrlhome.cfm

- Since you’ve got the session and chapter number, use the option to “Search by session law chapter.” Click the down arrow and scroll down to “54th R.S. (1955).” Then type “55” as the Chapter number. Click “Search by chapter.”

- You’ll arrive at a page that has a hyperlink to chapter 55. Click on that and Voilà – you’ve got a PDF of the entire original Probate Code! Since Sec. 38 was never amended prior to its repeal on December 31, 2013 (and replacement by Estates Code Secs. 201.001 and 201.002), you’ve got the language of that section as it existed before 1993.

- Former Texas Probate Code Sec. 45 had the rules for community property. The PDF you just downloaded had the version in effect when the Probate Code went into effect in 1956. But if you’ve got the enactment information, you’ll see that it was amended by Acts 1991, 72nd Leg., ch. 895, § 4, eff. Sept. 1, 1991, and by Acts 1993, 73rd Leg., ch. 846, § 33, eff. Sept. 1, 1993.

- If you’re researching the law applicable to someone who died before September 1, 1991, look no further – the original version was still the law. But if your decedent happened to die on or after September 1, 1991, but before September 1, 1993, you need to see what the 1991 amendment did. So back to the search page mentioned above. Scroll to 72nd R.S.

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4 If you don’t have a copy of the Probate Code with enactment information, you can get one! Prof. Gerry Beyer’s website (http://professorbeyer.com/) contains a copy of the Probate Code as it existed immediately prior to its repeal effective December 31, 2013, with post-1955 amendment information following each section. Click on Legal Updates | Texas Estates Code, and you’ll find the link to the final Probate Code at the upper left.
By the end of the 2017 session, Leg. Council had updated most, but not all, of references to old Probate Code provisions found outside of the Estates Code.\footnote{Previous Leg. Council code update bills relating to the Estates Code are \textit{S.B. 1303} (2011), \textit{S.B. 1093} (2013), \textit{S.B. 1296} (2015), and \textit{SB 1488} (2017).} They found a couple of other items to fix this session. The 2019 Leg. Council code update bill is \textit{HB \___ \___} (\___\___)\).

- Estates Code Sec. 752.113(c) deals with authority granted to an agent under a statutory durable power of attorney with respect to retirement plan transactions. The bill deletes an extra “a” in the following phrase: “an agent may be named a beneficiary under a retirement plan only to the extent the agent was \textbf{[a]} named a beneficiary by the principal under the retirement plan…”

- Estates Code Sec. 1104.359(a) deals with the effect of the failure of a guardianship program to register as required by Subchapter D of Gov’t. Code Chapter 155. Since Leg. Council’s code update bill redesignates Subchapter D as Subchapter F, the bill also updates the three current references in Sec. 1104.359(a) to the newly redesignated Subchapter F.

3.13 The REPTL Substantive Code Update Bill. But Leg. Council still couldn’t update all references to the Probate Code. Its mandate under Chapter 323, Government Code, only allows it to make \textbf{nonsubstantive} changes, and updating certain provisions in an appropriate manner could potentially result in making \textbf{substantive} changes. These provisions were identified and forwarded to REPTL for potential inclusion in a \textbf{substantive} code update bill.

\textbf{(a) Example of a “Substantive Change.”} An example provided by Leg. Council to this author is a reference to Texas Probate Code Sec. 95 contained in Civ. Prac. & Rem. Code Sec. 71.012:

\begin{quote}
Sec. 71.012. QUALIFICATION OF FOREIGN PERSONAL REPRESENTATIVE. If the executor or administrator of the estate of a nonresident individual is the plaintiff in an action under this subchapter, the foreign personal representative of the estate who has complied with the requirements of \textit{Section 95, Texas Probate Code}, for the probate of a foreign will is not required to apply for ancillary letters testamentary under \textit{Section 105, Texas Probate Code}, to bring and prosecute the action.
\end{quote}

The provisions of Probate Code Sec. 95 found their way into seven sections of Ch. 501 of the Estates Code, and one section each of Chs. 503 through 505. Changing the Sec. 95 reference to Chapter 501 alone would ignore portions of Sec. 95 that were ultimately
incorporated into Chapter 503, and would also include reference to a provision (Sec. 501.006) that was not originally derived from Sec. 95. Therefore, in order to update the reference to Sec. 95 in a manner that would not lead to confusion, a substantive, albeit minor, change was necessary. But Leg.Council takes the position that it isn’t allowed to make substantive changes, even if they’re teensy weensy.

(b) REPTL to the Rescue. That’s where REPTL has come in. Its 2019 Substantive Code Update bill, HB______(____ | ____), clarifies these references by revising Civ. Prac. & Rem. Code Sec. 71.012 as follows:

Sec. 71.012. QUALIFICATION OF FOREIGN PERSONAL REPRESENTATIVE. If the executor or administrator of the estate of a nonresident individual is the plaintiff in an action under this subchapter, the foreign personal representative of the estate who has complied with the requirements of Chapter 503, Estates Code [Section 95, Texas Probate Code], for the probate of a foreign will is not required to apply for ancillary letters testamentary under Section 501.006, Estates Code [Section 105, Texas Probate Code], to bring and prosecute the action.

In addition to the Civil Practice and Remedies Code, the other codes amended by this bill include the Education Code, the Estates Code, the Government Code, the Health and Safety Code, the Occupations Code, and the Property Code.

4. Key Dates.

Key dates for the enactment of bills in the 2019 legislative session include:

- **Tuesday, November 6, 2018** – General election for federal, state, and county offices.
- **Monday, November 12, 2018** – Prefiling of legislation for the 86th Legislature begins.
- **Tuesday, January 8, 2019** (1st day) – 86th Legislature convenes at noon. [Government Code, Sec. 301.001]
- **Friday, March 8, 2019** (60th day) – Deadline for filing most bills and joint resolutions. [House Rule 8, Sec. 8; Senate Rule 7.07(b); Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills]
- **Monday, May 6, 2019** (119th day) – Last day for House committees to report House bills and joint resolutions. [a “soft” deadline that relates to House Rule 6, Sec. 16(a), requiring 36-hour layout of daily calendars prior to consideration, and House Rule 8, Sec. 13(b), the deadline for consideration]
- **Thursday, May 9, 2019** (122nd day) – Last day for House to consider nonlocal House bills and joint resolutions on second reading. [House Rule 8, Sec. 13(b)]
- **Friday, May 10, 2019** (123rd day) – Last day for House to consider nonlocal House bills and joint resolutions on third reading. [House Rule 8, Sec. 13(b)]
- **Saturday, May 18, 2019** (131st day) – Last day for House committees to report Senate bills and joint resolutions. [relates to House Rule 6, Sec. 16(a), requiring 36-hour layout of daily calendars prior to consideration, and House Rule 8, Sec. 13(c), the deadline for consideration]
- **Tuesday, May 21, 2019** (134th day) – Last day for House to consider most Senate bills and joint resolutions on second reading. [House Rule 8, Sec. 13(c)]
- **Wednesday, May 22, 2019** (135th day) – Last day for House to consider most Senate bills or joint resolutions on third reading. [House Rule 8, Sec. 13(c)] Last day for Senate to consider any bills or joint resolutions on third reading. [Senate Rule 7.25; Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills]
- **Friday, May 24, 2019** (137th day) – Last day for House to consider Senate amendments. [House Rule 8, Sec. 13(d)] Last day for Senate committees to report all bills. [relates to Senate Rule 7.24(b), but note that the 135th day (two days earlier) is the last day for third reading in the senate; practical deadline for senate committees is before the 135th day; Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills]
- **Sunday, May 26, 2019** (139th day) – Last day for House to adopt conference committee reports. [House Rule 8, Sec. 13(e)] Last day for Senate to concur in House amendments or adopt conference committee reports. [relates to Senate Rule 7.25, limiting a vote on the passage of any bill during the last 24 hours of the session to correct an error in the bill]
- **Monday, May 27, 2019** (140th day) – Last day of 86th Regular Session; corrections only in House and Senate. [Sec. 24(b), Art. III, Texas Constitution; House Rule 8, Sec. 13(f); Senate Rule 7.25]
- **Sunday, June 16, 2019** (20th day following final adjournment) – Last day Governor can sign or veto bills passed during the previous legislative session. [Section 14, Art. IV, Texas Constitution]6

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6 A few words of further explanation about this deadline. This provision states the general rule that if the Governor
• Monday, August 26, 2019 (91st day following final adjournment) – Date that bills without specific effective dates (that could not be effective immediately) become law. [Sec. 39, Art. III, Texas Constitution] (Note that most bills in recent years include a standard specific effective date of September 1st of the year of enactment.)

5. If You Have Suggestions …

If you have comments or suggestions, you should feel free to contact the chairs of the relevant REPTL committee[s] identified in Section 1.4 on page 1. Their contact information can be found on their respective committee pages at www.reptl.org.

6. The REPTL Bills.

   6.1 The Original REPTL Legislative Package. In addition to REPTL’s Substantive Code Update bill (see Sec. 3.13 on page 5), REPTL’s 2019 legislative package consisted of a number of bills covering four general areas: (i) decedents’ estates; (ii) guardianships; (iii) trusts; and (iv) powers of attorney and advance directives. In addition, REPTL’s legislative package includes a Texas version of the revised Uniform Fiduciary Access to Digital Assets Act. However, Sec. 35(a), Article III, of the Texas Constitution contains the “one-subject” rule:

   No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject.

   Because of this rule, we (or sometimes Leg. Council) strip out provisions from one or more of the “general” bills that may violate the one-subject rule and place them in separate, smaller bills. In each of the substantive sections of this paper, we will identify any REPTL bills and begin with descriptions of them.

   6.2 Consolidation Into REPTL Bills. As hearings begin, legislators often ask interested parties to try to consolidate as many of the various bills on similar subjects as possible, in order to reduce the number of bills that would need to move through the legislature. Pursuant to this request, REPTL representatives and the statutory probate judges usually agree to consolidate all or a portion of a number of other bills into one or more of REPTL’s bills. Therefore, keep in mind that not everything that ends up in a REPTL bill by the time it passes was originally a REPTL proposal. Where non-REPTL provisions have been added to REPTL bills, we’ve attempted to identify the original bill[s] that served as the source of the amendments.

7. Decedents’ Estates.7

    7.1 REPTL Decedents’ Estates Bill. REPTL’s Decedents’ Estates bill is HB _________ (____|____).

   (a) Representative’s Access to Nonprobate Asset Information (Secs. 111.051 and 111.055). This change requires a third party who held nonprobate property to provide the personal representative information about the decedent’s interest prior to death, even if the estate has no interest in the asset. This assists the representative in preparing an estate tax return, or in determining whether nonprobate assets should be pursued to pay debts and expenses.

   (b) Liability of Nonprobate Assets (Sec. 113.252). This change corrects a previous amendment to make clear that a personal representative has no duty to pursue nonprobate assets to pay claims, expenses, and taxes unless a written demand is made by a surviving spouse, a creditor, or someone acting on behalf of a minor child of the decedent.

   (c) Memorandum of Conveyance Voids TODD (Sec. 114.102). This change clarifies that a memorandum of conveyance recorded before the transferor’s death voids a prior TODD covering the property (as an alternative to recording the conveyance itself).

   (d) Repeal of Statutory TODD Forms (Secs. 114.151-114.152). The optional statutory forms for a TODD and a revocation of a TODD found in Subchapter D have been criticized as confusing, and there is an ongoing desire to move away from statutory forms. Rather than trying to fix them, they’re repealed, since alternative forms (that can be modified as needed without legislative action) satisfying the statute are readily available.

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7 Section references are to the Texas Estates Code unless otherwise noted.
(e) Community Property Intestacy Clarification (Sec. 201.003). Sec. 45 of the Probate Code originally provided that when a person died without a will, survived by a spouse and descendants, the survivor is entitled to retain half of the community estate, and the other half passes to the decedent’s descendants. There’s no confusion because the section is dealing with the passage of the entire community estate. In 1993, Sec. 45(a) was added to provide that all of the community estate passed to the survivor if all of the decedent’s descendants were also descendants of the survivor. If not, the old rule now contained in Sec. 45(b), continued to apply. Again, the section was still dealing with the entire community estate.

However, when Sec. 45 was moved to Estates Code Sec. 201.003, Leg. Council drafted three subsections. Subsection (a) stated that the section governed the disposition of the community estate of a deceased spouse who dies intestate. This doesn’t seem to deal with the community estate of the surviving spouse. Subsection (b) contained the 1993 amendment that the community estate of a deceased spouse passes to the surviving spouse if all of the decedent’s descendants are also descendants of the surviving spouse. Ditto as to the community estate of the surviving spouse. But now subsection (c) provided that if the deceased spouse had a descendant who was not a descendant of the surviving spouse, “one-half of the community estate is retained by the surviving spouse and the other one-half passes to the deceased spouse’s children or descendants.” Even though subsection (a) said the section was only dealing with the decedent’s community estate, this subsection is dealing with the entire community estate, just like former Sec. 45. Unfortunately, REPTL has received anecdotal evidence that some lawyers (and even judges) are interpreting subsection (c) to apply to just the deceased spouse’s half of the community estate, so that the surviving spouse keeps his or her half, “retains” half of the deceased spouse’s half, and the other half of the deceased spouse’s half, or one-fourth of the entire community estate, passes to the descendants. This interpretation is wrong, and REPTL’s solution is to change subsection (c) so that it only discusses the passage of the deceased spouse’s half of the community estate to the descendants, and makes no mention of the surviving spouse’s interest.

(f) Number of Disinterested Witnesses in an Heirship (Sec. 202.151). This change requires two disinterested witnesses in an heirship proceeding unless the court is satisfied that only one can be found. Keep in mind that this section does not require that any of the witnesses personally knew the decedent. A genealogist who never met the decedent could be a disinterested witness who proves up the heirship solely by documentation found by the witness.

(g) Ability to Delegate Appointment of Administrator (Secs. 254.006, 256.051, 301.052, and 304.001). Every wish you could give someone the ability to name successor executors the same way you can give someone the ability to name successor trustees? Then this change is for you. New Sec. 254.006 allows a will to grant to a named executor or other person designated by name, office, or function the authority to name one or more persons to serve as administrator. By default, the designee(s) would act only if all named successors were unable or unwilling to act, but the will could provide otherwise (i.e., the person with the designation power could be given the ability to override the default order of succession). Unless the will or designation provides otherwise, the designee would have the same rights, powers, and duties of any named executor, including the rights to serve as independent administrator and exercise any power of sale granted in the will without the need for consent of the distributees. Of course, the designee would still need to offer the normal proof to the court that the designee is qualified to act, not disqualified, etc.

(h) Removal of Will Reformation from Constitutional County Court (Sec. 255.456). This change allows removal of a will reformation action in a constitutional county court without a statutory probate court to a county court-at-law exercising original probate jurisdiction, or to a district court if there is no statutory county court exercising original probate jurisdiction.

(i) Elimination of Reference to Unwritten Will (Sec. 256.051). An unnecessary reference to unwritten wills is deleted since we don’t have unwritten wills anymore (and haven’t since 2007).

Drafting Tip
TexasLawHelp.org has a handy, dandy toolkit for TODDs, currently available to download at: texaslawhelp.org/resources/transfer-death-deed-forms

Drafting Tip
You may be able to adapt language you already have for the selection of trustees if your testator wishes to delegate this authority in the will.

8 The designee wouldn’t be an executor since the designee wasn’t directly named in the will.
(j) Conversion of Muniment to Administration (Sec. 257.151). Ever find a need for appointment of an executor after the will has already been admitted as a muniment of title? This new section clarifies that admission of a will as a muniment does not preclude the subsequent appointment of an executor or administrator, so long as the application is filed within the original time frame for opening administrations, or the court otherwise finds administration necessary (see Estates Code Sec. 301.002(b)).

(k) Clarification of Proof Required for Letters (Sec. 301.151). Two different 2015 bills amended Sec. 301.151(2). This change repeals the less desirable of the two of them.

(l) Executor’s Access to Digital Assets (Secs. 351.106 & 402.003). This change clarifies the ability of an executor or administrator (including an independent one) to obtain a court order to access digital assets of a decedent.

(m) Court Approval of Contingent Fee Agreements (Sec. 351.152). This change clarifies that court approval of a contingent fee agreement in a dependent administration is required only if the agreement calls for a fee in excess of ⅓rd of the property sought to be recovered.

(n) Fees Awarded to Successful Contestant (Sec. 352.052). This change allows (but does not require) a successful will contestant who does not offer an alternative will for probate to be awarded costs, including attorney’s fees.

(o) Separate $15,000 Class 1 Claim Limits (Secs. 355.102 & 355.103). This change creates separate $15,000 limits for Class 1 funeral expenses and expenses of last illness, rather than a single combined $15,000 limit for both types of expenses.

(p) Claim Holder’s “Reasonable Time” Duty (Sec. 355.1551). Sec. 355.1551, added in 2015 (but not by REPTL!), attempted to require a secured creditor electing preferred debt and lien status to take possession of or sell the security within a reasonable time. This change clarifies the procedures to be followed in that situation.

(q) Procedures to Sell Real Estate. These changes clarify the procedures to be followed in dependent administrations where there is no will granting a power of sale.

(i) Auctions (Secs. 356.401-356.405). References to public “sales” are changed to public “auctions.” An auction is completed upon the bid of the highest bidder. Instead of the auction taking place in the county where the probate proceeding is pending, it will take place in any county where the real estate is located, unless the court supervising the probate orders the auction to be held in its county (this flips the existing priority). The auction must take place either at the courthouse or another place designated by the commissioners court. If the first Tuesday of the month is either January 1st or July 4th, then the auction will take place on the first Wednesday of the month. (The changes relating to the time and location of the auction make the provisions identical to sales under contractual liens. See Prop. Code Sec. 51.002.

(ii) Private Sales (Secs. 356.501-356.502). For private sales, “sales” terminology is revised to refer to the contract entered into by the representative.

(iii) Report and Approval (Secs. 356.551-356.558). Rather than a “sale” “being reported to the court, a “successful bid or private contract” is reported regarding the “proposed disposition” of the property, rather than referring to the “sale” as if it had already occurred. If the court is satisfied with the terms of the proposed disposition, it “approves,” rather than “confirms,” the sale.

(r) Waiver of Bond Where Will Doesn’t Waive Bond (Sec. 401.005). This change allows the distributees to waive bond for an independent executor or administrator where the will doesn’t waive it.

(s) Claims Procedures for Medicaid Recovery in Independent Administrations (Sec. 403.058). Sec. 403.058 states that most of the claims procedures in dependent administrations don’t apply to independent administrations. However, this change makes the dependent administration claims procedures apply to Medicaid Estate Recovery (MERP) claims in an independent administration where without the change, no statute of limitations applies without opening a full dependent administration.

(t) Public Probate Administrators (Ch. 455). Ch. 455, dealing with “public probate administrators,” was added in 2013. This change relates to the authority of and procedures for a PPA.

(u) Recusal of Presiding Statutory Probate Judge (Gov’t Code Secs. 25.002201 and 25.00255). This change clarifies procedures related to a motion to recuse a judge who is the presiding judge of the statutory probate courts.

7.2 Recovery of Unclaimed Funds from Comptroller (Secs. 551.051-551.055). Apparently, the claims process under the Estates Code for recovery of unclaimed funds held by the Comptroller is different from the process for all other unclaimed property (see Ch. 74, Prop. Code). It requires the claimant to sue the
Comptroller, and the suit must be brought in a district court in Travis County within a four-year deadline. **SB ______ (Zaffirini)** amends the Estates Code provisions to adopt the Property Code claims process.

7.3 Exemption From Reporting Requirements (Gov’t Code Secs. 36.003 & 37.002). See Sec. 14.2 on page 15.

7.4 Vacating Lease After Tenant’s Death (Prop. Code Sec. 92.0162. **HB 69** (Minjarez) allows the estate or a family member of a deceased tenant to terminate a residential lease by giving the landlord (1) timely notice of the death and identification of the tenant’s PR or authorized family member, (2) removing the tenant’s property before the next rent payment is due, and (3) paying delinquent rent and repairing damages. The landlord must provide a copy of the lease and may not impose a penalty just because the lease was terminated because of the tenant’s death.

8. Guardianships and Persons With Disabilities.9

8.1 The **REPTL Guardianship Bill.** REPTL’s Guardianship bill is **SB 667** (Zaffirini).

(a) Matters Related to Guardianship Proceeding (Sec. 1021.001). This section has contained two definitions of a matter related to a guardianship proceeding: subsection (a) for counties **without** a statutory probate court, and subsection (b) for counties **with** a statutory probate court. This change leaves subsection (a) to define those matters in counties without **either** a statutory probate court or a county court at law and inserts a new subsection (a-1) applicable to counties without a statutory probate court but with a county court at law (adding the interpretation and administration of a trust in which a ward is a beneficiary).

(b) Wards’ Bill of Rights (Sec. 1151.351). This change amends the right set forth in subsection (b)(12) to clarify that only a court investigator or guardian ad litem (and not an attorney ad litem) may be appointed to investigate a complaint relating to modification or termination of a guardianship, which is consistent with the procedure set forth in Sec. 1202.054.

(c) Notice to Creditors (Sec. 1153.001). This change requires that the general notice to creditors be published in a newspaper of general circulation in the county, rather than one printed in the county. The notice must be posted only if there’s no newspaper of general circulation. (This is similar to the 2017 change relating to publication of the notice to creditors in decedents’ estates.)

(d) Attorney’s Fees (Sec. 1155.054). This is a terminology change. Instead of requiring a party to reimburse certain attorney’s fees, a court may order the party to reimburse those fees.

(e) Costs (Sec. 1155.151). This change subjects the payment of costs out of a guardianship estate under subsection (a)(1) to a “best interests” standard, similar to the existing standard with respect to payment out of a management trust found in subsection (a)(2).

(f) Agency References (Secs. 1163.005 & 1163.101). References to the Department of Aging and Disability Services are changed to the Health and Human Services Commission, while references to the Guardianship Certification Board are changed to the Judicial Branch Certification Commission.

(g) Ch. 1301 Management Trusts. Several changes are made relating to management trusts under Ch. 1301.

(i) Notice (Sec. 1301.0511). The notice provisions when an application for creation of a management trust are made identical to the provisions applicable to the creation of a guardianship. Plus any currently serving guardian must also be served.

(ii) Termination Provisions (Secs. 1301.101 & 1301.203). The terms of a management trust must provide for its termination upon a minor beneficiary’s death or 18th birthday (unless the court provides for a later date no later than the beneficiary’s 25th birthday), whichever occurs first, or upon an adult incapacitated beneficiary’s death, a finding by the court that continuation of the trust is no longer in the beneficiary’s best interests, or when the adult beneficiary regains of capacity.

(iii) Accounting (Sec. 1301.154). Both the guardian of the estate and the guardian of the person must receive a copy of the annual account (not either).

(h) Sale of Property by Nonresident Guardian (Secs. 1355.002 & 1355.105). These changes clarify that money held in the clerk’s registry is to be paid to the nonresident guardian, not the nonresident minor or incapacitated ward.

8.2 Notice and Filing Under Mental Health Code (H&S Code Secs. 571.013 & 571.014). **SB 395** (Zaffirini) would require personal delivery of notices in proceedings under the under the Texas Mental Health Code to be made by a county constable or sheriff. In addition, copies of papers may be filed in the proceedings. Anyone filing a reproduced, photocopied,

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9 Again, section references are to the Texas Estates Code unless otherwise noted.
or electronically transmitted paper must maintain possession of the originals and make them available for inspection on request by the parties or the court.

8.3 Provision of Mental Health Services to Minor (H&S Code Sec. 572.001). HB 1318 (Moody) and SB 218 (Rodriguez) authorize an adult who’s had actual care, custody, and control of a minor for at least six months to request admission of the minor to an inpatient mental health facility or for outpatient mental health services. (Current law only authorizes a parent, managing conservator or guardian to make the request.)

8.4 Authority for Emergency Detention (H&S Code Sec. 573.001). The same two bills, HB 1318 (Moody) and SB 218 (Rodriguez), clarify that the authority of a peace officer to take a person into custody for an emergency detention without a warrant applies regardless of age.

8.5 Exemption From Reporting Requirements (Gov’t Code Secs. 36.003 & 37.002). See Sec. 14.2 on page 15.

8.6 Electronic Database for Settlement Agreements Involving Minors or Incapacitated Persons (Gov’t Code Sec. 72.034). HB 770 (Davis, S.) would have the Office of Court Administration establish an electronic database containing personal injury or wrongful death settlement agreements for which a minor or incapacitated person is the beneficiary. The agreement would remain confidential, would be accessible only by the parties, their attorneys, or the guardian, next friend, or guardian ad litem of a party. The OCA may charge a fee, not to exceed $50, for recording a settlement agreement in the database. That fee is a considered a court cost to be included for payment in the settlement agreement.

8.7 Guardianship Abuse, Fraud, and Exploitation Deterrence Program (Gov’t Code Secs. 72.121 – 72.124). HB 1286 (Smithee) and SB 31 (Zaffirini, et al.) would establish a guardianship abuse, fraud, and exploitation deterrence program within the Office of Court Administration designed to provide additional resources and assistance to courts that have jurisdiction over guardianship proceedings. This could include engaging guardianship compliance specialists who could review guardianships to identify deficiencies by guardians, audit annual accounts, develop best practices for managing guardianships, and report concerns of potential abuse, fraud, or exploitation to the appropriate courts. The program could also maintain a database monitoring filings of inventories, annual reports, and annual accounts. Courts selected by the OCA for review and audit would be required to participate, or courts could apply to participate. The director of the OCA may notify the State Commission on Judicial Conduct if the OCA has reason to believe that a judge’s actions or failure to act with respect to a report received from the OCA may constitute judicial misconduct.

8.8 Task Force on Appropriate Care Settings for Persons With Disabilities. SB 47 (Zaffirini) would establish a task force to assist in developing a comprehensive, effectively working plan to ensure appropriate care settings for persons with disabilities.

8.9 Use of Person First Respectful Language. In 2011, the legislature enacted Gov’t. Code Ch. 392, the intent of which is found in Sec. 392.001:

Sec. 392.001. FINDINGS AND INTENT. The legislature finds that language used in reference to persons with disabilities shapes and reflects society’s attitudes toward persons with disabilities. Certain terms and phrases are demeaning and create an invisible barrier to inclusion as equal community members. It is the intent of the legislature to establish preferred terms and phrases for new and revised laws by requiring the use of language that places the person before the disability.

Sec. 392.002 put the following terms on the “naughty” list: disabled; developmentally disabled; mentally disabled; mentally ill; mentally retarded; handicapped; cripple; and crippled. Instead, the legislature encouraged the use of the following phrases on the “nice” list in enacting or revising statutes or resolutions: “persons with disabilities;” “persons with developmental disabilities;” “persons with mental illness;” and “persons with intellectual disabilities.” HB 588 (González, M.) and SB 281 (Zaffirini) are similar bills that add the following terms to the “naughty” list: hearing impaired; hearing loss; audiologically impaired; auditory impairment, and speech impaired. And the following phrases are added to the “nice” list: “deaf,” “persons who are deaf;” “hard of hearing,” and “persons who are hard of hearing.” Note that statutes and resolutions aren’t invalid for failure to use the preferred terms. In addition, HB 965 (González, M.) changes the terms “mentally retarded” or “mental retardation” to “intellectual or developmental disability[ies]” and the term “the mentally retarded” to “persons with intellectual disabilities” in a number of Education Code statutes.

**Drafting Tip**

While there’s certainly no requirement that you follow the same guidelines in the documents you prepare, it certainly wouldn’t hurt.
8.10 **Court-Ordered Support Paid to SNT.**

**HB 558** (Thompson, S.) and **SB 262** (Rodríguez) would allow a court to direct that support for a child with a disability be paid to a special needs trust for the child.

8.11 **Property Tax Exemption.**

**HB 160** (Raymond) and **HJR 19** (Raymond) would extend the $10,000 property tax exemption currently available to individuals who are disabled or 65 or over to the parent or guardian of a minor who is disabled and resides with the parent or guardian. **HB 322** (Gerén) and **HJR 26** (Gerén) would extend the limitation of annual property tax valuation increases currently available to individuals who are disabled or elderly and their surviving spouses beyond school districts to other taxing units.

8.12 **Unlawful Possession of Firearm by Certain Persons.**

**HB 544** (Nevárez) makes it a misdemeanor for a person to possess a firearm while subject to any of the following judicial determinations: court-ordered inpatient mental health services, acquittal of crime by reason of insanity, determination to be an individual with an intellectual disability and committed for long-term placement, guardian appointment based on lack of mental capacity, or determination to be incompetent to stand trial.

8.13 **Financial Abuse of Elderly.**

**HB 977** (Thierry) creates an offense if a person knowingly engages in financial abuse of an elderly individual, including the financial exploitation by a person who has a relationship of confidence or trust with the elderly individual (such as breach of a fiduciary duty under a power of attorney).

8.14 **Phishing Against the Elderly.**

**HB 883** (Thierry) allows a court to triple the actual damages awarded under our Anti-Phishing Act (found in Bus. & Comm. Code Ch. 325) if the target of the phishing is an elderly individual.

9. **Trusts.**

9.1 **The REPTL Trusts Bill.**

REPTL’s Trust bill is **SB 631** (Rodríguez).

(a) **Mandatory Rules – Trustee’s and Attorney’s Fees (Sec. 111.0035).** Added to the list of mandatory trust terms that may not be altered by the settlor are the court’s ability to deny or order the return of trustee’s fees and to make an “equitable and just” award of costs and attorney’s fees under Sec. 114.064.

(b) **Incorporation of Will Construction Concepts Into Revocable Trusts (Sec. 112.0335).**

The provisions of Estates Code Ch. 255, relating to the construction and interpretation of wills (e.g., pretermitted children, advancements, lapsed gifts, class closing, and more) are made applicable to trusts revocable by the settlor, or the settlor and the settlor’s spouse. In addition, the abatement provisions of Estates Code Sec. 355.109 are made applicable to those trusts.

(c) **Effective Date of Reformations (Sec. 112.054).** This change clarifies that a judicial reformation of a trust (as opposed to a modification), because of the very nature of reformations, is effective as of the creation of the trust.

(d) **Decanting Into the Same Trust? (Sec. 112.071)** This change “clarifies” that the second trust to which trust assets are decanted may be created under the same trust instrument as the first trust, in which case the property need not be retitled, or under a different instrument. The language specifically states that it’s intended to be a clarification of the common law. What’s the point? Well, it’s hoped that this will allow a trustee to decant into a new trust with the same name and TIN as the original trust, reducing the transaction costs of changing title to the assets. We’ll see.

(e) **Effect of Divorce on Certain Transfers in Trust (Secs. 112.101-112.105).** The provisions currently found in Estates Code Secs. 123.051-123.056, relating to the effect of divorce on revocable dispositions in trust in favor of a former spouse and the former spouse’s family are copied to the Trust Code (where they really belong). At some point, they may be repealed from the Estates Code.11

(f) **Termination of Ch. 142 Trusts (Sec. 142.005).** The required termination provisions of a court-created trust governed by Property Code Ch. 142 are revised in a manner similar to the revisions found in REPTL’s Guardianship bill to court-created trusts governed by Estates Code Ch. 1301 (see Sec. 8.1(g)(ii) on page 10).

(g) **Pooled Trust Subaccounts (Sec. 142.010 and Ch. 143).** New Ch. 143 provides for pooled trust subaccounts, and the transfer of assets from a Ch. 142 management trust to a pooled subaccount, for example, if the initial trustee can no longer serve and no suitable replacement for the unpooled trust can be found.

9.2 **The REPTL Directed Trusts Bill (Sec. 114.0031).** REPTL’s Directed Trust bill is

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11 These provisions are inserted as new Subchapter D of Chapter 112. Current Subchapter D, which contains the decanting statutes, is relettered as Subchapter E. Don’t worry though – none of the section numbers have changed.
**SB 309** (Rodríguez). It amends our directed trust provision to clarify that the person with the authority to direct, consent to, or disapprove the trustee’s decisions is an “advisor,” and is a fiduciary. An exception to the fiduciary characterization is the power solely to remove and appoint trustees, advisors, trust committee members, or other protectors, and the advisor does not exercise the power to appoint himself or herself. Also, the fiduciary requirement does not prohibit the exercise of a power that must be exercised in a nonfiduciary capacity for someone to be treated as the owner of a trust for federal income tax purposes.

**10. Disability Documents.**

**10.1 The REPTL Financial Power of Attorney Bill.** REPTL’s Financial Power of Attorney bill is … Just kidding. After the significant overhaul of the financial power of attorney statutes in 2017, REPTL decided to give them a rest this session. (However, the nonsubstantive Leg. Council code update bill does repeal an extra “a” from Est. Code Section 752.113(c). See Sec. Error! Reference source not found. Error! Bookmark not defined.**)

**10.2 The REPTL Medical Power of Attorney Bill (Health & Saf. Code Secs. 166.152, 166.160 & 166.164).** REPTL’s Medical Power of Attorney bill is **SB 310** (Rodríguez). It makes the statutory form of medical power of attorney optional, so people who want to can use other forms, such as the Five Wishes document, the ABA’s simple form, or some other form as a standalone document. To be valid, a medical power must:

- be in writing;
- be signed by the principal (or another person at the principal’s express direction) before two witnesses or a notary; and
- contain the principal’s name, date of execution, and designation of an agent.

In order to make this more palatable to the Texas Medical Association and the Texas Hospital Association, both of which opposed this change in 2017, an attending physician, health or residential care provider, or agent of either will not be considered to have engaged in unprofessional conduct for assuming that a medical power was valid when made so long as they have no actual knowledge to the contrary. This time around, the Health Law Section of the State Bar adopted the objections expressed previously by TMA and THA. REPTL reached a compromise with the Health Law Section in the form of new Sec. 166.152(b). The new provision first provides that if two or more agents are named to act concurrently, unless the medical power provides otherwise, the agents will have authority to act as sole agent in the order in which their names are listed. If two or more agents are acting and cannot agree on a treatment decision in the manner provided in the medical power, again, they’ll have authority to act as sole agent in the order in which their names are listed. In that case, they may continue to act in the manner provided in the medical power on matters on which they agree. In exchange for this addition, the rest of the changes in REPTL’s proposal remained intact, including making the statutory form optional, rather than mandatory.

However, after the bill was filed, THA indicated that the compromise still did not satisfy its concerns. We’ll see how this plays out. **See also Section 10.5 below**

**10.3 The REPTL Anatomical Gift Bill (Health & Saf. Code Ch. 692 & Secs. 692A.005-007).** REPTL’s Anatomical Gift bill is **SB 258** (Rodríguez). It allows a statement of anatomical gift, a revocation of same, or a refusal to make an anatomical gift to be acknowledged in the presence of a notary instead of two witnesses. **Drafting Tip**

If you prepare these for clients and have already switched from two witnesses to one notary for the rest of your advance directives, you may do so now for this anatomical gift document.

However, when my clients bring this up, I usually encourage them to register at the Glenda Dawson Donate Life Texas Registry, since the client’s wishes will be documented and readily available to health care providers at the time of donation, while access to the anatomical gift form you’ve prepared may not be. Anyone can register at:

https://www.donatelifetexas.org/

The registry also has partnerships with the Texas DPS and DMV that allow individuals to join the donor registry when applying for or renewing their driver’s license, ID, or vehicle registration.

**10.4 The REPTL Disposition of Remains Bill (Health & Saf. Code Secs. 711.002 & 711.004).** REPTL’s Disposition of Remains bill is **SB 259** (Rodríguez). The bill revokes the authority of a spouse if the marriage is dissolved before the decedent’s death. It clarifies that a court with jurisdiction over probate

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12 In 2009, when HB 2027 replaced the Uniform Anatomical Gift Act found in Ch. 692 with the *Revised* Uniform Anatomical Gift Act found in new Ch. 692A, SB 1803 separately amended Sec. 692.003(d) of the old act. That left subsection (d) in place, but the rest of Sec. 692.003 was repealed, along with the rest of Ch. 692. The REPTL bill repeals the scrap of Ch. 692 that’s left.
proceedings for the decedent (whether or not commenced) has jurisdiction over a dispute regarding disposition of remains. However, a dispute over removal of remains is heard in a county court in the county where the cemetery is located.

10.5 Creditor’s Duty to Notify Agent (Secs. 751.231 & 751.251). SB 763 (Menéndez) has a relatively narrow scope. If a principal who is at least 65 is delinquent under an agreement relating to the principal’s living quarters, and the creditor knows that the principal has given a power of attorney to an agent that would allow the agent to make the delinquent payment, then before the creditor takes adverse action against the principal (like eviction proceedings), the creditor must submit a written request to the agent by certified mail. If the delinquency remains after 30 days, the creditor must bring an action requesting a court to review the agent’s conduct. Further actions by the creditor that are adverse to the principal are delayed until the court takes appropriate action.

10.6 Form of Advance Directive (Health & Saf. Code Secs. 166.032, 166.0325, 166.036, 166.102, & 166.163). HB 1082 (Raymond) does not make the statutory medical power form optional, but does allow the executive commissioner of the Department of State Health Services to designate alternate allowable forms. A designated alternate form must:

1. be promulgated by a national nonprofit;
2. be written in plain language;
3. allow a declarant to provide health care instructions;
4. require a declarant to name an adult agent;
5. allow a declarant to name an alternate adult agent;
6. allow the declarant to specify or limit treatment decisions an agent may make;
7. allow the declarant to specify treatments he or she approves (or doesn’t);
8. allow the declarant to specify personal, spiritual, and emotional care he or she approves (or doesn’t);
9. allow the declarant to detail information to be conveyed to family members and friends, including wishes for a memorial service or burial;
10. require the declarant to sign and date the directive before two witnesses; and
11. be accepted as valid in at least 40 other states.

Based on the required criteria, this sounds like a bill advanced by Aging with Dignity, the nonprofit that promulgates the Five Wishes document.

10.7 Advance Directive and DNR of Pregnant Patient (Health & Saf. Code Secs. 166.033, 166.049, 166.083, & 166.098). HB 1071 (Hinojosa) would allow a woman of child-bearing age to make her own decision regarding the effect of pregnancy on a decision regarding life-sustaining treatment, and makes conforming amendments to the statutory forms.

10.8 Anatomical Gifts. Here are several bills related to anatomical gifts:

- HB 406 (Price) and SB 516 (Zaffirini) require a person issuing a fishing or hunting license, and HB 407 (Kacal) and SB 517 (Zaffirini) require a person issuing a motor vehicle registration, to specifically ask each applicant “Would you like to register as an organ donor?” If yes, the issuer must forward the applicant’s information to the statewide donor registry.

- HB 609 (Thierry) changes the procedures for an applicant for a driver’s license or personal identification certificate. Currently, the applicant is asked “Would you like to register as an organ donor?” If yes, the applicant’s information is forwarded to the statewide donor registry. This bill changes the question for adult applicants to “Would you like to refuse inclusion in an organ donor registry?” If no, the applicant’s information is forwarded.

- HB 1350 (Oliverson) prohibits the hospital administrator, a person who exhibited special care and concern for the decedent and is associated with the hospital in possession of the decedent’s body, and any other person having the authority to dispose of the decedent’s body from making an anatomical gift. Nor may a procurement organization or any person associated with the hospital in possession of the decedent’s body acting as a guardian make an anatomical gift.

10.9 In-Hospital DNR Orders (Health & Saf. Code Secs. 166.201-166.209). The 2017 special session led to the passage of SB 11 (Perry, et al. | Bonnen, G., et al.), a bill that for the first time outlined procedures for issuing and revoking in-hospital DNR orders, as opposed to out-of-hospital DNR orders that are already dealt with in Subch. C of Health & Saf. Code Ch. 166. (See the description of the bill in the 2017 legislative update for further description of the bill). The changes contained in the bill went into effect April 1, 2018.

According to an article in the September 7, 2018, edition of the Austin American-Statesman, a hearing the previous day before the Senate State Affairs Committee included accusations by its chairman of violations of unwritten rules of conduct by several legislators relating to the bill. In accordance with directions contained in SB 11, shortly after the changes took effect, the Health and Human Services Commission published proposed rules implementing
the law (see 43 TexReg 2355). During the public comment period, Sen. Charles Perry and Rep. Greg Bonnen, who shepherded SB 11 through the special session, sent a letter to the agency seeking changes to the proposed rules that would prevent hospital ethics committees from approving a doctor’s request to halt life-sustaining care. In Texas, if a doctor believes continued treatment would inhumanely extend suffering, the doctor may appeal to an ethics committee for approval to halt life-sustaining care. The ethics committee may then order that treatment be halted in 10 days.

SB 11 is silent on whether ethics committee intervention is allowed with respect to the DNR orders dealt with by the changes, and that was intentional in order to obtain passage of the bill through a carefully-crafted compromise. Perry and Bonnen were specifically directed to ensure that no changes were made to SB 11 on either chamber’s floor. At the September 6th hearing, Sen. Byron Cook, chair of the State Affairs Committee, stated that the letter sent by Perry and Bonnen regarding the proposed rules violated the special session compromise. Cook also said that several of the over 60 other legislators who signed the Perry-Bonnen letter felt misled about its contents and wanted their names removed from it. As of the date of this version, no final rules have been adopted.

11. Nontestamentary Transfers.

11.1 The REPTL Decedents’ Estates Bill – Repeal of Statutory TODD Forms See Sec. 7.1(d) on page 7.

12. Exempt Property.

12.1 The REPTL Exempt Savings Plan Bill (Prop. Code Secs. 42.0021 & 42.0022). REPTL’s Exempt Savings Plan bill is HB______ (______). The provisions of current Prop. Code Sec. 42.0021, previously relating solely to the creditor exemption for retirement plans, are clarified and reorganized to be more readable and incorporate the provisions of Sec. 42.0022, relating to the creditor exemption for college savings plans. (The latter section is repealed.)


13.1 The REPTL Decedents’ Estates Bill – Removal of Will Reformation. See Sec. 7.1(h) on page 8.

13.2 The REPTL Guardianship Bill – Matters Related to Guardianship Proceeding. See Sec. 8.1(a) on page 10.

13.3 The REPTL Disposition of Remains Bill – Courts With Jurisdiction. See Sec. 10.4 on page 13.

13.4 Venue for Probate of Wills (Sec. 33.1011). SB 192 (Perry) authorizes transfer of a probate proceeding to the county of the executor’s residence after issuance of letters if no immediate family member resides in the county of the decedent’s residence. (This is in addition to the current grounds for transfer for the convenience of the estate under Sec. 33.103.)

13.5 Jurisdiction of Certain Courts. HB 1033 (Murr) and SB 793 (Alvarado) (which are companions), and HB 1380 (Murr) increase the amount in controversy limits for county and justice courts from $10,000 to $20,000. SB 561 (Zaffirini), does that too, and in addition, among other things, increases the lower limit of district and statutory county court jurisdiction from $500 to $10,000.

14. Court Administration.

14.1 The REPTL Decedents’ Estates Bill – Recusal of Presiding Statutory Probate Judge. See Sec. 7.1(u) on page 9.

14.2 State Contribution for Statutory Probate Judges (Gov’t Code Sec. 25.0021). HB 586 (Thompson, S.) changes the state’s annual contribution towards a statutory probate judge’s compensation from a flat $40,000 to 60% of a district court judge’s salary, but only if the judge does not engage in a private law practice. HB 1624 (Thompson, S.) is the same, but omits the requirement that the judge not have a private practice.

14.3 Exemption From Reporting Requirements (Gov’t Code Secs. 36.003 & 37.002). Gov’t Code Sec. 36.004 requires court clerks to prepare monthly reports listing court appointments for an attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator. Gov’t Code Sec. 37.003 requires courts to maintain lists of attorneys registered with the court as qualified to serve as attorney ad litem; attorneys and other persons registered with the court as qualified to serve guardian ad litem; persons registered with the court to serve as a mediator; and attorneys and private professional guardians registered with the court as qualified to serve as a guardian. HB 1285 (Smith) and SB 41 (Zaffirini) exempt from these reporting requirements attorneys ad litem, guardians ad litem, and guardians who serve pro bono or are volunteers of a nonprofit organization that provides pro bono legal services.

14.4 Associate Judges for Guardianship and Protective Services Proceedings (Gov’t Code Ch. 54A). Existing Subchapter C of Gov’t Code
Ch. 54A authorizes associate judges in statutory probate courts. **SB 536** (Zaffirini) adds a new Subchapter D that would authorize the appointment of associate judges to hear guardianship and protective services proceedings in courts other than statutory probate courts.

14.5 Bar Card Access to Courthouses (Gov’t Code Sec. 75.601; Local Gov’t Code Sec. 291.010). **HB 1359** (Wu) allows attorneys to skip the security entrance at courthouses by presenting their Texas bar card. Counties and municipalities may not adopt or enforce rules that conflict with this provision (like the special identification cards that some counties issue following an application process). This applies to buildings that house a justice court, municipal court, county court, county court at law, or district court. So it doesn’t apply to appellate courts. But what about buildings that house only statutory probate courts? (See Sec. 14.6 below.)

14.6 New Travis County Probate Court and Building.13 As practitioners in Travis County know, the facilities available for the county’s lone statutory probate court are cramped, to say the least. That’s why, despite the overwhelming need for a second court, Travis County still has only one statutory probate court. However, after standing vacant since 2012 when the federal courts moved to their new courthouse, it was announced at the end of 2016 that the old federal courthouse (dating back to about 1935)14 would be donated to Travis County for use by its probate court(s) and the probate division of the county clerk’s office. The county will need to spend an estimated $28 million (or more, since that estimate dates back to 2016) to modernize the old courthouse while maintaining many of the architectural details. In a conversation with this author in January, 2019, Judge Guy Herman indicated that they hope to move into the new facility by late 2020, and that a bill to authorize a second probate court would likely follow in the 2021 session.

15. Selected Marital Issues.

15.1 Agreements Incident to Divorce or Annulment Incorporated by Reference (Fam Code Sec. 7.006). **HB 559** (Thompson, S.) and **SB 261** (Rodriguez) provide that if a court approves a written agreement incident to a divorce or annulment and incorporates the agreement by reference in the final decree, the agreement itself is no longer required to be filed with the court or the clerk. This change applies whether the decree was signed before or after the effective date of the amendment.

15.2 Disclosure of Gestational Agreement; Standing (Fam Code Secs. 6.406 & 102.003). **HB 1689** (Deshotel) provides that if the parties in a divorce proceeding are the intended parents under a gestational agreement, the petition must state those facts, whether the gestational mother is pregnant or a child subject to the agreement has been born, and whether the agreement has been validated under Fam. Code. Sec. 160.756. An intended parent under a gestational agreement is also granted standing to file a SAPCR if that person files jointly with the other intended parent, or files against the other intended parent.

15.3 Divorce. Here are some other bills relating to divorce:

- **HB 922** (Krause) requires both spouses to agree in order for the court to grant a divorce on the grounds of insupportability.
- **HB 926** (Krause) extends the waiting period for a divorce granted on the grounds of insupportability if the household includes a minor child, an 18-year old child in high school, or an adult disabled child.

15.4 Same-Sex Marriages and Conduct. Here are some bills relating same-sex marriage and conduct:

- **SB 114** (Menéndez) repeals statutes regarding the criminality or unacceptability of homosexual conduct and statutes that don’t recognize certain same-sex relationship statuses.
- **SB 153** (Rodriguez) amends certain Family Code and Health & Safety Code provisions to recognize same-sex relationships. It also repeals a Penal Code statute making homosexual relations illegal.
- **HJR 64** (Beckley) and **SJR 9** (Rodriguez) are a proposed constitutional amendment that repeals the constitutional ban on same-sex marriages and the prohibition against creating or recognizing any legal status identical or similar to marriage.
- **HB 978** (Beckley) begins by adding new Fam. Code Sec. 1.0015 directing that gender-specific terminology be construed in a neutral manner to implement the rights and duties of spouse or parents in a same-sex marriage. It then makes a number of changes to specific statutes to implement that goal. It also repeals Penal Code Sec. 21.06 which criminalizes homosexual conduct (the statute was ruled unconstitutional by the U.S.

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13 This is only included in the paper because I practice in Travis County, and therefore care about it.
14 The old federal courthouse has been described both as art deco, and as “Depression-era Moderne.” I don’t know if those two descriptions conflict. More information about the old building can be found here.
Supreme Court in 2003 but has never been taken off the books in Texas.

15.5 Persons Conducting Marriage Ceremonies. HB 1572 (Moody) would add criminal law magistrates to the list of judges authorized to conduct marriage ceremonies.


16.1 Proposed Change to Disciplinary Rules Regarding Clients with Diminished Capacity. On October 5th, we all received an e-mail from the State Bar notifying us that the Committee on Disciplinary Rules and Referenda, established by the 2017 legislature to review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure and provide annual reports on their adequacy to the Supreme Court and the State Bar Board of Directors, had published proposed changes to three disciplinary rules:

- Current Rule 1.02(g), which requires a lawyer to take reasonable action to secure the appointment of a guardian or other legal representative, or seek other protective orders, for a client the lawyer reasonably believes lacks legal competency, would be repealed.

- Rule 1.05(c)(9) would be added to allow a lawyer to reveal confidential information in order to secure legal advice about the lawyer’s compliance with the rules.

- And most important, new Rule 1.16 would be added dealing solely with clients with diminished capacity. Here is the text of the proposed rule as it appeared in August 31st issue of the Texas Register and the September Texas Bar Journal:

  Rule 1.16 Clients with Diminished Capacity

  (a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

  (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

  (c) When taking protective action pursuant to (b), the lawyer may disclose the client’s confidential information to the extent the lawyer reasonably believes is necessary to protect the client’s interests.

This proposed change appears to be based on the ABA’s Model Rule 1.14. A public hearing was held on these proposed changes by the CDRR on October 10th, and comments are being accepted through November 1st at texasbar.com/CDRR.

16.2 Ethics Opinion No. 678 -- Serving as Executor and Attorney for Executor. The following is Prof. Gerry Beyer’s description of this nonlegislative development:

In September, 2018, the Professional Ethics Committee for the State Bar of Texas clarified the ethical rules that apply when the same person serves as both the executor and as counsel for the executor:

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is not prohibited from serving as both executor and as counsel for the executor; however, the lawyer must evaluate whether there are conflicts of interests before and during the representation including any arising from the lawyer serving in the dual roles. If the representation of the executor will be adversely affected by the lawyer’s or law firm’s own interests, then the lawyer may not serve as counsel for the executor unless the lawyer can obtain the consent required under the Texas Disciplinary Rules of Professional Conduct. If a lawyer cannot serve as counsel for the executor because of such a conflict, the other lawyers in the lawyer’s law firm are also prohibited from representing the executor. Finally, additional limitations can arise if the lawyer, serving as executor, should or may be a witness in a probate or other legal proceeding related to the estate, which limitations may affect whether the lawyer can be both a fact witness and an advocate before a tribunal in the same proceeding.

Moral: Although this opinion authorizes the same person to serve as the executor and the attorney for the executor under proper circumstances, prudent practice would be, IMHO, to avoid dual roles.

Note: That moral is Prof. Beyer’s, not mine. While I personally wouldn’t serve as executor for persons other
than family members and close friends, my “moral”
would be that under “proper” circumstances, i.e., where
there appear to be no complications or disagreements
related to the administration of an estate, a lawyer
could serve in both roles, but that dual capacity should
end at the first sign of any complication or
disagreement.

17. A Little Lagniappe.

We are [mostly] happy to report the following
developments critical to the future of Texas:

17.1 “Goin’ Up the Country.” In June,
2018, the Texas Legislative Council issued a report
compiling definitions of “rural” found in Texas statutes
and state agency rules. They found 46 of ‘em, and
included maps for 18 definitions. Notably, there’s no
reference to “rural” homesteads. Art. 16, Sec. 51, of
the Texas Constitution does not use the term “rural.” It
refers to a homestead, “not in a town or city,” of no
more than 200 acres, and a homestead “in a city, town
or village” of no more than 10 acres. And Prop. Code
Sec. 41.002 uses the term “rural homestead” without
defining what’s “rural,” although in all fairness, it does
provide guidelines for what is considered an urban
homestead. One might conclude that if it doesn’t fit
the definition of an urban homestead, it would be rural.
(Also, it appears that the report was designed to address
what’s “rural” over larger geographic areas, hence the
statewide maps.) If you’re interested, you can find the
report here:

17.2 Lemonade, Anyone? HB 234 (Krause)
prevents local governments from enforcing any
ordinance or rule that prohibits a minor from
temporarily selling lemonade or other nonalcoholic
beverages on private property. According to
Ken Herman of the Austin American-Statesman,16 Rep. King’s
constituents who buy Corvettes “don’t particularly
want to drill a hole in their brand new car’s bumper.”
King claims that Texas is unique in that most states
don’t require front license plates. While our
neighboring states may have dropped the front-plate
requirement, a majority (31 states) still require one. King
denies this is “a rich people bill. Almost every
car costs $60,000 anymore, particularly a sports car.”
Herman points out that due to an unintentional 2011
change, while it’s still illegal to drive without a front
plate, there’s no longer any penalty for it. If this bill
doesn’t pass, perhaps HB 688 (Guillen), which
authorizes display of the front plate inside the
windshield, will.

17.3 Repeal of Marihuana Laws! Not really.
HB 1196 was introduced by Rep. Terry Meza, a former
Spanish teacher who was irked by the fact that
“marihuana” is misspelled many times throughout
Texas statutes. But rather than correct those references
to “marijuana,” her bill would replace all the
“marihuana” references to “cannabis,” the plant’s
scientific name that she believes is less controversial.

17.4 Hook ‘Em vs. Gig ‘Em. HB 412 (Larson)
requires UT and A&M to play a football game against
each other on Thanksgiving weekend each year,
beginning in 2020. If one of them refuses to do so, that
university may not award any athletic scholarship
funded by state funds the following year.

17.5 One Plate or Two? HB 673 (King, K.) adds
“luxury passenger cars” (those with a base model
MSRP of at least $60,000) to the current list of vehicles
(tractors, motorcycles, trailers, and semis) exempt from
the requirement that a license plate be displayed on the
front bumper. According to a Ken Herman column in
the Austin American-Statesman,16 Rep. King claims that Texas is unique in that most states
don’t require front license plates. While our
neighboring states may have dropped the front-plate
requirement, a majority (31 states) still require one. King
denies this is “a rich people bill. Almost every
car costs $60,000 anymore, particularly a sports car.”
Herman points out that due to an unintentional 2011
change, while it’s still illegal to drive without a front
plate, there’s no longer any penalty for it. If this bill
doesn’t pass, perhaps HB 688 (Guillen), which
authorizes display of the front plate inside the
windshield, will.

17.6 “I Like Beer!” HB 1083 (Raymond)
exempts the sale of beer or ale from sales tax on
July 4th. Stock up!

17.7 Just Add Water! HB 1610 (Ashby)
designates powdered alcohol as an illicit beverage,
whether or not reconstituted. I didn’t even know there
was such a thing!

17.8 Places. Here are some official place
designations:
- Wine Capital. HCR 37 (Biedermann) designates
Fredericksburg as the official Wine Capital of
Texas, replacing its previous designation as the
Polka Capital of Texas.

- State Food. HCR 57 (Hinojosa) designates tacos
as the State Food of Texas. (This is sure to raise
the hackles of the BBQ lobby!)

- Dates. Here are some official date
designations:

16 I often find inspiration for the bills described in this part of
the paper in Herman’s columns.
• **Orange and Maroon Legislative Day.**  **HR 123** (Raney) and **SR 97** (Watson, et al.) recognize February 5, 2019, as Orange and Maroon Legislative Day (see Sec. 17.4 above!)

18. **The End.**

Except for any attachments I may add following the session’s end.
EDUCATION:

B.A. (History) With High Honors, Texas Tech University, 1975
J.D., Texas Tech University School of Law, 1978

PRACTICE CONCENTRATION:

Estate Planning and Probate with emphasis on Estate Administration, Guardianships and Probate and Trust Litigation

PROFESSIONAL ACTIVITIES:

State Bar of Texas: Member, Real Estate, Probate and Trusts Section
Dallas Bar Association: Member, Probate, Trusts, and Estates Section
Member, Dallas Bar Association Probate Council (1997 - 2001) for Probate, Trusts, and Estates Section
Chairman, Dallas Bar Association Probate, Trusts, and Estates Section (2000 - 2001)
Member of Committees which drafted revisions to the Texas Probate Code (1992) and the Dallas County Probate Manuel (1997)
Special Judge Dallas County Probate Courts No. 2 and No. 3 (1988 and 1996)

LAW RELATED PUBLICATION AND PRESENTATIONS:

Author/Lecturer, Denton County Probate Seminar 2018, Creditor’s Issues - Insolvency and the Estate
Author/Lecturer, Dallas Bar Association 2013, Creditor’s Issues - Insolvency and the Estate
Contributing Author to A Roadmap to Guardianship Alternatives, 2012
Contributing Author to Texas Guardianship Manuel, Third Edition, 2012
Author/Lecturer, State Bar of Texas Collection and Creditors’ Rights Course 2007,
Creditor’s Issues - Insolvency and the Estate
Lecturer, Texas Association of Legal Professionals Fall Board Meeting 2006,
Another Look At Will Contests
Author/Lecturer, State Bar of Texas Legal Assistants Division, Legal Assistants University 2004,
Creditor’s Issues - Insolvency and the Estate
Author/Lecturer, State Bar of Texas 2004 Advanced Estate Planning & Probate Course, Creditor’s Issues - Insolvency and the Estate
Author/Lecturer, State Bar of Texas 2003 Fourth Annual Building Blocks of Wills, Estates and Probate Panel Discussion
Author/Lecturer, Mesquite Bar Association 1995, Basics of Guardianship in Texas
I. INTRODUCTION

A Decedent’s estate can be a trap for the unwary creditor who is seeking to enforce a lien or collect a debt against a deceased debtor. A creditor must be aware of Texas law in both independent and dependent administrations and act appropriately in order to protect its claim against an estate. How a personal representative deals with creditors’ claims, allowances and exempt assets can materially affect the assets passing to the family members. Consequently, this article will discuss creditors’ claims in both independent and dependent administrations and uses of allowances and exempt assets. This article will also address creditor’s claims in guardianship estates.

II. INDEPENDENT ADMINISTRATION

A. Notice to Creditors.

Section 403.051 of the Texas Estates Code (the “Code”) provides for the notices that a personal representative in an independent administration is required to give to creditors.

1. Notice by Publication Section 308.051.

Within one (1) month after receiving letters, the personal representative of an estate shall publish in some newspaper, printed in the county where the letters were issued, a notice requiring all persons having claims against the estate being administered to present the same in the time prescribed by law. The notice shall include the date of issuance of letters held by the representative, the address to which the claims may be presented and an instruction of the representative’s choice that the claims be addressed in care of: (a) the representative; (b) the representative’s attorney; or (c) “Representative, Estate of _______. A copy of the printed notice together with the publisher’s affidavit that the notice was properly published shall be filed in the court where the cause is pending. Published notice is required in all independent administrations.

2. Notice to Secured Creditors.

A personal representative in an independent administration must also give notice to secured creditors in accordance with Section 308.053 of the Code. Within two (2) months after receiving letters, the personal representative shall give notice of the issuance of such letters to each and every person known to the personal representative to have a claim for money against the estate of a decedent that is secured by real or personal property of the estate. If the personal representative does not have actual notice of such a creditor within two (2) months of receiving letters, then within a reasonable time after obtaining actual knowledge of the existence of a secured creditor, the personal representative shall give notice to that person of the issuance of letters. Notice to secured creditors shall be given by certified or registered mail, with return receipt requested, addressed to the record holder of such indebtedness or claim at the record holder’s last known post office address. A copy of each notice to a secured creditor, a copy of the returned receipt, and an affidavit of the representative stating that the notice was mailed as required by law, giving the name of the person to whom the notice was mailed, shall be filed with the Clerk of the Court from which the letters were issued.

3. Penalty for Failure to Give Required Notices.

Pursuant to Section 308.056 of the Code, if a personal representative fails to give notice by publication or to a secured creditor, the representative and the sureties on the representative’s bond shall be liable for any damage which any person suffers by reason of such neglect, unless it appears that such person had notice otherwise.

4. Permissive Notice.

Section 403.051 of the Code provides that a personal representative in an independent administration may give notice permitted under Section 308.054 of the Code and bar a claim under that subsection. Section 308.054 provides that permissive notices may be given to unsecured creditors at any time before an estate administration is closed. Such notice may be given by certified mail with return receipt requested to an unsecured creditor having a claim for money against the estate expressly stating that the creditor must present a claim before the 121st day after the date of the receipt of the notice or the claim is barred, provided the claim is not already barred by the applicable statute of limitation. A notice must include: (1) the date of issuance of letters held by the representative; (2) the address to which claims may be presented; and (3) the instruction of the representative’s choice that the claim be addressed in care of: (a) the representative; (b) the representative’s attorney; or (c) “Representative, Estate of _______. In Section 403.051(b) added by the 2011 changes to the Code, the 308.054 letter must include language that a creditor must present a claim only by the methods set forth in Section 403.056. This
section states that a claim must be presented by certified mail, return receipt requested, by hand delivery with a receipt or a pleading filed in a lawsuit with respect to the claim or written instrument or pleading filed in the Court in which the administration is pending. The code is not clear as to how much detail from Section 403.056 should be included. In the form attached, the creditor is advised that the claim must be in compliance with Section 403.056. There is some question as to whether these sections can be interpreted to require the administrator’s attorney to provide legal advice to a creditor who is not the attorney’s client. This is at odds with the Courts decision in Mohseni v. Hartman, 363 S.W.3rd 652 (Tex. App. Houston [1st] 2011, no pet.), where the Court makes clear that an administrator does not owe a general duty of care to an unsecured creditor. It is also suggested that that the notice instruct the creditor that the claim must be in the form required by the Texas Estates Code and that the attorney for the estate cannot give advice as to the proper procedure for filing a claim, so the creditor should contact an attorney of its choice with respect to the procedures for filing the claim. This should decrease the number of phone calls received by the attorney for the personal representative from creditors asking for help in filing claims. It also puts the creditor on notice that the claim needs to be in a particular form.

B. Presentment of Claim by Secured Creditor.

Pursuant to Section 403.052, a secured claim for money must be presented within six (6) months after the date letters are granted, or within four (4) months after the date notice is received if the notice was sent more than two (2) months after the date letters were issued, whichever is later. A creditor with a claim for money secured by real or personal property must give notice to the independent representative of the creditor’s election to have the creditor’s claim approved as a matured secured claim to be paid in the due course of administration. If this election is not timely made, the claim is classified as a preferred debt and lien against the specific properties securing the indebtedness and shall be paid according to the terms of the contract that secured the lien, and a claim may not be asserted against other assets of the estate. The independent representative may pay the claim before the claim matures if paying the claim before maturity is in the best interest of the estate. If a secured creditor’s claim is considered a preferred debt and lien, then the creditor may not seek any deficiency against the other assets of the estate. Prior to this addition to Section 403.052, the secured creditor was not bound to such an election and could still seek a deficiency against the estate in an independent administration.

C. Non-Judicial Foreclosure.

It has long been the law in Texas that, in a dependent administration, an attempted exercise of a power of sale in an extrajudicial foreclosure is void. Pearce v. Stokes, 291 S.W. 2d 309 (Tex.1956); Hury v. Preas 673 S.W. 2d 949 (Tex.App--Tyler 1984, writ ref’d n.r.e.); Bozeman v. Follitt, 556 S.W. 2d 608 (Tex.Civ.App.—Corpus Christi 1977, writ ref’d n.r.e.). Consequently, if a secured creditor foreclosed upon a deceased person’s assets prior to a dependent administration being opened, the foreclosure would be void, but the foreclosure would stand if an independent administration was opened. Taylor v. Williams, 101 Tex. 388, 108 S.W. 815 (1908); Fischer v. Britton, 125 Tex. 505, 83 S.W.2d 305 (1935). Further, a nonjudicial foreclosure while a dependent administration is pending is void, as the administration suspends the power of sale. Because of the changes in Section 403.052, does a secured creditor also take a risk by foreclosing prior to the opening of an independent administration? There are no cases addressing this point since the changes to Section 403.052. However, in Bozeman v. Follitt, the Court seems to base its decision on the fact that in an independent administration, a creditor cannot enforce its claim against the executor in probate court. However, in a dependent administration, the creditor is required to seek permission from the probate court to foreclose and to enforce its claim. In Section 403.052, a secured creditor is now put to an election, and that election must be made within six months. Since a secured creditor in an independent administration is not put to an election and an independent executor has the right to pay the claim in accordance with the contract, does this some how change the law with respect to nonjudicial foreclosures prior to the opening of an independent administration? If a creditor forecloses prior to the opening of an independent administration, do the provisions of Section 403.052 not apply to that estate? In the Supreme Court decision of Pearce v. Stokes, the Court’s decision seems to turn more on the fact that the Court felt that a sale of property pursuant to a nonjudicial foreclosure prior to the opening of an administration would always interfere with the due administration of an estate. The Court held that the secured creditor is protected in the payment of his debt when the property is brought into administration.
He has a choice of methods he may pursue in obtaining payment. Now that the secured creditor is put to the same election and choices in both an independent and dependent administration, can it be argued that a nonjudicial foreclosure before the opening of an independent administration is voidable?

D. Presentment of Unsecured Claim.

In an independent administration, an unsecured creditor who has a claim for money against the estate and who has received the permissive notice shall give notice to the independent representative of the nature and amount of the claim before the 121st day after the date on which notice is received, or the claim is barred. Section 403.056 provides that the notice given by either a secured creditor or an unsecured creditor responding to a permissive notice letter must be contained in: (a) a written instrument that is hand delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor’s attorney; (b) a pleading filed in a lawsuit with respect to the claim; or (c) a written instrument or pleading filed in the court in which the administration of the estate is pending.

Note that the Estates Code was amended to make time periods uniform as opposed to the sections under the Probate Code that gave a four month permissive notice under old Section 294 and a 120 day requirement under old Section 146. Section 403.056 was also amended effective January 1, 2014. Prior to the amendment, a claim presented to an independent executor did not have to meet the formal requirements that were required in a dependent administration. Ditto Investment Co. v. Ditto, 293 S. W. 2d 267 (Tex. Civ. App. – Fort Worth 1956, no writ). Section 403.056 now requires that claims presented to independent executors must comply with Section 355.004 and as a result must meet the same requirements as claims filed in dependent administrations. It is important to note that the delivery of notice by the creditor to the independent executor must meet the requirements of Section 403.056 or the claim is barred pursuant to Section 403.055. For instance, if the creditor simply sends by regular mail a statement showing the amounts owed, it does not comply with Section 403.056 because it was not hand delivered with proof of receipt or mailed by certified mail. Therefore, a strict reading of the statute requires that the claim be barred. An executor’s attorney receiving claims from creditors should always keep the envelope in which the claim is received as proof as to whether or not it was properly delivered.

Section 403.058 has resolved the question of whether claims in independent administrations and dependent administrations were subject to the same rules regarding filing suit after a claim has been rejected. This section specifically states that Sections 355.064 and 355.066 do not apply to independent administrations. Thus, if a claim in an independent administration is rejected, the creditor is not required to file suit within ninety (90) days and may file suit anytime before the claim is barred by limitations.

E. Enforcement of Claims by Suit.

Pursuant to Section 403.059, any person having a debt or claim against the estate in an independent administration may enforce the payment of same by suit against the independent executor; and when judgment is recovered against the independent executor, execution shall run against the estate of the decedent in the hands of the independent executor which is subject to such debt. However, if the estate is insolvent, a creditor who secures judgment against the independent executor cannot have estate property sold under execution and applied to his debt to the exclusion of other creditors. Woods v. Bradford, 284 S.W. 673 (Tex. Civ. App. 1926, no writ). An independent executor is not required to plead to any suit brought against him for money until after six (6) months from the date the independent administration was created and the order appointing an independent executor was entered. Consequently, unlike a dependent administration, at any time a claimant may file suit against the executor; however, if the claimant has received the permissive notice letter, a claim must be presented or suit must be filed before the 121st day to prevent the claim from being barred.

F. Liability of Independent Executor.

An independent executor, in the administration of an estate, may pay at any time, without personal liability, a claim for money against the estate to the extent approved and classified by the personal representative if: (a) the claim is not barred by limitations; and (b) at the time of payment, the independent executor believes the estate has sufficient assets to pay all claims against the estate. Section 403.0585.

G. Unliquidated Claims.

Section 403.051 and Section 308.054 provide for permissive notice to unsecured creditors having a claim for money. Consequently, an unliquidated claim may not be presented and is not subject to a bar if a letter under Section 403.051 is sent. Case law has
construed “all claims for money” to require presentment of a claim if the amount can be ascertained with certainty. Examples of such unliquidated claims are tort claims See Wilder v. Mossler, 583 S.W. 2d 664 (Tex. Civ. App.—Houston 1964, no writ) and quantum meruit claims for services rendered See Wells v. Hobbs, 122 S.W. 451 (Tex. Civ. App.—1909, no writ); and Moore v. Rice, 80 S.W. 2d 451 (Tex. Civ. App.—Eastland 1935, no writ).

III. DEPENDENT ADMINISTRATION.

A. Notices.

In a dependent administration, the same notices as set forth above for independent administration are required under Sections 308.054 and 308.055; therefore, a published notice and notice to secured creditors are required. In addition, the permissive notice may be given to unsecured creditors.

B. Presentment of Claims.

In a dependent administration, the creditor is required to “present” its claim. The Probate Code authorizes two different methods by which a claim may be presented: (a) the creditor may present the claim directly to the executor or administrator as authorized by Section 355.001; or (b) claims may also be presented by depositing, or filing, same with the Clerk pursuant to Section 355.002 of the Code. If a claim is deposited with the Clerk, then the Clerk is directed to notify the “representative” of the estate of the deposit of the claim with the Clerk, but Section 355.002 goes on to provide that failure of the Clerk to give that notice does not affect the validity of the presentment or the presumption of rejection if the claim is not acted upon within thirty (30) days after it is filed with the clerk.

C. Exceptions to Presentment.

There are a few exceptions to the requirement of presentment of claims in a dependent administration: (a) as discussed in independent administrations above, unliquidated claims may not be presented because Section 355.061 requires only that “claims for money” be presented to the administrator; and (b) Section 355.201(e) eliminates presentment as a requirement with respect to: (1) claims of any heir, devisee, or legatee who claims in such capacity; (2) claims that accrue against the estate after the granting of letters for which the representative of the estate has contracted, such as attorneys’ fees or accounting fees; or (3) claims for delinquent taxes against the decedent’s estate that is being administered in probate in: (a) a county other than the county where the taxes were imposed or (b) the same county in which the taxes were imposed if the probate of the decedent’s estate has been pending for more than four (4) years.

D. Action by Personal Representative with Respect to Claims.

1. Form of Claim.

Section 355.059 of the Code prohibits a personal representative from allowing, and the Court from approving, any claim that is not supported by an affidavit that the claim is just and that all legal offsets, payments and credits known to the affiant have been allowed. Consequently, any time a claim is received in a dependent administration, it should be checked for these magic words. In addition, Section 355.005 of the Code contains the requirement that if the claim is made on behalf of a corporation, it must provide that an authorized officer or representative of the corporation make the affidavit authenticating the claim and that it is sufficient to state in such affidavit that the person making it “has made diligent inquiry and examination, and that he believes that the claim is just and all legal offsets, payments and credits known to the affiant have been allowed”. A corporate representative signing in his or her individual capacity, or simply signing the name of the corporation, with nothing else, is not proper, and the claim should be rejected.

2. Objections to the Form of Claims.

Under Section 355.007 of the Code, an administrator is deemed to have waived “any defect of form, or claim of insufficiency of exhibits or vouchers presented” in a claim, unless he files a written objection thereto within thirty (30) days after presentment. The dilemma facing the administrator on this subject is whether a defect in a claim is one of form only, or is a fatal defect, rendering the claim a nullity. In City of Austin v. Aguilar, 607 S.W. 2d 310 (Tex. Civ. App.—Austin 1980, no writ), the creditor filed two claims in which the authenticating affidavit was not properly executed by a representative of the corporation. The Administratrix rejected both of those claims although the Administratrix made no written objections to either claim. More than ninety days passed after the rejection of the claims. The Administratrix took the position that the claims were barred under Section 355.064 of the Code. The claimant argued that the claims were null because of its own failure to comply with Section 355.005. The Court of Appeals disagreed with the claimant and held
that the defects in the claims were defects in form only, which were waived by the Administratrix because she filed no written objection as to the form of the claim. The claims were barred because the claimant failed to file suit ninety days after rejection. However, in Boney v. Harris, 557 S.W. 2d 376 (Tex. Civ. App.—Houston 1977, no writ), the affidavit filed by the claimant did not comply with Section 355.004 because the affidavit stated that all legal offsets, payments and credits through a certain date had been allowed, but the affidavit was filed four months after the stated date. No representation was made in the claim concerning any offsets, payments or credits after the date set forth in the claim. The Administrator rejected the claim and the claimant failed to file suit within ninety days thereafter. The Court of Appeals, in reversing the trial court, held that the rejection of the improperly verified claim did not set in motion the ninety day statute of limitation. The Court stated “A claimant may sue for the establishment of his claim only after rejection of it by the personal representative and only if the claim was legally presented.” The Court found the claim at issue to be void and held that the ninety-day limitation period could not run against a void claim. Consequently, a personal representative who receives a claim that is not in the proper form has the dilemma of whether or not to object to the form of the claim. This author’s practice is to reject a claim that is not in the proper form and state that the reason for the rejection of the claim is because the claim does not comply with the form required by the Texas Probate Code. If the creditor fails to timely file a proper claim and does not file suit within ninety days of the rejection, the personal representative can argue that the claim is barred because the claim was rejected. If the personal representative had sent the permissive notice under Section 308.054 and the trial court decides to follow the reasoning under Boney, the personal representative could then argue that the creditor failed to file a properly authenticated claim as required by the Texas Probate Code, and therefore, the claim is void, as it was not filed within the requisite four month period. Consequently, a dependent administrator should always consider sending the permissive notice allowed under Section 308.054 because this puts the burden on the creditor to timely file a claim that strictly complies with the requirements of the Code.

3. **Endorsement of Claim.**
   Under Section 355.051 of the Code, the administrator must endorse on or annex to every claim presented to him, within thirty (30) days after presentment, a memorandum signed by him, stating the time of presentation or filing, and whether he allows or rejects it, or what portion thereof he allows or rejects. The administrator’s failure to take any action constitutes a rejection of the claim; and, under Section 355.052, if the claim is thereafter established by suit, the costs shall be taxed against the estate representative, individually, or he may be removed on the written complaint of any person interested in the claim, after citation and hearing.

4. **Limitations on Claims.**
   The administrator is expressly prohibited by Section 355.061(a)(2) from allowing any claim that is barred by limitations. If the administrator allows such a claim, and if the Court is satisfied that limitations has run, Section 355.061(b) directs the Court to disapprove the claim. Under Section 355.008 of the Code, the general statutes of limitations are tolled: (1) by filing a claim which is legally allowed and approved; or (2) by bringing a suit on a rejected claim within ninety (90) days after rejection. Also, under Section 16.062 of the Texas Civil Practice and Remedies Code, the general statute of limitation which would otherwise apply, are tolled for a period of twelve (12) months after a decedent’s death or until “an executor or administrator of a decedent’s estate qualifies”, whichever occurs first.

5. **Rejected Claims.**
   If an administrator in a dependent administration rejects a claim, the Court cannot override the rejection unless the rejected claim is established by suit. When that occurs, the Court may then render a judgment granting the claim and classifying it. Under Section 355.065, a creditor cannot obtain a valid judgment against an administrator unless he goes through the claims process, including presentment, rejection by the administrator, and obtaining a judgment in a suit on the rejected claim. If an administrator rejects a claim in a dependent administration, then the creditor must, within ninety (90) days of rejection, file suit or the claim is barred.

IV. CLASSIFICATION OF CLAIMS.

A. **Duty of Personal Representative.**
   In both an independent and dependent administration, a personal representative is required to classify claims; however, Section 403.051 provides that the independent executor classify the claims free from the control of the Court in the same order of priority, classification, and proration described in the
sections of the Code dealing with dependent administration. In a dependent administration, whenever a claim is allowed by the personal representative, the Court classifies the claim. Under Section 355.055 of the Code, the Court classifies a claim within ten (10) days after the administrator has allowed it and the claim has been placed on the claims docket. The Court can approve the claim in whole, in part or reject it.

Section 355.102 of the Code sets forth the eight classes in which the creditor’s claim may be classified:

a. funeral expenses and expenses of last sickness for a reasonable amount to be approved by the Court, not to exceed a total of $15,000.00, with any excess to be classified and paid as any other unsecured claim;

b. expenses of administration and expenses incurred in the preservation, safekeeping and management of the estate including fees and expenses awarded under Section 352.052;

c. secured claims for money under Section 355.151(a)(1), including tax liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien and when more than one mortgage, lien or security interest shall exist upon the same property, they shall be paid in order of their priority;

d. claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment as determined under Subchapter F, Chapter 157, Texas Family Code and claims for unpaid child support obligations under Section 154.015 Family Code (See Section 2 below);

e. claims for taxes, penalties and interest owed to the State of Texas;

f. claims for cost of confinement established by the institutional division of the Texas Department of Criminal Justice;

g. claims for repayment of medical assistance payments made by the State under Chapter 32, Human Resources Code, to or for the benefit of the decedent; and

h. all other claims.

Section 355.108 of the Code provides that if there is a deficiency of assets to pay all claims of the same class, then such claims shall be paid pro rata. This applies in both independent and dependent administrations.

B. Claims for Child Support.

A person may be obligated pursuant to a divorce decree to make child support payments until his children reach a certain age, even if the parent dies before the child attains the specified age. In order for the deceased parent’s estate to be obligated for the amount of child support the decedent would have paid had he lived until the child reached a specified age, a judgment must be obtained from the Court which retains jurisdiction over the minor child, commonly the Family Court which handled the divorce. Tex. Fam. Code Ann. §157.005 (Vernon Supp. 1999); Martin v. Adair, 601 S.W. 2d. 543 (Tex. Civ. App.—Beaumont 1980, on remand). The judgment must be obtained for the amount of child support the decedent would have been obligated to pay until the child reached a certain age. After such a judgment is obtained, the next friend of such minor child will be considered a creditor of the decedent’s estate and therefore, have a valid claim against the estate. Hutchings v. Bates, 393 S.W.2d 338 (Tex. Civ. App--Corpus Christi 1965), aff’d 406 S.W. 2d 419 (Tex. 1966). The next friend must then present a claim in the amount of the judgment against the decedent’s estate. If the decedent’s personal representative denies the claim, the court handling the probate proceedings is authorized to render judgment for such debt against the decedent’s estate. Smith v. Bramhall, 556 S.W.2d 112 (Tex. Civ. App--Waco 1977, writ ref’d n.r.e.). Tex. Fam. Code Section 154.015 has resolved the split among Texas Courts over the issue of whether child support payments should be reduced by the amount of social security death benefits paid to the same claimant as a result of the decedent’s death. Tex. Fam. Code Section 154.015(c)(4) states that social security death benefits must be considered in determining the amount of the unpaid child support obligation owed by the decedent.

C. Debts Due to the United States.

It is important to remember that, especially in an insolvent estate, there are other debts and expenses which must be taken into account by the personal representative, whether that representative is a dependent administrator or an independent executor, before the representative can pay any of the claims
which are classified under §355.102 of the Code. Nowhere in the Code is any mention made of amounts which may be owing to the United States Government. But under 31 U.S.C.A. §3713(a), a claim of the United States Government must be paid before other claims against the estate. Section 3713(a) provides as follows:

(a)(1) A claim of the United States Government shall be paid first when:

(A) a person indebted to the Government is insolvent and:
(i) the debtor is without enough property to pay all debts makes a voluntary assignment of property;
(ii) property of the debtor, if absent, is attached, or
(iii) an act of bankruptcy is committed;
(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

The cases have interpreted Section 3713 to require payment to the IRS above other debts of the estate; however, family allowances, administration expenses and funeral expenses have been determined not to be “debt” and therefore are not subject to the superior priority of the United States’ claims. United States v. Weisburn 48 F.Supp. 393 (E.D.Pa.1943); Rev. Rul. 80-112, 1980-1 C.B. 306.; PLR 8341018 (1983); Schwartz v. Commissioner, 560 F.2d 311 (8th Cir.1977). Note that only administration expenses have a priority over federal tax claims which are secured by a lien. However, not all cases are consistent on this matter and care should be taken in insolvent estates in determining payment of expenses, debts and claims due to the Federal Government so as not to make the personal representative personally liable for such amounts if assets of the estate were distributed to creditors, family members or beneficiaries instead.

D. Order of Payment of Claims.

Although Section 355.102 provides for the classification of claims, Section 355.103 provides the order of payment of claims and when claims can be paid. Basically, the order for payment of claims is as follows: (a) funeral expenses and expenses of last illness not to exceed $15,000.00; (b) allowances made to surviving spouse and children or to either; (c) expenses of administration and expenses incurred in preservation, safekeeping and management of the estate; and (d) other claims against the estate in order of their classification. After the date letters are granted and on application by the personal representative stating that the personal representative has no actual knowledge of any outstanding or enforceable claims against the estate, other than those claims that have already been approved and classified by the Court, the Court may order the personal representative to pay any claim that is allowed and approved. No claims for money against the estate of a decedent shall be allowed by the personal representative, and no suit shall be instituted against the personal representative on any such claim after an order for the final partition and distribution is made; but after such an order has been made, the owner of the claim, if it is not barred by limitations, shall have an action thereon against the heirs, devisees, legatees or creditors of the estate limited to the value of the property received by them in distribution from the estate. Section 355.063.

E. Secured Creditors.

1. Election by Secured Creditor.

When a secured creditor files a claim for money against an estate, the creditor must specify, in addition to the other matters required in a claim: (1) whether it desires to have the claim allowed and approved as a mature secured claim that may be paid in the due course of administration, in which event, it shall paid if allowed and approved; or (2) whether it is desired to have the claim allowed, approved and fixed as a preferred debt and lien against a specific property securing the indebtedness and paid according to the terms of the contract, in which event it shall be so allowed and approved if it is a valid lien; provided, however, the personal representative may pay said claim prior to maturity if it is in the best interest of the estate to do so. Section 355.151.

2. Time for Election.

A secured creditor must make the election described above within six months after the date letters are granted, or within four months after the date notice is received under Section 308.053 of the Code, whichever is later. The secured creditor may present its claim and specify whether the claim is to be allowed and approved either as a matured secured claim or a preferred debt and lien. If the secured claim is not timely presented, or if the claim is presented without specifying how the claim is to be paid, it will be treated as a claim being paid as a preferred debt and lien, and no deficiency may be allowed against any other assets of the estate. Section 355.152.
If a secured claim is allowed as a matured secured claim, the claim shall be paid in the due course of administration, and the secured creditor is not entitled to exercise any other remedies, including foreclosure, in a manner that prevents the preferential payment of claims and allowances as described in the Code. Section 355.153.

Section 255.301 repealed the common-law doctrine of exoneration of liens with respect to Wills executed on or after September 1, 2005. As a result, a specific devisee of encumbered property takes title subject to the encumbrance (absent contrary provision). Section 355.153 addresses the situation where the secured creditor elects matured secured claim status, requiring immediate payment of its claim out of the estate. The devisee has the option of satisfying the claim by its payment. If the devisee elects not to pay the claim, the personal representative must sell the property and apply the sale proceeds to the debt.

When an indebtedness is allowed as a preferred debt and lien, no further claim shall be paid against the other assets of the estate by reason of the claim, but the claim shall remain a preferred lien against the property securing the same, and the property shall remain as security for the debt, and any distribution or sale thereof, prior to final maturity or payment of the debt. If property securing a claim that is allowed as a preferred debt and lien is not sold or distributed within six months from the date letters are granted, the representative of the estate shall promptly pay all maturities which have accrued on the debt according to the terms of the contract and shall perform all of the terms of any contract securing the same. If the representative defaults in such payment or performance, on application of the claimant, the Court shall require the sale of the property or authorize a foreclosure. The procedures for a foreclosure and sale of the property are set forth in Section 355.156-160.

V. SETTING ASIDE EXEMPT ASSETS
In both a dependent and independent administration, the personal representative is required to set aside exempt assets for the use and benefit of the surviving spouse, minor children and unmarried children remaining with the family of the deceased. Exempt property is considered any property of the estate that is exempt from execution of forced sale by the Constitution and laws of the State of Texas. This includes the homestead and any property exempt from execution as set forth in the Texas Property Code.

A. Action by Personal Representative.
Section 353.051 provides that the personal representative, immediately after the inventory, appraisement and list of claims has been approved, shall by order of the Court, set apart for the use and benefit of the surviving spouse, minor children, and unmarried children remaining with the family, all of such exempt property of the estate. An independent executor shall set aside such exempt assets for the use and benefit of the surviving spouse, minor children, and unmarried children remaining with the family, all of such exempt property of the estate. An independent executor shall set aside such exempt assets for the use and benefit of the surviving spouse, minor children, and unmarried children remaining with the family, all of such exempt property of the estate. An independent executor shall set aside such exempt assets for the use and benefit of the surviving spouse, minor children, and unmarried children remaining with the family, all of such exempt property of the estate.

B. Delivery of Exempt Assets.
The exempt property set apart to the surviving spouse and children shall be delivered by the executor or the administrator without delay as follows: (a) if there be a surviving spouse and no children, or if the children be the children of the surviving spouse, the whole of such property shall be delivered to the surviving spouse; (b) if there be children and no surviving spouse, such property, except the homestead, shall be delivered to such children if they be of lawful age or to their guardian if they be minors; (c) if there be children of the deceased of whom the surviving spouse is not the parent, the shares of such children in such exempt property, except the homestead, shall be delivered to such children if they be of lawful age or to their guardian if they be minors; and (d) in all cases, homestead shall be delivered to the surviving spouse if there be one, and if there be no surviving spouse, to the guardian of the minor children or to the unmarried adult children, if any, living with the family. Section 353.052.

C. Homestead.
A homestead can be defined as being either urban or rural. An urban homestead is located within a municipality or subdivision, and is served by police protection, fire protection, and at least three of the following: electricity, natural gas, sewer, storm sewer and water. An urban homestead can consist of no more than ten acres of land in one or more contiguous
lots, and includes the improvements thereupon. A homestead is also considered urban if it is both an urban home and a place of business. A rural homestead consists of not more than 200 acres which may be in one or more parcels and the improvements thereupon if the home is occupied by a family; or if the rural home is occupied by a single adult person, it may not be more than 100 acres.

D. Partition of Homestead.

The homestead rights of the surviving spouse and children of the deceased are the same whether the homestead be separate property of the deceased or the community property between the surviving spouse and the deceased, and the respective interest of the surviving spouse and children shall be the same in one case as in the other. Section 102.002. Upon the death of a spouse, the homestead generally retains its prior definition either as urban or rural; however, in the case of a rural homestead, the homestead rights of the decedent’s surviving spouse and children continue, but only as to one hundred acres of the rural homestead, as the spouse and child are at that point determined to be single persons. United States v. Blakeman, 750 F.Supp. 216 (N.D.Tex 1990), affirmed in part, reversed in part, 997 F.2d. 1084 (5th Cir. 1993), cert denied, 510 U.S. 1042 (1994).

The homestead may not be partitioned among the heirs of the deceased during the lifetime of the surviving spouse, as long as the survivor elects to use and occupy the same as the homestead, or so long as the guardian of the minor children of the deceased is permitted under proper order of the Court to use and occupy the same. Section 102.005. Note, however, if only an unmarried adult child of the decedent is living in the homestead, it may be partitioned. When a surviving spouse dies or sells his or her interest in the homestead, or elects to no longer use or occupy the same as a homestead, or when the proper court no longer permits the guardian of the minor children to use or occupy the same as a homestead, it may be partitioned among the respective owners thereof in a like manner as other property held in common. Section 102.006.

The rights of the surviving spouse or child entitled to homestead rights is considered a homestead life estate under case law. The homestead life tenant is required to pay maintenance and upkeep on the property, taxes, and interest on any mortgage against the property. Principal payments on the mortgage and insurance are the responsibility of the remainder beneficiaries. Trimble v. Farmer, 157 Tex. 533, 306 S.W.2d 157(1957); Hill v. Hill, 623 S.W. 2d 779 (Tex. App.-- Amarillo 1981, writ ref’d n.r.e.).

E. Homestead Free from Debts.

Except as provided in Section 102.004 of the Code, the homestead shall not be liable for payment of debts of the estate. Consequently, if a constituent family member survives the decedent, then the homestead passes free from the claims of creditors, except as to those creditors defined in Section 102.004, forever. Constituent family members include the spouse, minor children and unmarried adult children remaining with the family. In George v. Taylor, 296 S.W. 2d 620 (Tex. Civ.App—Fort Worth 1956, writ refused n.r.e.), the homestead is not liable for the decedent’s debts following the death of the widow. Anyone who inherits the property receives it free from debt. Further, the homestead passes free from debt if the decedent is survived by a constituent family member whether or not such family member inherits the house. Consequently, if the decedent is survived by a minor child, but such minor child’s guardian does not elect to exercise the minor child’s homestead rights to live in the home, the homestead passes free from the claims of creditors to the ultimate beneficiaries of the homestead. Nat’l Union Fire Ins. Co. v. Olson, 920 S.W. 2d 458 (Tex. App. -- Austin 1996, no writ).

F. Title to Exempt Assets.

The exempt personal property to be set aside by the personal representative shall include any property that is exempt from execution or forced sale by the Constitution and the laws of the State of Texas. This includes any property described in Sections 42.001, et seq. of the Texas Property Code. A traditional list of exempt assets is found in Section 42.002, and certain retirement plans, annuity contracts and life insurance are described in Section 42.0021. The definition of exempt property is important because the personal representative has to determine whether or not the estate is insolvent. An estate is considered insolvent if the debts exceed the assets; however, in ascertaining whether an estate is insolvent, the exempt property set apart to the surviving spouse or children, or the allowance in lieu thereof and family allowance shall not be considered as assets of the estate. Section 353.154.

If an estate is insolvent, then upon final settlement of the estate, the title of the surviving spouse and children to the exempt properties and allowances in lieu of exempt property shall become absolute and are not liable for any of the debts of the estate except for Class 1 claims. Section 353.153. If the estate is solvent, then the exempt property, except for the
homestead and any allowance in lieu thereof, shall be subject to partition and distribution among the heirs and distributees of the estate in like manner as the other property of the estate. This can be a very powerful tool in an insolvent estate for setting aside automobiles, household furnishings, jewelry and other valuable exempt assets for the benefit of the surviving spouse, minor children and unmarried children remaining with the family.

VI. SETTING ALLOWANCES

In both independent and dependent administrations, the personal representative of the estate is required to set certain allowances as required by the Code. In a dependent administration, such allowances are set by application and order of the Court. In an independent administration, the personal representative of the estate sets the allowances without approval of the Court. The author of this paper suggests that in an independent administration, a memorandum of allowances be filed in the probate proceeding setting forth the allowances that have been set by the independent personal representative. This documents the allowances set. See Appendix B. Allowances such as the family allowance, allowance in lieu of exempt assets and allowance in lieu of homestead can allow the surviving spouse and children to retain more assets of the estate. Consequently, personal representatives must always be aware of the necessity for setting such allowances.

A. Family Allowance

1. Time for Setting.

Section 353.101 provides that immediately after the inventory, appraisement and list of claims has been approved, the Court shall fix the family allowance for the support of the surviving spouse and minor children of the deceased. However, before approval of the inventory, a surviving spouse and any person who is authorized to act on behalf of the minor child of the deceased, may apply to the Court for the family allowance by filing an application and a verified affidavit describing the amount necessary for the maintenance of the surviving spouse and minor children for one year after the date of death of the decedent, and describing the spouse’s separate property and any property the minor children have in their own right. The applicant bears the burden of proof by a preponderance of the evidence at any hearing on the application. The Court shall fix the family allowance for the support of the surviving spouse and minor children of the deceased.

2. Amount of Allowance.

Section 353.102 provides that the amount of the allowance shall be sufficient for the maintenance of the surviving spouse and minor children for one year from the time of death of the testator or intestate. The allowance shall be fixed with regard to the facts and circumstances then existing and those anticipated to exist during the first year. The allowance may either be paid in a lump sum or in installments as the Court shall order. The family allowance is a community debt and therefore will be satisfied in part out of the surviving spouse’s half of the community assets under administration. Miller v. Miller, 235 S.W. 2d 624 (Tex. 1951). No allowance shall be made for the surviving spouse when the survivor has separate property adequate for the survivor's maintenance, nor shall such allowance be made to the minor children when they have property in their own right adequate for their maintenance. Section 353.101. However, it appears that at least one court does not consider property inherited by the surviving spouse, or non-probate assets such as life insurance received by the surviving spouse as a result of the death of the decedent, when setting the allowance, although there was no holding to this effect by the Court. Churchill v. Churchill, 780 S.W.2d 913 (Tex. App.—Fort Worth 1989, no writ).

3. Payment of Allowance.

The family allowance shall be paid in preference to all other debts or charges against the estate except Class 1 claims. Section 353.104. Section 353.105 provides that the family allowance shall be paid as follows: (a) to the surviving spouse if there is a surviving spouse for the use of the surviving spouse and the minor children if such children be the surviving spouse’s children; (b) if the surviving spouse is not the parent of such minor children or of some of them, the portion of such allowance necessary for the support of such minor children of which the surviving spouse is not the parent shall be paid to the guardian or guardians of such child or children; (c) if there be no surviving spouse, the allowance to the minor child or children shall be paid to the guardian or guardians of such minor child or children; and (d) if there be a surviving spouse and no minor children, the entire allowance shall be paid to the surviving spouse.

B. Allowances in Lieu of Exempt Property

1. Setting Allowances.

Section 353.053 provides for allowances in lieu of exempt property if such exempt property is not on
hand in the decedent’s estate. If there should not be among the effects of the deceased all or any of the specific articles exempted from execution or forced sale by the Constitution and the laws of the State, the Court may make a reasonable allowance in lieu thereof to be paid to such surviving spouse, minor children, and unmarried children remaining with the family. An allowance in lieu of a homestead cannot exceed $45,000.00 and the allowance in lieu of other exempted property shall not exceed $30,000.00, exclusive of the allowance for support of the surviving spouse and minor children. Instances where an allowance in lieu of homestead might be appropriate is when the decedent and the family were living in rented property or if the mortgage on the homestead is so high that the surviving spouse or minor children cannot reasonably be expected to pay the mortgage and therefore, the home is unavailable for their occupancy. Ward v. Braun, 417 S.W. 2d 888 (Tex. Civ. App.—Corpus Christi 1967, no writ). The exempt property other than the homestead or an allowance made in lieu thereof, shall be liable for payment of Class 1 claims, but such property shall not be liable for any other debts of the estate, as provided in Section 353.155. Consequently, an allowance in lieu of homestead is paid before any other claims. An allowance in lieu of exempt property may be liable for payment of Class 1 claims but has priority over all other claims. Further, if the estate is determined to be insolvent under Section 353.154, then the allowance in lieu of exempt property shall be set aside for the surviving spouse, minor children and unmarried children remaining with the family above any other debts of the estate, except in Class 1 claims.

2. Delivery of Allowances

Section 353.074 provides that the allowance in lieu of exempt property shall be paid as follows: (1) if there be a surviving spouse and no children, or if all of the children are the children of the surviving spouse, the whole shall be paid to the surviving spouse; (2) if there be children and no surviving spouse, the whole shall be paid to and equally divided among them if they be of lawful age, but if any of such children are minors, their share shall be paid to their guardian; and (3) if there be a surviving spouse and children of the deceased, some of whom are not the children of the surviving spouse, then the surviving spouse shall receive one-half (1/2) of the whole plus the shares of the children of whom the survivor is the parent, and the remaining share shall be paid to the children of whom the survivor is not the parent, or if they are minors, to their guardian.

C. Timely Setting Allowance

By properly setting a family allowance and allowances in lieu of exempt property, the personal representative of the estate can have more non-exempt assets set aside for the benefit of the spouse and children over other claimants against the estate. Consequently, this is an important part of the duties of the personal representative, and a personal representative can be held liable for failure to properly set such allowances. Further, many courts will not set a family allowance if the request is made more than one year after the date of death, the reason being that if the surviving spouse or minor children have managed for more than one year, there is not a need to set allowances to support them for that year.

VII. NON-PROBATE ASSETS

In most instances, creditors of an estate cannot reach non-probate assets. Non-probate assets such as life insurance, IRA’s and qualified plan assets pass pursuant to the beneficiary designations and are outside the reach of the decedent’s creditors unless paid to the estate. Parker Square State Bank v. Huttash 484 S.W. 2d 429 (Tex. Civ. App—Fort Worth 1972, writ refused); Pope Photo Records, Inc. v. Malone 539 S.W. 2d 224 (Tex. Civ. App.—Amarillo 1976, no writ). However, some non-probate assets, such as multi-party bank accounts and joint tenancy with rights of survivorship may be subject to the claims of creditors. Section 113.252 of the Code provides that any multi-party bank accounts, including right of survivorship accounts, may be made available as necessary to pay the decedent’s debts, taxes and expenses of the administration, including statutory allowances to the surviving spouse and children if other assets of the decedent’s estate are insufficient. Further, any party receiving payment from a multi-party account after the death of the decedent shall be liable to account to the decedent’s personal representative for such taxes and debts of the decedent, up to the amount passing to the person from the bank account. However, in order for the payee to be liable, the personal representative must receive a written demand from the surviving spouse, a creditor, or one acting on behalf of the decedent’s minor child. Any such action must be brought within two (2) years after the decedent’s date of death. A financial institution will not be liable for paying such sums on deposit to the payee or beneficiary, unless it receives written notice from the personal representative stating that the sums on deposit are
needed to pay debts, taxes and expenses of administration.

VIII. GUARDIANSHIP ESTATES

A. Notice to Creditors.

Sections 1153.001 and 1153.003 of the Texas Probate Code provide for the notices that a guardian in a guardianship estate is required to give to creditors.

1. Notice by Publication.

Within one (1) month after receiving letters, the personal representative of a guardianship estate shall publish in some newspaper, printed in the county where the letters were issued, a notice requiring all persons having claims against the estate being administered to present the same in the time prescribed by law. The notice shall include the date of issuance of letters held by the representative, the address to which the claims may be presented and an instruction of the representative’s choice that the claims be addressed in care of the representative, in care of the representative’s attorney or in care of “Representative, Estate of_________”. A copy of the printed notice together with the publisher’s affidavit that the notice was properly published shall be filed in the court where the cause is pending. Published notice is required in all independent administrations.

2. Notice to Secured Creditors.

A guardian of an estate must also give notice to secured creditors in accordance with Section 1153.003 of the code. Within four (4) months after receiving letters, the guardian shall give notice of the issuance of such letters to each person having a claim for money against the estate of the ward if the guardian has actual knowledge of the claim. Section 1153.003 provides that such notice must be given by certified or registered mail with return receipt requested to an unsecured creditor expressly stating that the creditor must present a claim not later than the 120th day after the date of receipt of the notice or the claim is barred, provided that the claim is not already barred by the applicable statute of limitation. Section 1153.004 provides that a notice must include: (1) the address to which claims may be presented; and (2) an instruction that the claim be filed with the Clerk of the court issuing the letters of guardianship.

4. Penalty for Failure to Give Required Notices.

Pursuant to Section 1153.005 of the Code, if a guardian fails to give notice by publication, or to a secured creditor, or to an unsecured creditor, the guardian and the sureties on the guardian’s bond shall be liable for any damage which any person suffers by reason of such neglect, unless it appears that such person had notice otherwise.

B. Presentment of Claim by Secured Creditor.

Pursuant to Section 1157.151, a creditor with a claim for money secured by real or personal property must give notice to the guardian of the creditor’s election to have the creditor’s claim approved as a matured secured claim to be paid in the due course of administration. If this election is not timely made, the claim is classified as a preferred debt and lien against the specific properties securing the indebtedness and shall be paid according to the terms of the contract that secured the lien, and a claim may not be asserted against other assets of the estate. The guardian may pay the claim before the claim matures if paying the claim before maturity is in the best interest of the estate. If a secured creditor’s claim is considered a preferred debt and lien, then the creditor may not seek any deficiency against the other assets of the estate. If the property that secures a claim that has been allowed, approved and fixed is not sold or distributed not later that the 12th month after the date letters of guardianship are granted, the guardian of the estate shall promptly pay all maturities that have accrued on the debt according to the terms of the maturities and shall perform all of the terms of the contract securing the maturities. If the guardian defaults in the payment or performance, the Court, on motion of the claim holder, shall require sale of the property.
C. Presentment of Unsecured Claim.

In a guardianship, an unsecured creditor who has a claim for money against the estate and who has received the 120 day notice, shall give notice to the guardian of the nature and amount of the claim no later than the 120th day after the date on which notice is received, or the claim is barred. In a guardianship, the creditor is required to “present” its claim. The Probate Code authorizes two different methods by which a claim may be presented: (a) the creditor may present the claim directly to the guardian as authorized by Section 1157.051; or (b) claims may also be presented by depositing, or filing, same with the Clerk of the Court pursuant to Section 1157.002 of the Code. If a claim is deposited with the Clerk, then the Clerk is directed to notify the “guardian” of the estate of the deposit of the claim with the Clerk, but Section 1157.002 goes on to provide that failure of the Clerk to give that notice does not affect the validity of the presentment or the presumption of rejection if the claim is not acted upon within thirty (30) days after it is filed with the clerk.

D. Action by Guardian with Respect to Claims.

1. Form of Claim.

Subject to one exception found in Section 1157.102, Section 1157.004 of the Code prohibits a guardian of the estate from allowing, and the Court from approving, any claim that is not supported by an affidavit that the claim is just and that all legal offsets, payments and credits known to the affiant have been allowed. Consequently, any time a claim is received it should be checked for these magic words. In addition, Section 1157.005 of the Code contains the requirement that if the claim is made on behalf of a corporation, the “cashier, treasurer or managing official” of the corporation must make the affidavit authenticating the claim. Further, if affidavit is made by an officer of a corporation, an executor, administrator, guardian, trustee, assignee, agent or attorney, it is sufficient to state in such affidavit that the claim is just and that all legal offsets, payments and credits known to the affiant have been allowed. A corporate representative signing in his or her individual capacity, or simply signing the name of the corporation, with nothing else, is not proper, and the claim should be rejected. Section 1157.102 provides that a guardian may pay an unauthenticated claim against the estate of the ward if the guardian believes it to be just. The guardian and the sureties on his bond shall be liable for the amount of the payment of the claim if the Court finds the claim is not just.

2. Objections to the Form of Claims.

Under Section 1157.007 of the Code, a guardian is deemed to have waived “any defect of form, or claim of insufficiency of exhibits or vouchers presented” in a claim, unless he files a written objection thereto within thirty (30) days after presentment. The dilemma facing the guardian on this subject is whether a defect in a claim is one of form only, or is a fatal defect, rendering the claim a nullity. This author’s practice is to reject a claim that is not in the proper form and state that the reason for the rejection of the claim is because the claim does not comply with the form required by the Texas Probate Code. If the creditor fails to timely file a proper claim and does not file suit within ninety days of the rejection, the guardian can argue that the claim is barred because the claim was rejected.

3. Endorsement of Claim.

Under Sections 1157.051 and 1157.052 of the Code, the guardian must endorse on or annex to every claim presented to him, within thirty (30) days after presentment, a memorandum signed by him, stating the time of presentation or filing, and whether he allows or rejects it, or what portion thereof he allows or rejects. The administrator’s failure to take any action constitutes a rejection of the claim; and, under Section 1157.052, if the claim is thereafter established by suit, the costs shall be taxed against the guardian, individually, or he may be removed on the written complaint of any person interested in the claim, after citation and hearing.

4. Limitations on Claims.

The guardian is expressly prohibited by Section 1157.061 from allowing any claim that is barred by limitations. If the guardian allows such a claim, and if the Court is satisfied that limitations has run, Section 1157.061 directs the Court to disapprove the claim. Under Section 1157.008 of the Code, the general statutes of limitations are tolled: (1) by filing a claim which is legally allowed and approved; or (2) by bringing a suit on a rejected claim within ninety (90) days after rejection.

5. Rejected Claims.

If a guardian rejects a claim, the Court cannot override the rejection unless the rejected claim is established by suit. When that occurs, the Court may
then render a judgment granting the claim and classifying it. Under Section 1157.064, a creditor cannot obtain a valid judgment against a guardian unless he goes through the claims process, including presentment, rejection by the guardian, and obtaining a judgment in a suit on the rejected claim. If a guardian rejects a claim, then the creditor must, within ninety (90) days of rejection, file suit or the claim is barred.

IX. CLASSIFICATION OF CLAIMS.

A. Duty of Guardian.

In a guardianship, whenever a claim is allowed by the guardian, the Court classifies the claim. Under Section 1157.055 of the Code, the Court classifies a claim ten (10) days after the guardian has allowed it and the claim has been placed on the claims docket. The Court can approve the claim in whole, in part or reject it. It should be noted that Section 355.102 of the Code deals with classification of claims against decedent’s estates but there is no corresponding Code section for guardianship estates. Section 1001.102 states that to the extent there is no conflict, the laws applicable to estates of decedents also apply to guardianships. The classes in which creditor’s claims may be classified under Section 355.102 may also be applicable to claims against estates of wards. However it should be noted that the order in which claims are paid under Section 1157.103 may suggest a different classification of claims than under Section 355.102.

Section 355.102 of the Code sets forth the eight classes in which the creditor’s claim may be classified:

a. funeral expenses and expenses of last sickness for a reasonable amount to be approved by the Court, not to exceed a total of $15,000.00, with any excess to be classified and paid as any other unsecured claim;

b. expenses of administration and expenses incurred in the preservation, safekeeping and management of the estate including fees and expenses awarded under Section 352.052;

c. secured claims for money under Section 355.151, including tax liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien and when more than one mortgage, lien or security interest shall exist upon the same property, they shall be paid in order of their priority;

d. claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment as determined under Subchapter F, Chapter 157, Texas Family Code (See Section 2 below);

e. claims for taxes, penalties and interest owed to the State of Texas;

f. claims for cost of confinement established by the institutional division of the Texas Department of Criminal Justice;

g. claims for repayment of medical assistance payments made by the State under Chapter 32, Human Resources Code, to or for the benefit of the decedent; and

h. all other claims.

Section 355.108 of the Code provides that if there is a deficiency of assets to pay all claims of the same class, then such claims shall be paid pro rata.

B. Order of Payment of Claims.

Section 1157.103 provides the order of payment of claims and when claims can be paid. Basically, the order for payment of claims is as follows: (a) expenses administration; (b) funeral expenses of the ward and expenses of the ward’s last illness, if the guardianship is kept open after the death of the ward as provided under this chapter, except that any claim approved or established by suit before the death of the ward shall be paid before the funeral expenses and expenses of the last illness; (c) expenses of administration; and (d) other claims against the ward or the ward’s estate. If the estate is insolvent, the guardian shall give first priority to the payment of a claim relating to the administration of the guardianship. The guardian shall pay other claims against the ward’s estate in the order prescribed.

X. CONCLUSION

The Texas Estates Code can be a trap for the unwary creditor and a trap for the unwary attorney representing a personal representative of the decedent’s estate. The Estates Code, as well as other Texas law and case history, can affect a creditor’s right to assets in the decedent’s estate. A decedent who was very credit worthy during his lifetime may
be considered insolvent at the time of death after considering non-probate assets, exempt assets and allowances. Consequently, the attorney representing either the creditor or the estate must be aware of these traps and take timely action to protect his or her client.
FORM NO. 1

NO. ____________

ESTATE OF § IN THE PROBATE COURT

______________________, § NO. _ OF

DECEASED § DALLAS COUNTY, TEXAS

NOTICE TO CREDITORS

IN RE: Estate of ________________, Deceased

Notice is hereby given that Letters Testamentary (Letters Of Administration) of the Estate of ________________, Deceased, were granted to the undersigned on __________, 2014, by Probate Court No. _ of Dallas County, Texas. All persons having claims against said Estate are hereby required to present the same to _____________, Independent Executor (Administrator) of the Estate of ________________, Deceased, within the time prescribed by law. Claims should be mailed to: _____________, Independent Executor (Administrator) of the Estate of ________________, Deceased, (address).

_____________________, Independent Executor (Administrator)
of the Estate of ________________, Deceased

Attorney:
FORM NO. 2

__________, 2014

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

In re: Cause No. ________; Estate of ________________, Deceased
Probate Court No. _ of Dallas County, Texas
Your Client: __________________
Client Reference #: ____________

Dear Sir or Madam:

I represent the Estate of ________________, Deceased. Please be advised that ____________ has been appointed as the Independent Executor/Executrix of the above-referenced Estate by the Probate Court of ________ County, Texas in the above-referenced cause number. Letters Testamentary were issued by the Court on __________________. I have enclosed a copy of Letters Testamentary for your file.

It has come to our attention that the Decedent may have been indebted to you at the time of his/her death. You may also find that one of the obligors on the note, is the surviving spouse of Decedent, ________________. Please consider this your formal notice under Section 308.053 of the Texas Estates Code. Also, please forward to me copies of the promissory note, any security agreements executed by the decedent and/or ________________________, a statement declaring the balance as of __________________, the Decedent’s date of death, and information concerning whether the note is current.

If you have any questions or comments, please feel free to call.

Sincerely yours,

________________________
Attorney for Dependent Administrator

Enclosure

cc: _____________________
In re: Cause No. _________; Estate of ________________, Deceased
Probate Court No. _ of Dallas County, Texas
Your Client: ___________________
Client Reference #: ______________

Dear Sir or Madam:

Please be advised that Letters of Administration upon the Estate of ________________, Deceased, were granted to ________________ as Dependent Administrator of the Estate of ________________, Deceased, on the __ day of __________, 2013, in Probate Court No. _ of Dallas County, Texas. All persons having claims against said Estate are required to present the same to ________________ in the time prescribed by law. Claims should be addressed to ________________ as follows:

_______________, Dependent Administrator
Of the Estate of ________________, Deceased
c/o ________________, Attorney for Dependent Administrator
(Address)

All claims must be presented before the 121st day after the date of the receipt of this notice or the claim is barred. All claims must comply with the requirements of the Texas Estates Code.

Sincerely yours,

________________________
Attorney for Dependent Administrator
In re: Cause No. ___________  
Estate of ___________________, Deceased  
In Probate Court No. _ of Dallas County, Texas  
Account No. ______________________

Dear Sir or Madam:

Please be advised that Letters Testamentary upon the Estate of ___________________, Deceased, were granted to ________________ as Independent Executor of the Estate of ___________________, Deceased, on the ____ day of ______________, 2013, in the Probate Court No. _ of Dallas County, Texas. All persons having claims against said Estate are required to present the same to ________________ in the time prescribed by law. Claims should be addressed to ________________ as follows:

__________________________________________, Independent Executor  
of The Estate of _____________________________, Deceased  
c/o (Attorney)  
Attorney for Independent Executor  
(Address)

All claims must be presented before the 121st day after the date of the receipt of this notice or the claim is barred. All claims must comply with the requirements of the Texas Estates Code. A claim may be effectively presented by only one of the methods prescribed by §403.056 of the Texas Estates Code.

Sincerely yours,

______________________________  
Attorney for Independent Executor
FORM NO. 5

NO. ______________

IN THE ESTATE OF § IN THE PROBATE COURT

__________________, § § NO. ___ OF

DECEASED § § DALLAS COUNTY, TEXAS

AUTHENTICATED UNSECURED CLAIM

COMES NOW, _______________ ("Claimant"), the owner of an unsecured claim against the Estate of ________________, Deceased, in the sum of $_________. This claim is founded upon the following:

1. Claimant advanced funds in payment of Decedent’s ___________ in the total amount of $___________.

2. A breakdown (by claimant and by category) of all expenses described above is attached hereto as Exhibit “A” and incorporated herein by reference for all purposes. Additionally, true and correct copies of receipts and statements evidencing all such payments above are attached hereto as Exhibit “B” and incorporated herein by reference for all purposes.

3. Claimant requests that the claim be allowed and approved as a Class __ Claim in this Estate.

Respectfully submitted,

_________________________, Claimant

_________________________, ATTORNEY FOR CLAIMANT
STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared [Name], and after being duly sworn by me, stated that the foregoing unsecured claim is just and that all legal offsets, payments and credits known to Claimant have been allowed.

[Signature]

SWORN TO AND SUBSCRIBED before me on the___ day of _______, 2013, by [Name]

[Signature]

NOTARY PUBLIC, STATE OF TEXAS
FORM NO. 6

IN THE ESTATE OF

_____________________,
DECEASED

IN THE PROBATE COURT

NO. ___ OF

DALLAS COUNTY, TEXAS

MEMORANDUM OF ALLOWANCE

The Authenticated Unsecured Claim of _____________________ in the amount of $_______ was presented to me on the ___ day of _______________, 2013. After examining the claim, I hereby ALLOW the claim in full, as a matured claim to be paid in the due course of administration.

SIGNED this ____ day of _______________, 2013.

_____________________, Administrator of the Estate of _____________, Deceased
FORM NO. 7

IN THE ESTATE OF ______________________,

DECEASED

IN THE PROBATE COURT

NO. ___ OF

DALLAS COUNTY, TEXAS

ORDER APPROVING CLAIM

On this _____ day of __________________, 2013, came on to be examined the
Authenticated Unsecured Claim of __________________ for the sum of $_______ filed with
the Clerk on __________________, 2013, said claim having been duly presented and allowed
by the representative of this Estate and entered upon the claims docket for a period of at least ten (10)
days, is hereby approved in full as a Class _________ Claim against the Estate.

SIGNED this _____ day of _____________________, 2013.

________________________________
JUDGE PRESIDING
FORM NO. 8

NO. ____________

IN THE ESTATE OF

____________________,
DECEASED

IN THE PROBATE COURT

§ § §

NO. ___ OF

§

DALLAS COUNTY, TEXAS

APPLICATION FOR AUTHORITY TO PAY CLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW ________________, Administrator of the Estate of ____________________, DECEASED, and files this Application for Authority to Pay Claim, and would respectfully show the Court:

I.

An Authenticated Unsecured Claim of ____________________ for ______________ was filed with this Court, and allowed by Administrator on __________, 2013, in the amount of $________. An Order approving the Authenticated Unsecured Claim of ____________________ for ______________ was entered upon the claim docket and classified by this Court as a Class claim on ______________, 2013.

II.

Sufficient funds are on hand to pay this claim.

WHEREFORE, PREMISES CONSIDERED, ________________, Administrator, prays that the Court authorize the payment of the claim in the amount of $________ for ______________, and, that the Court enter such further orders as deemed necessary.

Respectfully submitted,

______________________________
FORM NO. 9

NO. ______________

IN THE ESTATE OF § NO. ___ OF

____________________, § DALLAS COUNTY, TEXAS

DECEASED §

ORDER AUTHORIZING PAYMENT OF CLAIM

On this ___ day of ______________, 2013, came on to be considered the Application for Authority to Pay Claim of ______________, Administrator of the Estate of ______________, DECEASED, for the payment of the claim set out in the Application and the Court finds that the Application should be granted.

IT IS, THEREFORE ORDERED, ADJUDGED AND DECREED that ______________, Administrator, is authorized to pay the sum of $_____ to ______________ in satisfaction of the Authenticated Unsecured Claim of ______________ for ____________.

SIGNED AND ORDERED entered this ____ day of ______________, 2013.

__________________________
JUDGE PRESIDING

ORDER AUTHORIZING PAYMENT OF CLAIM - SOLO PAGE
Blake A. Scott
1919 17th Street, Unit A
Lubbock, Texas 79401
Blake.Scott@ttu.edu
LinkedIn.com/in/blakeascott
(281) 770-6738

EDUCATION
Texas Tech University School of Law  Lubbock, Texas
Candidate for Doctor of Jurisprudence
Estate Planning and Community Property Journal—Comment Editor
Board of Barristers—Director of Trial Advocacy
National Arbitration Team—2018-2019
Advanced Mock Trial Finalist—Fall 2017

Texas A&M University  College Station, Texas
Bachelor of Science
Major/Minor: Biomedical Sciences/Business Administration
May 2016

EXPERIENCE
TTU Law Civil Practice Clinical Program  Lubbock, Texas
Student Lawyer
Represent clients on civil matters including consumer disputes, Social Security disability disputes, and family disputes. Provide complete representation from client intake through case closing. Draft petitions, motions, affidavits, demands, interview clients, interview witnesses, and argue at hearings.

Attorney Dean Boyd, PLLC  Amarillo, Texas
Litigation Clerk
Work on every aspect of personal injury civil litigation from client intake through settlement or final judgement. Draft petitions, motions, demands, discovery requests, answer discovery, conduct client intake, negotiate with adjusters and opposing counsel, prepare supervisors for depositions, assist in depositions, and assist in mediations.

Lubbock County Court #1  Lubbock, Texas
Judicial Clerk to Judge Mark J. Hocker
Assisted in drafting judicial orders on family and criminal law motions. Reviewed briefs and caselaw to advise the judge on his rulings. Reviewed affidavits for search warrants and arrest warrants. Participated in interviewing children involved in custody disputes. Observed civil and criminal trials from voir dire through final judgement.

PUBLICATION
Blake Scott, Save That Money: Ensuring Donations Received Through Crowdfunding Are Properly Protected, 10 EST. PLAN. & COMMUNITY PROP. L.J. 395 (2018).

ACTIVITIES AND INTERESTS
Health Law Association, Christian Legal Society, Snowboarding, Golf, Fishing, Hunting
SAVE THAT MONEY: ENSURING DONATIONS RECEIVED THROUGH CROWDFUNDING ARE PROPERLY PROTECTED

by Blake Scott*

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* J.D. Candidate, Texas Tech University School of Law, May 2019. This comment is dedicated to Nathan James Kaufman whose friendship, passion, and humor will never be forgotten. Rest easy, kid.
I. PREFACE

In 2012, Chris Salvatore moved into an apartment complex in Los Angeles, California. While coming and going from his new home, Chris noticed an eighty-five-year-old woman named Norma lived in the apartment across the hall. Chris, a young and outgoing actor, began saying hello to Norma day after day through her kitchen window. After a few weeks of waves and greetings, Chris took the liberty of knocking on Norma’s door and stepped into her world. Curious to hear Norma’s life stories, Chris began stopping by to see Norma more frequently. Chris quickly discovered that Norma had no family living in California, she had a laundry list of health problems, and she had no way to get around because she recently lost her ability to drive. Chris recounts the day he first spoke to Norma face-to-face as the day that changed his life.

Chris took it upon himself to make Norma his best friend. He began cooking for her, driving her wherever she needed to go, and taking care of her in any way he could. Thanks to Chris, Norma made it to her doctor appointments, was able to grocery shop, and get to the pharmacy to pick up her medications. The two had become inseparable, but in 2016, Norma’s health began declining at a rapid rate. Norma, who was now eighty-nine was losing her ability to walk, constantly falling, and suffering from severe asthma attacks throughout the night. Doing everything he could, Chris installed a wireless doorbell from Norma’s apartment to his own. Whenever Norma needed help, she could push the button, and Chris would come running every time—regardless of the hour of the night.

Eventually, Norma’s health deteriorated to the point that doctors gave her orders that she could not live at home without twenty-four-hour care. Wanting to keep Norma out of the county nursing facility, Chris took it upon himself to raise money to fund professional 24-hour home care for Norma. Not having much money himself, Chris turned to GoFundMe to crowdfund.

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
the necessary amount of money.\textsuperscript{17} When Chris first launched the crowdfunding campaign, he estimated that the cost of professional home care would be $3,500 per week.\textsuperscript{18} He set the campaign goal at an ambitious $60,000 and began sharing the campaign link.\textsuperscript{19}

Chris’s campaign quickly went viral, and before he knew it, the campaign surpassed the $60,000 goal.\textsuperscript{20} Chris moved Norma into his apartment, set her up in his spare bedroom, and hired around-the-clock professional care for her.\textsuperscript{21} The crowdfunding campaign ended with an astonishing $77,137 raised, which was enough to fund Norma’s care.\textsuperscript{22} The generosity of everyone who donated to the campaign, along with the inspiring compassion demonstrated by Chris, allowed Norma to live out her last few months comfortably and happily.\textsuperscript{23}

While Chris’s story is an example of how a successful crowdfunding campaign can change people’s lives for the better, there are a number of problems which may arise during, or even after, the course of a crowdfunding campaign.\textsuperscript{24} Consider, for example, what happens with any leftover money after Norma passed away.\textsuperscript{25} Is the money part of Norma’s estate, or is it Chris’s property?\textsuperscript{26} If Chris had passed away during the crowdfunding campaign, would Norma still be entitled to receive the money he raised?\textsuperscript{27} How would Norma get her hands on the money if she were entitled to it?\textsuperscript{28} Finally, what if either Chris or Norma had been married and undergone a divorce proceeding during the crowdfunding campaign?\textsuperscript{29} Whose estate is the money a part of?\textsuperscript{30} Is the money considered community property in divorce proceedings, or is it separate property?\textsuperscript{31} This comment will consider the issues underlying each of the hypothetical questions, provide answers to each, and ultimately prepare attorneys to confidently address similar issues should they arise in practice.\textsuperscript{32}

\begin{flushleft}
\textsuperscript{17} Id. \\
\textsuperscript{18} Id. \\
\textsuperscript{19} Id. \\
\textsuperscript{20} Id. \\
\textsuperscript{21} Id. \\
\textsuperscript{22} Id. \\
\textsuperscript{23} Id. \\
\textsuperscript{24} See infra Part VIII.A. \\
\textsuperscript{25} See infra Part VIII.A. \\
\textsuperscript{26} See infra Part VIII.A. \\
\textsuperscript{27} See infra Part VIII.A. \\
\textsuperscript{28} See infra Part VIII.A. \\
\textsuperscript{29} See infra Part VIII.A. \\
\textsuperscript{30} See infra Part VIII.A. \\
\textsuperscript{31} See infra Part VIII.A. \\
\textsuperscript{32} See infra Part VIII.A. \\
\end{flushleft}
II. INTRODUCTION

Crowdfunding has quickly become one of the most popular ways to raise money in today’s internet-driven society. The purpose of this comment is to bring awareness to the major property and estate planning issues embedded in crowdfunding, consider possible solutions to those issues, and ultimately offer guidance to attorneys so they can provide informed and competent advice to clients engaged in crowdfunding.

Before diving headfirst into the relatively new world of crowdfunding, specific nomenclature and terms must be established and defined. Following the definitions, this comment will provide a brief background on crowdfunding and the exponential growth it has seen in the past decade. It is important to understand the rapidly growing trend of crowdfunding to properly plan for the future impact it will have on estate planning as well as society as a whole. The comment will conclude by offering guidance on how Texas attorneys can advise their clients before, during, and after such clients take on the challenge of running a successful crowdfunding campaign.

III. EXPLANATION OF IMPORTANT TERMS AND PHRASES

Crowdfunding has become a household term as of late, but the concept of crowdfunding dates back centuries. Many people engage in crowdfunding daily without even realizing it. For example, placing money in the offering plate at church is crowdfunding. Pooling money for a gift, to cater food, or to throw a party is crowdfunding. While there are numerous forms of crowdfunding, this comment will strictly discuss modern-day crowdfunding, which includes taxonomy, words, and phrases with which many are unfamiliar.

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34. See infra Part VIII.A.
35. See infra Part IV.
36. See infra Part V.
38. See infra Part VII.
40. Id.
41. Id.
42. Id.
43. See infra Part III.A.
A. Definitions

Crowdfunding is simply “the practice of obtaining needed funding (as for a new business) by soliciting contributions from a large number of people especially from the online community.” While this simple definition may be sufficient for day-to-day discussion, this comment will rely on Massolution’s (the industry leader in crowdfunding analytics) definition, which defines crowdfunding as “any kind of capital formation where both funding needs and funding purposes are communicated broadly, via an open call, in a forum where the call can be evaluated by a large group of individuals, the crowd, generally taking place on the internet.”

In every crowdfunding campaign, there are two major parties—the campaign owner and the crowdfunder. The crowdfunding Industry Report defines campaign owners as “the person or company who is in charge of the campaign . . . In the case of financial crowdfunding, this is the issuer.”

Crowdfunders, on the other hand, are “the individual[s] that support or invest in crowdfunding campaigns. Philanthropic causes motivate some crowdfunders of non-financial return crowdfunding campaigns, or investors in the case of crowdfunding for financial return.” A third class of people has emerged which adds a level of complexity to the crowdfunding issues as well—the “considerate friend.” The considerate friend is a campaign owner who creates a crowdfunding campaign with another individual as the intended beneficiary.

Numerous types of crowdfunding models have emerged in recent years ranging from project-based models, investment or equity models, charitable models, and many more. To effectively discuss certain types of crowdfunding models, it is necessary to establish a taxonomy by which to reference the different crowdfunding models. This comment will employ the Massolution taxonomy for crowdfunding, although numerous other taxonomies exist in this rapidly expanding field.
bases itself on the campaign’s ultimate goal, and the terms are relatively intuitive.\textsuperscript{54} According to Massolution’s report, “crowdfunding models refers to the non-financial return forms of donation-based (i.e. philanthropic gestures) and reward-based crowdfunding (i.e. capital for perquisites), as well as the financial return crowdfunding models: lending-based (or debt-based), equity-based, and royalty-based crowdfunding, which is also sometimes know[n] as securities-based crowdfunding.”\textsuperscript{55} This taxonomy model is based on the type of exchange that occurs between the crowdfunder and the campaign owner.\textsuperscript{56}

\textbf{B. Crowdfunding v. Crowdsourcing}

People often interchange the word “crowdfunding” with “crowdsourcing,” but it is important to understand the distinction between the two for the purpose of this comment.\textsuperscript{57} Crowdsourcing is defined as a system or platform which “enlists a crowd of users to \textit{explicitly} collaborate to build a long-lasting \textit{artifact} that is beneficial to the whole community.”\textsuperscript{58} Crowdfunding, on the other hand, is the concept of using crowds to collect funds.\textsuperscript{59} A simple way to grasp the distinction between the two is to consider examples of each.\textsuperscript{60} Typical examples of crowdsourcing include Wikipedia, Linux, and Yahoo! Answers.\textsuperscript{61} Examples of crowdfunding platforms include GoFundMe, Kickstarter, and IndieGoGo.\textsuperscript{62} When comparing these types of campaigns, it is simple to distinguish between the two.\textsuperscript{63} Crowdfunding is the act of gathering funds for a specific purpose, while crowdsourcing is the collaboration of a community to create something which benefits the community.\textsuperscript{64}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id. at 40.
\item \textsuperscript{59} See Industry Report, supra note 37, at 34.
\item \textsuperscript{60} Doan, supra note 58, at 86–87.
\item \textsuperscript{61} Id. at 86.
\item \textsuperscript{62} See Industry Report, supra note 37, at 63.
\item \textsuperscript{64} Compare Doan, supra note 58, at 86–87, and Schweissguth, supra note 57, \textit{with Industry Report, supra note 37, at 37.}
\end{enumerate}
\end{footnotesize}
IV. BACKGROUND

As mentioned previously, crowdfunding got its start centuries ago when communities or groups would pool their resources for a common purpose. The first noted large-scale crowdfunding campaign, however, did not appear until 1997 when a British rock band utilized the concept to fund a reunion tour. This led to the first true crowdfunding platform in 2000, known as ArtistShare, which was designed to help finance bands and artists. In 2009, crowdfunding officially took off as a major source of funding as multiple platforms emerged.

By 2012, crowdfunding had exploded, and today there are well over 1,250 recognized crowdfunding platforms. Since the emergence of modern-day crowdfunding, there has yet to be a year where the growth of crowdfunding has failed to exceed the growth of the previous year. Many factors have played into the rapid expansion of crowdfunding, including the ever-increasing presence of the internet and mobile banking in our daily lives, and these driving forces do not show any signs of stopping.

The expansion of crowdfunding demonstrates more than a simple increase in the number of platforms and campaigns. The growth is largely a result of more people being willing to contribute to campaigns. While the average amount raised per campaign has remained relatively flat, the number of campaigns to reach their goals has steadily increased. This growth, paired with the general increase in the number of crowdfunding campaigns, suggests people no longer use crowdfunding exclusively for large funding goals, but for smaller, more common goals.

V. THE LAW: COMMUNITY PROPERTY V. SEPARATE PROPERTY

In Texas, property acquired during a marriage is presumed to be community property. However, if property is“(1) the property owned or claimed by the spouse before marriage; (2) the property acquired

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65. See Industry Report, supra note 37, at 37.
67. Id.
68. Id.
69. See Industry Report, supra note 37, at 8.
70. Id.
71. See id. at 37–38.
72. See id. at 15–16.
73. See id.
74. See id.
75. See id.
76. TEX. FAM. CODE. ANN. § 3.003(a) (West 1997).
spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage” then the property is considered separate property.77

Community property, in contrast, is simply defined as “the property, other than separate property, acquired by either spouse during marriage.”78 The law makes the distinction between community and separate property at the inception of title.79 The courts determined that inception of title occurs when title has vested, and the party has a right of claim to the property.80 Accordingly, for crowdfunding, there will need to be a determination as to when the beneficiary actually has a claim to the property.81

Whether donations to a crowdfunding campaign become community or separate property will hinge primarily on the classification of donations as either gifts or something other than gifts, such as income.82 In Texas, a gift to an individual who is married is separate property as a matter of law, but that does not mean the gift will remain separate property or that the grantee will be able to adequately prove the property was a gift when he or she received it.83 Clear and convincing evidence that property is separate is required to overcome the statutory presumption of community property.84

The definition of clear and convincing evidence, to overcome the presumption of community property, is the degree of proof necessary to produce a firm belief or conviction in the mind of the trier of fact that the property is separate rather than community.85 The burden of proving by clear and convincing evidence that certain property is separate, rather than community, lies with the party claiming the separate property.86 To meet this burden, the spouse must present evidence that clearly traces and identifies the disputed property as separate property.87 When a party offers clear and convincing evidence, the presumption no longer plays a role in the determination.88 Additionally, the initial presumption may not be used as evidence to convince the trier-of-fact that property is communal.89 The distinction between community and separate property will be vital when determining how funds in a crowdfunding account will be distributed in the

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77. TEX. FAM. CODE. ANN. § 3.001 (West 1997).
78. TEX. FAM. CODE. ANN. § 3.002 (West 1997).
80. Id.
81. See id.
82. See TEX. FAM. CODE. ANN. § 3.001 (West 1997).
83. See id.
84. TEX. FAM. CODE. ANN. § 3.003(b) (West 1997).
87. Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965).
89. Id.
VI. ARE DONATIONS TO CROWDFUNDING CAMPAIGNS COMMUNITY OR SEPARATE PROPERTY?

It is important to determine whether the funds in a crowdfunding campaign are considered community or separate property. Because Texas distributes separate property differently than community property, this determination will bear on how the funds are disbursed in the event of both death and divorce. As mentioned previously, this determination will hinge on whether the law classifies the contributions as gifts or something other than gifts. If the funds are classified as gifts, then the funds will also be classified as separate property. If the funds are classified as something other than gifts, such as income, then the funds are classified as community property.

A. Gifts v. Income

Crowdfunding walks a fine line between classification as a series of gifts rather than revenue or income, and that classification could make a significant difference for estate planning. Currently, there are many factors to consider when determining how the money flowing into a crowdfunding campaign should be classified—although there are no statutes or case law which provide a bright-line test.

The Texas courts define a gift as “a transfer of property made voluntarily and gratuitously.” In Grimsley v. Grimsley, the court explains that there must be (1) “an intent to make a gift” by the crowdfunder, (2) “delivery of the property” to the beneficiary, and (3) “acceptance of the property” by the beneficiary. This three-part test forces a determination of when the funds

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90. See TEX. FAM. CODE. ANN. § 3.001 (West 1997).
91. Compare TEX. EST. CODE ANN. § 201.002 (West 2014), with TEX. EST. CODE ANN. § 201.003 (West 2014) (comparing the difference between distribution of personal and community property when the decedent dies intestate).
92. Compare TEX. EST. CODE ANN. § 201.002 (West 2014), with TEX. EST. CODE ANN. § 201.003 (West 2014) (comparing the difference between distribution of personal and community property when the decedent dies intestate).
93. See id.; TEX. FAM. CODE ANN. § 3.003 (West 1997).
94. See id.
95. See id.
96. See supra note 37, at 40.
97. See infra Part VLA–B.
in a crowdfunding campaign are considered to be delivered to—and accepted by—the beneficiary.\textsuperscript{100}

The first prong of the test described in \textit{Grimsley} is “intent to make a gift.”\textsuperscript{101} In other words, the beneficiary must prove by clear and convincing evidence that each crowdfunder of the campaign intended their donation to be a gift.\textsuperscript{102} However, many of the donations made to crowdfunding campaigns are anonymous or lack a description by the crowdfunder of the purpose of their contribution.\textsuperscript{103} How, then, can intent of a gift be demonstrated by “clear and convincing evidence” if the crowdfunder never expressly states their intent?\textsuperscript{104}

For situations in which the crowdfunder has not clearly stated the intent of their asset transfer, Texas courts rely on extrinsic evidence to determine intent.\textsuperscript{105} The court in \textit{Dutton v. Dutton} clearly states, “extrinsic evidence is important in cases where the nature of a gift is raised.”\textsuperscript{106} The most valuable extrinsic evidence in determining the nature of contributions is likely to be the public description of the crowdfunding campaign as published on the crowdfunding platform.\textsuperscript{107} For this reason, it is important that managers of a crowdfunding campaign explicitly state the purpose of their campaign so as to leave no doubt about the intent of the crowdfunders.\textsuperscript{108}

Additionally, it is worth noting that no gifts become part of the community estate—even if the gifts are directed to both spouses.\textsuperscript{109} Rather, each spouse acquires an undivided one-half interest in the gift.\textsuperscript{110} There are likely to be many crowdfunding campaigns raising money for a family, or spouses, in need rather than a single individual.\textsuperscript{111} In instances like this, if the law considers the funds as “gifts,” each spouse is entitled to an undivided one-half interest in the funds received.\textsuperscript{112}

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item See supra Part V.
\item See supra Part VI.
\end{enumerate}
\end{footnotesize}
B. Determining If Contributions are Gifts

A contribution’s classification hinges on the intent of each crowdfunder. However, because it is unlikely each crowdfunder took the time to describe the intent of his or her donation, the courts will use extrinsic evidence to determine the crowdfunder’s intent. Crowdfunding platforms, such as GoFundMe, allow campaign owners to raise funds for nearly any purpose. GoFundMe lists several examples of reasons to start a crowdfunding campaign including “medical expenses, education costs, trips and aspirations, volunteer programs, youth sports, funerals and memorials, or animals and pets.” These examples, however, are noticeably different from the types of campaigns Kickstarter promotes. Kickstarter states it “can be used to create all sorts of things: art and gadgets, events and spaces, ideas and experiences. But every project needs a plan for creating something and sharing it with the world.” This unlimited range of diversity makes a bright line rule for crowdfunding campaigns difficult, if not impossible, to establish.

C. Distribution of Community Property Funds

Distribution of community property in Texas is relatively simple. The general rule is that when a person dies intestate but leaves a surviving spouse, the community property becomes the property of the surviving spouse. However, the distribution can become more complicated when children are involved. If the decedent’s children are also the children of the surviving spouse, then all of the community property is still passed to the surviving spouse. An exception occurs when the decedent has children conceived with someone other than the surviving spouse. In this instance, the law splits the community property to entitle the children of the decedent

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116. Id.
118. Id.
119. See generally Drennen, supra note 49, at 165 (concluding that each crowdfunding campaign is too different for the IRS to regulate further on the issue of whether contributions are income or gifts).
120. See TEX. EST. CODE ANN. § 201.003 (West 2014).
121. See id.
122. See id.
123. See id.
124. See id.
who are not of the surviving spouse to one-half of all community property while retaining the remaining half for the surviving spouse.\(^{125}\)

**D. Distribution of Separate Property Funds**

Distribution of separate property in Texas is slightly more complicated than the distribution of community property.\(^{126}\) Section 201.002 of the *Texas Estates Code* outlines the persons entitled to claim of title for property of a decedent who passes intestate and leaves behind personal property.\(^{127}\) If the decedent has children and a surviving spouse, the children are entitled to two-thirds of the personal estate, while the surviving spouse is entitled to one-third of the personal estate.\(^{128}\) If, however, the decedent has no children, then the surviving spouse is entitled to all of the decedent’s personal estate.\(^{129}\)

**VII. RECOvering FUNds From a CROWdfunding CAMPAIGN IF THE CAMPAIGN OWNER DIES**

Another major dilemma in regard to crowdfunding is how to recover funds that have been contributed to a crowdfunding campaign if the campaign owner passes away before withdrawing the campaign contributions.\(^{130}\) GoFundMe, for example, requires the first withdrawal be requested manually by the campaign owner while they are logged into their GoFundMe account.\(^{131}\) If the campaign owner executes the initial withdrawal, then all future contributions to the campaign will be automatically deposited in the campaign owner’s bank account.\(^{132}\) However, if the campaign owner does not execute the initial withdrawal within thirty days, GoFundMe will prevent the campaign from accepting new contributions.\(^{133}\) If the campaign owner does not execute the initial withdrawal within sixty days, GoFundMe will refund all of the contributions back to the crowdfunders.\(^{134}\) Therefore, if the campaign owner failed to leave the account login information with an interested party, it may prove difficult for anyone to login to the campaign and manually withdraw the funds from the campaign.\(^{135}\)

\(^{125}\) *See id.*


\(^{127}\) *See id.*

\(^{128}\) *See id.*

\(^{129}\) *Id.*

\(^{130}\) *See supra Part I.*


\(^{132}\) *Id.*

\(^{133}\) *Id.*

\(^{134}\) *Id.*

\(^{135}\) *See supra Part I.*
If Texas licensed crowdfunding platforms as a recognized financial institution, then Texas case law, paired with the special regulations surrounding banks and financial institutions, would provide a way of recovering the funds by way of a probated will.  Most—if not all—crowdfunding platforms are not registered as financial institutions, but they do use third-party companies, who are registered financial institutions, to actually carry out each donation and withdrawal transaction.

A. Texas Revised Uniform Fiduciary Access to Digital Assets Act

A problem that has plagued the digital world since the inception of the internet is how to recover digital assets when the owner of those digital assets passes away. Texas, along with many other states, has attempted to address this problem by passing a revised version of the Uniform Fiduciary Access to Digital Assets Act, known as the Texas Revised Uniform Fiduciary Access to Digital Assets Act (TRUFADAA).

This new addition to the Texas Estate Code outlines when, and how, an executor, administrator, or individual with power of attorney can access the digital assets of a deceased individual. The TRUFADAA, however, limits “digital assets” to a scope so narrow it is unlikely the contributions to a crowdfunding campaign would qualify. The statute defines digital assets as “an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.” Therefore, because the asset in question is money rather than an “electronic record,” the executor, administrator, guardian, or person with durable power of attorney would not be able to gain access to the funds in a crowdfunding account via this statute.

This is unfortunate because the TRUFADAA explicitly excludes financial institutions from being covered by the statute and GoFundMe, the world’s leading crowdfunding platform, claims that:

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139. TEX. EST. CODE ANN. § 351.001 (West 2017).
142. Id.
143. Id.
GoFundMe is not a broker, agent, financial institution, creditor or insurer for any user. GoFundMe has no control over the conduct of, or any information provided by, a Campaign Organizer, a Charity or any other user and GoFundMe hereby disclaims all liability in this regard to the fullest extent permitted by applicable law.\textsuperscript{146}

Therefore, if the TRUFADAA were to be amended to allow certain underlying assets—or to include assets held by a mere conduit or intermediary—then crowdfunding campaigns would be subject to the TRUFADAA and fiduciaries, trustees, and those with durable power of attorney of the deceased would be able to utilize the statute to access the campaign funds.\textsuperscript{147}

Within its terms of services, GoFundMe outlines what types of institutions it is not, but GoFundMe fails to clearly state what kind of institution it is.\textsuperscript{148} The closest GoFundMe gets to stating exactly what type of entity it considers itself to be is an “administrative platform.”\textsuperscript{149} Crowdfunding sites are not registered as financial institutions, and therefore, are not subject to the same regulations and requirements as financial institutions.\textsuperscript{150} In Texas, courts may compel financial institutions to release the balance of accounts held by a deceased to an interested person—such as an heir or spouse.\textsuperscript{151} Without protection from the TRUFADAA or the protection inherent in a financial institution, it may prove extremely difficult for heirs, spouses, or anyone else with an interest in a deceased’s estate to gain access to the funds in the crowdfunding campaign.\textsuperscript{152}

\textbf{B. Utilizing the Courts to Compel Crowdfunding Platforms to Provide Account Access to Fiduciaries}

While the TRUFADAA may prove futile in a fiduciary’s attempt to access the crowdfunding campaign funds, the fiduciary may have a remedy in the courts.\textsuperscript{153} GoFundMe’s Terms and Conditions explicitly state that “GoFundMe facilitates the Donation transaction between Campaign Organizers and Donor, but is \emph{not} a party to any agreement between a campaign organizer and a Donor. . .” [emphasis added]\textsuperscript{154} This statement is significant because it confirms that the crowdfunding platform is simply an

\textsuperscript{146} Terms and Conditions, supra note 137.
\textsuperscript{148} Terms and Conditions, supra note 137.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} TEX. EST. CODE ANN. § 153.003 (West 2015).
\textsuperscript{152} See infra Part VII.
\textsuperscript{153} See infra Part V.
\textsuperscript{154} Terms and Conditions, supra note 137.
intermediary rather than a party to the transaction.\textsuperscript{155} The distinction between whether the crowdfunding platform is a party to the transaction or not is important in determining when the beneficiary or campaign owner acquires title to the transferred funds, as well as determining whether or not the crowdfunding platform has a right to withhold funds from the campaign owner or beneficiary.\textsuperscript{156}

Section 550 of the \textit{United States Bankruptcy Code} addresses financial transfers.\textsuperscript{157} The statute does not define the term “initial transferee”, but the Fifth Circuit, as well as many other federal circuits, have interpreted the meaning of initial transferee through common law.\textsuperscript{158} In \textit{Matter of Coutee}, the Fifth Circuit adopted the majority rule for determining whether a recipient of a financial transfer is an initial transferee by articulating that “a party that receives a transfer directly from the debtor will not be considered the initial transferee unless that party gains actual dominion or control over the funds.”\textsuperscript{159} If the party never exercises dominion or control over the funds, then they are said to be a “mere conduit” in the transaction.\textsuperscript{160} The dominion and control requirement meet when the party is, “in essence, ‘free to invest the whole [amount] in lottery tickets or uranium stocks’ if it wishes.”\textsuperscript{161}

Based on the description in GoFundMe’s Terms and Conditions, it seems that GoFundMe has effectively revoked any right it may have to the funds in a crowdfunding campaign so long as it has no reason to believe the crowdfunding campaign is fraudulent or being utilized for other illegal activity.\textsuperscript{162} Because crowdfunding platforms, such as GoFundMe, have opted to explicitly remove themselves as a party to the transaction and act as a mere conduit, it is likely the crowdfunding platforms will not be considered an initial transferee.\textsuperscript{163}

If the crowdfunding platform is not an initial transferee, then the initial transferee is the campaign owner or the beneficiary.\textsuperscript{164} This conclusion begs the questions: at what point does the campaign owner or beneficiary have a claim to the title of the funds?\textsuperscript{165} Do the beneficiaries have a claim to the title the moment the crowdfunder makes a donation, the moment the campaign owner manually clicks withdraw, or the moment the funds reach the actual possession of the campaign owner or beneficiary?\textsuperscript{166}

\textit{Id.}\textsuperscript{157} See \textit{Matter of Coutee}, 984 F.2d at 140–41.
\textit{Id.}\textsuperscript{158} at 141.
\textit{Id.}\textsuperscript{159} at 140.
\textit{Id.}\textsuperscript{160} at 140–41 (quoting Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890, 894 (7th Cir. 1988)).
\textit{Id.}\textsuperscript{161} See \textit{Matter of Coutee}, 984 F.2d at 140.
\textit{Id.}\textsuperscript{162}, supra note 137.
\textit{Id.}\textsuperscript{163}; see \textit{Matter of Coutee}, 984 F.2d at 140.
\textit{Id.}\textsuperscript{164} See \textit{infra} Part VII.C.
\textit{Id.}\textsuperscript{165} See \textit{infra} Part VII.C.
\textit{Id.}\textsuperscript{166} See \textit{infra} Part VII.C.
C. The Effect of Third-Party Payment Processing

Buried deep within GoFundMe’s Terms and Conditions is a single sentence disclosing that GoFundMe uses a third-party payment processing partner to handle all financial transactions. GoFundMe lists a string of third-party payment processing partners (“Processors”) they use including “WePay, Inc., Stripe, Inc., Adyen LLC, PayPal, Inc., and PayPal Giving Fund.” Further investigation into these Processors complicates the issue of recovering funds from the campaign of a deceased campaign owner while simultaneously simplifying the issue.

By using Processors to complete transactions, crowdfunding platforms like GoFundMe never have access to the funds donated through their website. GoFundMe, Kickstarter, and IndieGoGo all use Processors rather than handling transactions between campaign crowdfunders and campaign owners themselves. While the two major Processors used by crowdfunding platforms differ in their business models, licensing, partnerships, and structures, the result from a crowdfunding crowdfunder or crowdfunding campaign owner’s perspective is the same.

WePay, the primary Processor for GoFundMe, is a Payment Service Provider (PSP). WePay is clear that it is not a licensed Money Transmitter or a registered Money Services Business. By acting simply as a PSP, WePay—similar to GoFundMe—never has control or ownership over the funds it processes. Rather, WePay has partnered with a member bank (Bank) who is ultimately responsible for the collection, transfer, and deposit of funds.

167. Terms and Conditions, supra note 137.
168. Id.
169. Compare supra Part VII.A–B, with infra Part VIII.C.
170. Compare Terms and Conditions, supra note 137 (describing GoFundMe as a facilitating platform rather than a party to the transaction), with WePay Terms of Service, WEPAY, https://go.wepay.com/terms-of-service#us perma.cc/B4RM-WSD8 (last visited Jan. 19, 2018) (stating WePay is a Payment Service Provider and outlining WePay’s relation to platforms, member banks, processors, and merchants) [hereinafter Terms of Service], and Stripe Payments Company Terms, STRIPE, https://stripe.com/spc/legal perma.cc/ GP7L-7JGP(last visited Jan. 19, 2018) (stating Stripe Payment Company is a licensed money transmitter and federally registered money services business) [hereinafter Stripe Terms].
172. Compare Terms of Service, supra note 170, with Stripe Terms, supra note 170.
173. See Terms of Service, supra note 170.
174. See id.
175. See id.
176. See id.
Understanding how these three entities are connected makes it clear that GoFundMe is nothing more than the “administrative platform” it claims to be.\(^{177}\) GoFundMe, and other crowdfunding platforms with similar structures, simply offer a platform for campaign owners and crowdfunders to create or browse crowdfunding campaigns.\(^{178}\) When crowdfunders select a campaign they wish to donate to, they will be prompted to input their payment information into a form created and controlled by WePay.\(^{179}\) WePay then securely collects the crowdfunder’s payment information and delivers the information to the Bank, who is responsible for initiating and completing the entire transaction.\(^{180}\)

Stripe, the Processor used by Kickstarter and IndieGoGo, both collects a crowdfunder’s payment information \textit{and} acts as the Bank rather than utilizing a third-party member bank.\(^{181}\) This is a slight variation from how WePay operates, but Stripe’s business model eliminates a (seemingly unnecessary) part of the transaction chain.\(^{182}\) Stripes, as previously mentioned, is both a licensed money transmitter and a federally registered money services business (MSB). While banks and MSBs are distinct, they are both considered financial institutions under the \textit{Code of Federal Regulations}.\(^{183}\)

These Processors indicate in their Terms of Service that the Bank is authorized to hold, receive, disburse, and settle funds on behalf of the merchant—which in this case is the crowdfunding campaign owner.\(^{184}\) The Terms of Service state that the transaction is complete once the Bank has made the transaction, and at that point, the bank is holding the funds on behalf of the merchant.\(^{185}\)

\textbf{D. Utilizing a Probated Will to Collect from a Financial Institution}

Regulations addressing security and privacy for financial institutions should provide a sense of relief to crowdfunders since all major crowdfunding platforms use registered financial institutions for transactions between crowdfunders and campaign owners.\(^{186}\) The additional regulations and requirements that govern financial institutions also allow for easier

\(^{177}\) \textit{See Terms and Conditions, supra note 170.}\n\(^{178}\) \textit{See id.}\n\(^{179}\) \textit{See Terms of Service, supra note 170.}\n\(^{180}\) \textit{See id.}\n\(^{181}\) \textit{Stripe Terms, supra note 170.}\n\(^{182}\) \textit{Compare Terms of Service, supra note 170, with Stripe Terms, supra note 170.}\n\(^{183}\) 31 C.F.R. § 1010.100(t) (2018).\n\(^{184}\) \textit{See Terms of Service, supra note 170.}\n\(^{185}\) \textit{See id.}\n\(^{186}\) \textit{See, e.g., 15 U.S.C. § 6801 (2010); 16 C.F.R. § 313.12 (2018).}
recovery of funds by executors or administrators of a deceased crowdfunding campaign owner’s estate. If the decedent dies testate, then the will must be probated before the administration of the estate. Probating the will deems the will “effective to prove title to, or the right to possession of, any property disposed of by the will.” Additionally, an executor or administrator must be appointed by the court to effectuate the administration of the estate unless the proper requirements under §§ 401.002–.003 of the Texas Estates Code are satisfied to nominate an independent administrator. The application for the court to appoint an executor or administrator may be combined with the application for the probate of the will, and an individual interested in the appointment and the probate is permitted to apply for both. If the decedent dies intestate, then either an independent administrator or an administrator appointed by the court through application by an interested party will oversee the administration of the decedent’s estate in accordance with Chapter 201 of the Texas Estates Code.

If (1) it has been at least ninety days since the date of the decedent’s death, (2) there is no pending petition for an appointment of a personal representative for the decedent’s estate, and (3) there have been no testamentary or administrative letters granted with respect to the decedent’s estate, then any interested person may apply for a court order requiring a financial institution to release the balances of all of the decedent’s accounts held by the financial institution.

After an executor or administrator is appointed for the estate, or during the process of applying for an executor or administrator to be appointed, the executor, administrator, or an interested person can file an application with the court admitting a will to probate. An interested person is defined as an heir, devisee, spouse, creditor, or anyone having a property right in the estate being administered. After the will has been admitted into probate, the probated will serves as muniment of title for devisees under the will.

Once the executor admits the will into probate, the will, along with a death certificate, can be used to have a financial institution release funds to
the executor of the will. Different financial institutions may have slightly different requirements, but once the executor has a probated will and a death certificate, they should then meet the requirements of any financial institution in which the decedent held an account.

E. The Considerate Friend

As mentioned in Part III.A, a considerate friend is a crowdfunding campaign owner who creates a campaign for which another individual is the intended beneficiary. GoFundMe permits a campaign owner to act as a “considerate friend” and provides two options for setting up a campaign in this way. The first option is for the campaign owner to receive the funds —either through check or direct deposit—and then personally deliver the funds to the beneficiary.

The second option is to have the funds deposited directly into the beneficiary’s account. If the campaign owner sets up the crowdfunding campaign, so the funds are directly deposited into the account of the beneficiary, very few problems should ever arise because the campaign owner never takes possession of the funds.

VIII. RECOMMENDATIONS TO ATTORNEYS ENGAGED IN ESTATE PLANNING

The Preface of this comment posed a series of questions following Norma and Chris’s story. Each section of this comment has, thus far, identified new issues, provided insight into how those issues might be resolved, and established rules that govern each issue discussed. Using the rules and conclusions previously discussed, this comment will finally address each issue from the Preface individually, as well as provide suggestions for attorneys who may face similar issues in practice.

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198. Id.
201. Id. 202. Id.
203. See supra Part VII.C.
204. See supra Part I.
205. See supra Parts I–VII.
206. See supra Part VIII.A–B.
A. Answering Questions Posed in Preface

The first question posed at the end of the Preface to this comment was whether Norma’s estate or Chris should receive the leftover money from the crowdfunding campaign when Norma passed away.\(^\text{207}\) This will depend entirely on how Chris decided to set up the crowdfunding campaign when he indicated whether or not the beneficiary was someone other than himself.\(^\text{208}\) If Chris set up the campaign to have all funds deposited into his personal bank account, and then he was personally giving those funds to Norma, it seems Chris would have no obligation to give the remaining funds to Norma’s estate.\(^\text{209}\) If instead Chris had set up the crowdfunding account to have all donations directly deposited into Norma’s personal account, Chris would have no claim to the funds and anything leftover would be part of Norma’s estate.\(^\text{210}\)

The second issue proposed was how Chris passing away during the campaign would affect Norma receiving donations.\(^\text{211}\) Again, if Chris had set up the campaign to automatically deposit funds into Norma’s account, Norma would continue receiving donations so long as the campaign remained active online.\(^\text{212}\) However, if Chris was personally receiving the funds, then Norma may face greater difficulty claiming title to the donations.\(^\text{213}\) If Chris did not indicate that there was a beneficiary when he established the campaign, Norma likely has no claim to the money.\(^\text{214}\) In the event that Chris did indicate that there was a beneficiary other than himself, but opted to deliver the funds to the beneficiary personally, Norma may be able to claim a right to the funds if she and Chris had executed a separate right of survivorship agreement.\(^\text{215}\)

The third hypothetical addressed what would happen had either party undergone a divorce proceeding during the crowdfunding campaign.\(^\text{216}\) Regardless of who was receiving the funds, it is unlikely the funds would be considered community property subject to division in a divorce proceeding.\(^\text{217}\) Basic language in the crowdfunding campaign should suffice in proving the crowdfunders intended their contributions to be gifts.\(^\text{218}\)

\(^{207}\) See supra Part I.
\(^{208}\) See supra Part VII.E.
\(^{209}\) See TEX. EST. CODE ANN. § 111.002 (West 2014).
\(^{210}\) See id.
\(^{211}\) See supra Part I.
\(^{212}\) See supra Part VII.E.
\(^{213}\) See supra Part VII.E.
\(^{214}\) Compare supra Part VII.E, with TEX. EST. CODE ANN. § 111.002 (West 2014).
\(^{215}\) TEX. EST. CODE ANN. § 111.001 (West 2014).
\(^{216}\) See supra Part I.
\(^{217}\) See supra Part VI.A.
\(^{218}\) See supra Part VI.A.
Therefore, the funds should be considered separate property and would remain either Chris or Norma’s property through divorce.\textsuperscript{219}

B. General Suggestions to Minimize Risk

One of the best ways to minimize the risk of issues with crowdfunding is to ensure people know about the campaign.\textsuperscript{220} If family members are aware of the campaign then they can begin the journey of recovering funds from the campaign if necessary.\textsuperscript{221} It is likely the campaign owner has set up automatic withdrawals from the crowdfunding campaign into a personal bank account prior to death, in which case the executor can easily gain access to the decedent’s bank account and withdraw the funds.\textsuperscript{222}

If the campaign owner had yet to setup automatic withdrawals, the executor has two ways of accessing the funds.\textsuperscript{223} First, the executor can simply login if the campaign owner has left a username and password.\textsuperscript{224} If the executor, or other family member, does not have the password then the executor can contact the crowdfunding platform, determine which payment processing company the platform uses, and then contact the processor to attempt to access the funds.\textsuperscript{225} Because these third-party companies are financial institutions and hold the funds in a pooled account, the executor should be able to access the funds using a probated will and death certificate.\textsuperscript{226} This must be completed quickly, however, because many crowdfunding platforms automatically refund crowd funders if the campaign owner does not make a withdrawal within sixty days.\textsuperscript{227}

IX. CONCLUSION

While the issues surrounding crowdfunding seemed complicated at first, the solutions to most problems can be easily resolved.\textsuperscript{228} In most cases a deceased campaign owner will have already set up automatic withdrawals from the crowdfunding account into their personal bank account.\textsuperscript{229} In these situations the executor can easily access a bank account with a probated will

\begin{itemize}
\item \textsuperscript{219} See supra Part VI.A.
\item \textsuperscript{220} See supra Part VI.D.
\item \textsuperscript{221} See supra Part VI.D.
\item \textsuperscript{222} See supra Part VI.D.
\item \textsuperscript{223} See supra Part VII.
\item \textsuperscript{224} See supra Part VII.
\item \textsuperscript{225} See supra Part VII.
\item \textsuperscript{226} See supra Part VII.D.
\item \textsuperscript{227} See supra Part VII.D.
\item \textsuperscript{228} See supra Parts I–II.
\item \textsuperscript{229} See supra Part VII.
\end{itemize}
and death certificate. If the situation arises in which the campaign owner has not established automatic withdrawals, the executor will either need the password to access the crowdfunding account or a probated will and death certificate to access the financial institution the crowdfunding platform uses.

In the event of a divorce, the donations made by crowdfunders will almost certainly be considered gifts in Texas. Gifts are separate property in Texas, but the intent of the donors is necessary to establish that the donations were, indeed, gifts. The most effective way to establish this intent is to have language on the crowdfunding campaign page indicating that all donations are gifts. By advising clients about the type of language they should use—or avoid—on their campaign page, along with urging clients to establish direct deposits as soon as possible (or provide their username and password to someone they trust), avoiding property and estate issues in crowdfunding should be easily attainable.

230. See supra Part VII.
231. See supra Part VII.
232. See supra Part VI.
233. See supra Part VI.
234. See supra Part VIII.
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1986-present  Private practice of law. Practice limited to estate planning, guardianship, conservatorship, special needs and other trust administration, and probate matters. Practice located in Tucson, Arizona.

2011-present  Adjunct Professor, Stetson University College of Law (teaching Retirement Planning course in the Elder Law LLM program)

1995-2000  Adjunct Lecturer, University of Arizona Department of Gerontology


1979-1981  Special City Magistrate, City of Tucson. Judge of lower court with jurisdiction over misdemeanors, traffic offenses and domestic protective proceedings.


Education:

1976  J.D., University of Arizona

1974  B.S., Utah State University (Political Science/Chemistry)

Memberships and Professional Associations:

Fellow  American College of Trust and Estate Counsel

Fellow  National Academy of Elder Law Attorneys

President  National Elder Law Foundation (2008-2010)

Member  Board of Directors, National Academy of Elder Law Attorneys (2006-2012)

President  Arizona Fiduciary Association (2010-2012)
Member Disciplinary and Ethics Commission, CFP® Board of Standards, Inc. (2009-2012)

Member State Bar of Arizona, State Bar of Montana, Pima County Bar Association


Former Chairman Tucson Supplemental Retirement System Board of Directors (1992-1999)

Delegate White House Conference on Aging (1995)

Former Member Board of Directors, National Academy of Elder Law Attorneys (1993-1996)

Member Arizona State Legislature "Living Will, Health Care Power of Attorney and Surrogate Decision Making Study Committee" (1991)


Chair Arizona State Hospital Advisory Board (1985-1987)

Publications:


Planning for Disability, Estates, Gifts and Trusts Portfolios, Bureau of National Affairs, Inc., 2012 (with co-author Prof. Rebecca Morgan)


Alive and Kicking: Legal Advice for Boomers, Carolina Academic Press, 2007 (with co-author Prof. Kenney Hegland)


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Care of Incompetent Adults: A Brief History of Guardianship, The Arizona Attorney, December, 1993


Health Care Directives and Health Care Decision Making, The Arizona Attorney, October, 1993
In the last two years “electronic will” legislation has been introduced – and occasionally adopted – in several states. The nationwide legislative push to authorize electronic signing of wills began with proposals in Florida, Nevada, Indiana and Arizona, with additional efforts in New Hampshire, Virginia and Washington DC. What was a novel idea moved quickly into the mainstream of legal thought.

At least two major industry players (both online self-help alternatives to local legal advice) had begun to push for states to consider authorization for digital execution of wills, and perhaps other documents (powers of attorney, trusts, etc.) that had long been thought to require “wet” signatures on paper documents. Florida’s legislature adopted an electronic will law in 2017, but Florida’s governor vetoed the new statutes. Nevada legislators discovered that they had a decade-old law already, and quickly updated their statutes. Then, in 2018, Indiana and Arizona adopted – and passed – new laws.

What does it mean to have an “electronic will” law, and what will that mean for practitioners not eager to find themselves on the leading edge of the law? Will we begin seeing digital documents that need review, modification, clarification or revocation? What will develop in other jurisdictions?

Before considering those changes, a very brief review of the purpose of wills and non-legislative developments might be in order. Consider, for example, the seminal article by John H. Langbein in 88 Harvard Law Review 489 (1975), “Substantial Compliance with the Wills Act.” Professor Langbein notes that there
are at least these four functions served by our long history of requiring strict compliance with will formalities:

1. The evidentiary function. The formal requirements of will signing give the probate court evidence of the testator’s intent. The formality of will signing helps protect against the possibility that the testator’s intent might become uncertain, muddled or contradictory.

2. The channeling function. When wills are prepared, signed and witnessed in accordance with accepted social norms, the reader (whether court or beneficiary) can be confident that the testator understood that he or she was signing a will, and that the expressed intent was understood by everyone in the transaction. At the same time, the testator has a model for expressing those intentions, without having to reinvent the process. Finally, orderly administration of the resultant documents is made easier, and the entire process less expensive and fraught.

3. The cautionary function. The fact of will formality helps drive home the purpose for the testator. Rather than a casual “I’d like you to have my house if anything should happen to me” the testator is undergoing a detailed process that should give him or her pause to consider whether the will expresses his or her real intentions.

4. The protective function. The requirement of witnesses and the testator’s need to clearly express wishes helps protect against the possibility of fraud. In theory, at least, the formality of will execution should help protect against undue influence, fraud, or exploitation of a vulnerable testator.

Notwithstanding the history of formality, however, much has changed in recent decades. As the title of Professor Langbein’s law review article suggests, even as early as the last quarter of the twentieth century saw movement away from strict compliance and toward substantial compliance with those formalities. That movement has continued for the intervening 40+ years, though it is not universal.

Thus, various states have liberalized requirements for witnessing wills², eliminated witnesses altogether³, enhanced the validity of holographic wills⁴, or

² Various states (whether by statutory change or appellate decision) have made it possible for witnesses to sign a will at separate times and places, including (in some states) after the decedent’s death (assuming, of course, that they in fact witnessed the signing at the time).

³ Colorado and North Dakota have adopted a revision of UPC §2-502(a)(3) that permits a will to be notarized but not witnessed. These documents are inevitably referred to as “notarial wills”. What if a notary and one witness signs a will? In most states, that will qualify as two witnesses. If a second person actually was present when a notary signed a will in a state other than Colorado or North Dakota, can the notary serve as a witness and the second witness sign after the decedent’s death? Yes, in at least some states.

⁴ About half of the states recognize holographic wills. Over time, most of those may have recognized that filling in blanks in a pre-printed form may qualify as a holograph, or that the technical requirements for signature may be somewhat loosened.
allowed virtually any document to function as a testamentary instrument. Meanwhile, the commercial world has largely moved past testamentation altogether; beneficiary designations, online account maintenance and multiple ownerships have all made the ancient practice of signing a “last will” seem quaint and archaic.

In particular, lawyers have often engaged in discussions about the possibility of digital will signing. Those discussions have accelerated in the past decade or so, as computers, tablets, smartphones and all-purpose applications have proliferated. There are at least four American court cases that have often been referred to in this context.


In 2012, Javier Castro was dying in a hospital in Ohio. He knew his time was short, and he wanted to sign a will. Unfortunately, no one had paper available.

Mr. Castro’s brother pulled out his Samsung Galaxy Tablet and, using a stylus, wrote a will as Mr. Castro dictated it. After the document was read back to him, he signed at the bottom of the digital document (again, using the stylus). His two brothers and one other person signed (using the stylus) as witnesses.

After Mr. Castro’s death his brother sought probate of the electronic document. He testified that the tablet had been continuously in his presence, and password protected, since the signing. He printed out a paper copy and sought its probate as a copy.

The Ohio probate judge admitted the will to probate, without objection from any devisee or heir. The judge ruled that, though the will did not include an attestation clause, it satisfied the Ohio requirements for signature, expression of wishes and witnesses. The lack of an attestation clause required the finding to be by clear and convincing evidence, which the probate judge ruled had been satisfied.

Of course, the Castro decision is not an appellate decision. It also did not arise from a contested proceeding. Still, it does suggest that the formalities might be met without the use of paper or ink.

Litevich v. Probate Court, District of West Haven, (Conn. Sup. Ct. #NNHCV126031579S), May 17, 2013.

This unpublished trial court decision addressed electronic will signing from an unusual angle. Carole Berger had prepared a LegalZoom will, which was then

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5 See, for instance, the 1997 revision of the Uniform Probate Code permitting the use of a “harmless error” rule if the proponent of a defective instrument can establish by clear and convincing evidence that the decedent intended it to be a will. UPC §2-503 or a similar rule has been adopted in eleven states: California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, Oregon, South Dakota, Utah and Virginia.
printed and mailed to her for completion. Even as the will was arriving at her New York home, she was admitted to a Connecticut hospital for what would prove to be her final illness.

After she asked a friend to collect the package from LegalZoom and bring it to her, the friend mistakenly believed that a notary was required. That delayed the signing for several days; in the meantime, the decedent’s condition worsened, she became incapacitated, and died without ever signing.

The two beneficiaries of what would might have become her will if it had been signed mounted a challenge to the state constitutionality of Connecticut’s statutory signature requirement. By not allowing a “harmless error” approach to will signing, according to the contestants, the state violated the decedent’s right to equal protection of the law.

This unusual argument was summarily dismissed by the trial court. It does not seem to have been appealed or pursued, though it does appear that the unsuccessful beneficiary then sued LegalZoom for allegedly producing confusing and inaccurate signature instructions; that case was sent to mandatory arbitration based on the contractual provisions between LegalZoom and the decedent. *(Litevich v. LegalZoom, (Conn. Sup. Ct. #X04HHDCV146055757S), January 8, 2016.)*


In the first U.S. reported appellate case helpful to the discussion, a Tennessee appellate court approved the electronic “signature” of the decedent – but primarily because he acknowledged the signature to the witnesses who signed after him.

A week before his 2002 death, Steve Godfrey typed a will on his computer. He used a cursive font to add his “signature” at the bottom. He printed the document and showed it to two friends, who testified that he said the “signature” was his. They signed the printed version (in ink) and the whole thing was notarized.

The decedent’s sister objected to probate of the will, arguing that it did not meet the statutory requirements. The probate court determined that the will was valid, and the Tennessee Court of Appeals upheld that ruling. The court treated the typed signature as a “mark” that was affirmed by the witnesses.


Duane Horton, 21, committed suicide in 2015. Found in his journal was this note, which was apparently in his handwriting (but neither signed nor dated): “I am truly sorry about this … My final note, my farewell is on my phone. The app should be open. If not look on evernote, “Last Note”

There was, indeed, an Evernote entry in Mr. Horton’s account. It was electronic only, and it ended with his full (typed) name. It said:
Have my uncle go through my stuff, pick out the stuff that belonged to my dad and/or grandma, and take it. If there is something he doesn’t want, feel free to keep it and do with it what you will. My guns (aside from the shotgun that belonged to my dad) are your’s to do with what you will. Make sure my car goes to Jody if at all possible. If at all possible, make sure that my trust fund goes to my half-sister Shella, and only her. Not my mother. All of my other stuff is you’re do whatever you want with. I do ask that anything you well, you give 10% of the money to the church, 50% to my sister Shella, and the remaining 40% is your’s to do whatever you want with.

In a portion of the note addressed directly to his uncle, Mr. Horton had written: “Anything that I have that belonged to either Dad, or Grandma, is your’s to claim and do whatever you want with. If there is anything that you don’t want, please make sure Shane and Kara McLean get it.” Finally, Mr. Horton addressed a separate note to his sister Shella, telling her that “all” of his “money” was hers.

Was Mr. Horton’s Evernote entry a will? Was the handwritten note a holographic, which might be construed to have adopted the Evernote entry?

Michigan is one of the eleven states to have adopted the so-called “harmless error” language of UPC §2-503. That provision allows a non-compliant document to be treated as a testamentary instrument if its proponent establishes the decedent’s intent by clear and convincing evidence. The Michigan probate court determined that the Evernote file met that standard, and admitted it as Mr. Horton’s will over his mother’s objection.

The Michigan Court of Appeals affirmed. The document itself, and the “suicide note” in Mr. Horton’s journal, both clearly expressed his intent that the Evernote file should be treated as his will. Mr. Horton’s mother has appealed to the Michigan Supreme Court.

What’s happening in Australia?

Meanwhile, two cases in Australia received wide attention in the popular media. Neither has much direct bearing on the law in the US (and certainly not Arizona), but they are worth mentioning:


In a 2013 decision in Queensland, Australia’s Supreme Court, a will prepared on an iPhone and “signed” by typing the testator’s name, was admitted to probate. The court found that the iPhone file was a “document” as required by Queensland’s Succession Act, and that it clearly stated the signer’s testamentary intentions.

Well-known local restaurateur Karter Yu typed out “This is the last Will and Testament…” and followed that with choice of executor and disposition of
property. He typed his name at the bottom where a signature would ordinarily appear. The judge treated the typed document as Mr. Yu’s will.

**Re: Nichol, [2017] Queensland Supreme Court 220**

In a number of ways, Mark Nichols’ tragic story was similar to Karter Yu’s. Mr. Nichols had been married for one year, and had been in a relationship with his wife for more than two years before that. The relationship was plainly rocky. After his wife moved out (though she remained in contact), Mr. Nichols decided on suicide.

After his death, his mobile phone was found on a work bench in the shed where he had taken his life. A friend looked through his phone’s data to find people who should be notified of his death. She found a text message which read:

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Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she’s ok gone back to her ex AGAIN I’m beaten . A bit of cash behind TV and a bit in the bank Cash card pin 3636
MRN190162Q
10/10/2016
👍 My will😊
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(Note: a paperclip and smiley face are in the original, though the reported decision does not illustrate them.)

The text message, apparently completed by the decedent and addressed to his brother Dave, had not been sent. His widow filed a petition for appointment as executor and a finding of intestacy. The court found the unsent text message to be a valid testamentary instrument, appointed the brother and his son (the decedent’s nephew) as executors and admitted the text message to probate.

**Nevada’s 2017 Legislative Changes**

Meanwhile, back in the U.S., Nevada already had stolen the march on other states. In 2001, that state became the first to legislatively approve electronic wills – though the process was so cumbersome that, according to every Nevada practitioner questioned, no electronic wills were ever prepared or executed. See, for instance, Nevada estate planning attorney Jay Larsen’s blog post from early 2017 at [http://www.attorney-lasvegas.com/blog/nevada-electronic-wills/](http://www.attorney-lasvegas.com/blog/nevada-electronic-wills/)

That has changed. In 2017, the Nevada legislature adopted a major rewrite of the Nevada electronic wills statutes. Assembly Bill 413 permits electronic documents, signed and witnessed electronically, to be admitted as original wills in probate proceedings. It defines “certified paper original” (a printed copy of a digital will), “electronic notary public” and “qualified custodian” (Nev. Rev. Stat.
Chapter 132, §2). It declares that a witness or notary is “in the presence” of the testator if they are in the same location or “can communicate with one another by means of audio-video communication.” (Nev. Rev. Stat. §133.050 for wills, §162A.220 for powers of attorney). It also declares that “a document shall be deemed to be executed in this State if … [t]he person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State.” (AB 413, §17)

Trust & Will, a San Diego-based online estate planning provider, trumpeted what it insisted was the first “end-to-end digital will” signing in a January, 2019, press release (https://www.businesswire.com/news/home/20190124005523/en/Trust-Notarize-Partner-Deliver-Nation%E2%80%99s-End-to-End-Digital). Cory McCormick, a Las Vegas police officer, signed his will online and it was notarized by Notarize.com, an online remote notarization firm based in Virginia. It is unclear from the press release whether the witnesses were physically present or could just communicate by audio-video means.

Florida’s Electronic Wills Act (vetoed)

In June, 2017, the Florida legislature approved an “electronic wills” act and sent it to Governor Rick Scott for his approval. Instead, on June 26, 2017, Governor Scott vetoed the bill.

Governor Scott particularly pointed to three concerns about the Florida Electronic Wills Act:

1. The Act included a remote notarization provision that Governor Scott felt would not sufficiently protect Floridians from possible fraud and exploitation. Note that it is the notarization provision, not the underlying digital will idea, that garnered Governor Scott’s objections.
2. The Act also provided that any will (not just a digital will) could be submitted to Florida probate courts for admission, so long as a custodian of the will was located in Florida. This, the Governor worried, might lead to huge increases in the caseload for probate courts in Florida.
3. The delayed implementation of the remote witnessing and notarization provisions bothered the Governor. They would require the legislature to make further provisions by April of 2018, and Governor Scott expressed his idea that the legislature might just spend that time improving what he called an “imperfect” bill.

What would the Florida law have accomplished? It would have allowed the testator to sign a digital will by simply typing his or her name. The will would still require two witnesses, though they could sign remotely and electronically.
Indiana’s 2018 Electronic Will law

After a failed effort in the 2017 legislative session in Indiana, advocates pursued a new electronic will law in the 2018 legislative session. The introduced bill had been extensively vetted by Indiana probate practitioners, and slid through with relatively little opposition (and few changes). The law was passed by both houses of the Indiana legislature and signed by the Governor on March 8, 2018.

Indiana’s new law is much more restrictive than the Nevada law, and in many ways similar to the Arizona law (see below). It became effective, however, on July 1, 2018. It permits a testator to sign a will electronically, but mandates that two witnesses be “physically present in the same physical location as the testator.” (Indiana Code § 29-1-21-1 Sec. 3) It allows the electronic will to be held by the testator, an attorney, the named personal representative, any distributee, or a custodian (that latter term being somewhat similar to Arizona’s use of “qualified custodian”). (IC §29-1-21-1 Sec. 3)

While not required, the law encourages any attorney or vendor/licensor of estate planning software to include a three-page “advisory instruction”, the text of which is provided in the statute. (IC §29-1-21-1 Sec. 6) The significance of including the advisory instruction is ambiguous.

Indiana explicitly recognizes any electronic will valid under Indiana law, under the law of the state where the testator was physically present at execution, or the domicile of the testator at the time of execution or death. (IC §29-1-21-1 Sec. 8) An electronic will may be printed out and accompanied by an affidavit of the custodian describing details of storage, discovery and provenance. (IC §29-1-21-1 Sec. 9) A custodian is required to use “best practices and commercially reasonable means” to maintain the privacy and security of the electronic will. (IC §29-1-21-1 Sec. 10)

Arizona’s New Electronic Will Law, Eff. 6/30/2019(?)

In the 2018 legislative session, the House and then the Senate passed an electronic will bill and sent it to the Governor for signature. On April 20, 2018, Governor Ducey vetoed the bill – not for any substantive reason but because the House had failed to deliver the budget resolution the Governor had demanded. The electronic will law was one of 10 House Republican bills on the Governor’s desk at the time, and became an attention-getter for Governor/Legislature squabbles.

Once the budget issues got back on the track the Governor had directed, the legislature reintroduced the ten victims of the intraparty squabble. HB 2656 was quickly adopted by both houses (unchanged from the original HB 2471 as passed) and returned to the Governor’s desk. He signed it on the last possible day, May 16, 2018. The House Engrossed version of HB 2656 is attached.
Among the items included in HB 2656:

**Effective date**
The new law is not effective until June 30, 2019. It is not immediately clear whether documents signed before that date might be made effective as of that date; with luck, this question will not come up.

**Structure of electronic will law**
To review prior Arizona law:

1. ARS §14-2502 spells out basic will formalities (in writing; signed by testator; two witnesses)
2. ARS §14-2503 allows holographic wills
3. ARS §14-2504 includes the language of and effect for self-proved wills

HB 2656 adds a new §14-2518, parallel to §14-2502, allowing the testator’s and witness’s signatures to be digital. It also adds a new §14-2519, authorizing an electronic will to be self-proved.

The requirements for witnesses are similar to those for paper wills. One key: the witnesses must be “physically present with the testator when the testator electronically signed the will, acknowledged the testator’s signature or acknowledged the will.” (new ARS §14-2518(A)(3)(a)). The electronic will also must include a government-issued identification card for the testator. (new ARS §14-2518(A)(5)).

As an interesting aside, it is not yet clear exactly how the notarization of a self-proved electronic will might work. Prior to this legislative session, ARS §41-351 et seq spelled out an electronic notary scheme to allow the mechanics of notarizing non-paper documents. In an earlier bill this session (HB 2178) the legislature repealed all of those provisions*. Instead, the Secretary of State has been directed to create a system for electronic notarization by December 31, 2019, unfortunately for that project, the incumbent Secretary of State lost her bid for renomination and the ultimate winner in November, 2018, was from a different political party with a different set of priorities. This will create the difficulty that there is no clearly-approved electronic notarization mechanism, and no ability to print out and notarize (on paper), an electronic will signed between June 30, 2019, and the Secretary of State’s ultimate action.

**Qualified Custodians**
HB 2656 introduces a new notion of “qualified custodians” for electronic wills. New sections 14-2520, 14-2521 and 14-2522 explain who can be a qualified custodian.

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* Well, almost. They left a single definition (for “electronic signature”) in place, and deleted the entire remaining Article.
custodian, what agreements they must have with the testator and how they must protect, and produce, the digital document.

Who did the law anticipate might become qualified custodians? Lawyers, for certain (though not of their own family members’ documents; see new ARS §14-2520(1)).

So should you consider becoming a Qualified Custodian (if you’re going to put it on your business cards you should of course capitalize it)? Maybe you want to consider Arizona’s data breach law (ARS §8-545). In fact, you probably want to review that statute anyway. It sets up your duty to take reasonable precautions to protect client and vendor data. It requires you to take reasonable precautions to prevent unauthorized access to any of the following data about anyone on whom you maintain electronic records:

- Names, including first initial and last name
- Social Security numbers
- Driver license numbers (think about your office notary’s files)
- Financial account numbers
- Credit or debit card numbers with or without security codes, access codes or passwords

If you learn of a data breach, you have a duty to notify anyone whose data is affected within a reasonable time, and by the method by which you usually communicate with them (that probably means by mail for most of your clients). One piece of good news: you can avoid the potential liability if your data is encrypted.

Back to storing electronic wills: are LegalZoom, Willing.com and other commercial organizations planning on acting as qualified custodians? Not, probably, as a profit center. We’ll see.

Here’s a key to understanding qualified custodians, however: if a self-proved electronic will is later to be admitted to probate, it is going to have to have been in the continuous custody of a qualified custodian. While that may look like an attempt to guarantee future custodial fees, it is unlikely that the authors envisioned this as a revenue generator. It is not clear, for example, that a qualified custodian would have any ability to either destroy an electronic will or refuse to release it for nonpayment of any storage fees.

Probating an electronic will

Once the testator dies, how does an electronic will get admitted to probate? So far, our Arizona probate process is entirely dependent on traditional, paper-and-ink wills. Until we have a notion of electronic filing of original wills, we need to be able to get an electronic will into paper form for filing.

Enter new ARS §14-2523. It creates the concept of a “certified paper original of electronic will.” The necessary printing and certification can be by a qualified
custodian (will there be an additional fee for this?) or by the will’s discoverer and printer.

**Interrelationship between electronic and paper wills**

Can an electronic will revoke a paper will? Yes, implicitly (ARS §14-1201(68) defines “will” as including “a paper will or an electronic will”, both of which are also defined terms). Can it serve as an amendment or codicil? Yes, but still implicitly.

Can a paper will or codicil amend or revoke an electronic will? Yes, but implicitly, again.

How can one revoke an electronic will? By making a new will (no change in the law, except to add electronic wills to the mix), OR by physical destruction (including, in new language, “rendering unreadable” – ARS §14-2507(A)(2)).

**What about trusts?**

The word “trust” appears just three times in the entire new Arizona law. First, it is (misleadingly) in the title. Second and third, it appears in this sentence (and modifying the definition of an electronic will) in new ARS §14-2518(C):

> This section does not apply to a trust except a testamentary trust created in an electronic will.

**Uniform Law Commission Drafting Committee**

Meanwhile, the Uniform Law Commission formed a drafting committee in October, 2017. That Committee has met several times, and has gone through several drafts of an attempted uniform act for states to consider. Several concepts pervade the Uniform Laws proposal:

- The developing practice of electronic signatures, prevalent throughout commerce and second nature to anyone who is either a business person or young, should be allowed to develop in the law of testation.
- State adoption of online notarization options will likely overtake the digital signature space, making witnessing of wills a different kind of experience in the next few years. For the handful of states already authorizing so-called notarial wills, the availability of an online notary may make electronic wills a fait accompli.
- Self-proving may be a different matter. States might reasonably choose to restrict self-proving of digital wills to in-person witnessing (as in Indiana and Arizona).
- Although early drafts of the uniform law toyed with the idea of a specialized role for a digital custodian, the committee ultimately moved away from having digital wills “blessed” by a for-fee manager of the product.
• Choice of law problems will likely be key to the development of digital wills. If one state (or a handful of states) explicitly forbids recognition of digital wills, then testators’ wishes will likely be frustrated by a move, trans-state property ownership or the accident of death while traveling. Simplicity in the uniform law and widespread adoption will be the best antidote to that kind of testamentary balkanization.

• Even seasoned practitioners may come to like the ability to execute testamentary instruments online (for home visits, traveling or very busy clients, unusual short-turnaround arrangements, etc). For that reason, the process should be made as lawyer-friendly as possible.

• Much resistance will be raised by practitioners and even the probate bench. It will likely be useful to make the laws simple (more simple than the three in place today) in order to make the criticisms easier to address.

• Testator intention should be the primary object. For the same reasons that “harmless error” statutes, relaxing of the formalities of will signing, and even notarial wills have become more common, digital or electronic wills should be permitted. Testators (our clients) want to sign their wills with the same kinds of options they have for their beneficiary designations, property titles and other legal documents; the digital signature is here, and we need to be as quick to recognize that fact as we were to discard wax seals.

Summary

The three new state statutes (ignoring Florida’s vetoed law), plus the current status of the Uniform Law Commission draft, are reflected on the attached chart prepared by Katherine Peters, Texas Tech Law School Research Assistant. The ULC proposal is a shifting target, as it has developed somewhat even from the proposal current at the time the chart was most recently updated.

Some questions to consider as various states begin to consider new electronic/digital will statutes:

1. What state’s law applies in a given case? Is it the testator’s residence, physical presence at the time of signing, situs of property, location of probate proceeding, state of death?
   a. If an Arizona resident wants to sign an electronic will while she is on vacation in Texas, can she use Arizona’s new law?
   b. If an Arizona resident likes Nevada’s electronic will law better, can he simply declare that he is signing under that law? Does it matter if he owns property in Nevada, or even has ever visited the Silver State?
   c. If a Nevada resident signs an electronic will under its new statute, but moves to Washington and then dies while traveling in Arizona while owning Florida real property, is the will valid in each of the
relevant states (spoiler alert: Florida lawyers insist that the Florida real property will pass by rules of intestacy).

2. What if one or more states, anxious about digital or electronic wills, were to pass legislation specifically invalidating such wills? (Spoiler alert: one state has already done so.) What about the general principle that a will valid at the time and place of execution will be valid in other states? Is that a Constitutional imperative? Can we analogize anything from different states’ treatment of holographic wills?

3. What if Arizona changes its law in future years? Will existing documents be invalidated or (perhaps even more confusingly) retroactively validated? This is not a theoretical problem – there is a bill currently in the Arizona legislature that would invalidate any self-proving affidavit in which a devisee is one of the witnesses. Should exploiters rush out to get wills signed soon, before that change becomes effective?

4. What about trusts (other than testamentary trusts in electronic wills, that is) and powers of attorney? Are they already covered by the Uniform Electronic Transactions Act and the federal ESIGN (Electronic Signatures in Global and National Commerce) law? After all, both of those exempt only “testamentary” instruments.

Most states have moved away from requiring strict compliance with the common-law principle that witnesses (and, in the case of a self-proved will, the notary) must all be physically present together and witness one another’s signatures. But what about a virtual meeting, possibly asynchronous, to secure all the signatures? Can the testator be in Washington, one witness in Alaska and the other in Hawai‘i, while the notary is in Nevada? Not under Indiana or Arizona law – but what about choosing to invoke Nevada’s (or some other state’s) law? Must they all be online at the same time? Which state’s law will govern the test of validity of the document?

Electronic wills, digital signing and other technology-based changes to will formalities are coming to our practices. We need to be cognizant of the changes, and the motivations and approaches taken by various players in this space. For a good summary of recent developments in the area, consider the Bifocal publication from June, 2017 (https://www.americanbar.org/publications/bifocal/vol_38/issue-5--june-2017-/the-future-of-electronic-wills.html) “The Future of Electronic Wills”, Volume 38 Issue: 5.

Final note about irony: the profusion of recent legislative developments in the electronic will space all share a significant feature. Not one of them would have validated (or improved the validity of) the wills of Javier Castro, Carole Berger, Steve Godfrey or Duane Horton.
## Electronic Wills Act

**FEB, 2019 MEETING DRAFT**

### Effective Date

<table>
<thead>
<tr>
<th>Draft</th>
<th>July 1, 2017</th>
<th>July 1, 2018</th>
<th>July 1, 2019</th>
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</table>

### Capacity

- Anyone eligible to make a will under state law.
- Electronic Wills Act § 3.

- Sound mind; and
- Over the age of 18.

### Required Execution Elements

- A writing in a record;
- Signed electronically with testamentary intent; and
- Either signed electronically by two witnesses in actual or electronic presence of testator OR notarized by an electronic notary public (in states that permit “notarial” wills).

Electronic Wills Act § 4.

- An electronic will is a will of a testator that:
  - Is created and maintained in an electronic record;
  - Contains the date and electronic signature of the testator;
  - Contains an authentication characteristic of the testator;
  - Contains the signature and seal of notary public.

If the electronic will is NOT notarized:

- Two or more witnesses must electronically sign the will in testator’s presence.


- An electronic will is a will of a testator that:
  - Is created and maintained as an electronic record;
  - Contains electronic signatures of the testator and attesting witnesses; and
  - Date and times of all such electronic signatures

Ind. Code Ann. §29-1-21-3(10).

- The testator must also command the software application or user interface to finalize the electronically signed will as an electronic record.


- An electronic will is a will of a testator that:
  - Is created and maintained in an electronic record;
  - Contains the date, electronic signature of the testator, and;
  - An authentication characteristic of the testator OR the electronic signature and seal of an electronic notary public.

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<thead>
<tr>
<th>ELECTRONIC WILLS ACT</th>
<th>NEVADA</th>
<th>INDIANA</th>
<th>ARIZONA</th>
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### Witness Presence Provisions

- **Actual or electronic presence.**
  - **Electronic Wills Act § 4.**
  - But actual presence can include witnesses in a different physical location if they “can communicate ... by means of audio-video communication.”

### Choice of Law

- **An electronic will is validly executed if executed in compliance with the law of the place where:**
  - At the time of execution, the testator is physically located; or
  - At the time of execution or at the time of death the testator is domiciled or resides.
  - **Electronic Wills Act § 10.**
  - An electronic will may be held valid in this state regardless of where the will is executed, so long as the authoritative copy is maintained in this state.

### Self-Proving Electronic Wills

- **An electronic will with all attesting witnesses physically present in the same location as the testator may be made self-proving by acknowledgement of the testator and affidavits of the witnesses.**
- **An electronic will is self-proving if:**
  - Witness declarations are attached to or logically associated with the electronic will;
- **A will that is self-proved must include the standard form self-proving clause provided in the statute and must be self-proved before the will is:**
- **An electronic will must contain the following to be self-proved:**
  - Affidavits of attesting witnesses incorporated or logistically associated with
<table>
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<tr>
<th><strong>Electronic Wills Act</strong></th>
<th><strong>Nevada</strong></th>
<th><strong>Indiana</strong></th>
<th><strong>Arizona</strong></th>
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<tbody>
<tr>
<td><strong>Electronic Wills Act § 6.</strong></td>
<td>• The will designates a qualified custodian to maintain the electronic record of the electronic will; and • The will remains under custody of a qualified custodian. Nev. Rev. Stat. Ann. § 133.086.</td>
<td>electronically finalized. <em>See Ind. Code Ann. § 29-1-21-4(c).</em></td>
<td>the electronic will; • Designation of a qualified custodian to maintain custody of the electronic will; and • The electronic will remains under the custody of a qualified custodian at all times. Ariz. Rev. Stat. Ann. § 14-2519.</td>
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<tr>
<td><strong>Electronic Wills Act § 7.</strong></td>
<td>An electronic will may be made self-proving after execution by acknowledgment by testator and affidavits of witnesses.</td>
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<td><strong>Electronic Wills Act § 8</strong></td>
<td>An electronic will or part is revoked by: • A subsequent will that revokes the previous electronic will or part expressly or by inconsistency; or • Any revocatory act accomplished with revocatory intent. Electronic will may revoke a will that is not electronic.</td>
<td>A testator may revoke a previously executed electronic will by: • Executing a new will that explicitly revokes or supersedes all prior wills. • Contacting each custodian to the testator’s best ability and instructing each custodian to delete the will. • Executing a revocation document. Ind. Code Ann. §29-1-21-8.</td>
<td>A testator may revoke a will or electronic will in whole or in part by: • Executing a subsequent will or electronic will that revokes the previous will or electronic will or part expressly or by inconsistency • Cancelling, rendering unreadable, or obliterating an electronic will with the intention of revoking it. Ariz. Rev. Stat. Ann. § 14-2507.</td>
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<tr>
<td><strong>Revocation</strong></td>
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<tr>
<td><strong>Electronic Wills Act § 11.</strong></td>
<td>An electronic will may only be revoked by: • Another will, codicil, electronic will or other writing, executed as prescribed in this chapter; or • Cancelling, rendering unreadable or obliterating the will with the intention of revoking it. Nev. Rev. Stat. Ann. § 133.120.2.</td>
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<tr>
<td><strong>TRUST PROVISIONS</strong></td>
<td><strong>ELECTRONIC WILLS ACT</strong></td>
<td><strong>NEVADA</strong></td>
<td><strong>INDIANA</strong></td>
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Prepared by Katherine Peters, Research Assistant for Prof. Gerry W. Beyer. Revised February 19, 2019
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Affiliations:
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University of Texas at Austin, Austin, Texas
Bachelor of Science, Corporate Communication, German minor, May 2016
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Field, Manning, Stone, Hawthorne & Aycock | Law Clerk | Spring 2019 – Present | Lubbock, Texas
Writing research memoranda, assisting in discovery, drafting legal pleadings and discovery documents.

Texas Advocacy Project | Law Clerk | Summer 2018 | Austin, Texas
Drafted pleadings, conducted legal research, attended senate committee and court hearings, assisted with community outreach projects and policy initiatives.

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Strauss Institute | Legislative Research Intern | Fall 2015 | Austin, Texas
Tracked legislation, votes, and political initiatives, summarized pending and passed legislative bills.

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Texas Access to Justice Commission Spring Pro Bono Program | Spring Break 2018
State Bar of Texas Law Student Pro Bono College | Summer 2018—Present
WHO WANTS THE WARD?  
THE STATE’S ROLE IN GUARDIANSHIP PROCEEDINGS

by Hailey M. Hanners

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1 This Comment was recently chosen for publication and has not been edited through the formal editing process.
2 J.D. Candidate, Texas Tech University School of Law, 2020.
I. ONE WOMAN’S STORY: THE CURSORY PATH TO GUARDIANSHIP

Loyce Juanita Parker was a survivor. Born in rural Oklahoma in 1919, Loyce’s childhood was colored by the immediate aftermath of World War I. At the age of eighteen, Loyce survived a devastating train wreck that left her hospitalized and unconscious for six weeks. After regaining her health, she married her husband Alvin and began her new life with him on a farm in southern Oklahoma. Together, Loyce and Alvin raised their five children through the midst of the Great Depression, the Dust Bowl, and another World War. But it was not until the spring of 2006, when Alvin unexpectedly passed away after 68 years of marriage, that Loyce’s world changed dramatically.

After Alvin’s passing, one of the Parkers’ daughters moved Loyce from the family farmhouse to an assisted living facility in Texas, where that daughter resided. Shortly after, a psychiatrist identified only as “Dr. Dash” evaluated Loyce. Loyce’s daughter, Linda Jones, later testified that Dr. Dash had concluded Loyce suffered from a form of dementia, required 24-hour care, and needed a guardian. Linda then applied in Texas for appointment as permanent guardian of her mother’s person and estate. In her application, Linda included a letter from another physician who had examined Loyce after Linda decided to pursue guardianship. In his letter, the physician stated that Loyce was “incapacitated,” without defining the term. He further opined that Loyce suffered from “dementia or mild dementia,” and had “significant cognitive deficits, including poor memory, disorientation, and confusion.”

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4 Id.
5 Id.
6 Id.
7 Id.
9 Id. at 626.
10 Id.
11 Id. (Dr. Dash never appeared live or by deposition at trial, nor did he submit a report to the court).
12 See id. at 626–27.
13 Id.
14 Id. at 626.
15 Id. (This physician provided the only expert testimony at trial).
From there, Loyce’s situation grew only more complicated.\footnote{See In re Guardianship of Parker, 275 S.W.3d at 623.} After Linda filed her application for appointment of guardian, Loyce’s son, Edward Parker, quietly removed Loyce from her Texas facility and placed her in a new facility in Oklahoma, where Edward resided.\footnote{Id.} Edward then filed a contest of the daughter’s guardianship application in Texas and initiated his own proceeding for guardianship in Oklahoma.\footnote{See In re Guardianship of Parker, 189 P.3d 730, 730 (Okla. Civ. App. 2008).} On multiple occasions, Loyce expressed her strong desire to remain in Oklahoma, where her entire estate and the majority of her friends and family were located, and where she had lived her entire life.\footnote{Eric Fish et al., Guardianship of Loyce Juanita Parker: The Case for Adoption of UAGPJJA in Texas, South Texas College of Law, 25th Annual Wills and Probate Institute (2010), https://slideplayer.com/slide/12226372/.} Loyce also maintained that she did not need a guardian, but that if she were deemed incapacitated, she preferred Edward be appointed, or if he was unavailable, her other daughter, Polly Ward.\footnote{Id.}

Nevertheless, in March 2007, a district court in Texas heard Linda’s application for permanent guardianship.\footnote{Id.} Loyce, who refused to leave Oklahoma, did not appear at the hearing.\footnote{Id.} The court ultimately held that Linda, by clear and convincing evidence, proved that Loyce was an “incapacitated person” for the purpose of guardianship, and appointed her as guardian—with full guardianship authority—of both the person and estate of Loyce.\footnote{Id.} Then, against her mother’s wishes, Linda moved Loyce out of her home state and back to Texas.\footnote{See Fish et al., supra note 19.}

Nearly three years after her husband’s funeral, Loyce Juanita Parker died on December 22, 2011.\footnote{See Obituary of Loyce Juanita Bacon Parker, supra note 1.} She was ninety-two years old.\footnote{Id.} The long-running legal dispute over Loyce’s guardianship ended the day she died, but the negative impact it had on her children and her final years could not be undone.\footnote{See generally Parker v. Jones, No. CIV–09–0940–HE, 2009 WL 3698121} The entire dispute hinged on who should have been appointed
guardian and where Loyce should have resided, and it led to allegations by each of her children that the others were interested only in taking Loyce’s money.\textsuperscript{28} Meanwhile, her requests were never honored when she died in Texas, still under the guardianship of her daughter.\textsuperscript{29}

Loyce had nine siblings, five children, thirteen grandchildren, and twenty-four great-grandchildren.\textsuperscript{30} She had financial resources and several different family members who were willing to take her in.\textsuperscript{31} Yet, despite all of this, the determination of guardianship—and whether it was even appropriate—was highly complicated and faithfully contested.\textsuperscript{32}

Unfortunately, Loyce’s case is not unique.\textsuperscript{33} Guardianship proceedings—even those that involve friends or family members close to the proposed ward—are highly sensitive and multi-faceted.\textsuperscript{34} This Comment will explore the implications that may arise when a state agency, rather than a close family member, is the proposed guardian, by addressing one particular area for improvement in guardianship law: public guardianship.\textsuperscript{35} Part II addresses the impending shift in the nation’s demographic that will likely give rise to an increased need for guardianships.\textsuperscript{36} Part III.A provides a brief general background to guardianship before introducing the statutory concept of public guardianship, or “guardian of last resort,” and the problematic practices involved in appointing a state entity as guardian of last resort.\textsuperscript{37} Part III.B gives a comparative analysis of common public guardianship statutory schemes and addresses major policy concerns prompted by state statutes that implicitly designate one or more state agencies as guardian of last resort.\textsuperscript{38} Examining these issues through the lens of Texas law, Part IV evaluates the current Texas statutory scheme and

\textsuperscript{28} See Fish et al., supra note 19.

\textsuperscript{29} See Obituary of Loyce Juanita Bacon Parker, supra note 1.


\textsuperscript{31} See Fish et al., supra note 19. (Among other things, the parties disputed jurisdiction, Loyce’s competency, the admissibility of critical evidence, and possible adverse interests of those seeking to be appointed guardian.)

\textsuperscript{32} See, e.g., In re Mollie Orshansky, 804 A.2d 1077 (D.C. Cir. 2002); See also Pamela B. Teaster et al., Wards of the State: A National Study of Public Guardianship, 37 STETSON L. REV. 193 (2007).

\textsuperscript{33} See generally Teaster et al., supra note 33.

\textsuperscript{34} See infra Parts I–VI.

\textsuperscript{35} See infra Part II.

\textsuperscript{36} See infra Part III.A.

\textsuperscript{37} See infra Part III.B.
its implications.\footnote{See infra Part IV.} Finally, in Part V, this Comment proposes statutory recommendations informed by the policy considerations addressed in Parts II and III and throughout this Comment.\footnote{See infra Part V.}

II. GUARDIANSHIP LAW AND THE AGING POPULATION

The United States population is on the verge of an unprecedented transformation: within decades, the nation’s retirement-age population will likely outnumber minors for the first time in history.\footnote{See Press Release, \textit{Older People Projected to Outnumber Children for the First Time in U.S. History}, U.S. Census Bureau (Sept. 26, 2018), https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html.} The U.S. Census Bureau estimates that, by 2035, the national population will include 78 million people 65 years of age and older, surpassing the 76.7 million people under the age of 18.\footnote{Id.} Experts attribute this shift in demographics to the generation of post-World War II “Baby Boomers,” or persons born between 1946 and 1964.\footnote{See Janet Stidman Eveleth, \textit{Baby Boomers Retire}, MD. B.J., Jan./Feb. 2009 at 5.} This wave, or “boom,” of child births remained unmatched by subsequent generations, resulting in the current and impending age disparity as Baby Boomers approach retirement.\footnote{See generally Naomi Karp et al., \textit{Guardianship Monitoring: A National Survey of Court Practices}, 37 STETSON L. REV. 143 (2007).} The population transformation will likely lead to significant changes in the area of guardianship law.\footnote{Id.}

The aging Baby Boomer population has heightened previously existing concerns about the competency and susceptibility of our elderly.\footnote{Id.} Occurrences of Alzheimer’s disease and related forms of dementia have more than doubled since the early 1980s and will likely continue to grow, affecting between 11.3 and 16 million Americans by 2050.\footnote{See Stephen McConnenell, Testimony, \textit{Presented to the U.S. Senate Special Committee on Aging} (Alzheimer’s Assn., Apr. 27, 2007) (available at http://www/alz.org/join_the_cause_stephen_mcconnell_42704.asp).} Meanwhile, incidents of elder abuse are also on the rise.\footnote{Id.} It is estimated that between 1 to 2 million Americans aged 65 and older have been injured, exploited, or otherwise mistreated by someone who they depended on for care and

\begin{itemize}
  \item \footnote{See Karp et al., \textit{supra} note 42, at 150.}
\end{itemize}
Ironically, one form of exploitation may be through the misuse of a legal guardianship arrangement as a means of controlling a ward and his or her assets for personal gain. As the elderly population increases nationwide, so too will the number of adult guardianships, emphasizing concerns about a variety of areas in guardianship law. Issues may arise under guardianship because a ward’s most basic rights may be seriously restricted, if not wholly restrained. Procedural or substantive pitfalls in guardianship law have the potential to lead to more egregious human and civil rights violations than almost any other area of law. For example, wards may lose the power to choose where to live, how to spend and invest their own money, and whether to marry or vote. It follows that the methods for appointing a guardian and the requirements for becoming a guardian are two crucial considerations in ensuring that a proposed ward’s rights are protected. Unfortunately, these safeguards are susceptible to failure and the fundamental rights of wards often go unprotected. Nevertheless, guardianship is a vital legal mechanism that far more people are likely to rely upon in coming years. Improving outdated guardianship laws, practices, and procedures is therefore of utmost importance.

III. AN INTRODUCTION TO ADULT GUARDIANSHIP & GUARDIANSHIP OF LAST RESORT

Guardianship is a relationship created by law whereby the court gives one person or entity (the “guardian”) the duty and power to make

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50 See generally Teaster et al., supra note 33; see also In re Mollie Orshansky, 804 A.2d 1077, 1079, 1104 (D.C. Cir. 2002).
51 See Karp et al., supra note 44.
53 See id. at 579–81; see also Kelly Hassett, Money on Hold for 100 Clients of Ex-Guardian, LANSING ST. J. 1A (Aug. 18, 2005).
54 See Redding, supra note 52.
55 See Karp et al., supra note 44.
56 Id.
57 See infra Part IV.
personal and property decisions for another (the “ward”).\(^{59}\) Guardianships are established by state law and are subject to state court supervision.\(^{60}\) In most states, any person or entity may initiate a guardianship proceeding by petitioning to the court that an individual is an “incapacitated person.”\(^{61}\) A typical statute defines “incapacitated person” as an individual, either a minor or an adult, who is “substantially unable to provide food, clothing, or shelter for himself or herself; care for the person’s own physical health; or manage the person’s own financial affairs.”\(^{62}\)

In most states, the initial application for guardianship requires a medical statement from a physician, mental health specialist, or other healthcare professional, usually based on an evaluation of the ward within the previous six to eight months.\(^{63}\) The court then notifies the proposed ward of the allegation and initial guardianship hearing.\(^{64}\) Depending on the jurisdiction, the court may appoint a court investigator, court visitor, or guardian ad litem to serve as its “eyes and ears,” as the court assesses the overall situation and potential need for guardianship.\(^{65}\)

If the guardianship is uncontested, the hearing may be very brief.\(^{66}\) If the guardianship is contested, the court will make a finding on the proposed ward’s capacity, usually based on medical evidence from one or two experts and testimony from the ward.\(^{67}\) The judge then has wide discretion in determining the extent of the ward’s incapacity and may appoint a plenary or limited guardian, thereby affecting the extent to which the guardian may control the ward and the ward’s property.\(^{68}\) If the court finds that an emergency exists—for example, that the proposed ward is in danger of immediate harm—it may appoint a temporary guardian before the

\(^{59}\) See Karp et al., supra note 44, at 147.
\(^{60}\) Id.
\(^{61}\) Id.
\(^{62}\) See, e.g., TEX. EST. CODE § 1002.017.
\(^{64}\) See Karp et al., supra note 44, at 147.
\(^{65}\) Wright, supra note 63, at 94.
\(^{66}\) Id.; see also Matter of Janczak, 634 N.Y.S.2d 1020, 1023 (Sup. Ct. 1995) (defining an uncontested guardianship as “a proceeding in which a respondent consents to the appointment of a guardian”).
\(^{67}\) See Wright, supra note 63; see also In re Guardianship of Barnhart, 859 N.W.2d 856, 864 (Neb. 2015) (explaining that a guardianship is “contested” when an objector alleges a “true interest or attentiveness to the well-being and protection of the ward” and objects to the proposed guardianship).
\(^{68}\) See Teaster et al., supra note 33, at 205.
hearing on general guardianship. A typical statute allows for appointment of permanent guardianship if the court finds, by clear and convincing evidence, that the proposed ward is incapacitated and that all alternatives to guardianship have been considered and deemed infeasible.

If the court grants permanent guardianship, court procedures then seek to ensure guardian accountability. Certain financial reporting, accounting, and other duties are also imposed on the guardian, typically on an annual basis. The court at any time may sanction or remove a guardian for failure to follow up with the court or perform other duties. Additionally, the court may decide for any number of reasons that the guardianship, or the scope of the guardian’s authority, is no longer appropriate and may modify or terminate the guardianship.

A. Varying Practices for Appointing Guardians of Last Resort

One important subset of guardianship is public guardianship. A public guardian is typically a governmental agency that receives most, if not all, of its funding from the state. Public guardianship programs are funded through state appropriations, Medicaid funds, county funds, fees from the ward, or some combination thereof. State programs may operate from a single statewide office, have local and regional components, or both. The program may be entirely staff-based or may operate using paid staff and volunteers. The latest comprehensive study shows that every state except Nebraska and Wyoming, and the District of Columbia, has some form of public guardianship.

Public guardians are last resort guardians to incapacitated persons subject to what is already a last resort legal mechanism (guardianship) when no suitable alternative options are available to address the person’s needs.
Public guardianship is designed to be utilized in circumstances when no willing or responsible friend or family member is available to act as guardian of the incapacitated person, or when the proposed ward lacks the resources to employ a private guardian. The vast majority of public guardian statutes provide that the state may serve as guardian of both the person and the estate. Forty-four states have enacted statutory provisions authorizing public guardianship, according to the most recent comprehensive national study. This trend represents a shift in response to the demographic changes discussed in Part II of this Comment and the increased need for surrogate decision makers for our elderly population.

B. Policy Concerns: A Comparative Analysis of Public Guardianship Statutory Schemes

The statutory scheme a state chooses to implement regarding public guardianship may critically affect the ward subject to that guardianship. Two major studies of adult guardianship law have been conducted on a national level. Windsor Schmidt and colleagues conducted the first study in the late 1970s, when public guardianship practices were still highly uncommon. Pamela Teaster and colleagues conducted and published the second major study in 2005.

Both studies found that statutory provisions for public guardianship are usually included in a state’s guardianship code, but that such provisions are often also located in (or supplemented by) separate statutory sections, such as services for the aging, adult protective services, mental health services, or services for individuals with disabilities. Whether through one or multiple statutory sections, states implement either “implicit” or “explicit” statutory schemes. Explicit statutes specifically refer to a “public guardian,” such as a particular governmental agency. Implicit statutory schemes provide a mechanism for public guardianship, without

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82 Id. at 205–06.
83 Id at 205.
84 Id.
85 See Karp et al., supra note 44, at 150.
86 See generally Teaster et al., supra note 33.
87 Id. at 195.
88 Id.
89 Id.
91 See Teaster et al., supra note 33, at 205.
92 Id. at 206.
actually denoting the mechanism as “public guardian.” More specifically, while implicit schemes often name a state agency or employee as guardian of last resort, explicit schemes generally provide for an office and the ability to hire staff and contract for services. This means that explicit statutory schemes are more likely to have budgetary appropriations and greater oversight than is required for guardians under an implicit statutory scheme.

Referencing the Schmidt study, Teaster and her colleagues found that over the years states have continued to move toward more explicit statutory schemes to public guardianship in an effort to reform guardianship law, but that several important statutory provisions remain either implicit, or nonexistent. Teaster noted that the most successfully statutory schemes usually provide for certain provisions, such as: (1) eligibility for public guardianship; (2) scope of services provided by the guardian program; (3) administrative location of the public guardianship function in the state government; (4) duties and powers of the public guardian; (5) costs of the guardianship program; (6) court oversight and program review; and (7) staffing ratios.

Even when a particular state agency is statutorily designated as public guardian, or guardian of last resort, failure to explicitly include one or more of the aforementioned statutory provisions may negatively impact a ward under public guardianship. Illinois’s statutory scheme presents a prime example. Many important procedures for petitioning for adult guardianship in Illinois are statutory and enumerated in the state’s probate code, which is the state’s sole statutory act addressing guardianship matters. The statutory scheme establishes a dual system of public guardianship, designating the role of public guardian to either the Office of State Guardian (OSG), an agency which functions statewide through seven regional offices, or the Office of Public Guardian (OPG), which is a county-by-county program. The OSG serves wards with estates of less than

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93 Id.
94 Id.
95 Id.
96 See generally, Teaster, et al., Wards of the State: A National Study of Public Guardianship, American Bar Association (March 31, 2005).
97 Id.
98 See generally Karp et al., supra note 44.
100 See generally, Chapter 11a of the Probate Act of 1975, 755 ILCS 5/1-1, et seq.
who wants the ward?

$25,000, while the OPG serves wards with estates of more than $25,000.\textsuperscript{102} Additionally, by statute, any non-profit agency found suitable by the court may act as public guardian.\textsuperscript{103}

However, although centralized in the probate code and explicit in many respects, the Illinois statutory scheme is silent regarding several key provisions that are essential features of a truly explicit statutory scheme.\textsuperscript{104} For example, the code fails to specify staffing ratio requirements or the number of wards per staff members either agency must be willing to accept.\textsuperscript{105} This alone has created significant problems within the overall public guardianship system.\textsuperscript{106} The Teaster study found that the state’s OSG program in particular serves approximately 5,500 wards, with one of the highest staff-to-ward ratios at 1 to 132 for guardianships of the person and 1 to 31 for guardianships of the estate.\textsuperscript{107}

The OSG attempts to mitigate its poor staffing ratio by providing extensive training and requiring Registered Guardian certification for nearly all its staff through the National Guardianship Foundation.\textsuperscript{108} However, staff visits to wards occur at best once every three months.\textsuperscript{109} Moreover, the focus groups who participated in the Teaster study stressed that the OSG serves far too many wards without proper funding, and that most of the wards receive insufficient personal attention due to the inadequate staffing.\textsuperscript{110}

Thus, primarily explicit statutory schemes that designate specific amounts and sources of funding to a designated agency are “for all practical purposes” rendered ineffective when the statute also fails to specify caps to staffing ratios.\textsuperscript{111} The absence of any staffing provision also implicates the provision expressly permitting the OSG to petition for its own appointment as guardian.\textsuperscript{112} In effect, the agency is less likely to petition courts for

\textsuperscript{103} 755 ILCS 5/11a–5.
\textsuperscript{105} See Teaster, et al., supra note 33, at 226.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
guardianship or pursue outside guardianship abuses when faced with high staffing ratios and insufficient resources—key issues stemming from a statutory scheme which fails to provide important safeguards.113

By contrast, Florida—the state with the highest percentage of its population aged 65 years or older—presents a more formative approach with its statutory scheme.114 The Statewide Public Guardianship Office (the Office) is housed under the state’s Department of Elder Affairs.115 As directed by Florida’s guardianship code, the Office contracts with seventeen local “Offices of Public Guardianship” throughout Florida, which are usually non-profit organizations.116 Since 2016, the program has expanded and is now regulating more than 550 professional guardians statewide, which includes investigating possible needs for guardianship and, if deemed appropriate, disciplining guardians in violation of law.117 The Teaster study found that, while twelve state laws specifically address ward-to-staff ratios in the statute, Florida is the only state that provides an exact ratio cap in its statute—a one-to-forty staff-to-ward ratio—with the remaining statutes simply providing that a ratio must be administratively determined by the agency responsible for public guardianship.118

While it may seem like a good idea to allow agencies responsible for public guardianship to determine their own staffing ratio, Florida’s statutory scheme illustrates why an across-the-board limitation may actually be the most appropriate approach.119 The statutorily capped ratio acts as a limitation, rather than a minimum requirement.120 This capped ratio effectively safeguards wards subject to public guardianship within an agency that: (1) has not properly assessed its ability to handle a certain number of wards; (2) has ulterior motives for taking in more wards; or (3) has knowingly taken on an overwhelming caseload under the mistaken belief that minimal guardianship is still better than no guardianship at all.121

Moreover, given that states generally provide most of the funding to these agencies, the capped ratio ensures a more equitable distribution of resources and a higher standard of care for those under guardianship.122

113 Id.
115 Teaster, et al., supra note 96.
117 Id.
118 Teaster, et al., supra note 96.
119 Id.
120 Id.
121 Id.
designated public agencies, it makes sense that the two highly interrelated concerns of budgetary appropriations and staffing ratios remain under the control of state legislatures.\textsuperscript{122}

Although there are many important considerations regarding public guardianship, the Teaster study showed that virtually all states reported lack of funding and staffing as their “greatest weakness and greatest threat.”\textsuperscript{123} The study identified staff-to-ward ratios as high as 1:50, 1:80 and even 1:173.\textsuperscript{124} Focus groups involved in state public guardianship systems reported “staff burnout,” “judges not sympathetic to the high caseload problem,” “more labor intensive cases,” “not enough time to do proper accounting,” “not enough time to see wards often enough,” “too few restoration petitions,” and “prohibitively high caseloads preventing a focus on individual needs.”\textsuperscript{125} While many states continue to improve their public guardianship systems, the Teaster study makes it clear that there is still room for great improvement across the board.\textsuperscript{126}

C. Public Guardianship & Olmstead

The conundrum, in light of the current state of public guardianship law, is that public guardianship was originally contemplated as an essential part of the public safety net.\textsuperscript{127} Public guardianships began as a relatively new phenomenon in the 1970s, with the idea being that public guardians could serve as guardians of last resort, often to take in poor and vulnerable citizens with nowhere else to go.\textsuperscript{128} Without proper statutory schemes to support this movement, however, state programs may be stretched to the breaking point and actually create issues by failing to provide any real benefit to the individuals they have committed to serve.\textsuperscript{129}

The landmark U.S. Supreme Court case \textit{Olmstead v. L.C. ex rel. Zimring} also provides a strong impetus to supporting improvements in public guardianship law.\textsuperscript{130} Decided in 1999, the \textit{Olmstead} case requires

\begin{itemize}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.}
\end{itemize}
states, under authority of the American Disability Act of 1990, to fully integrate individuals with disabilities into community settings when appropriate, as opposed to institutional placements.\footnote{Id.} Although \textit{Olmstead} dealt with plaintiffs who were younger, disabled individuals, the facts and circumstances in \textit{Olmstead} are in many ways analogous to the current dilemma.\footnote{Id.} Many older adults are confined to state institutional care, although eligible for public guardianship—a service that arguably places such individuals in the “most integrated” setting appropriate to meet the individuals’ needs.\footnote{Id. at 592.} The court in \textit{Olmstead} cited the Attorney General’s preamble to the regulations on the ADA, which defines “the most integrated setting appropriate to the needs of qualified individuals with disabilities” as “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”\footnote{Id.; 28 CFR § 35.130(d) (1998).}

Like the plaintiffs in \textit{Olmstead}, wards under public guardianship require surrogate decision-makers to establish and facilitate community supports.\footnote{See \textit{Olmstead}, 527 U.S. 581, 581–82.} And under another regulation, public entities are required to “make reasonable modifications” to public services and programs, which may be necessary to avoid “discrimination on the basis of disability,” unless “the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”\footnote{28 C.F.R § 35.130(b)(7) (1998).} Yet wards with mental disabilities may, among other things, be susceptible to unnecessary confinement in mental hospitals or nursing homes because they lack the assistance of a public guardian due to a state’s flawed statutory scheme.\footnote{See Cashmore, supra note 127.}

It follows, then, that \textit{Olmstead} serves as a charge to states, if not a duty, to address unmet needs in the area of public guardianship. By establishing more fully funded public guardianship programs with explicit statutory schemes, states can promote independent living and greater community interaction for wards who might otherwise be institutionalized.\footnote{See, e.g., TEX. HUM. RES. CODE § 161.071.}
IV. ADULT GUARDIANSHIP LAW IN TEXAS

Academics and social service providers across the nation have increasingly pushed for policies and programs that will better assist the elderly population. Like many states, Texas guardianship law has undergone a significant degree of transformation over the past several decades. This transformation has largely been sparked by increased public awareness and attention to guardianship abuses and system failures. Additionally, Texas is no exception to the national demographic trend raising concerns for the elderly population—with the over sixty-five population in Texas expected to double by 2040 from approximately 2.85 million to more than 6 million. Included in this growth is an increase in the percentage of persons age 75 and older, including those living with Alzheimer’s disease and other illnesses typically associated with the elderly population.

Thus, even as concerns relating to guardianship continue to increase, guardianships continue to be utilized at higher and higher rates. As late as July 2016, nearly $3 billion in personal wealth was under the control of guardians in Texas.

Guardianship jurisdiction in Texas is spread out across three different court systems: statutory probate courts, county courts at law, and constitutional county courts. Texas currently has eighteen statutory probate courts in ten counties and 211 constitutional county courts. Notably, only eleven percent of the 254 of the current county judges in Texas were actually licensed to practice law. There are many standards differentiating statutory probate courts from county courts, which were initially designed at a time when the statutory probate courts heard eighty

139 See Cashmore, supra note 127.
140 Id.
143 Id.
144 See Michels, supra note 141.
145 Id.
146 See TEX. EST. CODE § 1022.
percent or more of all guardianship cases filed in Texas.149

Today, however, at least forty percent of all guardianship petitions in Texas are filed in the state’s county-level courts.150 Nevertheless, through a variety of key provisions in the Texas Estates Code, statutory probate courts continue to be governed under different, typically higher, standards than county-level courts, and typically have more resources allocated to them.151 For example, statutory probate courts receive funding for additional staff, such as court investigators, to assist with probate and guardianship-specific tasks.152 Additionally, when a guardianship petition is filed in statutory probate court, the court must receive a physician’s evaluation of the alleged incapacitated person and a court investigator must determine the availability of less restrictive alternatives (LRA) to guardianship.153 The requirement to engage in an LRA determination applies only to statutory probate courts.154 Yet another important disparity relates to bond allocation.155 Statutory probate courts must execute a bond in the amount of $500,000, conditioned on the faithful performance of the duties of office, while the bond amount for all other court judges is between $1,000 and $10,000, with no such duty imposed.156

At the same time, much of Texas’s guardianship law is consistent across the three court systems and comports with national trends in guardianship.157 For example, regardless of the jurisdiction, the court will hold a hearing to consider evidence of the alleged incapacity of the person who is the subject of the petition.158 After the hearing, the court will issue an order either granting a full or limited guardianship or denying the guardianship petition altogether.159 Once created, the person named as guardian may change, but the guardianship itself remains in effect until the individual under guardianship dies or is found by the court to no longer require a guardian’s support (a “restoration” of rights).160 If the individual

150 Id.
151 Id.; see TEX. EST. CODE § 1022.
152 See id. §§ 25.0024, 25.0025, 25.00251.
153 Id. §§ 1101.103, 1054.151.
154 Id. §§ 1101.103, 1054.151.
155 See generally, id., Ch. 1105.
157 See infra Part IV.
158 TEX. EST. CODE § 1101.051.
159 Id. § 1101.051.
160 Id. §§ 1101.151, 1101.152, 1101.155.
dies, a formal “settlement of guardianship,” or a proceeding to formally close the guardianship with the court, is generally required.\textsuperscript{161}

As is the case in every state, the Texas Estates Code provides for ongoing monitoring of any guardianship, including the filing of annual reports for guardianships of the person and annual accountings for guardianships of the estate.\textsuperscript{162} Courts must review all annual reports and exercise “reasonable diligence” to determine whether the guardian is performing all of the required duties and whether the guardianship should be continued, modified, or terminated.\textsuperscript{163} While statutory probate courts are given specific instructions regarding the review process, county courts “may use any method . . . that is determined appropriate by the court according to the court’s caseload and available resources.”\textsuperscript{164}

\textbf{A. Texas’s Implicit Statutory Scheme to Public Guardianship}

Texas law provides for public guardianship through the Texas Estates Code and the Human Resources Code, which together create an implicit statutory scheme.\textsuperscript{165} Guardianship is defined in the Texas Estates Code, which encompasses the majority of laws passed by the Texas Legislature regarding adult wards under guardianship.\textsuperscript{166} The Texas Estates Code designates the Department of Aging and Disability Services (“the Department”) as guardian of last resort, or “successor guardian,” of the person, estate, or both.\textsuperscript{167} The Human Resources Code contains additional laws relating to procedural and substantive duties applicable to the Department.\textsuperscript{168}

While both bodies of law provide some guidance in regards to public guardianship, neither provides explicit statutory provisions in regards to funding or staffing ratios.\textsuperscript{169} Moreover, several key provisions relating to the substantive duties and obligations of the Department are missing from

\begin{footnotesize}
\textsuperscript{161} See, e.g., \textsc{Tex. Est. Code} §§ 1204.001, 1204.002.
\textsuperscript{162} See generally, \textsc{Tex. Est. Code} Ch. 1151.
\textsuperscript{163} \textsc{Tex. Est. Code} §§ 1201.001, 1201.002, 1201.052.
\textsuperscript{164} \textit{Id.} § 1201.053.
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} See \textsc{Tex. Est. Code} § 1203.108.
\textsuperscript{168} See \textit{A Texas Guide to Adult Guardianship}, supra note 165.
\end{footnotesize}
It is also worth noting that the Department is no longer a formal organization, after being absorbed by the Department of Health and Human Services ("HHS") in September 2017.\footnote{See generally TEX. EST. CODE tit. 3; TEX. HUM. RES. CODE § 161.101; see, infra Part IV.A. See Department of Aging and Disability Services and Functions Moved to HHS, TEX. HEALTH & HUM. SERVS. (Dec. 21, 2018), https://apps.hhs.texas.gov.}

The Human Resources Code imposes an obligation on HHS (or, technically, on the Department) to file an application for appointment of guardian, depending on the situation.\footnote{See TEX. HUM. RES. CODE § 161.101.} The Code specifically addresses filing obligations for two categories of proposed wards.\footnote{See id. §§ 161.101(a)(1); 161.101(b).} For disabled minors referred to the Department, the Department “shall file” an application for guardianship upon determination “that the minor, because of a mental or physical condition, will be substantially unable to provide for the minor’s own food, clothing or shelter,” among other things.\footnote{Id. § 161.101(a)(1).} Additionally, the Human Resources Code provides that, upon appointment by a probate court, the Department “shall serve as the successor guardian” of a ward described by Section 1203.108(b) of the Texas Estates Code, or as that statute stands, a “ward who has been adjudicated as totally incapacitated.”\footnote{Id. § 161.101(f) (emphasis added); TEX. EST. CODE § 1203.108(b).}

The Department’s obligations regarding an “elderly person” are not the same.\footnote{See TEX. HUM. RES. CODE §161.101(b); § 48.002 (defining "elderly person" as “a person 65 years if age or older”).} The Human Resources Code provides that the Department “shall conduct a thorough assessment of the conditions and circumstances of an elderly person or person with a disability referred to the department for guardianship services to determine whether a guardianship is appropriate for the individual or whether a less restrictive alternative is available for the individual.”\footnote{Id. See TEX. HUM. RES. CODE §161.101(b); § 48.002 (defining "elderly person" as “a person 65 years if age or older”).} The Human Resources Code further provides that “in determining whether a guardianship is appropriate, the department may consider the resources and funds available to meet the needs of the elderly person or person with a disability.”\footnote{Id. § 161.101(b).} If the Department determines guardianship is appropriate, it “shall” either: (1) file an application for appointment as guardians; (2) refer the person to another potential guardian; or (3) if a less restrictive alternative to guardianship is
available, pursue that alternative.\textsuperscript{179} Notably, there is no provision in the Human Resources Code or the Texas Estates Code relating to judicial review of the Department’s determination or an administrative appeals process.\textsuperscript{180}

Section 1203.108(b) of the Texas Estates Code is the only statutory provision expressly permitting a court to require the Department to file an application for guardianship.\textsuperscript{181} However, as discussed above, the court may require an application under this section only when appointment of successor guardian is being sought for an individual adjudicated as \textit{totally incapacitated}.\textsuperscript{182} And under Section 1203.108(b) of the Texas Estates Code, the Department “may not be appointed as permanent guardian for any individual” unless it applies for or otherwise consents to the appointment.\textsuperscript{183} Subsection (c) of that statute provides that the number of appointments is subject to an annual limit of 55.\textsuperscript{184} It further provides that under Subsection (b), “the appointments must be distributed equally or as equally as possible among the health and human services regions of this state,” but that “the department, at the department’s discretion, may establish a different distribution scheme to promote the efficient use and administration of resources.”\textsuperscript{185}

The most important obligations imposed upon the Department by this statutory scheme effectively hinge on two main factors: the category that the proposed ward falls under (disabled minor or incapacitated adult) and the type of guardianship being sought.\textsuperscript{186} Under the Texas Estates Code, there are generally three types of guardianships: (1) “permanent,” (2) “temporary,” and (3) “successor.”\textsuperscript{187} A permanent guardianship continues indefinitely and includes a requirement that all persons with an interest in the proposed ward be notified of the proceeding.\textsuperscript{188} Permanent guardianship also includes the requirement of personal service on both the proposed ward and the person named in the application to be appointed guardian, if that person is not the applicant.\textsuperscript{189}

\textsuperscript{179} \textit{Id.} § 161.101(c)(1), (2).
\textsuperscript{180} \textit{See generally T EX. HUM. RES. CODE} § 161.101; \textit{T EX. EST. CODE tit. 3} (2015).
\textsuperscript{181} \textit{See generally T EX. HUM. RES. CODE} § 161.101; \textit{T EX. EST. CODE} § 1203.108(b).
\textsuperscript{182} \textit{See supra} note 183.
\textsuperscript{183} \textit{T EX. ESTATES CODE} § 1203.108(b) (emphasis added).
\textsuperscript{184} \textit{Id.} § 1203.108.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{See generally T EX. HUM. RES. CODE} § 161.101; \textit{T EX. EST. CODE tit. 3} (2015).
\textsuperscript{187} \textit{T EX. EST. CODE} §§ 1002.012(a); 1101.001.
\textsuperscript{188} \textit{See T EX. EST. CODE} § Ch. 1101; 1051.
\textsuperscript{189} \textit{T EX. EST. CODE} § 1051.103(a)(5).
Temporary guardianship is initiated in the event that the proposed ward “may be an incapacitated person,” or if the court “has probable cause to believe that the person, the person’s estate, or both require the immediate appointment of a guardian.”\textsuperscript{190} The proposed temporary guardian must be given notice of the proceeding and has the right to appear at the initial hearing.\textsuperscript{191} Successor guardianship has similar requirements for a guardian who has not initiated the proceeding.\textsuperscript{192} A successor guardian is typically an alternate guardian in the event that the first appointed guardian resigns, is removed, or dies.\textsuperscript{193} The main statutory provisions governing both temporary and successor guardians specifically reference the Department.\textsuperscript{194}

The statutory scheme created by the Texas Estates Code and Human Resources Code confuses the obligations and duties of the Department and fails to account for potential issues pertaining to the Department’s manpower and resources.\textsuperscript{195} Rather than allow the Department to consider its current caseload from the start, the scheme requires the Department to conduct an investigation into the appropriateness of guardianship, only to then grant the Department wide administrative discretion in determining whether the Department wishes to take on the role of public guardian.\textsuperscript{196} Additionally, stricter requirements are imposed upon the Department depending on whether the Department is being sought as successor guardian or permanent guardian, despite the fact that such distinctions may have nothing to do with the Department’s ability to act as a competent public guardian.\textsuperscript{197} And, while there is a limit to the number of wards the Department may appoint annually for permanent guardianship, there remains no provision providing for a staffing ratio cap.\textsuperscript{198} This, coupled with unclear, or at the very least, disproportionate, duties imposed on the Department sets the system up for the same issues discussed above, with regards to public guardianship across the nation.\textsuperscript{199} The following section serves as an illustration of public guardianship under this statutory

\textsuperscript{190} See id. § 1251.001(a)(1),(2).
\textsuperscript{191} See id. §§ 1251.005(a); 1251.005(b)(2); 1251.009.
\textsuperscript{192} See id. § 1203.108(b)(5)
\textsuperscript{193} See id. § 1203.102.
\textsuperscript{194} See id. §§ 1203.108(b)(5); 1251.001; 1251.009.
\textsuperscript{195} See generally TEX. HUM. RES. CODE § 161.101; TEX. EST. CODE tit. 3 (2015).
\textsuperscript{196} TEX. HUM. RES. CODE § 161.101(c)(1), (2).
\textsuperscript{197} See TEX. EST. CODE §§ 1203.108(b)(5); 1251.001; 1251.009.
\textsuperscript{198} See id. § 1203.108; See generally TEX. HUM. RES. CODE § 161.101; TEX. EST. CODE tit. 3 (2015).
\textsuperscript{199} See supra Parts III.B, C.
scheme.200

B. Implicit Problems: In Re the Guardianship of Edwin Wooley

One obvious concern with public guardianship in Texas is the potential for courts to rely too heavily on government agencies for guardianship.201 In lieu of upholding the statutory requirement that parties exercise due diligence in finding an alternative guardian, or an alternative to guardianship altogether, courts may be tempted to simply appoint state agencies as public guardian.202 Moreover, courts may make such without regard for whether the agency has the resources to handle additional guardianships, or before the court assesses a person’s individual needs to determine if public guardianship is even in the proposed ward’s best interest.203

Implicit public guardianship statutory schemes like the one in Texas fail to provide the necessary safeguards to address these concerns.204 This was apparent in the 2017 case, In re the Guardianship of Edwin Wooley.205 In Wooley, the Tarrant County Probate Court No. 2 appointed the Department as temporary guardian of an alleged incapacitated man by the name of Edwin Wooley.206 The court investigator filed an application for permanent guardianship, nominating “the Department or another person” to be appointed permanent guardian.207 The Department filed a plea to the jurisdiction, arguing that its immunity from suit barred the court investigator’s motion because it had not applied to be permanent guardian, nor had it consented to the appointment of public guardian.208 The probate court denied the plea and the Department appealed to the Texas Second Court of Appeals, Fort Worth.209

200 See infra Section VII.
202 Id.
203 Id.
204 Id.
205 See In the Matter of the Guardianship of Edwin Wooley, No. 02-14-00315-CV, 2016 WL 3179643, at *1 (Tex. App.—Fort Worth June 2, 2016, no pet.).
206 Id.
207 Id.
208 Id.
209 Id.
In a divided opinion, the court of appeals affirmed. The lead opinion concluded that sovereign immunity did not apply because uncontested guardianship proceedings are by statute in rem proceedings. The court reasoned that the Department was therefore considered a party, but not a defendant, to the proceeding in its capacity as temporary guardian and that the administration of the guardianship is a single proceeding over which the probate court has jurisdiction. That opinion also reasoned that the statute exempting the Department from serving as permanent guardian without its consent at most afforded the Department immunity from liability, not an immunity from suit that would defeat the probate court's jurisdiction.

A concurring opinion emphasized that immunity did not apply because the guardianship proceeding was not a suit brought against the Department. That opinion also concluded that the Department's statutory exemption from permanent guardianship did not implicate the probate court's subject-matter jurisdiction because the Department had been appointed as successor guardian, or “potential permanent guardian.” The dissent, however, reasoned that naming the Department as a potential guardian in the application for permanent guardianship was “tantamount to a lawsuit being brought against the Department” and an effort by the court to control state action by compelling the Department to serve in an unwanted role. The dissent explained that the probate court could have easily dismissed the guardianship application as to the Department while retaining jurisdiction over the remainder of the proceeding.

The Department appealed for a second time to the Texas Supreme Court, which granted its petition for review. The case, however, was dismissed on October 6, 2017, after the death of Mr. Wooley and before the

210 Id.
211 See id. at *1 (emphasis added); see also TEX. EST. CODE § 1022.002(d) (“from the filing of the application for the appointment of a guardian of the estate or person, or both, until the guardianship is settled and closed under this chapter, the administration of the estate of a minor or other incapacitated person is one proceeding for purposes of jurisdiction and is a proceeding in rem”).
213 Id. at *6.
214 Id. at *8.
215 Id.
216 Id.
217 Id.
court could issue its decision. Nevertheless, the opinions of the probate court and the court of appeals on interlocutory appeal, as well as the briefs by both parties on appeal to the Texas Supreme Court, highlight the multiple interpretations public guardianship law in Texas lends itself to.

Throughout the case, the Department framed the primary issue in terms of the statutory limitations on the probate court's jurisdiction, focusing on the immunity from suit argument second. The Department argued that even if it was not immune from suit, together the Estates Code and the Human Resources Code make clear that a court may not exercise jurisdiction over it as a potential permanent guardian.

In addressing its second argument relating to sovereign immunity, the Department—in line with the dissent on appeal—urged the court that it could seek dismissal of the permanent guardianship application, without forcing the court to dismiss the entire proceeding. Although the Texas Estates Code describes a guardianship proceeding as in rem, the Department argued that a guardian proceeding is actually quasi in rem because it requires potential guardians to have notice and an opportunity to be heard. The Department also challenged whether it even makes sense to characterize its exemption from guardianship as only immunity from liability and not immunity from suit. As was alluded to by the court of appeals, the Department stressed it would be able to object to suit if the application was for permanent guardianship. Because establishing a permanent guardian is the ultimate goal in most guardianship proceedings, the court of appeals’ interpretation of the Estates Code wasted time finding a suitable guardian, when the Department would ultimately object to permanent guardianship anyways.


223 See id. at 7.

224 Id.

225 Id.

226 See generally id.
On the other hand, Wooley's guardian ad litem used the court of appeals' immunity analysis and argued that any plea based only on the potential appointment of the Department as permanent guardian was premature. Further, Wooley maintained that the Human Resources Code cannot extend immunity to the Department by delegating to the Department the decision on permanent guardianship because that alleged interference with the probate court's authority would violate the Texas Constitution's Separation of Powers provision.

Had the Supreme Court reached a decision on the Department's issue regarding its interpretation of the public guardianship statutory scheme, the entire system for public guardianship in Texas could have been significantly implicated. A ruling in favor of Wooley on this issue would have meant that in all future uncontested guardianship cases, the Department would have no choice but to act as “temporary” or “successor” guardian, if appointed by the court. It is also important to note that in interpreting Texas’s statutory scheme, the court may have ruled on the issue regarding immunity from suit, affecting the legal theory of sovereign immunity in the context of all in rem proceedings, not just public guardianship proceedings.

V. POTENTIAL SOLUTION TO THE CURRENT STATUTORY SCHEME IN TEXAS

A. What Texas Can Learn from Other States: General Recommendations

Public guardians are generally subject to the same statutory provisions for guardianship duties, accountability, and monitoring as other types of guardians. For example, the vast majority of states require regular (typically annual) status reports for all wards under permanent

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228 Tex. Const. of 1869, art. II, § 1.
230 Id.
231 Id.
guardianship, including those under public guardianship. Additionally, many states have enacted statutes that establish requirements specific to public guardianship. Successful public guardianship statutory schemes are explicit and provide for germane provisions, such as provisions on public guardianship program funding and staff-to-ward ratio caps, two problems previously identified.

Ideally, such provisions will be located in a specific public guardianship chapter of a statutory code, such as the state’s probate code. A designated public guardianship chapter provides convenient clarification to public guardians regarding the duties and obligations specifically assigned to them, while also providing clearer procedural guidelines to courts and practitioners. Moreover, consolidating the most important public guardianship statutes into a single statutory code and chapter is an important safeguard to prevent legislatures from enacting incompatible public guardianship statutes which may result in systematic failures, as in Wooley.

The 2015 Texas Legislature enacted numerous amendments to the state’s guardianship framework. Among these were major changes defining and encouraging alternatives to guardianship proceedings, while also defining and expanding a ward’s rights under guardianship. For example, all attorneys representing an applicant for guardianship must now be certified by the State Bar of Texas as having completed a course in guardianship law. Under an entirely new section, the legislature laid out seven specific alternatives to guardianship. Similarly, sections of the Texas Estates Code were added or amended to provide an additional basis for an alternative to guardianship, or termination of an existing guardianship, in the event that sufficient “supports and services” are available to the alleged incapacitated person or ward.

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233 Id.
234 Id.
235 See supra Part III.B.
236 See infra Part V.B.
237 See generally Teaster et al., supra note 232.
238 See supra Part V.B.
240 Id.
241 TEX. EST. CODE § 1054.201.
242 See id. § 1002.0015.
243 See id. §§ 1002.031; 1202.051; 1202.151(a); 1202.153(c).
Without a separate public guardianship chapter in the Texas Estates Code, there is nothing to suggest that the 2015 amendments do not also apply to public guardianship proceedings. While this may seem like a positive development, specific mandates may actually conflict with administrative procedures implemented by the Department or expressly allowed by the Human Resources Code. For example, one amendment enacted by the 2015 Legislature establishes stricter requirements regarding an applicant’s burden to prove to the court that alternatives to guardianship were considered and deemed not feasible. At the same time, the Human Resources Code allows for the consideration of alternatives under a much more lenient standard, granting the Department wide discretion not subject to the court’s review.

B. To the Texas Legislature: Proposed Public Guardianship Statutes

This Comment recommends that the Texas legislature enact key substantive and non-substantive amendments in an effort to create a more explicit statutory scheme to public guardianship. First, the consolidation of Texas’s public guardianship provisions is an important step in the right direction toward improving the state’s public guardianship law. Title 3 of the Texas Estates Code, “Guardianship and Related Procedures,” should be amended to include a chapter specifically addressing public guardianships and the agency responsible for them. This chapter should include the public guardianship statutory provisions that are inappropriately located in the Human Resources Code. Section 161.071 of the Human Resources Code currently coordinates with the Texas Estates Code by providing that the Department is responsible for “serving as guardian of the person or estate, or both, for an incapacitated individual as provided by Subchapter E of this chapter and Title 3, Estates Code.” The legislature should move Subchapter E of the Human Resources Code, “Guardian Services,” to the Texas Estates Code, under the recommended public guardianship chapter. Consolidating the main statutes governing public guardianship law will simplify the presentation of the law, which in turn will allow for

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244 See generally, Kreshover supra note 239.
245 Id.
246 See TEX. EST. CODE § 1101.01.
247 See TEX. HUM. RES. CODE § 161.101(a).
248 See infra Part V.B.
249 See infra Part III.B.
250 See infra Part I.B.
251 See infra Part IV.A.
252 TEX. HUM. RES. CODE § 161.071(10).
253 See infra Part V.B.
the reconstruction of ambiguous and incompatible statutory provisions.\textsuperscript{254}

Additionally, this Comment recommends that the legislature make concurrent substantive changes to existing public guardianship law.\textsuperscript{255} First, as a technical matter, the relevant statutes should designate the agency now in charge of public guardianship—the Texas Health and Human Services under the Guardianship Services Program (“HHS”)—as public guardian.\textsuperscript{256} More importantly, the legislature should redefine the statutory duties of HHS to prevent the same confusion as was seen in \textit{Wooley}.\textsuperscript{257} Namely, provisions relating to public guardianship appointment should be amended to allow for wider discretion on behalf of the Program in determining whether to act as public guardian.\textsuperscript{258} Currently, Section 161.101 of the Human Resources Code, which references four different provisions of the Texas Estates Code, is the main statutory provision addressing adult public guardianship appointment.\textsuperscript{259} Section 161.101 and the sections of the Texas Estates Code referenced therein should be consolidated under a public guardianship chapter of the Texas Estates Code and amended according to the following framework.\textsuperscript{260}

\textbf{Texas Health and Human Services Guardianship Services Program}

\textbf{Guardianship Services}

(a) The Texas Health and Human Services (“HHS”) may file an application under Section 1101.001 or 1251.003 to be appointed guardian of the person, estate, or both of a minor or adult, referred to the Department under Section 48.209(a)(1) of the Human Resources Code for guardianship services if the department determines that:

(1) in the case of a minor under Section 1002.019, the minor, because of the minor’s mental or physical condition, will be substantially unable to provide for the minor’s own food, clothing, or shelter, to care for the minor’s own physical health, or to manage the minor’s own financial affairs when the minor becomes an adult; or

\begin{thebibliography}{99}
\bibitem{255} See infra Part V.B.
\bibitem{256} See infra Part IV.A; see also \textit{What is Guardianship? TEX. HEALTH & HUM. SERVS.} (2018), https://hhs.texas.gov/laws-regulations/legal-information/guardianship.
\bibitem{257} See supra Part IV.B.
\bibitem{258} Id.
\bibitem{259} See \textit{TEX. HUM. RES. CODE} §§ 161.101(b)–(f); see also, \textit{TEX. EST. CODE} §§ 1101.001; 1251.003; 1251.003; 1203.108(b).
\bibitem{260} See infra Part V.B.
\end{thebibliography}
(2) in the case of an adult, that the adult is an “incapacitated” person as is defined under Section 1002.017; and
(3) a less restrictive alternative is not available.

(b) HHS shall conduct a thorough assessment of the conditions and circumstances of an elderly person or person with a disability referred to HHS under Section 48.209(a)(2) of the Human Resources Code²⁶¹ for guardianship services to determine whether a guardianship is appropriate for the individual or whether a less restrictive alternative is available for the individual. In determining whether a guardianship is appropriate, the department may consider the resources and funds available to meet the needs of the minor or incapacitated adult. The executive commissioner shall adopt rules for the administration of this subsection.

(c) Subject to Subsections (d) and (e), if after conducting an assessment of a minor or alleged incapacitated adult under Subsection (1) HHS determines that:

   (1) guardianship is appropriate for the elderly person or person with a disability, the department may:
      (A) file an application under Section 1101.001 or 1251.003, to be appointed guardian of the person or estate, or both, of the individual; or
      (B) if HHS determines that an alternative person or program described by Section 161.102 of the Human Resources Code is available and better suited to serve as guardian, HHS may refer the individual to that person or program as provided by that section; or
      (C) if HHS determines that a less restrictive alternative to guardianship is available for a minor or incapacitated adult, the department may pursue the less restrictive alternative instead of taking an action described by Subsection (a); or
      (D) if HHS determines HHS lacks the resources and funds available to meet the needs of the minor or incapacitated adult and serve as guardian, it may submit its findings and recommendations to the Court.

²⁶¹ References to statutory provisions of the Human Resources Code are included as they currently stand for reference. This Comment proposes that the Legislature move such sections to the Texas Estates Code, along with the proposed statute.
(d) Not later than the 70th day after the date the department receives a referral under Section 48.209(a)(2) for guardianship services, HHS may make the determination required by subsection (c) and, if the HHS determines that guardianship is appropriate and that the department should serve as guardian, may file the application to be appointed as guardian under Section 1101.001 and 1251.003. If the department determines that an alternative person or program described by Section 161.102 of the Human Resources Code is available to serve as guardian, the department may refer the minor or incapacitated adult to that alternative person or program in a manner that would allow the alternative person or program sufficient time to file, not later than the 70th day after the date HHS received referral, an application to be appointed guardian.

(e) With the approval of the Department of Family and Protective Services, HHS may extend, but not more than 30 days, a period prescribed by Subsection (d) if the extension is:

(1) made in good faith, including any extension for a person or program described by Section 161.102 of the Human Resources Code that intends to file an application to be appointed guardian; and

(2) in the best interest of the minor or incapacitated person.

(f) HHS may not be required by a court to file an application for guardianship and HHS may not be appointed as permanent, temporary, or successor guardian for any individual unless HHS files an application to serve or otherwise agrees to serve as the individual’s guardian of the person, estate, or both.

Lastly, this Comment recommends that the legislature enact the following additional statutory provisions under the appropriate sections of a public guardianship chapter of the Texas Estates Code.262

(1) The executive director of the Health and Humans Services, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish, within a county in the judicial circuit or within the judicial circuit, one or more offices of public guardian and if so established, shall create a list of persons

best qualified to serve as the public guardian. The public guardian must have knowledge of the legal process and knowledge of social services available to meet the needs of incapacitated persons. The public guardian shall maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions, including an attorney who has experience in probate areas and another person who has a master’s degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner. A public guardian that is a nonprofit corporate guardian must receive tax-exempt status from the United States Internal Revenue Service.

(2) The executive director shall appoint or contract with a public guardian from the list of candidates described in Subsection (1). A public guardian must meet the qualifications for a guardian as prescribed in the Texas Estates Code. Upon appointment of the public guardian, the executive director shall notify the chief judge of the judicial circuit and the Chief Justice of the Supreme Court of Texas, in writing, of the appointment.

(3) If the needs of the county or circuit do not require a full-time public guardian, a part-time public guardian may be appointed at reduced compensation.

(4) A public guardian, whether full-time or part-time, may not hold any position that would create a conflict of interest.

(5) The public guardian is to be appointed for a term of 4 years, after which her or his appointment must be reviewed by the executive director of HHS and may be reappointed for a term of up to 4 years. The executive director may suspend a public guardian with or without the request of the chief judge. If a public guardian is suspended, the executive director shall appoint an acting public guardian as soon as possible to serve until such time as a permanent replacement is selected. A public guardian may be removed from office during the term of office only by the executive director who must consult with the chief judge prior to said removal. A recommendation of removal made by the chief judge must be considered by the executive director.

(6) Public guardians who have been previously appointed by a chief judge prior to the effective date of this act pursuant to this section may continue in their positions until the expiration of their term.
pursuant to their agreement. However, oversight of all public guardians shall transfer to the Office of Public and Professional Guardians upon the effective date of this act. The executive director of the Office of Public and Professional Guardians shall be responsible for all future appointments of public guardians pursuant to this act.

VI. CONCLUSION

State legislatures have been forced to reexamine guardianship laws amidst a growing public outcry stemming from numerous cases of guardianship abuse.263 While legislatures across the nation have made significant efforts to reform guardianship laws, laws relating to public guardianship are too often excluded from these efforts.264 Yet, as the elderly population continues to grow, state legislatures may soon be forced to similarly reexamine flawed public guardianship laws.265 It is therefore vital that states address public guardianship now, before our nation’s elderly suffer the consequences.266

Public guardianship will likely become an essential legal mechanism to aid state courts faced with the impending shift in demographics.267 Implicit and unconsolidated statutory schemes complicate public guardianship law and public guardianship administration at the expense of wards under public guardianship.268

State legislatures should address public guardianship by designating respective public guardianship chapters and consolidating all statutory provisions relating to public guardianship.269 Such provisions must explicitly address (among other things) staff-to-ward ratios, budgetary appropriations, and duties and powers of the public guardian. Importantly, public guardianship agencies must not be required to apply for guardianship or be appointed guardian by the court without their

264 See infra Part V.B.
265 See infra Part II.
266 See infra Parts I–V.
267 Id.
268 Id.
269 Id.
Implementing and consolidating these and other provisions will aid state agencies in handling wards, reduce staff attrition, and encourage courts to seek out lesser restrictive alternatives to guardianship. The result will be greater protection for one of the nation’s most vulnerable populations: wards with nowhere else to go.
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The paper is my own ramblings, and I advise you to take it with a grain of salt. I take no responsibility for any misinformation in it, whether occasioned by my rising disillusionment with Congress or my increasing contrariness.
I. INTRODUCTION

What is “fair market value?” Fair market value is a concept we attorneys often discuss with our clients in a variety of circumstances, including estate and gift taxation, Medicaid eligibility, divorce settlements, and probate dispute settlements. It is interesting that the Super Bowl jersey belonging to Tom Brady of the New England Patriots which disappeared after the game has had a value of $500,000 ascribed to it even though it is stolen property. Valuation of “oddball” assets is a matter of opinion. The first example which the author will bring to the reader’s attention is the value of a Cheeto. According to the Associated Press, in a story dated February 7, 2017, a Cheeto that looks like the slain gorilla Harambe has sold for nearly $100,000 on eBay. The seller says he found the gorilla-shaped snack in a bag of Flamin’ Hot Cheetos. Bidding began at $11.99 on January 28th. It ended ten days later with a winning bid of $99,900. Harambe was a gorilla at the Cincinnati Zoo until handlers shot him dead when he started dragging a small boy who had gotten into his enclosure.1

II. FAIR MARKET VALUE

A. Basic Definition

Black’s Law Dictionary defines fair market value as “the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arm’s-length transaction; the point at which supply and demand intersect.”2

B. Further Clarification

“[A] forced sale price is not fair value though it may be used as evidence on the question of fair value. Likewise, the fair value of salable assets is not what they would sell for in the slow process of the debtor’s trade as if the debtor were continuing business unhampered. The general idea of fair value is the amount of money the debtor could raise from its property in a short period of time, but not so short as to approximate a forced sale, if the debtor operated as a reasonably prudent and diligent business with the interests in mind, especially a proper concern for the payment of his debts.”3

C. Internal Revenue Code

The Internal Revenue Code provides that the fair market value of property includible in a decedent’s estate is the price at which it would change hands between a willing buyer and a willing seller, both having reasonable knowledge of relevant facts. However, if an item is generally available to the public in a particular market, the fair market value of the property is the price obtainable on the market in which it is most commonly sold to the public. If the item of property is generally obtainable by the public on the retail market, the fair market value of the item is the price at which that item or a comparable one will sell at retail in a particular geographical market.4

The price paid for an item in a decedent’s gross estate at a public auction or in answer to a classified newspaper advertisement will also be considered its retail price. There are two conditions, however. The sale must be made within a reasonable period after the applicable valuation date, and there must not be a substantial change in market conditions during that period.5

Only in rare and extraordinary cases does property have no determinable fair market value.6 If the fair market value of an asset received in an exchange (such as a contract to receive royalties) cannot be determined with fair certainty, gain is not realized on the exchange until after the total payments received under the contract exceed the cost (or other basis) of the property surrendered in exchange. The Tax Court has applied the Cohan rule (estimated or approximate value) to estimate the value of patents, patent applications, and stock rights, where the taxpayer could not provide their exact value.

III. “ODDBALL ASSETS”

Assets which are commonly bought and sold, either through private transactions or through public exchanges, are valued fairly easily. One needs only to compare the asset to the same or similar assets for which a market exists. In the case of many unique or “oddball” assets, the task becomes very difficult inasmuch as a ready available market does not exist and such assets are commonly valued using different criteria by various federal and state authorities and private individuals. In

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2 http://www.cbs7.com/content/news/Cheeto-that-looks-like-Harambe-sells-for-100000-on-eBay-413018203.html
3 BLACK’S LAW DICTIONARY 1549 (7th ed. 1999).
4 NEVIN DAVID, ET AL., BANKRUPTCY §6-18 (at 307 993).
5 Treas. Reg. § 20.2031-1(b).
7 Treas. Reg. § 1.1001-1.
an effort to provide some guidance on factors to be considered in determining the value of such assets, the author has interviewed various knowledgeable persons regarding the valuation of small mineral interests, sports memorabilia, stamps and coins, and antiques. While this presentation is not intended as a definitive guide to valuation, it is hoped that it will stimulate attorneys and clients to give due consideration to various factors impacting the valuation of assets which might otherwise be overlooked.

A. “Unique Assets”

Perhaps the best starting point for considering whether an asset has non-apparent value is to consider whether it is an “unique asset” or not. Everyone who has studied basic contract law is familiar with the term specific performance and its relevance to unique or hard to value assets. Black’s Law Dictionary defines specific performance as “a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inadequate, as when the sale of real estate or a rare article is involved. Specific performance is an equitable remedy that lies within the Court’s discretion to award whenever the common-law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established.”

“In essence, the remedy of specific performance enforces the execution of a contract according to its terms, and it may therefore be contrasted with the remedy of damages, which is compensation for non-execution. In specific performance, execution of the contract is enforced by the power of the Court to treat disobedience of its decree as contempt, for which the offender may be imprisoned until he is prepared to comply with the decree. Actually…it is not strictly accurate to say that the Court enforces execution of the contract according to its terms, for the Court will not usually intervene until default has occurred, so that enforcement by the Court is later in time than performance carried out by the person bound, without the intervention of the Court.”

B. “Specific Performance”

The Uniform Commercial Code provides:

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

An initial lawyer problem under 2-716 concerns the words “unique or in other proper circumstances.” Surely treasured heirlooms remain “unique,” but Comment 2 to 2-716 suggests an even broader reach:

The test . . . . . . must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation.

The courts are thus encouraged to take notice of current market sources and commercial realities in determining whether goods are “unique.”

C. Judicial View

A typical judicial recitation of what constitutes unique items might be: “Unique items may be heirlooms, works of art, patents and inventions, particular shares of stock with peculiar investment features and similar items. (Flick v. Beer, 263 App.Div. 599, 601, 33 N.Y.S.2d 833 (First Dept. 1942)). Certain historic Indian wampum belts were also considered in this category. (Onondaga Nation v. Thatcher, 29 Misc. 428, 61 N.Y.S. 1027 (Onondaga Co. Supreme Ct. 1899); affd. 53 App.Div. 561, 66 N.Y.S. 1014 (Fourth Dept. 1900); affd. 169 N.Y. 584, 62 N.E. 1098 (1901)).

Determining what a willing buyer and a willing seller will value an asset and whether an asset is “unique” is obviously something of an art rather than a science.

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8 BLACK’S LAW DICTIONARY 1549 (7th ed. 1999).
9 KEETON, G.W., AN INTRODUCTION TO EQUITY 304 (5th ed. 1961).
11 WHITE, JAMES J. AND SUMMERS, ROBERT S., UNIFORM COMMERCIAL CODE § 6-6, AT 236 (2d ed. 1980).
12 Morse v. Penzimer, 58 Misc.2d 156 (N.Y. 1968).
IV. SPORTS MEMORIBILIA

As a further example of an “oddball” asset, the author chose one of his most treasured sports collectibles, a 1983 Michigan Panthers United States Football League (“USFL”) championship ring. By way of background, the author was an avid fan of the USFL and has collected numerous USFL related items over the years including game worn helmets, trading cards, programs, and team autographed USFL footballs. The ring was purchased by the author from a pawn shop in Detroit, Michigan, sometime ago. The purchase price for the ring was $2,000. In an attempt to ascertain the value of the ring, two reputable jewelers in Midland, Texas, were consulted, and neither would hazard a guess as to what the ring might be worth. The next step was to consult a longtime locally owned Midland pawn shop, Village Pawn & Coin Shop. Mr. Charles Green explained that for pawn value purposes, the only value of the ring was approximately 75% of the value of the gold contained therein. After examining the ring, Mr. Green stated that it was worth $312. In an attempt to determine what the original value of the ring was, the author contacted Josten’s, the original manufacturer of the ring. Unfortunately, a representative of Josten’s explained that Josten’s has a non-disclosure agreement with the USFL players association and with the NFL players association prohibiting such information to be made available to anyone but the original owner of the ring. The author then contacted Joseph Nye who owns Antiques by Joseph, an established Midland estate sale service. Mr. Nye indicated that from his perspective, he would, of course, attempt to determine the value of the ring based solely on its gold content; however, he said that he would further research what other championship rings had sold for on eBay and through various trade organizations with which his business is affiliated. Mr. Nye stated that based on sales of championship rings from various universities and other sports leagues that he would probably attempt to sell the ring in his showroom for $5,000 rather than offering it in an estate sale, per se. It would appear that the value of certain sports collectibles is in the eye of the beholder.

V. STAMPS AND COINS

While attempting to ascertain the value of the ring, the author visited with William Rutter, Jr., a regionally known stamp collector. While Mr. Rutter had no suggestions or insight regarding sports collectibles, his information and guidance regarding philately and coin collecting was invaluable. Mr. Rutter explained that prior to the internet, several major philately organizations published bid/offer sheets listing the going price for thousands of stamps. While this constituted a thinly traded market, Mr. Rutter indicated that the lists determined the going price of a particular stamp and few transactions deviated from the list price. Mr. Rutter went on to explain that with the advent of the internet, and particularly eBay, philatists now see a more remarkably diverse opinion on stamp values…that the value of a stamp varies significantly depending on whether a particular collector values it more highly for his or her collection. The author was also fascinated to learn that many very common stamps sell for less than their face value. Perhaps, a cottage industry in discounted postage may someday arise.

VI. MINERAL INTERESTS

Mineral interests, particularly small fractional ones, are another type of “oddball” assets which require judgment and common sense to value. Non-producing minerals are not subject to ad valorem tax in Texas; however, with the recent technological advances in horizontal drilling and hydro fracking, speculative value of unproven and non-producing minerals has skyrocketed. In the Permian Basin region, Michael T. Morgan, Esq., a preeminent oil and gas attorney in Midland, reports that values of $15,000 and upwards per acre are becoming more and more common. Even within city limits, residential property owners are receiving unheard of leasing offers as various oil companies attempt to assemble proration units. The author is aware of several instances of the Internal Revenue Service questioning nominal values assigned to non-producing mineral interests for estate and gift tax purposes which heretofore would have been unchallenged.

VII. MEDICAID RULES

While establishing values for “unique” assets for tax purposes can result in disputes and disagreements with taxing authorities, the rules for Medicaid are currently more clear.

A. Personal Effects

For an unmarried individual, or both spouses if they are both seeking eligibility, the client can have household goods if the items are found in or near the home, are used on a regular basis, and are needed for the maintenance, use, and occupancy of the premises as a home. An individual can also have personal effects if the items are personal property ordinarily worn or carried by the individual, have an intimate relation to the individual, have cultural or religious significance to the individual, or are required because of the individual’s
impairment. The value of household goods and personal effects are not considered unless a client lists items exceeding $500 on the Medicaid application or discusses these items in the interview. Items used for everyday living, such as a set of silver or an antique table, are not counted. One wedding ring and one engagement ring are exempt, as are “personal care items, prosthetic devices, and educational or recreational items such as books or musical instruments.” For a married client with one spouse in the community all personal and household effects are excluded, regardless of value.

Health and Human Services attorney Shari L. Nichols has opined that as long as a nursing home resident does not intend to gift jewelry, it may be entrusted to an authorized representative, other family member or close friend. It may also be placed in a safe deposit box.

B. Mineral Interests

With respect to mineral interests, Texas’ Medicaid eligibility rules provide that “the Texas Health and Human Services Commission counts the equity value of a person’s ownership of or interest in mineral rights as a resource, unless the mineral rights are: connected with property excluded as a home; or excluded as property essential to self-support under 20 CFR §§416.1220, 416.1222, and 416.1224.”

Minerals do not count if the surface contains the exempt homestead. Therefore, if the parcel contains the home, the fact that the property includes the mineral rights does not create the need to separately describe value and/or exempt the mineral interests. This is consistent with the treatment of all contiguous land (surface) as “part of” homestead property; both acreage attached to the home and mineral rights are exempt if the home is exempt. Both are physically and legally (under state property law) a component of the property bundle recognized as “the homestead” for Medicaid eligibility purposes. However, cash payments such as royalties based on the mineral rights are still counted as “income” by Medicaid, even if the mineral rights are part of an exempt home.

The Medicaid rules create a category of “property essential to self-support” that may be exempt, then make a critical distinction between business property (whose value is unlimited for purposes of exemption) and non-business property (whose exempt value is limited to $6,000, and must be producing income at the rate of at least a 6% net annual return based on equity value). This “$6,000/6% Rule” applies to mineral rights and can be the basis for exemption for mineral interests whose ownership is severed from the surface. The rule also applies generally to any “non-business property that is producing income necessary to self-support” so long as the property is not “liquid.”

Non-business property such as rental property and income-producing mineral rights is excluded to the extent its equity value does not exceed $6,000, provided the client receives a net annual rate of return of at least 6% of the equity value. There is some flexibility if the rate of return drops below 6% due to “unusual or adverse circumstances.”

Because of the low value limit for this exemption, valuation is crucial and most real properties are now far more valuable than $6,000 by any measure. However, due to the small fractional interests commonly held in mineral rights through inheritance over generations or business arrangements involving multiple parties, a commonly encountered example of exempt real property worth less than $6,000 is mineral rights.

The Medicaid handbook provides the following hierarchy for eligibility workers to use for valuing producing minerals:

1. Tax statement, if assessed;
2. A knowledgeable source in the community using telephone contact documentation;
3. Verifcation of Mineral Rights, completed by an authorized employee of the producing company; or
4. IRS formula of 40 times the average monthly payout in assessing the value of mineral rights for inheritance purposes (to be used only when no other source is available).

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13 Medicaid Eligibility for the Elderly and People With Disabilities Handbook MEPD §F-4222
14 42 U.S.C. §1396r-5(c)(5).
16 Medicaid Eligibility for the Elderly and People With Disabilities Handbook §F-4310 Nonbusiness Property - $6000/6%.
17 Medicaid Eligibility for the Elderly and People With Disabilities Handbook §F-4300.
18 Medicaid Eligibility for the Elderly and People With Disabilities Handbook §F-4312.
19 Medicaid Eligibility for the Elderly and People With Disabilities Handbook Appendix XVI.
If the mineral rights are non-producing, a “$100 ‘default value’ should be assigned.” This default rule, combined with the $200 threshold for penalizable transfers, creates the opportunity to efficiently dispose of mineral rights by transferring them to the intended heirs via gift deed prior to or during Medicaid eligibility. However, it is not clear that the default value will control a situation where an owner of mineral rights has reason to believe they are worth more than the Medicaid default valuation – for example, because he has received lease offers for substantially more or has leased the property and expects production in the foreseeable future. In the absence of official guidance in these circumstances, a third-party appraisal is the most reliable basis for valuation.

Texas follows the federal SSI rule on “property essential to self-support” pursuant to Texas Administrative Code §358.371 “Treatment of Other Resources.” Property used in the client’s trade or business is excluded regardless of value or rate of return. The property must be in current use, or it must have been used previously and there must be a reasonable expectation of its being used again. It may be land and buildings, equipment and supplies, inventory, livestock, motor vehicles, and liquid assets needed for the business. After proving a “valued business” exists, the critical question is whether the owner “materially participates” in the farm or other business. If so, the income should be reported as earned income on the federal income tax return. Self-employment tax is due, and the property is exempt from consideration by Medicaid. However, if it is properly reported as rental income, real property is not exempt for Medicaid purposes.

If a lease or other business agreement contains one or more of the provisions in MEH §E-6100 defining “material participation” by the owner, and if the owner actually participates in the business that way, the requirements for “business property” are met, both for income tax and Medicaid purposes.

VIII. CONCLUSION

Attorneys, certified public accountants and their clients should always be cognizant of the possibility of seemingly worthless assets actually being highly prized collectibles and/or having their historical cost or value significantly inflated by changing economic conditions. While it is often tempting to advise a client to simply guess the value of household goods based on a hypothetical Sunday afternoon garage sale, clients should also attempt to identify assets which possibly could bring inflated values because of their intrinsic “oddball” categorization. Quite often, valuation is truly in the eye of the beholder.

20 20 C.F.R. Sections 416.1220, 416.1222, 416.1224 regarding property essential to self-support.
21 Medicaid Eligibility for the Elderly and People With Disabilities Handbook §F-4330.
22 Medicaid Eligibility for the Elderly and People With Disabilities Handbook §E-6100.
A native of Graham, Texas, Judge King graduated from the University of Texas and Baylor Law School, then practiced in Fort Worth for 17 years before being elected Judge of Tarrant County Probate Court Number One in 1994. He served in that capacity for six terms, retiring at the end of 2018.

Judge King now sits by assignment across the state, as well as offering his services as a mediator.

He has previously served as:
- Presiding Judge of the Statutory Probate Courts of the State of Texas
- President of the National College of Probate Judges
- Editor of the probate section of the Handbook for the Texas Judiciary (three times)
- a member, for over twenty years, of the Texas Supreme Court Judicial Committee on Information Technology

He is currently serving:
- on the Texas Supreme Court’s Probate Forms Task Force
- as a co-author of West’s Texas Practice Guide – Probate

A 6th generation Texan and lifelong student of history, he frequently writes and speaks on probate and guardianship issues, as well as the history of the Texas frontier.

Judge King and Julie, his wife of 45+ years, have two children:
- Cassie, an Innovation & Design Specialist with Trademark Property Company in Fort Worth, Texas
- Mason, Director of the Village Church Institute in Flower Mound, Texas, a Doctoral candidate at Southern Baptist Theological Seminary (and father of three wonderful grandchildren).

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THINGS I WISH LAWYERS KNEW

11TH ANNUAL
ESTATE PLANNING AND COMMUNITY PROPERTY LAW JOURNAL
CLE AND EXPO
TEXAS TECH SCHOOL OF LAW
LUBBOCK, TEXAS
MARCH 1, 2019

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## APPENDIX:

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Things I Wish Lawyers Knew

“The trouble with the world is not that people know too little; it’s that they know so many things that just aren’t so.” — Mark Twain

I. INTRODUCTION: Purposes:
A. To help the reader gain insights into the finer points of practicing law, particularly in the probate, estate planning and guardianship arena;
B. To examine available technologies to enhance the practice of law;
C. To highlight some of the most common transgressions in pleading and practice and
D. To point out ways to make uncontested hearings go more smoothly for the client, the Court and counsel.

II. THE PERILS OF DABBING IN PROBATE LAW
Wills drawn by attorneys that have not done so before or only do so as an accommodation to a friend or client (where the attorney is principally engaged in another field of practice) can cause unanticipated headaches when the will must be presented for probate and then actually administered.

Attorneys who keep and use an all-purpose ‘standard’ simple will form can often be unaware of perils which will only be discovered after the client is deceased.

The most common problems can be grouped into a few categories:

A. IMPRECISION/ AMBIGUITY
1. Be specific: in an attempt at simplicity, the will may read: “I leave everything to my wife.” However, a Testator married and divorced multiple times after the will was executed can create thorny issues.

Likewise, a will leaving “everything to my children” or using nicknames or a grandparent’s possibly faulty memory for specifics names may frequently require a later reformation/ modification proceeding to determine the Testator’s intent as to the takers under the will. Tex. Est. Code § 255.451ff.

2. Charitable Gifts: The precise name of the charity can make a real difference as to who is actually entitled to the bequest. A small single-purpose non-profit may go out of business. A charitable bequest with too many restrictions may cause the charity to decline the gift.

Organizations such as Guidestar (guidestar.org), Bridge (Basic Registry of Identified Global Entities) Registry (bridge-registry.org) or Charity Navigator (charitynavigator.org) can be a great help in determining the specific name of a non-profit and learning something about the organization.

3. Anticipate change: specific bequests of bank accounts with account numbers may be adeemed if the accounts change or if the bank is later sold, merged or otherwise ceases to exist.

4. Revoke Prior Wills: a will executed under the laws of a foreign country might not be effectively revoked “by operation of law” when a Texas will is made.

5. Write a residuary clause: just because the client thinks everything has been specifically disposed of is no reason to omit a residuary clause because of the possibility that property will have been sold, accounts transferred, or other changes leading to lapsed gifts. The general presumption against intestacy under Texas law is not sufficient to create a residuary clause in a will if none exists. Alexander v. Botsford, 439 S.W. 2d at 416-17 (Tex. Civ. App. – Dallas 1969, writ ref’d n.r.e.).

6. Suggestions:
   b. Determine if the charity selected has an official name or national registration number.
   c. Carefully consider whether to even use “will,” “shall” and “must” in a will.
   d. Try to avoid use of the passive voice.
   e. Get the correct full names of family members and then list them.
   f. Avoid legalese such as hereinafore, hereafter, in relation to, touching and concerning. Consider “everything I own,” instead of “all right, title and interest” or the “rest, residue and remainder.”
   g. Latin is rarely helpful in adding understanding: prima facie and ab initio can safely be omitted.
   h. The word omitted can also be omitted left out.

B. IMPULSE CONTROL: THE PERILS OF NOT THINKING-IT-THROUGH
1. Think How the Will Actually ‘Works’: one beloved senior attorney who wore many hats famously wrote many of his wills providing: “In the event my wife and I die as a result of a common accident or disaster…” then made no provision for passage of property in any other event. This created an intestacy, which had to be dealt with by requesting declaratory relief. Taking the time to work through how the property will flow may avoid this.

2. Use Simple Trust Language: instead of “To Johnny, in trust,” word such a casual bequest as “To my Great-Nephew, John Albert Thompson, in trust until age 25 with my Executor to serve as Trustee without bond.”

3. Back to Basics: always make sure that the will
creates an independent administration, waives bond, and creates a power of sale.

C. SCRIVENER’S ERRORS

While term “Scrivener” conjures up images of quill pens and coal scuttles, scrivener’s errors today are mostly the result of the ‘cut-and-paste’ operation of a word processor program. All too often, the name of an individual (for example, one to be nominated as Independent Executor) is either actually the name left over from a previous will drafted using that form or the Testator’s name (“I, John Smith, hereby designate John Smith as my independent executor.”) This often results from preparing the will for one spouse, then failing to carefully check when the same form is used to write the will for the other spouse.

Having another pair of eyes to proof the document is often the simplest way to catch this. The word processor’s spell-checker just won’t catch such errors.

On the topic of proofreading, perhaps Mark Twain’s observation is the most apt: “You think you are reading proof, whereas you are merely reading your own mind; your statement of the thing is full of holes & vacancies but you don’t know it, because you are filing them from your mind as you go along. Sometimes—but not often enough—the printer’s proof-reader saves you—and offends you—with this cold sign in the margin: (?) & you search the passage & find that the insulter is right—it doesn’t say what you thought it did: the gas-fixtures are there, but you didn’t light the jets.” (Mark Twain, letter to Walter Bessant, February 1898.)

D. INCORRECTLY ASSUMING THE EFFECT OF THE LAW

Lawyers incorrectly assuming the effect of the law incorrectly is nothing new. In your materials, as an appendix, is a wonderful old opinion from New York concerning a damage suit against the estate of an attorney who had given his client bad advice regarding intestacy where the attorney had failed to learn of a major change in the law some years before.

The opinion is also the earliest documented reference to the phrase

“No Man’s Life, Liberty or Property is Safe While the Legislature is in Session.”

Final Accounting in the Estate of A. B., 1 Tucker 248 (N.Y. Surr. 1866).

Over the last twenty years, massive change has occurred in both statutory and decisional Texas probate law. Even the “non-substantive” revision of the Texas Probate Code to the Texas Estates Code produced many unanticipated consequences and unanswered questions. Attorneys who presume nothing major has changed can be in for a shock.

E. EXECUTION AND ATTESTATION ERRORS

The requisites for proper execution and attestation of a written (non-holographic) will as well as the procedure for a simultaneous execution, attestation, and self-proving ceremony are set out in a forthright manner in the Texas Estates Code. Tex. Est. Code §§ 251.104, 251.1045.

All too often, wills are not executed with any particular ceremony. The witnesses are just instructed to sign the signature blanks without being asked to raise their right hands to be sworn. The Testator is not introduced to the witnesses, asked to confirm that the document is his or her will or request the witnesses to act as witnesses. If a notary is actually conducting the will-signing, the Testator and witnesses may not be actually gathered together, all at one time.

The best references for a proper will execution ceremony are Beyer, The Will Execution Ceremony (professorbeyer.com/Archive/new_site/Articles/Will_Ceremony.html) or Beyer, How to Conduct a Modern Texas Will Execution. (papers.ssrn.com/sol3/papers.cfm?abstract_id=2087884)

Consider recasting the self-proving affidavit in Tex. Est. Code § 251.104 as a numbered sub-paragraphed affidavit, making clear what each of the participants has stated, attested or sworn to.


Do not leave any signature lines blank.

F. BOTTOM LINE

A 2016 Google Consumer Survey reported that while 63% percent of Americans did not have a will, of the remaining 37% that had a will, almost 72% of them had wills that were not up-to-date. (uslegalwills.com/blog/americans-without-wills).

The reality behind all of this is that none of us knows when they are going to die. In the YouTube video “Savin’ Me” by Nickelback (youtube.com/watch?v=_JQiEs32SqQ), the main character can see numbers over everybody’s head counting down to their death. Incredibly powerful.

III. PROCEDURAL PERSPECTIVES

Sometimes, lawyers and judges will have diametrically opposed views on the procedural aspects of probate practice.

A. LAWYER’S PERSPECTIVE - Lawyers have a hard enough time keeping up with all of the different areas of law in which they expected to be knowledgeable, with appellate courts and the legislature forever tinkering with the statutes and now here comes a judge who wants to make a whole new set of rules for her or his court.

Some lawyers take the position that all of the law is
already in the Estates Code and that judges should not be allowed to “make new things up.” Others urge that “[W]e need to the State Bar to sponsor legislation to prohibit judges from imposing requirement that are not in the Estates Code.”

The truth is, it is largely a matter of perspective.

A lawyer who is actively practicing probate in an urban county might be handling ten, twenty or even thirty matters over a year’s time. The judge in each court will probably review and act on well over a thousand applications and another several thousand motions in that same year.

B. JUDGE’S PERSPECTIVE - From the Court’s perspective, it is absolutely necessary to find ways to systematize the process so that the Court staff will know what answers to give to achieve uniform administration of the estates.

While it would wonderful if the answer to every question were contained in the statutory law, the reality is that, from a procedural standpoint, the procedural guidance in the Estates Code is at best, spotty.

C. LEGISLATIVE GUIDANCE? NOT LIKELY! - Some states, like Maine, Florida and Ohio have developed, adopted and promulgated statewide Rules of Probate Procedure. However, Texas, with its usual frontier independence in the spirit of Judges in the pattern of Isaac Parker and Roy Bean, has resisted imposing such a uniform scheme. Most judges, from the Constitutional County Court up, don’t want to be told by someone else what they can or cannot do.

D. STATUTORY PROBATE COURT GUIDANCE - All of the Texas statutory probate courts (Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant and Travis counties), have local rules, approved by the Texas Supreme Court, that may differ from the local rules for the District Courts in a given county.

Also, in guardianship matters, because these statutory probate courts handle 90%+ of all guardianships, the courts have had to create policies and approaches to fill in procedural gaps left by the Estates Code to deal with the high volume of work and to ensure uniform results.

E. NOTICE AND CITATION: DISCRETION WITH THE JUDGE - Even if not expressly provided for, the court may require that citation or notice be given and may prescribe the form and manner of service and the return of service. Tex. Est. Code § 51.001(b).

F. SOLUTION: Keep up! Ask good questions.
   1. Check with the court in which you have a matter as to any particular rules or standing orders.
   2. Check the pocket part, i.e. see if the statutes or caselaw have changed. see The Final Accounting of the Estate of A. B., appendix infra.

   3. Strive to get the best CLE. While it may be easier to get all of your continuing legal education attending a local luncheon once a month, the State Bar of Texas has made access to excellent, focused legal education much easier. By either webcast or remote video presentation, pretty much all of the advanced courses are readily available. www.texasbarcle.com

Caveat: Right now (February 2019) the Texas Legislature is in session. It is vital to learn what changes are made in your practice area.

IV. THE TOOLS IN YOUR TOOLBOX: Technology

1. DIGITAL RESOURCES: readily available (free - or very inexpensive):
   A. Texas Statutes and Legislative Histories: www.statutes.legis.state.tx.us/
   B. Texas Legislature Online: www.capitol.state.tx.us/ Follow the circus as the sausage gets made. Also the best bookmark to check the actual language of the statutes.
   C. Professor Beyer’s Website: pdf versions of both the Texas Probate Code and the Texas Estates Code, (updated through August 2, 2015) and a conversion table from the Probate Code to the Estates Code. www.professorbeyer.com/
   E. Digital Texas Estates Code: (downloadable/ searchable pdf) courtesy of Richardson attorney Michael Koencke (includes Professor Beyer’s conversion tables): http://koeneckelaw.com/public
   F. re:SearchTX™: Texas Office of of Court Administration. Cross-Jurisdictional Access to your cases https://research.txcourts.gov/
   G. Texas Probate Website: If you are not one of the members of this listserve, you are not serious about probate law. http://www.texasprobate.com/
   H. The Ad Litem Manual & The Intestacy Manual: search on the website of Tarrant County Probate Court One for the current digital version.
   I. Clerk’s Public Web Access: Check the websites of the probate clerks of the larger counties (Dallas, Harris, Travis, Fort Bend, etc.) for lot of basic information about probate filings.
   J. Probate Court Websites: Specific information about the policies of the probate courts can be found on the specific court websites. Judge Guy Herman (Travis County) has an astonishing amount of available information. Dallas, Denton and Harris Counties all have excellent websites with detailed information about their staff and court policies.

B. iPhone J. D., the oldest and largest website for lawyers using iPhones and iPads. ABA Blawg 100 Hall of Fame. www.iphonejd.com/
C. www.attorneyatwork.com
D. www.rocketlawyer.com
E. lawyerist.com
G. loweringthebar.net Legal humor. Seriously.
H. ipracticeonanipad.com - Brett Burney’s highly entertaining and informative (subscription) series on how to use our iPad in your practice.
H. www.americanbar.org - look for “solo magazine”
H. The Lawyer’s Guide to a Well-Appointed iPad

V. COMMUNICATING WITH THE JUDGE

“It is no sin to be wrong, but you must never, never, never appear to be unsure.”

“Always appear to be reasonable, for when the time comes that you have to be otherwise, people may not notice the difference.”

The late Prof. Loy M. Simpkins
(Baylor Law School)

In law school, you are told to “think like a lawyer,” but is equally important to communicate your clients’ positions effectively, efficiently, and when appropriate – emphatically - to be a persuasive advocate.

A. WHAT ARE YOU ASKING? The judge doesn’t have time to study a five-page, single-spaced memorandum to figure out what you are asking for. This is not only frustrating to the Court, but you are also wasting your client’s resources.

Crystalize the actual request in your mind— then ask. A simple request for a continuance or for leave to file a document late should not take the tone and length of a Shakespearean tragedy. Do not waste your time, and never waste the Court’s time.

Once you have identified your precise request: observe the following:
1. Avoid Emotional Pleas. You may have a difference of opinion with your adversary and have to call upon the Court to bridge this gap. Do not let your emotions become a distraction. The Court’s decision will not turn upon who sends the angrier letter. “Venting” and name-calling in correspondence will do more to damage your rapport with the Judge than to advance your client’s position.

2. Don’t Ask for More Than You Need. If you need a one-week extension to file a pleading, don’t ask for a month. Lawyers who want to set trial for two years in the future may get disappointed.

3. Is Your Question Appropriate? Many, many questions in guardianship and heirship matters provoke the response: “Read the Manual.” Courts go to extraordinary lengths to establish and promulgate policies, rules and materials. These are often on the Court’s website or in CLE presentations by the Judge or staff. Such questions expose you as a newbie. Ask around.

4. Can the Court Grant Your Request? Not infrequently, once both sides come in for a docket control conference in a contested matter where lots of time, effort and client’s money has been spent, the Court has to inform the lawyers that what they are asking for is not within the Court’s power to rule on. It may be a matter of jurisdiction, standing, limitations, lack of compliance with a statute or a notice or service issue. Again, a better-educated advocate may encounter this information beforehand.

B. BE PUNCTUAL. “To be early is to be on time. To be on time is to be late.” Whether in filing pleadings or appearing before the court, tardiness or downright failure to appear does a disservice to the Court and to your client.

Arriving early for an appearance can give you the opportunity to prepare your client for what to expect. It also allows you to get to know the “battleground.”

When you are punctual and prepared for a Court appearance, the optics signal to your adversary (and to the Court) that you are not only serious, but diligent.

C. BE PREPARED. You must not only know your facts, you must know and understand your adversary’s iteration of those facts. Often, by the time an attorney responds to a motion, their response is so firmly wedded to their own inflexible perspective of the case, they fail to hear that their opponent may have just laid the basis for a compromise or even a settlement on their terms. Focusing on immaterial facts and refusing to make otherwise unavoidable concessions may frustrate or defeat the ultimate outcome of your motion.

D. BE PERSONABLE. It’s no secret that in every courthouse across the country, there are attorneys whom judges uniformly appreciate appearing before them.
These attorneys are typically not only knowledgeable but also personable. Advocacy begins long before you stand to your feet for oral argument. Every action you take is a communication on behalf of your client. An attorney who takes a consistent attitude toward the Court that “I don’t have to tell you all the facts” becomes memorable to that judge, but perhaps not for the reasons desired. A disheveled appearance or eye-rolling in response to a statement by opposing counsel or to an inquiry from the Court can very well undermine any attempt to advocate for your client.

E. BE PASSIONATE. Many attorneys view the practice of law as a calling. A truly gifted practitioner is able to confidently and effectively captivate his or her audience. Generally, the most persuasive attorneys are visibly and audibly wholly invested in their cause. You might do well to study the delivery and mannerisms of charismatic and effective speakers.

Often, it is not so much what is said but how it is conveyed.

F. FINAL THOUGHT: Staff and Clerks. Many attorneys never give a second thought to venting or browbeating Court staff with comment like: “Well, where did you get your law degree?” Such comments are not only ill-mannered and ill-informed, they will sometimes earn the attorney a private conference with the Judge. The staff of the Court and the Clerk’s office are the foot soldiers in making your pleadings work.

Most court staff have reviewed thousands of the same type of application or pleading in question or the setting policy or other court procedure. Like a pediatrician who has gained their expertise by ‘looking down seven or eight thousand throats,’ clerk and court staff have deep and broad experience on the variations of ‘normal.’ Usually the court staff has much, much more experience than the belligerent attorney.

If you have a disagreement with what you are told by the employees of the Clerk or Court, could it be that your level of knowledge of the procedure is not as broad and deep as theirs?

A wise old lawyer once told me when I was a baby lawyer: “Make friends with the staff. If they will look out for you, you’ll do OK.” (Hint: cookies are always appreciated.)

VI. DRAFTING CONSIDERATIONS

Nitpicking? Perhaps, but with justification.

After hearing more than 30,000 uncontested applications, some norms emerge in the problems that arise in pleadings. Many of these are based on the habit of lawyers to tenaciously cling to what was learned at their Mentor’s knee, early in one’s career. In many instances, this knowledge was passed down in an unbroken chain, like the secrets of a fraternal order, without regard to the current statutes or caselaw. see A. B. infra.

Legal practice and pleadings change with the times. Phrases such “of this he puts himself upon the country” or “may he go hence without day” have no real place in 21st century jurisprudence. As the law changes, our law practice must change. When the legislature or the appellate courts divert our path from what we have done before, we must learn new ways.

A. “NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA” – Some popular probate document assembly software programs apparently contain an option to include the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." It is often chosen as an inadvertent default setting.

While Tex. Rules Civ. Proc. 21c(b) prohibits e-filing of documents containing “sensitive data,” most people miss the first part of the rule: “Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation…” This means that if the Estates Code or a court rule requires the inclusion of otherwise sensitive data, supplying the require data does not run the filer afoul of the Supreme Court rule.

Many items in probate and guardianship pleadings are specifically required to be included by the Estates Code (e.g.: An application for appointment of a guardian shall contain the proposed ward’s name, sex, date of birth, and address.) Tex. Est. Code § 1101.001(b)(1). As a result, the provisions of Tex. Rules Civ. Proc. 21c(b) regarding sensitive data vis-a-vis minors do not apply.

The consequence of placing this notice on a pleading is to require the county clerk to make the document a “non-public document” which cannot then be viewed or used by anyone other than court staff.

Surely not the filer’s intent.

B. “ON THIS _______ DAY OF ______, 20____.” OR “SIGNED THIS _______ DAY OF ______, 20____.” – With a paperless courtroom, all blanks must be filled in by computer annotation. There is no good reason to require the court to fill in the same date in two different places, once at the beginning and again at the end. Unless the order is prepared after the hearing date, all orders should begin with “On this date….”

If at all possible, counsel should fill in all blanks themselves. Since the hearing date is known well in advance, there is no good reason for not completing the date line. If you cannot fill in the date yourself (preferred method), provide a space that indicates: “Signed _____________” rather than requiring the court to make three separate annotations to complete the date.
C. “INDEPENDENT CO-EXECUTORS,” not “CO-INDEPENDENT EXECUTORS” - Tex. Est. Code § 307.002 speaks to the actions of Joint Executors or Administrators and also variously refers to them as “co-executors” or “co-administrators.” Their ability to act with or without court oversight makes them dependent co-executors or independent co-administrators. Hopefully, they would not be “co-dependent.”


In only one section does the Estates Code mention “co-guardians” and then, only with reference to appointees under the laws of another state. Tex. Est. Code § 1104.001 (‘Co-guardians appointed under the laws of a jurisdiction other than this state’).

E. “MINUTES OF THE COURT” - In 2009, the Texas Legislature provided that all references in the Texas Probate Code (now the Texas Estates Code) be changed from the “Minutes of the Court” to the “Judge’s Probate Docket. Acts 2009, 81st Leg., ch. 602, § 2; Tex. Prob. Code § 13, Tex. Est. Code § 2.001. It has been more than nine years since that law was changed and yet, references to “the Minutes of the Court” still turn up in many orders.

F. “IT IS FURTHER ORDERED THAT UPON HIS DEATH, THE DECEDENT WAS THE OWNER OF THE FOLLOWING REAL AND PERSONAL PROPERTY…” Whether this is in an application to probate a will and for letters testamentary or merely as a muniment of title, unless you have specifically plead for declaratory relief and had a twenty-day return period on your citation, you are not entitled to declaratory relief, either as to the existence of particular property or the characterization thereof.

G. APPOINTMENT OF APPRAISERS - Appraisers may only be appointed upon the court’s own motion or on the motion of an interested person and only then, upon a showing of good cause. Tex. Est. Code, Ch. 309, Subch. A. Again, such language is surplusage.

H. “ADMITTED TO PROBATE ANDRecorded” - This language is inappropriate in Texas. The judge signs the order, but the clerk records the documents. This language seems to assume some kind of self-effectuating action implicit in the order. Not in Texas.

I. “NO FURTHER ACTION…” – Appointment of an independent personal representative carries with it the statutory freedom from additional actions in court. The two exceptions are: 1) the return of an inventory and 2) the notices to beneficiaries required by Tex. Est. Code § 302. Either leave the language out or be accurate and complete.

Note: Because an Affidavit in Lieu of Inventory can only be filed at the option of the Applicant, the court cannot include in its order a reference to the filing of such an affidavit, since it is not “required by law.” Such a reference should not be included in the ‘no further action’ decretal clause.

J. “UPON THE PAYMENT OF TAXES, IF ANY ARE DUE, THIS ESTATE SHALL BE DROPPED FROM THE DOCKET.” – Another relic from the dustbin of legal and legislative history. This phrase (occurring principally in muniment of title orders) came from a time, more than 40 years ago, when the taxable threshold for estates was $60,000.00 and the courts did not have to report to the Texas Supreme Court on case dispositions. However, because no administration is ever opened in a muniment proceeding, ‘dropping the case from the docket’ in a time of electronic files makes no sense.

VII. THE UNCONTESTED HEARING: Some Practical Observations

A. COME WATCH – get an idea of what normal looks like.

B. DECORUM - This is a courtroom, people!! No tobacco/ No gum/ No shorts/ No hats/ No cell phones/ No pagers/ No client conferences in the courtroom.

C. HIDING THE BALL - The Court would usually rather be relieved than surprised. If you have an unusual fact situation (or the situation is not what it appears), find some way to plead it. Please don't make the court guess at what is going on and have to delay your hearing until we find out.

AD LITEMS - Even if you do not actively contest the application, make sure the court has a full picture of the situation. Rather than merely saying "No questions," ask questions to highlight any points not covered by the Applicant or Guardian Ad Litem. But use some judgment. Sometime “No questions” is the proper tactic.

D. ASK FIRST - It is not always better to get forgiveness than permission.

E. CHECK IN with the bailiff, not the court
F. CALL the court coordinator if you're not coming.

G. APPROACHING AND WITHDRAWING – Many bailiffs take their job of court security very seriously. The better practice in entering the ‘well’ of the court (beyond the ‘barrister’ - fence) is to ask for permission to approach the bench and to be dismissed. Ad Litem all too often slink out like they have done something wrong.

H. PREPARE YOUR TESTIMONY - Some courts are now paperless and require all pleading to be pre-filed. If not, unless you have ordered a court reporter for your uncontested hearing, always have your testimony reduced to writing, in all cases, for all witnesses, every time. Otherwise, there is no record of what happened.

I. PREPARE YOUR WITNESSES - Discuss the testimony of each witness and any legal issues or definitions with each witness outside the presence of the Court (e.g.: disqualification, incapacity). Some courts will not permit conclusory or summary questions. Some excellent lawyers will prepare a script for themselves and their witnesses to ensure there are no surprises.

J. TESTIMONY - (“Even a fool is thought wise if he keeps silent.”) Proverbs 17:28 (NIV)
   1. Speak up - it’s your show.
   2. Lead the Witness - but avoid droning repetition or the use of repetitive phrases in every question.
   3. Nervous? - If you think you are nervous, imagine how the witness feels! Don’t make your client grasp for dates, names, etc. Phrase questions to be easy to answer. Don’t rush through the testimony of your witnesses.
   4. It’s Not the “Decedent” or the “Ward” - it’s someone’s Family Member - Personalize your questions. This is a part of the grief process. Refer to the person whose will is being probated as “your father” or “Mrs. Anderson.”
   5. Bond…Surety Bond - Except in only a few situations, the court has no authority to waive bond. Don’t betray your ignorance by asking for a waiver of bond when it cannot be waived. Elicit sufficient testimony on the nature and extent of the Estate to enable the Court to set the bond.

K. SOCIAL SECURITY NUMBERS - Please provide the court clerk with the Social Security Number for the Personal Representative to be appointed (on a separate sheet for the court’s records). Tex. Est. Code §§ 351.355, 1201.004)

L. BLANKS - Fill in all the blanks you can, especially the date (or at least provide a date line long enough). If the court has already had to carve up your order with corrections and interlineations, it takes all that much longer to fill in the case number, the court designation, the date of the hearing, the date the application was filed and the date signed.

M. RESIDENT AGENT FOR SERVICE - If your Applicant is not a Texas resident and has not appointed a resident agent for service, the potential appointee is disqualified by law until such an agent is designated. e-File your completed form before the hearing or (if your court is not paperless) bring the form with you to the hearing. Resident agents may resign and a new agent may be appointed. Tex. Est. Code §§56.001, 1057.001. Also, a non-resident guardian may be removed without notice for failure to appoint a new resident agent Tex. Est. Code §§ 404.003(1)(C), 1203.051(a)(5)(C).

RANT:
Direct Examination by the Ad Litem -
1. If you are examining multiple witnesses on direct examination, after you have finished with the first witness, it is perfectly acceptable to ask the second witness:
   "If I asked you the same questions that I just asked (1st Witness), would your answers be the same?"

2. It makes little or no sense however, to listen to a direct examination and then cross-examine the same witness with:
   "If I asked you the same questions you were just asked, would your answers be any different?"

3. How confused must the witness (and opposing counsel and the judge) think you are?

LAGNIAPPE:
Offering an Exhibit in a Contested Hearing
1. Mark the exhibit or have it marked by the Court Reporter.
2. Request permission to approach the witness.
3. Tender the exhibit to the witness (with courtesy copies to opposing counsel and the court).
4. Ask the witness to identify the exhibit (but do not discuss the substance of the exhibit yet).
5. Lay any necessary predicate for the exhibit.
6. To the Court, say "subject to any objections, I offer Exhibit ‘X’ into evidence.”
7. The Court will ask if opposing counsel has objections and deal with them accordingly.
8. The Court will then rule on the admissibility of the exhibit.
THE FINAL ACCOUNTING OF THE ESTATE OF A.B.

The final accounting of the Estate of A. B.

RESPONSIBILITY of an attorney for mistaken or erroneous advice given to his client. An attorney held to respond to his client for culpable negligence in not watching the changes of the public statute law made by the legislature.

THE SURROGATE. The claim presented against this estate, and which I am to try on this final accounting, involves the delicate question of the responsibility of the testator, who in his lifetime was an eminent attorney and counselor-at-law, for damages claimed from his estate by a client, by reason of erroneous advice given by the testator upon a professional question.

An act "concerning the rights and liabilities of husband and wife" was passed by the Legislature, March 20, 1860. (See Session Laws of 1860, p. 157) The eleventh section of that act provided (it has since been repealed) that,

"At the decease of the husband or wife, intestate, having minor child or children, the survivor shall hold, possess and enjoy all the real estate of which the husband or wife died seized, and all the rents, issues and profits thereof, during the minority of the youngest child, and one-third thereof during his or her natural life."

While this law was in existence upon our statute book, the husband of the present claimant died intestate, leaving a large and valuable real and personal estate. She took letters of administration upon his goods. The decedent left, besides his widow, two sons, one of whom had just come of age, and the other was an infant, twelve years old. It is clear that the real estate of the husband became subject to this statute, and that the widow, the present claimant, was entitled to "hold, possess and enjoy, all the real estate of which her husband died seized, and all the rents, issues and profits thereof, during the minority of the infant. It is not necessary, perhaps, to construe the following words of this section, and to undertake to discover from them what her estate will be when the minor reaches his majority; he is still under age.

Some months after the death of her husband, the son who was of age, demanded of the present claimant, his step-mother, his share of the father's real estate, and, through his counsel, urged a partition suit. The claimant applied to the present testator, her attorney and counsel, for professional advice. The testator gave her advice without, as it seems, consulting the statute book of the preceding year. He of course advised her that, as widow, she had a dower interest only in the realty of her husband: a life estate in one-third of the rents. A compromise was effected with the son, and the probable expense of a partition induced a pecuniary arrangement. Most of the personal property was set apart to him, and he released his claim to the real estate of his step-mother and half-brother. The testator drew the papers, and superintended their execution and delivery.

The mistaken advice of her attorney and counsel having produced a considerable loss to the claimant, she now claims that his estate is responsible to her for the amount.

Attorneys, counselors and conveyancers, like agents in any other professional employment, and like all mechanics, artists or other employees, are bound to possess some skill and knowledge of their business or profession. And this skill or knowledge must be reasonable in amount, and such as the employer is entitled, in the nature of things, to expect from them. And there can be no doubt that they are responsible for every unskilful or mistaken act that they may commit, or for every erroneous opinion they may utter to those who consult and confide in them. (Godefroy v. Dalton, 6 Bing., 460; Bailkis v. Candless, 3 Camp., 20)
They are to have and exercise common diligence in the performance of their professional duties. The opposite of this is culpable negligence, and for any damage to their clients from such negligence they are liable. (*Kipping v. Quin, 12 Wendell, 520.*)

In the present case, it is impossible to impute to the testator, the legal adviser, a want of knowledge, or of skill in his profession, in the ordinary acceptance of such a phrase. All who knew him could testify to his long and honorable career of laborious duty, continued through forty years of successful practice at the bar. **The error arose from want of diligent watchfulness in respect to legislative changes.** He did not remember that it might be necessary to look at the statutes from the year before. *Perhaps he had forgotten the saying, that "no man's life, liberty or property are safe while the legislature is in session."* I find some cases on the books bearing on and defining this responsibility. In *Parker v. Rolls*, 14 *Common Bench Reps.*, 5 J. Scott, 691, an attorney was charged with damages for negligence. He had prepared and superintended the execution of an agreement which was void at Common Law for want of a seal. And there are several cases in which an attorney, acting under a plain and intelligible statute, has been held liable to his client for the damages resulting from the adoption of a mistaken course of practice.

It is not claimed that a person who undertakes to perform professional business should be acquainted with the whole circle of jurisprudence, and able to apply all as multitudinous rules, principles and distinctions with absolute accuracy. He is, however, bound to understand the leading and fundamental principles of the Common Law; and he cannot be excused for ignorance of the public statutes of the State. Lord Brougham, in delivering a judgment on the question of professional responsibility, illustrated his conclusions by putting what he calls "a very gross case; as, for instance, a man advising his client that eldest son was not his heir-at-law." He adds, "or any other thing, which, upon the face of it, shows gross ignorance in the A B C of the profession, and the most gross negligence in the performance of his professional duty." (*Purves v. Lundell, 12Clark & Finelly 99.*) The question of who is entitled to the lands of a deceased intestate, who has left a wife and two sons, one a minor, is surely within the very A B C of the law, at any time. Any one acting as a professional conveyancer, and advising upon the rights of takers of land under an intestacy, must certainly be liable for negligence, if he should overlook a legislative enactment, changing the Common Law upon such a point -- if not on any -- and consequently giving advice resulting in loss to his client.

I must hold the estate of the testator responsible, and refer the claim to an auditor, to pass upon as to amount.

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1 Tucker 248 (N.Y. Surr. 1866)
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Education

A.B. summa cum laude  Harvard College 1973

A.M. (History)  Harvard University 1975

J.D. cum laude  Harvard Law School 1978


Employment

1979-1983  Associate, Davis Polk and Wardwell, New York City

1983-1987  Assistant Professor of Law, University of Pittsburgh School of Law

1987-1992  Associate Professor of Law, New York Law School

1992-  Professor of Law, New York Law School

1993-  Rita and Joseph Solomon Professor of the Law of Wills, Trusts and Estates, New York Law School

2015-  Associate Dean for Academic Affairs and Student Engagement, New York Law School

Spring 2002 Visiting Lecturer, Yale Law School (teaching Trusts and Estates)

Spring 2007 Visiting Professor, Yale Law School (teaching Trusts and Estates)

Spring 2008 Visiting Professor, Yale Law School (teaching Trusts and Estates)
Bar Membership

Admitted to the Bar of the State of New York in the Fourth Appellate Department, 11 February 1980

Honors and Awards

University of Pittsburgh Student Bar Association Excellence in Teaching Award, June 1987
Phi Beta Kappa (Alpha of Massachusetts)

Professional Organizations

American Society for Legal History (Member 1989-2008, Program Committee for 1999 annual meeting, Member, Board of Directors, 2003-2005; Secretary/Treasurer 2005-2006, Treasurer 2006-2007)

New York State Bar Association (Trusts and Estates Law Section; Chair, Multistate Practice Committee, 1997-2000, 2010-2013; delegate at large to the Executive Committee, 2000–2004)

American Bar Association (Real Property, Trust and Estate Law Section; Vice-Chair, Committee A-2, Significant Developments (1998-2002); Chair, Committee I-1, Postmortem Transfer Tax Planning (2002-2003), Supervisory Council (2003-2009)

Academic Fellow of the American College of Trust and Estate Counsel (Committee on State Laws; Committee on Legal Education), Co-chair, Committee on Legal Education, 2017-

Member of the American Law Institute (Member of Members’ Consultative Groups for Restatement (Third) Trusts and Restatement (Third) Property (Wills and Donative Transfers)

Public and Pro Bono Activities


Panel Member, Program on 1990 changes to New York transfer tax statute, Meeting of the Trusts and Estates Law Section, New York State Bar Association annual convention, January, 1991

Contributor to the report of the Trusts and Estates Law Section of the New York State Bar Association on the proposed revisions of the Estates, Powers and Trusts Law, November 1991

Speaker at the Sixth Annual Law Seminar of the Archdiocese of New York, January 25, 1992, topic: “Application of Estate and Gift Taxes to Trusts”

Speaker, Seminar on EPTL revisions, Chase Lincoln First Bank, Binghamton, New York, December, 1992

Contributor to the report of the Trusts and Estates Law Section and the Section on Taxation of the New York State Bar Association on the proposed generation skipping transfer tax regulations, April 1993.

Panel Member, Program on “The Generation-Skipping Transfer Tax,” Meeting of the Trusts and Estates Law Section, New York State Bar Association annual convention, January, 1994


Lecturer on Income Tax Planning for the Large Estate, Practicing Law Institute program on “Valuation, Taxation and Other Planning Techniques for Large Estates.” March, 1997

Appearance on “Miller’s Law” discussing estate planning, Court TV, June, 1997

Guest Commentator for Court TV coverage of Garcia v. Garcia, July 1997

Panel Member, “Significant Current Developments,” Real Property, Probate and Trust Section, American Bar Association Annual Meeting, San Francisco, California, August, 1997


Panel Member, “Significant Current Developments,” Real Property, Probate and Trust Section, American Bar Association Annual Meeting, Atlanta, Georgia, August, 1999


Faculty Member, ALI-ABA “Estate Planning in Depth,” presentations on current developments and difficult non-tax drafting issues, 2000-2003

Appointed ABA Advisor to the National Conference of Commissioners on Uniform State Laws, Drafting Committee on the Uniform Power of Attorney Act, April 2003-July 2006

Elected to the Board of Directors of the American Society for Legal History, 2003 (three year term)

Elected to the Supervisor Council of the Real Property Trust and Estate Law Section, American Bar Association, August 2003 (three year term); re-elected August 2006 (three year term)

Delegate-at-large to the Executive Committee of the Trusts and Estates Section of the New York State Bar Association, 2001-2004


Speaker, Third Annual Sophisticated Trusts and Estates Law Institute, November 17, 2005, “New Developments in Disclaimers”

Speaker, ABA RPTEL Section Spring CLE Symposium, April 2017


Speaker, Fifth, Sixth, and Seventh Annual Sophisticated Trusts and Estates Law Institute,

Panel member, “If my Grandson Becomes My Granddaughter, Will She Get the Farm? Document Construction Issues Raised by Changing Concepts of Family, Gender, and Race,” ABA RPTEL Section Spring CLE Symposium, April 2017

Panel member, “Novel (and Not So Novel) Approaches to Adapt and Irrevocable Trust to Meet Today’s Needs,” ABA RPTEL Section Spring CLE Symposium, April 2017

Speaker, New York State Bar Association Trust and Estate Law Section, Spring Meeting, “Same-Sex Marriage Update: Far-Reaching Developments,” May 2017

Panel Member, “‘Who(se) are You’ -- Navigating the Challenging Road of Identifying Those Who Might be Included in Class Gifts for the Benefit of ‘Children,’ ‘Descendants’ or ‘Issue’ In a World of Evolving Family Relationships,” American College of Trust and Estate Counsel, Summer Meeting Professional Program, June 23, 2018

Speaker, “A Primer on Trusts: Parsing Issues Relevant to Trust Litigation in Surrogate’s Court,” 2018 Judicial Summer Seminars, New York State Judicial Institute, July 26 and August 9, 2018

Member, New York Office of Court Administration Surrogates Court Advisory Committee, 2009-

Writings in Legal History


Writings in the Law of Wills, Trusts, and Transfer Taxation

Books:
Disclaimers in Estate Planning: A Guide to Their Effective Use (Section of Real Property, Probate and Trust Law of the ABA, 1990) (with R.A. Brand)


Bloom and LaPiana, Drafting New York Wills and Related Documents (2 vols; LexisNexis) (revised semi-annually)


Articles:


“Uniform Disclaimer of Property Interests,” 14 Probate & Property 57-61 (January/February 2000)


“Married Same-Sex Couples Living in Non-Recognition States: A Primer,” 7 Estate Planning and Community Property Law Journal (Summer 2015), 417-473


Other:
Editor, “Keeping Current—Probate” column for Probate & Property published by the Real Property, Trust and Estate Law Section of the American Bar Association (1994-)

Author of the “New Fiduciary Decisions” column in Estate Planning, published by Thomson Reuters (beginning with the October, 2014 issue, vol. 41 no. 10)

Conferences and Symposia

Wills, Trusts, and Transfer Taxation


“Selecting the Trustee of the Irrevocable Trust: Tax Considerations,” fall meeting of the New York State Bar Association, Trusts and Estates Law Section, October, 1995

“Modern Coverture,” paper delivered at the annual meeting of the International Bar Association, Vancouver, British Columbia, Canada, September, 1998


“State Responses to the Repeal of the State Death Tax Credit,” presented at the Thirty-Seventh Annual Heckerling Estate Planning Institute, Miami Beach, Florida, January, 2002


“Yours, Mine, and Ours: Now, Later or Never: What the Community Property Law Should Know About the Elective Share,” Estate Planning Symposium, Texas Tech University
“Conditional Gifts,” Notre Dame Tax and Estate Planning Institute, South Bend, Indiana October, 2013


“Planning for Same-Sex Married Couples Living in a Non-Recognition State,” 54th ICLE Estate Planning Institute [sponsored by the State Bar of Michigan]) Acme, Michigan, May 2014

“Drafting the Non-Tax Driven Will,” Notre Dame Tax and Estate Planning Institute, South Bend, Indiana, November, 2014.

Legal History:


Commentator, session on Nineteenth Century Tort Law, at annual convention of the American Society for Legal History, October 1990

“Nineteenth Century Legal Culture and the Sherman Act” paper delivered at symposium on Antitrust Law as Public Interest Law, New York Law School, November, 1990

Commentator, session on Aspects of the Law of Nuisance in Mid-Nineteenth Century America, at annual convention of the American Society for Legal History, October 1993


Commentator, session on Nineteenth-Century Legal Education, at annual convention of the American Society for Legal History, October, 1998


• New Challenges in Identifying Those Who Might be Included in Class Gifts for the Benefit of “Children,” “Descendants” or “Issue”
• In a World of Evolving Family Relationships
  • William P. LaPiana
  • New York Law School

Introduction
• The class gift
  • Restatement (Third) of Property: Wills and Other Donative Transfers section 13.1 defines “class gift” as “. . . a disposition to beneficiaries who take as members of a group. Taking as members of a group means that the identities and shares of the beneficiaries are subject to fluctuation.” Class gifts to family members are among the most common dispositions in wills and trusts, whether those are single-generation class gifts—“to my children,” “to my nieces and nephews,” “to my siblings”—or multi-generation gifts “to the settlor’s issue,” or “to my descendants.”
  • There would seem to be very little scope for ambiguity in carrying out such gifts. Traditionally, family relationships arise through birth or adoption. And there is a good deal of law, much of it codified, that deals with what once were difficult puzzles, such as the status of persons adopted by someone other than the donor (is the adopted child of X a grandchild of X’s parents?) and the legal relationship of nonmarital children to the families of their parents.
  • The former question is long-settled by the abandonment of the “stranger to the adoption rule” and the latter by the recognition that under the principle of equal protection, the only permissible state-imposed limitation on recognizing the parentage of nonmarital children involves the sort of proof necessary to give legal consequences to the parentage of persons not born to a married person.
  • Two interrelated developments have made this paradigm far less helpful.
    • First, developments in the biological sciences have expanded the means of human reproduction.
      • The technology of storing human gametes is well understood and makes possible separating in time the biological production of sperm and ova and fertilization.
      • The technology of fertilization of an ovum outside of the human body (in vitro fertilization) is also well developed and, when coupled with the ability to preserve the resulting embryo, allows for the future implantation of the embryo in the uterus of a woman who need not be the woman whose ovum was fertilized, making it
possible to separate fertilization and birth by much more than the nine month period of human gestation.

• This ability to store both gametes and very early-stage embryos makes it possible for the dead to reproduce—stored gametes of a decedent can be used to create an embryo, or the an embryo created from the gametes of a person or persons long dead can be implanted in the uterus of woman who is willing to be a gestational surrogate.

• Living persons might also seek the service of a gestational surrogate to be the birth mother of a child created from their gametes, gametes of donors or some combination of both once fertilization has taken place \textit{in vitro}.

• Second, society has been changing in ways that have made bearing and raising children outside of a family founded on the marriage of a man and woman far less unusual and far more accepted.

• Unmarried women and unmarried men can adopt. An unmarried woman can conceive through artificial insemination using the sperm of a donor, anonymous or not. An unmarried man can contract, whether within the law or not, for a gestational surrogate to bear a child conceived from his sperm and a donated ovum (or from donated sperm for that matter).

• Unmarried same-sex couples have the same options, but the legalization of same-sex marriage, made nationwide by \textit{Obergefell v Hodges}, ___ U.S. ___, 135 S. Ct. 2584 (2015), has led to increased awareness of the creation of family relationships not based on a marriage between a man and a woman and the role of assisted reproduction in the creation of those relationships. The only way a same-sex couple, married or otherwise, can have children other than through adoption must involve the use of assisted reproduction (putting aside sexual intercourse outside of the marriage).

• Principal focus of this outline

• This outline focuses on the determination of the rights, principally in the context of class gifts, of family members whose status as a member of the family is based on something other than being born to a woman married to a man. Some of the law involved—the law of adoption and class gifts—is well established; some of it is very much in the process of being made. And all of this law is state law, and it is no surprise to learn that the laws of the states vary, in spite of the existence of uniform acts on the relevant topics.

• This outline is by no means a comprehensive survey of all United States
jurisdictions, but is limited to providing examples to illustrate the issues that have been addressed and are still unsettled.

- Of course, the variation in state law and the geographical mobility of the population means that the law of the state that governs a trust may have provisions dealing with defining family relationships different from the laws of the states where the beneficiaries live and where the family relationships were created.

- Adoption
  - The stranger to the adoption rule
    - The generally accepted wisdom is that once upon a time the law governing the family relationships of adopted persons was the stranger to the adoption rule, under which the adopted person was the child of the adoptive parent and a sibling of any other children the adoptive parents or parent might have, but was not related to other relatives of the adoptive parent. The adopted child was not the grandchild of the parents of the adoptive parent nor was the adopted child a niece or nephew of the adoptive parent’s siblings.
    - The extent to which the stranger to the adoption rule was the law in fact is of little contemporary interest, with an exception noted in a moment.
    - Today, adopted persons, at least if they have not been adopted as adults, are full members of their adoptive family and are completely legally cut off from their genetic family.
    - One widespread if not universal exception to the latter proposition is a rule that adoption by the spouse of one’s parent does not end the parent-child relationship between the child and the original parent. The limitation of this exception to adoption by the spouse of a parent presents difficulties for unmarried couples one of whom wants to adopt the child of the other. In some jurisdictions such “second-parent adoptions” are possible under statute (Colo. Rev. Stat. Ann. § 19-5-203) or decisional law (Matter of Jacob, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995)).
    - There is also a less common exception to the rule of complete separation from the genetic family for adoptions by members of the adopted person’s genetic family. Under N. Y. Dom. Rel. § 117, a person adopted by a genetic grandparent or the descendant of such a grandparent continues to inherit and to take under class gifts in instruments according to the adopted person’s birth relationships. A similar rule is found in U.P.C. § 2-119(c) allowing a person adopted by a relative of a genetic parent to inherit through and from a genetic parent. Section 2-119(d) extends the same rule to a person adopted by persons who are not relatives of a genetic parent if the person is adopted after the death of both genetic parents. U.P.C. § 2-705(b) construes class gifts based on family relationships
according to the rules for intestate succession.

- **Continuing relevance**
  - These rules, however, often apply only to persons adopted as minors, thus giving the stranger to the adoption rule continuing relevance.
  
  - The U.P.C. provisions limit the treatment of an adoptive child as the child of the adoptive parent for purposes of construing dispositive provisions of a transferor other than the adoptive parent to cases where the adoption took place when the adopted person was under the age of 18 (the age is placed in brackets which indicates that legislatures adopting the Code should select the age they believe appropriate). There is an exception if the adoptive parent was the adopted person’s stepparent or foster parent or the adoptive parent “functioned as a parent” before the stated age.

  - The viability of the stranger to the adoption rule in the case of adult adoptions is not unusual.

  - We’ve already noted the limitations in the U.P.C. provisions.


  - The Connecticut intermediate appeals court has recently affirmed a trial court decision holding that two persons adopted as adults by the settlor were remainder beneficiaries of the settlor’s irrevocable trust. The terms of the trust give the remainder to the settlor’s children and defined the term to include all children living at termination of the trust, whether born or adopted after the creation of the trust and the court found that the adoptions could not be characterized as a “sham” to evade the trust terms because of the close relationship between the settlor and the adopted persons. It is significant, of course, that the settlor is the adoptive parent. The opinion contains a useful discussion of cases from several jurisdictions. Elder’s Appeal from Probate, 177 Conn.App. 163, 171 A.3d 506 (2017).

  - Whatever the law of a state on the effect of adult adoption on inheritance and class gifts in donative instruments, the outcome of any one case may very well depend on the law of another state, for example, the state where the adoption took place. Testator’s will was probated in New York and created a trust for the benefit of testator’s grandchildren. On the termination the trust property was to be distributed to testator’s great-grandchildren. Two of the grandchildren were childless and each of them
adopted an adult, adoptions properly done under the law of Texas where the adopted persons but not the adoptive parents lived. The trustees asked the Surrogate’s Court for a declaration that the adopted grandchildren were not beneficiaries. The Surrogate dismissed the petition, holding that there were no grounds for denying full faith and credit to the Texas adoptions and that there was no evidence that the testator intended to exclude adopted great-grandchildren, even if adopted as adults. *Levien v Johnson*, 2014 WL 1496169 (Sur. Ct. New York Co.) Note that under V.T.C.A. Family Code § 162.605, persons adopted as adults are children of the adoptive parents “for all purposes.”

- The trustees, however, were free to continue their action in Texas seeking to void the adoptions, a subject beyond the jurisdiction of the New York Court. And challenges by beneficiaries to adult adoptions diluting the beneficiaries’ interest in the property are possible, *Marshall v Lauriault*, 372 F.3d 175, 184-87 (3rd Cir. 2004)

- While most of the adult adoption cases involve the question of whether the stranger to the adoption rule applies to the question of whether the adopted person is a relative of those other than the adopting parent, occasionally, the other effect of adoption—removal from the genetic or birth family—is the question. In *Matter of Cowell*, 158 A.D.3d 546, 71 N.Y.S.3d 459 (1st Dep’t 2018), the intestate decedent had been adopted as an adult by the decedent’s same-sex partner at a time when same-sex marriage was not legally recognized (and it is not inappropriate to add when no one thought such recognition would come other than in some remote future). The following facts are taken from the report of the decision in the Surrogate’s Court, *Matter of Cowell*, 2016 WL 3763102 (Sur. Ct. New York Co.)

  - The adoption took place in Florida in 1979 when decedent was 41 and decedent’s partner was 57. The couple had been together since 1960 and the relationship endured until the death of the adoptive parent in 1997.

  - The decedent died in 2009, a domiciliary of New York. Letters of administration were granted to the public administrator. The personal representative of the decedent’s post-deceased genetic brother objected to the accounting based on the public administrator’s refusal to recognize the bother as decedent’s distributee.

  - The Surrogate dismissed the objection on the grounds that under New York’s adoption statute, Dom. Rel. Law § 117, the adoption cut off the decedent from the decedent’s genetic family and that evidence that the decedent and the brother maintained a close, loving relationship, that they both received letters of administration in the Florida probate proceeding of their genetic mother, and that
decendent believed the adoption did not alter inheritance rights in her genetic family was all irrelevant given the clear rule of the statute. Cases favorable to the objectant were distinguished on the grounds that those cases involved minor children and therefore the best interests of an adoptive child were paramount and that here recognizing the brother’s claim would injure members of the adoptive family. The Appellate Division affirmed on the same grounds.

- Draft with the possibility of adoption in mind.
  - Language defining beneficiaries described by family relationship as persons born into the relevant family relationship should be effective.
  - Some transferors might go further and limit beneficiaries to those born within marriage, and perhaps within a marriage between a man and a woman.
  - Far more common, is language limiting adopted persons as beneficiaries to those persons adopted before reaching a certain age, whatever it might be.

- Equitable adoption
  - Equitable adoption is a common law concept which in narrow circumstances will treat an adoption as having taken place so that the adoptee becomes an heir of the person who is treated as having adopted the adoptee.
  - The cases that involve equitable adoption almost always arise when a person dies intestate and the only heirs are distant relatives or the state. A person who lived as a child with the decedent then comes forward and claims that she should be recognized as the decedent’s child and heir. The facts are often appealing, but the courts have generally been reluctant to recognize these sorts of equitable claims.
  - Courts deal with these cases by starting with the classic proposition that equity will regard as done that which should have been done. More restrictive cases require proof not only of the intention to adopt but of a binding promise to do so between the alleged parent and someone who had the authority to offer the child for adoption. *O’Neal v Wilkes*, 263 Ga. 850, 439 S.E.2d 490 (1994).
  - In a leading case in which the court did not require proof of a binding promise, the court required clear and convincing evidence of an intention to adopt or of the decedent’s statements that the child was an adopted or a genetic child. *Estate of Ford*, 32 Cal.4th 160, 82 P.3d 747, 8 Cal.Rptr.3d 541 (Cal. 2004).
  - The Texas cases require either an agreement to or an attempt to adopt that

• Generally, once an equitable adoption is found, the benefits run only one way—the child inherits from the decedent, but the decedent’s relatives cannot inherit from the decedent through the child should the child die intestate.

• Equitable adoption would seem to have little relevance to class gifts defined by family relationships made in wills and trusts. What is perhaps more likely is the possibility that a class gift might be construed to include persons who are not related by blood or adoption but whom the testator or settlor intended to include. A recent example is Matter of Warren, 143 A.D.3d 1110, 39 N.Y.S.3d 282 (3d Dep’t 2016).

  • Testator and her spouse had eight children together with whom they raised two children from the spouse’s prior marriage, but testator never adopted the stepchildren. Testator’s will made bequests of $2000 to each of the ten children, directed that property equal in value to the maximum amount that can pass free of federal estate tax be held in trust for the spouse and that on the spouse’s death any remaining trust property be divided equally among the surviving children and the descendants of deceased children. The residuary estate was given to the spouse “absolutely.” No provision was made for the spouse predeceasing the testator which is what happened.

  • At testator’s death the applicable exclusion amount had been exhausted by lifetime gifts made by one of the testator’s genetic children as testator’s attorney-in-fact. One of the stepchildren then began a construction proceeding asking for a decree construing the will to make a gift of the residue to all ten children.

  • The Surrogate decreed the requested construction and on appeal the Appellate Division affirmed, finding a gift by implication to all ten children, principally because the only provision of the will that did not treat all ten children equally is the gift of the residue.

• Parentage and marriage: the presumption of legitimacy.

  • Today, the presumption of legitimacy is better named the presumption of parentage through marriage.

  • The traditional presumption states that a child born to a married woman is presumed to be the child of her husband.

  • This presumption, which is sometimes codified, e.g., V.T.C.A. Family Code § 160.204(a), is the basis of state statutes dealing with the parentage
of a child born to a married woman through artificial insemination and perhaps other forms of assisted reproduction with the sperm of a man other than her husband. These statutes usually provide that if the procedure is done with the husband’s consent and under medical supervision, the child born as a result of the procedure is the husband’s child without any need for a court proceeding. Generally, the child’s birth certificate simply shows both spouses as parents. See V.T.C.A. Family Code §§ 160.703, 160.704 (all children of assisted reproduction), N.Y. Dom. Rel. § 73 (artificial insemination only), Ga. Code § 19-7-21 (artificial insemination only). It’s worth noting that the Georgia Supreme Court has refused to apply the statutory presumption of parentage to children born through artificial insemination to a child born through in vitro fertilization, Patton v Vanterpool, 302 Ga. 253, 806 S.E.2d 493 (2017).

The presumption itself rests on a combination of biology and status. To the extent it is the latter, the presumption should apply to same-sex married couples.

• To the extent the basis is biology, presumably the argument is that the wife could have been impregnated by her husband and therefore we assume that she was in order to make the child a marital child. But even then, the “could” rests on the assumption that the status of spouses likely excludes a man other than the husband as the genetic father of the child. In a world in which adultery (at least by a wife) was a crime and in which adultery with the king’s wife was treason, perhaps that was not an unreasonable assumption.

• The presumption as expressed in the artificial insemination statutes is less linked to biology. When a married woman conceives through artificial insemination using sperm other than that of her spouse it is certain that her spouse is not the other biological parent of the child. Should it matter whether that spouse is male or female? Under the statutes that make the other spouse the parent of the child so long as that spouse has consented to the assisted production procedure, the status of being a spouse is more important than biology. The spouse who is not a genetic parent is a legal parent because of the marriage coupled with consent. It seems that these statues should apply to married couples both of whom are women.

• The artificial insemination statutes could be understood not to apply to male married couples, and if the couple is to have children by other than adoption they must contract for the services of a gestational surrogate as well as acquire donated ova (and depending on the situation, donated sperm as well). If one of the
spouses is the biological parent of the child, that is, donated sperm were not used, the non-biological parent may have to become a parent by second-parent adoption of the spouse’s child, if that is possible under state law. In addition, the rules governing gestational surrogacy will probably displace the marital presumption in any event, see Matter of Adoption of J.J., 44 Misc. 3d 297, 984 N.Y.S.2d 841 (Fam. Ct. Queens Co. 2014) where the court approved a second parent adoption by the genetic father’s same-sex spouse of a child born to a gestational surrogate in India under an arrangement valid under Indian law, but see In re Maria-Irene D., 153 A.D.3d 1203, 61 N.Y.S.3d 221 (1st Dep’t 2017), III.C.14, below.

- The reported cases: artificial insemination of a married woman with the consent of her same-sex spouse.
  
  - Matter of Seb C-M, 2014 NYLJ LEXIS 5518 (Sur. Ct. Kings County 2014) where the same-sex spouse of the child’s genetic and birth mother filed a petition to adopt the child. Under New York law the adoption was superfluous because the child’s birth certificate identified both spouses as the parents of the child. The Surrogate denied the petition because it was unnecessary, even though the court took notice that in a jurisdiction that does not recognize the couple’s marriage, the parent-child relationship between the petitioner and the child might not be recognized resting as it does on the marriage. After Obergefell, of course, all United States jurisdictions must recognize the marriage and it is easier to see the adoption as superfluous. Note, however, that in Matter of L., 2016 WL 5943053 (Fam.Ct. Kings Co.), the court approved the adoption of children conceived through artificial insemination by their birth mothers’ same sex spouses. The court found that although under the law of New York their mothers’ spouses were their parents and were named on the children’s birth certificates as parents, the possibility of needing to prove parentage while travelling outside of the United States would be eased if there were an adoption decree in place therefore making adoption by their mothers’ spouses in the children’s best interests.

  - The Massachusetts Supreme Judicial Court has held that a child born to A and conceived by artificial insemination with the consent of A’s same-sex spouse, B, was the child of B under the Massachusetts statute, G.L. c. 46 § 4B, making a child conceived by a married woman through artificial insemination with the consent of her spouse the child of both spouses. The sperm donor, who was known to the parents, was not a parent of the child and therefore did not require notice of B’s proceeding to adopt the child, a proceeding the court stated might be necessary to insure that B was always recognized as the legal parent of the child. Adoption of a Minor, 471 Mass. 373, 29 N.E.3d 830 (2015).
• No matter what the statutes say, however, a married same-sex couple may still face resistance to putting their marriage on the same footing as one between people of different sexes. A female married couple in Utah became parents through artificial insemination of one of the spouses with anonymously donated sperm with the full consent and knowledge of the other spouse. Under Utah statutes, a husband becomes the father of his wife’s child conceived through artificial insemination if he consents and signs a record to that effect. Utah Code Ann. §§ 78B–15–201(2)(e), -703, -704. The Utah Department of Health and the Office of Vital Records and Statistics refused to recognize the spouse who did not give birth as the parent of the child without a second parent adoption. The couple sued in federal district court and obtained an injunction prohibiting state officials from treating female spouses of women who give birth through artificial insemination differently from male spouses of women who do so. Roe v. Patton, 2015 WL 4476734 (D.C. Utah 2015)

• While this Utah couple was successful, another female same-sex couple has not been as successful in having the spouse who did not give birth to a child conceived through artificial insemination recognized as a parent of the child. The couple was married in Wisconsin six days after the child’s birth. The couple eventually began an adoption proceeding in which they sought not an adoption but a declaration that the spouse who did not give birth was a parent of the child. The trial court denied the petition because the petitioners had not served the state attorney general which was required because the action called into question the constitutionality of a statute. The intermediate appellate court affirmed on the same ground. In the course of its opinion in S.R. and C.L. v. Circuit Court for Winnebago County, 366 Wis.2d 134, 876 N.W.2d 147 (Wisc.Ct.App. 2015), the appellate court also observed that the federal district court which a week after the Obergefell decision held that Wisconsin’s laws restricting marriage to different sex couples were unconstitutional and issued an order noting that Obergefell did not answer questions related to Wisconsin’s statutes dealing with presumption of paternity and the parentage of children conceived through artificial insemination. Of course, the case is complicated by the fact of the marriage occurring after the child’s birth.

• On May 2, 2016, however, the Wisconsin Department of Health Services began to use a “birth certificate worksheet’ that referred to the child’s mother’s “husband/spouse” in questions dealing with conception through artificial insemination designed to implement the legal requirements for the issuing of a two-parent birth certificate in that situation, that is, insemination must take place under the supervision of a physician and with the consent of the mother’s spouse (Wis. Sat. § 891.40(1)). In its decision in Torres v. Seemeyer, 207 F.Supp.3d 905 (W.D. Wisc. 2016) the district court for the Western District of Wisconsin issued an injunction
ordering the Wisconsin authorities to apply the artificial insemination statute to married different sex couples and married female couples in same manner, that is, to construe “husband” to mean “spouse” for the period before May 2, 2016. This decision, however, does not deal with the issue in S.R. and C.L. because there the couple married after the child’s birth.

- A federal district court in Indiana has declared Indiana’s parentage statutes unconstitutional because they do not allow a birth mother’s same sex spouse to be listed as the child’s other parent on the child’s birth certificate and has issued an injunction requiring the estate to apply the statutes in a non-discriminatory manner, without regard to how the birth mother conceived. *Henderson v. Adams*, 209 F.Supp.3d 1059 (S.D. Ind. 2016), opinion clarified, ___ F.Supp.3d ___, 2016 WL 7492478, appeal to 7th Cir. filed, Jan. 23, 2017.

- A federal district court in Florida has issued a similar injunction with respect to Florida’s parentage statutes and birth certificates of a child conceived by artificial insemination and born to a woman in a same-sex marriage. *Brenner v. Scott*, ___ F.Supp.3d ___, 2016 WL 3561754 (N.D. Fla.)

- Same-sex female married couples in Nebraska have also been refused birth certificates listing both spouses as parents of the child born to one of the spouses, a reason cited by the District Court in *Waters v. Ricketts*, 159 F.Supp.3d 992 (D. Neb. 2016) for holding the section of the Nebraska Constitution defining marriage as a union between one man and one woman unconstitutional on the authority of *Obergefell*.

- Two divisions of the Court of Appeals of Arizona came to different conclusions on the applicability of the codified marital presumption, A.R.S. § 25-0814(A) and the artificial insemination statute, A.R.S. § 25-501, to a marriage of two women.

  - In *McLaughlin v. Jones*, 240 Ariz. 488, 382 P.3d 118 (Ct.App. 2016), the court held that a dissolution proceeding between same-sex spouses would proceed as a dissolution action with children where one of the spouses during the marriage conceived through artificial insemination. The court found that A.R.S. § 25-501 requires the spouse to support the resulting child but does not determine paternity. Rather, A.R.S. § 25-0814(A), must be applied in a gender neutral manner to comply with *Obergefell*, and therefore gives the spouse in this case the presumptive status of legal parent of the child. In addition, under the facts, the birth mother is estopped from denying the presumption of her spouse’s parentage given the written agreement entered into by the spouses
before the child’s birth.

- In *Turner v. Steiner*, 242 Ariz. 494, 398 P.3d 110, (Ct.App. 2017), however, another panel of the appellate court with one justice dissenting, held that the statutory presumption of paternity could not apply to a woman married to another woman. *Obergefell* does not demand a gender-neutral application of the statute and in addition under the Arizona statutory scheme parentage is determined by biology.

- The Arizona Supreme Court granted review in *McLaughlin* and affirmed, abrogating *Turner*, 243 Ariz. 29, 401 P.3d 492 (2017), holding that under *Obergefell* excluding from the statutes the female spouse of a woman who gives birth by artificial insemination violates the Fourteenth Amendment and the remedy is extending the statute to married couples where both spouses are women. One justice dissented on the remedy, insisting that the court could not “rewrite” the paternity statutes, an issue the majority fully addressed.

- A divided Supreme Court of Arkansas, however, held that the Arkansas statutes governing the issuing of birth certificates deal with biological parentage and that the artificial insemination statute making the husband who consents to his wife’s conception of a child by artificial insemination the father of that child by its terms applies only to husbands and wives and must be amended by the legislature to apply to same-sex married couples. Three justices dissented in whole or in apart and all three agreed that the artificial insemination must be read in a gender-neutral manner in light of *Obergefell*. *Smith v. Pavan*, 505 S.W.3d 169 (Ark. 2016).

- The Supreme Court of the United States granted certiorari in *Pavan* and reversed the Arkansas court in a per curiam opinion clearly holding that *Obergefell* “proscribes such disparate treatment” of different sex and female same-sex married couples. ___ U.S.___, 137 S.Ct. 2075, 198 L.Ed.2d 636 (2017). Three justices dissented principally on the ground that summary reversal of the Arkansas court was not appropriate.

- On remand, a divided Arkansas high court remanded to the lower state court to enter appropriate declaratory and injunctive relief that do not “rewrite” the statute. One justice concurred but would require the lower court to hold hearings to establish the disparate impact of the statute on same-sex couples. Three justices dissented, insisting that the only possible result was the a declaration that the statute governing parentage in the case of assisted reproduction and the statute governing the issuing of birth certificates are unconstitutional and must be stricken. *Smith v. Pavan*, 2017 Ark.
• The New York intermediate appellate court has held that the presumption of legitimacy applies to a same-sex married couple where both spouses are female and one of the spouses conceived a child through artificial insemination from a known donor and that the presumption cannot be rebutted solely by the fact that the child cannot be the biological child of both parents. The court also held that equitable estoppel applies in the circumstances and that the best interests of the child would not be served by granting the sperm donor’s request for a paternity test. *Matter of Christopher YY v Jessica ZZ*, 159 A.D.3d 18, 69 N.Y.S.3d 887 (3d Dep’t 2018). See also, *Joseph O. v Danielle B.*, 158 A.D.3d 767, 71 N.Y.S.3d 549 (2d Dep’t 2018) (child born to married woman through artificial insemination with sperm of a known donor with the consent of her same-sex spouse is the child of the spouse; absence of medical supervision of the procedure meant the artificial insemination statute did not apply, but the rebuttable presumption of parentage did apply and under the facts the sperm donor is equitably estopped from asserting parental rights).

• In *In the Interest of A.E.*, 2017 WL 1535101 (Tx.Ct.App. Beaumont 2017), the court refused to apply the presumption of parentage through marriage to a woman married to another woman who gave birth during the marriage but after the couple had separated. The court expressly held that *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) does not give the court “authority” to “re-write” the statutes governing parentage and that rights conferred on married couples by state law such as the right to adopt and rights involving child custody, support, and visitation are not “fundamental rights.”

• All of these cases involve two women married to each other. Applying the marital presumption when the spouses are both male seems to be a more complicated question. While a child could be “born to” one of the spouses in the sense of having been conceived using his sperm, the child will have a birth mother who is by definition a stranger to the marriage and who will have parental rights to the child unless those rights are properly surrendered as part of an adoption proceeding or the birth has been brought about as part of a valid gestational surrogacy arrangement, which is not possible under New York law, Domestic Relations Law §§ 121, 124, but certainly is a possibility under the law of other states, including Texas, V.T.C.A., Family Code § 160.754(b) which requires the couple entering into the agreement intending to become parents to be married, although the courts have recognized a California declaration of paternity under a California surrogacy contract where both intended parents were married validly married in Canada but not in Texas, *Berwick v. Wagner*, 509 S.W. 3d 411 (Tex.Ct.App. Hou. 2014).

• In *In re Maria-Irene D.*, 153 A.D.3d 1203, 61 N.Y.S.3d 221 (1st Dep’t
2017), the First Department affirmed the Family Court’s vacating the adoption of a child born to a married male couple by the new partner of one of spouses. The married couple had entered into a surrogacy agreement “with the intention of being parents” in 2013. The couple was married under United Kingdom law as of 2008 (through conversion of their civil union into a marriage). Both spouses donated sperm and an embryo fertilized by one of the spouses was transferred to the surrogate who gave birth in 2014. The Missouri courts awarded the genetic father sole custody. The couple separated and the genetic father’s new partner commenced a petition to adopt the child in New York where the genetic father and the child now lived. In the meantime, the other spouse had commenced a divorce proceeding in Florida where the couple and the child had lived until October of 2015. The divorce proceeding and the spouse’s request for joint custody were not mentioned in the adoption proceeding. In affirming Family Court, the Appellate Division stated that the martial presumption applied, and was not rebutted by the judgment of the Missouri court especially because the couple had taken steps in the United Kingdom to establish the other spouse’s parental rights under UK law.

• Parentage and gestational surrogacy
  • The status of gestational surrogacy arrangements is not uniform throughout the United States.
    • In some states contracts are enforceable and the person or person who entered into the contract with the surrogate are the parents of the child without any surrender of rights by the surrogate.
    • In others, parentage may be confirmed either pre-birth or afterwards in a proceeding that is not an adoption.
    • In yet other states, surrogacy contracts, or contracts involving payment, are not legal; one consequence is that the woman who gives birth to the child must surrender parental rights before anyone can adopt the child even if there is an agreement and the birth mother is a volunteer. (See, K. Knaplund, “‘Adoptions Shall Not be Recognized’: the Unexpected Consequences for Dynasty Trusts,” 7 Univ. Cal. Irving L. Rev. 545 (2017).
  • So long as the surrogacy arrangement conforms to law, however, the parentage of the child is clear. That clarity, however, does not necessarily determine the status of the child for purposes of class gifts by persons other than the legal parents.
    • The court was asked to construe trust agreements that stated “adoptions shall not be recognized” to answer the question of whether children of a beneficiary, grandchild of the settlor, were great-grandchildren of the
settlor and therefore beneficiaries themselves. Fertilization occurred in vitro using donated ova and the sperm of beneficiary’s different sex spouse. The surrogacy contract was entered into in California and the California courts had issued a “judgment of paternal relationship” Under Cal. Fam. Code §§ 7630 and 7650.

- The Surrogate first noted that at the time the trusts were created, the settlor could not have anticipated the medical technology that resulted in the birth of the children.
- The Surrogate then construed the terms of the trust and found that there was nothing in them to allow the court to infer that the settlor intended to exclude all means of assisted reproduction and that the settlor had not intended to limit beneficiaries to the settlor’s blood relations because under some circumstances the spouses of beneficiaries might themselves be beneficiaries of the trusts.
- Finally, the Surrogate decided that the California judgement of parental relationship was not an adoption proceeding and was entitled to full faith and credit in New York, even though New York statutes declare surrogacy arrangements that involve payment to be contrary to public policy.
- *Doe* indicates that the terms of a trust prohibiting recognition of family relationships created by adoption may not apply to persons born into a family line through the use of in vitro fertilization even where the persons are not genetically related to the family. If the children in *Doe* had been conceived from the beneficiary’s ova, the question of whether the California proceeding was an adoption would still arise although presumably it would be easier to find that the children are beneficiaries.

- **Posthumous conception**
  - The effective storage of gametes and early stage embryos makes it possible for persons long dead to become the genetic parents of children born long after their deaths.
- **Existing legislation**
  - What legislation there is usually requires written consent to the use of one’s stored gametes for reproduction after death and birth of the child within a given time after the death of the person whose stored gametes have been used (Cal. Prob. Code § 249.5, N.Y. Est Powers & Tr. Law § 4-1.3)
  - The U.P.C. recognizes other ways of giving consent and creates a presumption of consent when a widow conceives using the sperm of her late husband, § 2-120(h)(2).
  - Under the new Uniform Parentage Act, if the donor of gametes has agreed to assisted reproduction by a woman who herself has agreed to give birth
to a child and then dies before a transfer of gametes or embryos, the donor is a parent of a child conceived by assisted reproduction if the donor gave written consent to be the parent of a child conceived after death or that intent can be proved by clear and convincing evidence and the child is in utero not more than 36 months after the donor’s death or born not more than 45 months after the donor’s death. Unif. Parent. Act § 708(b).

• Under older versions of the uniform act, all that was required was the existence of the consent of the deceased parent in a record to becoming a parent after death. The Texas version, V.T.C.A., Family Code § 160.707, applies only to a deceased “spouse” and the record must be “kept by a licensed physician.” There are no time limits under the Texas statute.

• The Parentage Act provision is more restrictive than the U.P.C. provision, not only in not including a marital presumption of consent, but also in making the time limit a necessary requirement of parentage. Under the U.P.C., meeting a time limit on implantation of the embryo or, alternatively, on birth (and the limits are the same as those under the Parentage Act), is necessary only if the child is to be an heir of the deceased person whose gametes were used. If the question of parentage arises in the context of a class gift, the usual class closing rules apply and the time limits are relevant only if the “distribution date,” that is, the date in which the gift vests in possession or enjoyment, is the death of the deceased person whose gametes were used. The limits to not apply to a distribution date other than the date of death of that person. (see Comment to U.P.C. § 2-705)


• There seems to be only one reported case addressing the question of whether children of a trust beneficiary conceived after the beneficiary’s death using gametes stored during the beneficiary’s life are children of the beneficiary and therefore descendants of the beneficiary’s parent and as descendants of the beneficiary’s parent are themselves beneficiaries of those trusts.

• The trusts were executed in 1969. The settlor was a life income beneficiary and after the settlor’s death in 2001 the trusts continued during the lifetime of the settlor’s surviving spouse, the trustees having discretion to distribute principal to the settlor’s issue during the surviving spouse’s life. At the surviving spouse’s death, the trust property is subject to the surviving spouse’s non-general power of appointment to appointment to the settlor’s issue. The takers in default are the issue living at the time of the surviving spouse’s death.

• One of settlor’s children, James, predeceased the settlor. Before his death James deposited samples of his semen at what the opinion describes as a
“laboratory” with instructions that in the event of his death the samples be held subject to the directions of his surviving spouse, Nancy.

- Nancy underwent two in vitro fertilization procedures resulting in the birth of two children, the first three and a half years after James’s death, the second five years after the first birth (the “genetic children”).

- The trustee made an application to the Surrogate’s Court for advice and direction on the status of the genetic children as beneficiaries. The application was unopposed, so in essence all the parties were asking the court to approve including the genetic children as beneficiaries. (Note, that according to the opinion, the remaining samples of James’s sperm has been destroyed, thus ruling out the birth of more genetic children of James.)

- Because there was no binding authority in the law of the jurisdictions governing the trusts (New York and the District of Columbia), the court turned “to less immediate sources for a reflection of the public’s evolving attitude toward assisted reproduction-including statutes in other jurisdictions, model codes, scholarly discussions and Restatements of the law.”

- The court concluded that James had given his consent to the use of his genetic material after this death and the genetic children are entitled to all of the rights of a “natural child.”

- Although the children are James’s children, their status as beneficiaries is determined by the intent of the settlor. The Surrogate concluded that the intent gleaned from a reading of the trust instruments is to benefit the settlor’s children and their families equally and therefore the genetic children are beneficiaries of the trusts.

- One way to look at the result is that the intent to benefit one’s descendants is presumed to include all descendants no matter how their lives have begun. In short, the genetic relationship of the genetic children to the settlor (grandchild and grandparent) is sufficient. It can be argued that it is less of a leap to include these children as beneficiaries than to include adopted children.

- Also, under NY EPTL 4-1.3, enacted after the decision in Martin B., the genetic children would not be James’s children unless they were in utero within 24 or born within 32 months of James’s death. Neither genetic child meets the requirement, and, therefore, neither would be members of the class of the settlor’s descendants (EPTL 4-1.3(f)). Under the Uniform Parentage Act §708(b), the elder child may meet the born within 45 months requirement (depending on how many days are in the month the statute refers to) and therefore is a child of James and a beneficiary of the trusts, but the younger clearly does not and therefore is not. Under the U.P.C. provision the elder genetic child is therefore likely to be an heir of
James; the younger definitely is not, but both are members of the class not only for discretionary distributions of principal but also are permissible objects of the power of appointment and takers in default.

- Equitable and de facto parentage.
  - Two very different concepts
    - The terms “equitable parentage” and “de facto” parentage are often used interchangeably, creating some potentially serious confusion.
    - Both terms are used to describe a legal doctrine under which someone who it not a parent by biology or adoption can have the rights and responsibilities of a parent which clearly include the right to custody and visitation and the obligation of providing support for the child.
    - De facto parentage, however, can also be used to describe a doctrine under which that person who is not a parent by biology or adoption has not only the rights of an equitable parent but also is a parent for all purposes, including for testate and intestate succession.
  - Equitable parentage
    - Not every state recognizes equitable parentage in all possible circumstances. The most usual limitation is the requirement that the person seeking to be an equitable parent be married to the child’s parent. The nationwide legalization of same sex marriage, however, has raised questions about the application of the concept of equitable parentage including applying the concept to same-sex couples whose marriages were not recognized by their state of residence when their marriage ended and to same-sex couples who would have married had state law allowed them to.
    - The Michigan intermediate appellate court has held that equitable parentage, which is limited to married couples under Michigan law, does apply where a same sex couple legally married outside of the state and separated while living in Michigan before the state recognized same-sex marriage. *Stankevich v. Milliron*, 313 Mich.App. 233, 882 N.W.2d 194 (Ct.App.Mich. 2015).
    - On the other hand, the Michigan high court refused to allow an appeal from an intermediate appellate court decision refusing to apply equitable parentage in a situation where the same-sex couple could not have married under Michigan law (and did not enter into a valid marriage that would have been recognized under Michigan law) before the relationship ended, *Mabry v. Mabry*, 499 Mich. 997, 882 N.W.2d 539 (2016), albeit over a vigorous dissent by Justice McCormack; cf. *Sheardown v Gusatella*, 324 Mich.App. 251, 262 N.W.2d 172 (2018) (turning back constitutional challenge to the statutory definition of parent in Michigan’s Child Custody
Act as the “natural or adoptive parent” of a child, Mich. Cons. L. § 722.22(i), based on an equal protection argument under Obergefell on the grounds that the couple was not married and whether or not they would have married had it been legal to do so was irrelevant.

• In a very recent case, decided on February 13, 2018, Hawkins v. Grese, 68 Va.App. 462, 809 S.E.2d 441 (2018), the Virginia intermediate appellate court affirmed denial of custody to the same-sex partner of the child’s biological mother who made a home with the biological mother and the child for the first seven years of the child’s life. The child was conceived through artificial insemination. The couple never married and the partner did not adopt the child. The couple informally shared custody for two years after the separation, but that arrangement fell apart and the partner filed a petition for visitation and custody. The court awarded joint legal and physical custody and shared visitation, the biological mother appealed, then withdrew the appeal as regards visitation. The circuit court reversed the award of joint custody and the appeal followed. The appellate court rejected the argument that Virginia’s failure to recognize de facto parentage violates the equal protection guarantee of the Fourteenth Amendment because the Commonwealth’s limitation of parentage to biological relationship or adoption passes the rational basis test, especially because it applies equally to same-sex and different-sex couples. The court also found that the couple’s inability to marry in Virginia was not legally significant to the decision nor did Obergefell require the court to treat the couple’s relationship as a marriage. Note that although the opinion describes the issue as one of de facto parentage, the case is about custody and implicates what is described in this discussion as equitable parentage.

• In C.G. v. J.H., 193 A.3d 891 (Pa. 2018), the Pennsylvania Supreme Court refused to consider the possibility of parentage by intent where there was no formal contract in the case of any unmarried female couple where one of the partners conceived and gave birth through artificial insemination. In separate concurring opinions, two justices agreed with the result because the evidence showed that the mother’s partner did not take part in the mother’s decision to bear a child and did not consider the to be hers, but argued that the time had come to recognize parentage by intent.

• The Oklahoma high court came to the opposite conclusion in Ramey v. Sutton, 362 P.3d 217 (Okla. 2015). A same-sex couple entered into a committed relationship, and one of the partners conceived through artificial insemination and gave birth. After 8 and a half years and before legalization of same-sex marriage in Oklahoma the couple ended the relationship. The partner who had not given birth petitioned for a determination of parental rights and responsibilities. The Supreme Court reversed dismissal below holding that the Oklahoma equivalent of equitable parentage applies where the couple “(1) were unable to marry
legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner’s parental role following the birth of the child.”

• Claims by same-sex unmarried partners of women giving birth through artificial insemination have also led the high courts of Maryland and New York to overrule existing precedent and recognize the equitable parentage concept for the first time: Conover v. Conover, 450 Md. 51, 146 A.3d 433 (2016.), Brooke S.B. v. Elizabeth A. C. C., 28 N.Y.3d 1, 61 N.E.3d 488, 39 N.Y.S.3d 89 (2016).

• In Conover, the couple married after the child’s birth and then separated a year later. After approximately a year of visitation by the non-birth mother, the birth mother cut off the visits and less than a year later filed for divorce. The non-birth mother filed a counter-complaint for divorce in which visitation rights were requested. The lower courts decided that the non-birth mother had no standing to request visitation because under the Maryland Court of Appeals opinion in Janice M. v. Margaret K., 404 Md. 661, 948 A.2d 73 (2008) Maryland does not recognize equitable parentage. The high court overruled Janice M. and adopted the test set forth a Wisconsin case, In re Custody of H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419, 421 (1995), which requires consent by the biological or adoptive parent to the other person’s formation of a parent-like relationship with the child, the other person and the child living in the same household, the other person assuming obligations of parenthood, and that the parental role has continued long enough so that the other person has established a bonded, parental like relationship with the child. The Maryland intermediate appellate has recently stated that the holding in Conover does not apply only to same-sex couples, Kpetigo v. Kpetigo, 238 Md.App. 561, 192 A. 3d 929 (2018). Note that the Maryland courts use the term de facto parentage, although the cases all deal only with custody, visitation, and support.

• The New York case concludes that a where the biological parent and another person enter into an agreement before the child is conceived to raise the child as co-parents and the existence of the agreement is proved by clear and convincing evidence, the non-biological parent has standing to seek custody and visitation. The opinion is quite clear that it says nothing about situations not involving such an agreement.

• And equitable parentage makes it possible for a child to have more than two parents at least for purposes of custody, visitation and support.

• A married male couple, David S. and Raymond T., and a female friend, Samantha G., decided to have a child together. For eight days the men alternated daily delivery of their sperm to the woman
who became pregnant through artificial insemination done without medical supervision. She delivered a baby boy at the home of the male couple using the services of a midwife. Subsequent genetic testing showed that Mr. S. was the genetic father of the child and he signed an acknowledgment of paternity when the child was five days old. The three adults involved sought clarification by the court of their parental rights and the New York Family Court held that under *Brooke S.B.*, Mr. T has standing to seek custody and visitation even though the child has two legal parents. *Raymond T. v. Samantha G*, 59 Misc.3d 960, 74 N.Y.S.3d 730 (N.Y. Fam. Ct. 2018)

- The decision in *Raymond T.* is consistent in another case in which the court issued a “tri-custody order” giving joint custody to the biological father, his former wife, and another woman who is the biological mother and the partner of the father’s ex-spouse, even though the child already had two legal parents, *Dawn M. v Michael M*, 55 Misc.3d 865, 47 N.Y.S.3d 898 (Sup.Ct. Suffolk Co. 2017).

- Is an equitable parent a parent for property law purposes? Is the child an heir in intestacy? Of the parent? Of relatives of the parent? Is the child included in class gifts in the instruments of the parent? Of others? The answer is probably “no” since the rights that are involved are those that related to the upbringing of the child, unless, of course the existence of the support obligation somehow makes gives the child some sort of claim on the equitable parent’s estate, at least in intestacy (cf. the discussion by the Massachusetts Supreme Judicial Court in *Woodward v. Commissioner*, 435 Mass. 536, 760 N.E.2d 257 (2002) of the purposes of the intestacy statute which include transmitting wealth to the decedent’s consanguineous descendants which presumably includes adopted persons under modern law.)

- In addition, questions related to custody, visitation, and support become moot when the child reaches majority. Does equitable parentage then come to an end?

- De facto parentage, however, is something else again.

- The full implication of the concept can be found in the new Uniform Parentage Act. Among the more important provisions:
  - The marital presumption applies whenever a married woman gives birth, whether her spouse is a man or a woman (§ 204).
  - Parentage may be established by an acknowledgment signed by the woman who gives birth to the child and by the individual “seeking to establish a parent-child relationship” (§§ 302, 304).
  - Rules for determining if an individual may be adjudicated the de facto parent of the child (§ 609) which requires proof by clear and convincing evidence of seven factors all related to acting like a
parent, including undertaking full responsibility for the child, establishing “a bonded and dependent relationship” with the child, and also that continuing the relationship is in the child’s best interest (§ 609(d)).

- Rules for adjudicating competing claims of parentage including an alternative provision allowing the court to determine that the child has more than two parents.

- Remember that an adjudication of parentage means that the parent-child relationship exists for all purposes, presumably including inheritance and inclusion in class gifts in donative documents. (§ 203). There is an exception in § 203 for law of the state other than the parentage act, but the comment gives only one example: a statute like UPC § 2-114(a)(2) that prevents a parent from inheriting in intestacy if the child dies before reaching a stated age (18 is suggested) and there is clear and convincing evidence that parental rights could have been terminated under the law of the state.

- At least two states have statutes recognizing de facto parentage: Maine, Me. Stat. tit. 19-A § 1891 and Delaware, 13 Del. C. § 8-201(c).

- Under the Maine statutes, it is clear that a de facto parent is a parent for property law purposes as well. The definition of “child” in the Maine Probate Code, Me. Stat. tit. 18-A § 2-109, defines child in reference to the adoption provisions of the code as well as the provisions of the parentage act, Title 19-A ch. 61 which includes the de facto parent provision. (The definition is the same under the new probate code which becomes effective July 1, 2019 where the definition of child is Me. Stat. tit. 18-C § 2-115.) Note that before the enactment of the statute, the Maine high court established the principal of de facto parentage in the context of custody, visitation, and support, Pitts v. Moore, 90 A.3d 1169 (Me. 2014).

- The Maine Supreme Judicial Court has issued opinions in three cases dealing with the de facto parentage statute.

- All three deal with whether or not grandparents had standing to pursue a claim of de facto parentage, Lamkin v. Lamkin, 186 A.3d 1276 (Me. 2018); Davis v. McGuire, 186 A.3d 837 (Me. 2018), Curtis v. Medeiros, 152 A.3d 605 (Me. 2016).

- None of the cases involve rights in intestacy or inclusion in gifts in wills or trusts.

- The effect of the Delaware statute is not as clear. While the parentage established under 13 Del. C. § 8-201(c) “applies for all purposes” under§ 8-203, the definition of child in the probate code,
12 Del. C. § 508 only refers to adoption and nonmarital children. Like the Maine jurisprudence, none of the Delaware cases dealing with the statute involve rights in intestacy or inclusion in gifts in wills or trusts.

- There are cases finding that unmarried partners of genetic parents are parents of the children the parent and partner raised together at least for some time.
  - Relying on *Brooke S.B.* a New York Family Court has issued an order of filiation in favor of the unmarried same-sex partner of the children’s birth mother. The parties became registered domestic partners in 2005 and agreed to have children together and that one of the partners would conceive through artificial insemination with anonymously donated sperm. Two children were born and the parties raised them together until they separated in July 2011 (just as same-sex marriage became legal in New York). The birth mother and her former partner finally agreed on custody and access to the children but could not agree on whether the former partner was entitled to a court order confirming her parentage. The Family Court concluded that while *Brooke S.B.* was concerned with standing to seek visitation and custody, the opinion also broadened the definition of “parent” to include an unmarried partner of a legally recognized parent under certain circumstances. In addition, the extension of all the rights and responsibilities of marriage to same-sex couples means that such couples can establish legal parent-child relationships that were once not possible. In this case where the parties were registered domestic partners during a time when they could not legally marry in New York and where for six years the parties were an “intact couple” raising the children together, the partner is entitled not only to rights of visitation and custody and has the obligation to support the children but also is entitled to an order of filiation creating a legal parent-child relationship between the partner and the children. *A.F. v. K.H.*, 56 Misc.3d 1109, 57 N.Y.S.3d 352 (Fam.Ct. Rockland Co. 2017).

- Other courts have relied on the “holding out” provision of the 1973 Uniform Parentage Act, § 204(a)(5) under which a man is presumed to be the father of a child if during the first two years of the child’s life the man resided in the same household with the child and “held out the child as his own.”

- The Supreme Judicial Court of Massachusetts has applied that provision to the same-sex partner of the mother of two children born while the then partners made a home together with the children and who both presented themselves as the children’s parents, *Partanen v Gallagher*, 475 Mass. 632, 59 N.E.3d 1133 (Mass. 2016). The same result under the same statutory provision
was reached by the California Supreme Court in *Elisa B. v Superior Court*, 37 Cal.4th 108, 117 P.3d 660, 33 Cal.Rptr.3d 46 (2005).

- Other state courts have come to similar conclusions based on the “holding out” provision as enacted in their versions of the 1997 Uniform Parentage Act, or on other grounds, see e.g., *Frazier v Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013); *Chatterjee v King*, 280 P.3d 283 (N.M. 2012); *In re S.N.V.*, 284 P.3d 147, 151 (Colo.Ct.App.2011); *In re Parentage of L.B.*, 155 Wash.2d 679, 122 P.3d 161 (2005). At least one state high court, however, has refused to recognize de facto parentage or equitable parentage, finding that the question of doing so belongs to the legislature, *LP v LF*, 338 P.3d 908 (Wyo. 2014).

- Whether or not the establishing of parentage on other than by biology or adoption, be it called de facto parentage or equitable parentage, has property law consequences such as creating inheritance rights and including in class gifts in document of the de facto parent and family members of the de facto parent is not clear.
  - For example, both the New York and Maryland high court cases cited above apply the equitable parentage doctrine only to questions of visitation and custody, questions, as noted above, become moot when the child reaches majority. The result in *A.F. v. K.H.*, however, makes the children the legal children of the former partner of the birth mother and presumably makes them a part of the former partner’s family.
  - That may also be the result of the cases finding that the unmarried partner of a genetic parent is a parent under the holding our provisions of the 1997 Uniform Parentage Act. Presumably the provision determines parentage for all purposes.
  - On the other hand, the Maine statutes make the de facto child an heir of the de facto parent and under the rules for construction of wills and trusts membership in a class gift is determined by the rules govern parent-child relationships for purposes of intestate succession, Me. Stat. tit. 18-A § 2-611, repealed as of and replaced on July 1, 2019 by Me. Stat. tit. 18-C § 2-702(2). Under the new statute, if the transferor is not the parent, the parent-child relationship must have been established before the child was 18 years of age.
  - Cases dealing with the family relationships created by equitable and de facto parentage as well as assisted conception will likely start to appear. In the meantime, planners must ascertain what their clients want when it comes to defining membership in class gifts and work to find language that will accomplish the client’s intent.
• Some suggestions on drafting
  • Drafting to *exclude* from inclusion in the “family” is probably easier than drafting to include
    • For example, the term “lawful issue” in the past at least, excluded non-marital children and perhaps even adopted persons.
    • Today, that result is not at all certain, but consider this formulation in a will or trust: *Whenever the [executor or trustee] in order to take an action to carry out the terms of this [will or trust] must determine whether or not a person has a family relationship to another person, a person is a child of any other person only if that child was born to a woman married to a man and is genetically related to both that woman and that man.*
      • This formulation excludes all children of assisted reproduction, except a child born through artificial insemination of a woman with her husband’s sperm, or a child born though *in vitro* fertilization using the woman’s ovum and her husband’s sperm.
      • It will also, of course, excluded or adopted persons, included those adopted by a stepparent, and
      • All non-marital children, except perhaps those born to a woman who later marries child’s father.
      • And of course it also excludes children of same-sex couples, married or otherwise.
  • On the other hand, consider this formulation as an attempt to create the broadest possible inclusion in the family: *Whenever the [executor or trustee] in order to take an action to carry out the terms of this [will or trust] must determine whether or not a person has a family relationship to another person, a person is a child of any other person if the parental relationship between the child and the person is recognized by law [or by the law of any jurisdiction or any United States jurisdiction], whether the relationship is based on adoption, a legally recognized presumption of parentage, the terms of an applicable statute, a judicial proceeding valid in the jurisdiction where it took place, or by any other legally recognized means.*
  • There certainly are positions between these two poles.
    • For example, the definition could include all adopted persons, persons adopted only before a specified age (generally exclude recognition of adult adoptions), or if the relationship between the adopted person and the adoptive parent arose while the adopted person was a child who was perhaps a member of the same household with the adoptive parent.
    • The definition could expressly include or exclude non-marital children.
    • The definition could also expressly address children of assisted reproduction, including children conceived after the death of one or both genetic parents.
• In the end, we are back to where we began: the idea of family is far more complicated than it was even a generation ago.