CHAPTER B

WILLS AND ESTATES WITH BASIC ESTATE PLANNING FORMS

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Serna v. City of San Antonio, 244 F.3d 179, 182 (5th Cir. 2001) (cert denied) U.S. ___.
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I. INTRODUCTION TO A WILLS AND PROBATE PRACTICE

A wills and probate and related practice is, for the most part, one of the last bastions of civility in the practice of law. Of course, there are notable exceptions; for example, will contests can be as acrimonious as any litigation. Generally, however, a wills and probate practice involves counseling clients, who are motivated to put their affairs in order, on how to arrange their estates so as to take into account the laws of wills, taxes, insurance, property and trusts to gain maximum benefit of all such laws while carrying out the wishes of our clients for the disposition of their property upon death. The primary legal services which you can provide to ensure that your clients' objectives are attained is counseling with the aim of preparing devices such as:

1. Last Will and Testaments,
2. Durable Power of Attorney,
4. Directive to Physicians,
5. Declarations of Guardian instruments,
6. Revocable and/or Irrevocable Trusts,
7. Testamentary Trusts,
8. Life Insurance Trusts,
9. Generation-Skipping Trusts, and
10. A host of documents for making transfers of funds or interests to minors so as to qualify for favorable tax treatment or other advantages.

A common perception is that this type of basic estate planning is worthwhile only for large estates or that it involves planning which will take effect only upon death. Neither of these notions, however, is accurate. Everyone can expect and achieve substantial benefits from careful and thoughtful planning.

II. POWER OF ATTORNEY DOCUMENTS

A Power of Attorney is the basic instrument utilized to effectuate the desires of your client when that client, for whatever reason, cannot manage the estate by him or her self.

A. What Are The Requirements For A Valid Power Of Attorney In Texas?

Generally, a power of attorney must be:

1. In writing, and
2. Signed by a principal who is an adult. (Tex. Prob. Code § 482.)
   (a) The principal must be competent, and
3. The principal's designation of an agent must be in writing.
4. The principal's signature on the Power of Attorney must be acknowledged before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of Texas or any other state. Id. at § 482(4).

What Are the Different Types and Uses of Power of Attorney (POA) Documents?

There are "general" power of attorney documents and specific, or "special" power of attorney documents. This latter type or special power of attorney device is used primarily to authorize agents to accomplish singular or non-recurring tasks, such as transferring titles to property specified in the special power of attorney. These are used mainly as a one time convenience to the principal.

There are also medical powers of attorney (formerly known as durable power of attorney for health care situations) that specifically enable the principal to designate someone to make health care decisions.

All of these instruments are predicated on the assumption that the principal has the capacity to designate the agent or "attorney-in-fact". Accordingly, these types of documents are revoked or rendered useless whenever the principal is incapacitated, unless the document specifically states otherwise.


A durable power of attorney, in addition to all of the provisions in II A., above, must contain the language, "This power of attorney is not affected by subsequent disability or incapacity of the principal;" or, it may contain a "springing" provision which states that it "becomes effective on the disability of the principal" or similar words to this effect. These may be revoked in accordance with any limiting language within the document itself or by any contingency occurring under the terms of the document which provides for such revocation.

When Do Power Of Attorney (POA) Documents Have To Be Filed?

A power of attorney for a real property transaction requiring the execution and delivery of an instrument to be recorded, must be filed where the instrument was recorded. This includes:

1. a release,
2. assignment,
3. satisfaction,
4. mortgage,
5. security agreement,
6. deed of trust,
7. incumbrance,
8. deed of conveyance,
9. oil, gas or other mineral lease,
10. memorandum of a lease,
11. lien; or
12. other claim or right to real property.

They must also be filed of record in the county in which the principal resides. (Tex. Prob. Code § 489.)
How Are POA's Revoked?

A power of attorney is always revokable upon notice to any third party known to be relying upon the principal's designation of the agent. This can be done verbally or in writing. Moreover, an affidavit terminating a power of attorney can be recorded in accordance with Texas Probate Code § 487. Further, powers of attorney can be revoked or terminated by the expiration of time or the occurrence of any event stated within the document itself. Tex. Prob. Code § 487 (d).

Divorce or annulment terminates a power of attorney granted to a former spouse unless the instrument provides otherwise. (Tex. Prob. Code § 485A.)

Revocation will also occur if, after its execution of the power of attorney, a court of the principal's domicile appoints a guardian of the estate of the principal. (Tex. Prob. Code § 485.) This revocation is effective upon the qualification of a guardian. (Id.)

Generally, revocation of a durable power of attorney is not effective as to third parties relying on the power of attorney until such third parties receive actual notice of the revocation. This is usually accomplished by signing an instrument revoking the power of attorney and serving same on third parties known to be acting in reliance thereon. (Tex. Prob. Code § 488.)

In the case of real estate transactions only, filing the revocation for record in the county in which the power was recorded is a requirement. (Tex. Prob. Code § 489.)

Lastly, please note that under the Durable Power of Attorney Act, the death of the principal terminates any and all authority of the decedent's attorney-in-fact to act on behalf of the principal's estate.

III. DURABLE POWER OF ATTORNEY FORM  See Appendix "A" (Durable Power of Attorney Form).

What Is A Durable Power Of Attorney?

A Durable Power of Attorney is a potent instrument since it authorizes the designated agent or "attorney-in-fact" to continue to act on behalf of the grantor (or principal) in the event the principal becomes incapacitated or unable to act for him or her self. The ramifications of the use and also the misuse of such an instrument are far-reaching. Accordingly, attorneys should carefully counsel their clients about these dangers before and after executing them. Further, attorneys should provide specific guidelines for the agent (or attorney-in-fact). This is especially true if the designated agent or attorney-in-fact is someone other than a spouse.

IV. STATUTORY DURABLE POWER OF ATTORNEY FORM  See Appendix "B", attached.

The Texas Legislative promulgated a statutory form for durable power of attorney documents effective September 1, 1993 and then amended this in 1997. It was not revised in 1999.

These can be made "springing" powers, meaning that they come into effect only upon the occurrence of certain specified conditions precedent or subsequent. See Tex. Prob. Code § 490. The 1997
amendments provide that third parties will be protected if they rely on the written certification by a physician that the principal is mentally incapable of managing his or her affairs. Ibid.

V. MEDICAL POWER OF ATTORNEY See Appendix "C", attached.

Is A Different POA Document Necessary For An Agent To Make Health Care Decisions?

The preferred practice is to make two separate documents since powers of attorney with health care provisions are authorized by different statutes. See Texas Health and Safety Code §§ 166.163-164; previously at Texas Civil Practice and Remedies Code §§ 135 et. seq. Along with a general durable power of attorney it is usually also advisable that a Durable Power of Attorney for Health Care be prepared and executed. These instruments authorize the attorney-in-fact to make decisions about health care for the principal in the event the principal is unable to do so. These can be especially important for clients who have no relatives close by and/or who want to be certain that the health care decisions made for them reflect their own views. Further, these can be limited in virtually any way the principal may desire. Health care powers of attorney are authorized not by the Probate Code but rather by the Texas Health and Safety Code. Id.

VI. DIRECTIVE TO PHYSICIANS See Appendix "D", attached.

What Is A "Living Will"?

Directive to Physician instruments contain provisions that are sometimes referred to as a “living will.” This devise allows your client to die in the way he or she chooses. It enables him or her to relieve loved ones of decisions that may be faced during a last illness, such as whether or not life-sustaining equipment or procedures should be utilized, and if so, to what specific extent. This instrument should be an integral part of any estate plan because these decisions may bear a direct relationship to the size and bounty of an estate or to the ability of a personal representative to fulfill the testamentary instructions in a will and/or trust.

VII. WHAT IS DECLARATION OF GUARDIAN AND WHEN SHOULD IT BE USED? See Appendix "E", attached

What Is A "Declaration Of Guardian"?

A Declaration of Guardian is a devise used to plan for later incapacity or need of guardian and is authorized by § 679 of the Texas Probate Code. This written declaration allows your client to state who he or she prefers as his or her guardian, in the event of a later disability or incapacity. This instrument can also be used to disqualify someone from ever serving in such a capacity.

Section 676 authorizes the selection of guardians for minors and § 677A authorizes parents to designate guardians for their children. Minors can also select their guardians under the circumstances set forth in § 680.

VIII. WHAT ARE THE REQUIREMENTS FOR A VALID WILL IN TEXAS?

A. A "Will" Is Defined Or Explained In The Probate Code As Follows:

"Will" includes codicil; it also includes a
testamentary instrument which merely:
(1) appoints an executor or guardian;
(2) directs how property may not be disposed of; or

B. Execution Of Wills (Tex. Prob. Code §§ 57; 59)

What Are The Basic Requirements For A Valid Will Execution?

Generally, a will needs to be in writing and signed by the testator in person or by another person for the testator at the testator's direction, and if not wholly in the handwriting of the testator then be attested by two or more witnesses above the age of fourteen (14).

Such a will may, at the time of its execution or at any time thereafter during the testator's lifetime, be made self-proved. This involves the execution of an affidavit by the testator and two (2) witnesses, before a notary public or other officer authorized to administer oaths under the laws of this state. If this is accomplished, then the will can be admitted to probate without the necessity of any witnesses.

"Codicil" is a supplement or an addition to a will; it may explain, modify, add to, subtract from, qualify, alter, restrain or revoke provisions in an existing will. A codicil does not purport to dispose of an entire estate or to contain the entire will of a testator, nor does it ordinarily, expressly or by necessary implication, revoke a prior will. See Texas Probate Code §§ 3(g); 69A.

Are There Different Requirements For The Execution Of Codicils?

No, codicils must be executed in the same manner and with the same formalities as wills.

C. Testamentary Intent

Is testamentary intent the same as testamentary capacity?

No, for example, a testator suffering from an insane delusion may have testamentary intent when he or she executes a will, but would not have testamentary capacity to do so. Moreover, testamentary intent is not a statutory requirement but; rather, a jurisprudential development. Hinson v. Hinson, 280 S.W.2d 731, 733 (Tex. 1955). Testamentary capacity is a statutory requirement. Tex. Prob. Code § 57.

If an instrument offered for probate shows some evidence of testamentary intent, but is ambiguous; then extraneous evidence is admissible to show testamentary intent. Straw v. Owens, 746 S.W.2d 345 (Tex. App. - Ft. Worth 1988, no writ). The reverse, however, is also true: if an instrument purports to be a will but the evidence shows that it was executed without testamentary intent, the "will" should be denied probate. For example, in the case Shiels v. Shiels, 109 S.W.2d 1112, 1115 (Tex. Civ. App. - Texarkana 1937, not writ) the court denied probate to a will signed after protest and only because it was part of an initiation into a lodge after testator was told he could readily revoke it afterwards. Instructions for the preparation of a will or codicil may not be probated as a will. See Price v. Huntsman, 430 S.W.2d 831, 833 (Tex. Civ. App. - Waco 1968, writ ref'd n.r.e.).

D. Testamentary Capacity

i. Section 57 of the Probate Code states that
Every person who has attained the age of eighteen (18) years, or who is, or has been lawfully married, or who is a member of the armed forces of the United States, or of the auxiliary thereof, or of the maritime service at the time a will is made, (2) being of sound mind shall have the right and power to make a last will and testament under the rules and limitation prescribed by law. Tex. Prob. Code § 57.

The age and status requirements enumerated in the statute are usually readily verifiable and therefore, do not generate much litigation. The further requirement, that the testator be of "sound mind" requires a subjective evaluation and therefore, generates a great deal of litigation.

What Is The Legal Test For Testamentary Capacity?

(a) Five Part Test

In Prather v. McClelland, 13 S.W.2d 543 (Tex. 1890), the Supreme Court set forth the following test for determining whether a testator was "of sound mind". It essentially requires that the testator have possessed the following attributes at the time the will was executed:

1. Sufficient ability to understand the business in which he or she was engaged;
2. Sufficient ability to understand the effect of his or her act in making the will;
3. The capacity to know the objects of his or her bounty;
4. The capacity to understand the general nature and extent of his or her property; and

Can A Person Whose Capacity Is Questionable Execute A Valid Will?
This depends on the nature and extent and the cause of the questionable capacity and whether or not it relates to the person's testamentary capacity. For example:

(b) Insane Delusion

An insane delusion refers to a situation where the testator was laboring under the belief of a state of supposed facts that did not exist and that no rational person would have believed to be true. See Lindley v. Lindley, 384 S.W.2d 676, 679 (Tex. 1964).

(c) Lucid Intervals

As will be set forth in more detail in the section pertaining to undue influence, all that is required in order for testamentary capacity to exist is that it have existed on the day the will was executed. The proponent of a will is not required to prove that the testator was always sane or rational, but rather only that he or she was capable of satisfying the five part test of Prather v. McClelland on the date in question. This applies even if the person was generally insane or irrational.

What Kind Of Evidence Is Needed To Establish Testamentary Capacity?

(1) Expert Opinion

If the testator had a "lucid interval" on the day the will was executed, then the will should be admitted to probate. See Crocher v. Crocher, 660 S.W.2d 55 (Tex. 1983)(medical evidence of incompetency is relevant if it is probative of testator's lack of testamentary capacity on the date will executed; but evidence of incapacity at other times should be admitted only if it tends to show that the condition persisted and had some probability of being the same condition on the date the will was executed. See Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968); see also Lowery v. Saunders, 666 S.W.2d 226, 236 (Tex. App. - San Antonio 1983 writ ref'd n.r.e.); Kenny v. Estate of Kenny 829 S.W.2d 888, 890 (Tex. App. - Dallas 1992, no writ); accord Hammer v. Powers, 819 S.W. 669, 672 (Tex. App. - Ft. Worth 1991, no writ); compare Alderidge v. Spell, 774 S.W.2d 707, 710 (Tex. App. - Texarkana 1989, no writ).

(d) Lay Opinion Admissible

The testimony of lay witnesses is generally admissible to the extent it constitutes observations of the testator's conduct either prior to or on the date the will was executed, or shortly thereafter. Kenny v. Estate of Kenny 829 S.W.2d 888, 890 (Tex. App. - Dallas 1992, no writ), citing Campbell above 774 S.W.2d at 719.

(e) Prior Adjudication of Insanity

- Presumption of Continued Insanity

Generally, a prior adjudication of insanity will create a presumption that the insanity continued, unless there was a subsequent judgment relieving the testator from the burden of having been judicially determined to be insane or incompetent or incapacitated. See Bogle v. White, 168 S.W.2d 309, 311 (Tex. Civ. App. - White 168 S.W. 309, 311 - Tex. Civ. App. - Galveston 1942, writ ref'd w.o.m.). Although such evidence of insanity is admissible, it is never conclusive, but rather may be rebutted. Similarly, a diagnosis of a mental illness is likewise admissible but not conclusive evidence. See Haile v. Holtzclaw, 414 S.W.2d 916 (Tex. 1967)(testator who was mentally ill and therefore, committed to a mental
hospital and appointed a guardian was nonetheless, found to have testamentary capacity). See section 576.002 of the Texas Health and Safety Code Annotated (Vernon 1992).

(f) Subsequent Adjudication of Insanity
   - Not admissible

The Texas Supreme Court has ruled that a testator's subsequent adjudication of insanity is not admissible. Carr v. Radkey, 393 S.W.2d 806 (Tex. 1965). Compare Stephens v. Coleman, 533 S.W.2d 444 (Tex. Civ. App. - Ft. Worth 1976, writ ref'd n.r.e.).

(g) Comparison of Testamentary Capacity With Contractual Capacity

Case law and commentators agree that less mental capacity is required for making a will than for entering into a binding contract. Vance v. Upson, 1 S.W. 179 (Tex. 1886); Hammel v. Brachear, 513 S.W.2d 602, 607 (Tex. Civ. - Amarillo 1974, writ ref'd).

IX. WILL DRAFTING CONSIDERATIONS

In his seminal treatise Anatomy of a Will, Steve Akers has provided perhaps the best guidelines for the preparation of clear and effective wills. The checklist in Appendix "H" provides an invaluable tool for drafting wills.

A. Preamble

   (1) Identify Testator

   (2) Identify Testator's domicile

   (3) Revoke prior wills

B. Have testator identify family and property

   (1) Identify spouse and children

   (2) Make sure afterborn children are provided for or mentioned to avoid Section 67b

   (3) Identify stepchildren and discuss whether included as beneficiaries

   (4) Identify property being disposed of and whether any election intended

C. Appointment of Fiduciaries

   (1) Executor
      - Appoint independent executor(s) tracking Section 145(b) of Probate Code
      - Appoint successor independent executor(s)
      - Waive executor's bond

   (2) If it is a testamentary trust, then appoint trustee
      - Appoint trustee(s), e.g., for minor children or incapacitated adults, etc.
- Appoint successor trustee(s)
- Consider income and estate tax effects to appoint trustees
- Waive trustee's bond

(3) If there are minor children or incapacitated or special needs adults, then appoint Guardian or guardians

- co-guardians must be
- spouses, joint managing conservators or

D. Specific Bequests

“Specific bequests or legacies of debts or obligations ordinarily carry with them unpaid accrued interest, but bequests of stock do not pass cash or usually even stock dividends declared in testator's lifetime. A specific legatee or devisee is entitled to all accessions and accretions occurring after the testator's death.

E. General Legacies

“General legacies usually bear interest at the legal rate after one year from testator's death, though in some jurisdictions by virtue of statutory provisions the interest does not begin to run until a certain time after the grant of letters or until the legacies are ordered paid by the court. The ordinary rule is subject to exceptions, as when the legacy is for the support of a minor child or is in payment of debt, in which case interest runs from the death. Interest is borne by the residuary estate. T. Atkinson, Law of Wills, section 135 (1953).

F. Consider an Abatement Clause If There Are Many Specific Bequests.

G. Residuary Estates Are Intended To Prevent Partial Intestacies.

(1) Dispose of all property.

(2) Provide contingent trusts for minors or beneficiaries under specified age.

(3) Provide for alternate beneficiaries, ultimately to heirs or permanent organizations (any lapse may cause partial or total intestacy).

H. Apportionment of Debts, Expenses, and Taxes

(1) Do not require payment of debts.

(2) Allocate away from marital deduction bequest or charitable bequest.

(3) Except out any taxes payable under
Section 2044 attributable to QTIP Trusts.

(4) Except out generation-skipping transfer taxes.

(5) Specifically state whether taxes on non-probate assets should be paid out of probate estate.

I. In Terrorem Clause  See also IX Section 8

J. Attestation Clause and Self-Proving Affidavit See also IX Section 7

X. CONTESTING AND DEFENDING VALIDITY OF A WILL  (Tex. Prob. Code §§ 93; 94.)

A. Before Will Admitted to Probate

No will is effective for the purpose of proving title to property, or a right, or an interest in any property, whether real or personal property, until such will has been admitted to probate. Accordingly, will contests are sometimes inevitable. A contest brought before a will is admitted to probate is always advantageous to the contestant, since the burden of proof is on the proponent of the will.

B. After Will Admitted to Probate

Conversely, if a will is not challenged until after it has been probated, then the contestant will bear the burden of proving the will to be invalid.

HOT SPOT: Any interested person may contest a will by filing suit. This action must be filed within two (2) years after the date the will is admitted to probate.

Moreover, any interested person may institute suit in the proper court to cancel a will for forgery or other fraud within two (2) years after discovery of such forgery or fraud.

HOT SPOT: Incapacitated persons (non compos mentis) and minors have two (2) years after removal of their respective disabilities within which to institute such a contest. If a guardianship is established for an incapacitated person, then the statute of limitations will begin to run from the date a guardian is qualified.

C. Are There Different Types of Will Contests Or Different Methods For Contesting The Validity of Wills?

Yes, generally will contests will be based either upon an alleged lack of testamentary capacity by the testator and/or exertion of undue influence by another upon a testator, fraud or mistake.

1. Lack Of Testamentary Capacity

The proponent of a will has the burden of proving that all of the requirements for probate are met, (i.e., death within the past four (4) years, jurisdiction, venue, service of citation, proof of service, etc.). If the will is not self proved, the proponent must also show that the testator was at least eighteen (18) years of age at the time of execution.
age, or lawfully married, or a member of the armed forces and was of sound mind and the other requisite formalities were followed at the time of the execution of the will. See § 88(b) of the Tex. Prob. Code.

As previously noted, once a will has been probated, the burden of proof shifts to the contestant to show that any of the requirements for probate have not been met. For example, if the contestant questions testamentary capacity, then the contestant must show testamentary capacity did not exist at the time of the execution of the will. See e.g., Kenney v. Estate of Kenney, 829 S.W.2d 888, 890 (Tex. App. - Dallas 1992, no writ). If the will as self-proved then a presumption will be indulged that the testator had testamentary capacity. If, however, the will did not contain self proving affidavits, it cannot be presumed that the testator had testamentary capacity at the execution of the will; some evidence of testamentary capacity will need to be shown. Estate of Hutchins, 829 S.W.2d 295 (Tex. App. - Corpus Christi 1992) writ denied, per curiam, Triestman v. Kilgore, 838 S.W.2d 547 (Tex. 1992). Similarly, if there is no evidence to support any material element of proof, then the probate of a will should be denied or if after probate, then on an appropriate challenge should be set aside.

2. Undue Influence

In Rothermel v. Duncan, 369 S.W.2d 917 (Tex. 1963), the Texas Supreme Court lists the following legal requirements for proving the existence of undue influence:

"(1) [T]he existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of testament which the maker thereof would not have executed but for such influence.... It cannot be said that every influence exerted by one person on the will of another is undue, for the influence is not undue unless the free agency of the testator was destroyed and a testament produced that expresses the will of the one exerting the influence."

369 S.W.2d at 922.

Thus, merely establishing an opportunity to exercise influence and/or the susceptibility of the testator to influence, or the making of an unusual disposition are not in and of themselves sufficient to establish undue influence. See Smallwood v. Jones, 794 S.W.2d 114, 118 (Tex. App. - San Antonio 1990, no writ); see also In the Matter of the Estate of M.L. Wood, 542 S.W.2d 845, 847 - 48 (Tex. 1976). Moreover, the party seeking to have the will declared invalid has the burden of proving the existence of undue influence. Tieken v. Midwestern State Univ., 912 S.W.2d 878 (Tex. App. - Ft. Worth 1995, writ ref'd n.r.e.); Folsom v. Folsom, 601 S.W.2d 79 (Tex. Civ. App.- Houston [14th Dist.] 1980, writ ref'd n.r.e.); Wilson v. Wilson's Estate, 593 S.W.2d 789 (Tex. Civ. App. - Dallas 1979, no writ). See also Watson v. Dingler, 831 S.W.2d 834 (Tex. App.- Houston [14th Dist.] 1992, writ denied) (trial judge finding of undue influence upheld). It is not necessary to prove, however, that undue influence existed generally, but rather only that it existed immediately prior to execution of the will. Holcomb v. Holcomb, 803 S.W.2d 411 (Tex. App. - Dallas 1991, writ denied).

3. Fraud

Fraud in the testamentary context is often akin to undue influence. The difference is essentially one of focus; usually an undue influence claim will be made against a caregiver or other person with access to a
testator who is believed to be frail or diminished in some way that would make the testator susceptible to undue persuasion. The counterpart fraud allegation focuses the scrutiny on the person with access to the testator. It assumes a more active participation, or level of deception, or misrepresentation by a third party with access to the testator which causes or induces a testator to execute a will by deception. See Vickery v. Hobbs, 21 Tex. 570 (1858); Stolle v. Kanetzky, 259 S.W. 657, 663 (Tex. Civ. App. - Austin 1924, no writ); Holcomb v. Holcomb infra generally.

4. Mistake

What Type Of Mistake Will Be Sufficient To Invalidate A Will?

There are two types of relevant mistakes: (1) mistake in the factum and (2) mistake in the inducement.

a. Mistake In The Factum

The execution of a will based upon a mistake of law or fact, will generally be insufficient to set aside the will unless it can be shown that the mistake was one of two types:

(a) mistake in the identity of the instrument or (b) a mistake in the contents of the instrument. A mistake in identity occurs for example, when a testator signs a will believing the documents is something else or if he intends to sign his will but instead sings another instrument.

(1) Plain Meaning Or Omission

A testator's incorrect understanding of a will's contents cannot be established by extrinsic evidence. In other words, if a will is ambiguous, the plain meaning of the words in a will cannot be effectively contradicted by testimony that the testator actually intended something different, unless, of course, the incorrect understanding is claimed to be the result of fraud, undue influence or the like. Huffman v. Huffman, 339 S.W.2d 885, 888 (Tex. 1960); Harrington v. Walker, 829, S.W.2d 935, 938 (Tex. App. - Ft. Worth 1992, writ denied).

(2) Latent Ambiguity

Whenever a will is found to be ambiguous, extrinsic evidence is admissible in order to clarify the ambiguity. This even applies to ambiguities created by extrinsic facts. See McCauley v. Alexander, 543 S.W.2d 699, 700-01 (Tex. Civ. App. - Waco 1976 writ ref'd n.r.e.).

(3) Mistaken Insertion

A mistaken insertion is a clause or paragraph that is inserted without knowledge of the testator. Under these circumstances the will may be admitted to probate without the unintended clause or paragraph. In these situations, the words or clauses inserted by mistake can be construed by a court without regard to the mistaken insertion. Mercantile National Bank v. National Cancer Research Foundation, 488 S.W.2d 605, 608 (Tex. Civ. App. - Dallas 1972 writ ref'd n.r.e.). As a general rule, it will be presumed that a testator knows the contents of a will which he or she has signed. Boyd v. Frost National Bank, 196 S.W.2d 497, 507-08 (Tex. 1946). If, however, a testator can be shown not to have had knowledge of the
contents of his will, then the execution of the will would lack testamentary intent, and the will should be theoretically denied probate. See *Kelly v. Settegast*, 2 S.W. 870, 872 (Tex. 1887).

b. Mistake In The Inducement

A mistake in the inducement occurs when a testator executes a will based upon a mistaken belief about some extrinsic fact. An example of a mistake in the inducement would be where a testator wills his estate to charity and states within the will that he has done so because his son "John", predeceased him. This would be a mistake in the inducement if, and only if, his son, John was, in fact alive. Therefore, the mistake must appear on the face of the will and the will must also state what would have been the will of the testator, but for the mistake. See *First Christian Church of Temple v. Moore*, 295 S.W.2d 931, 934 n.1. (Tex. Civ. App.- Austin 1956, writ ref'd n.r.e.)

5. Testator Presumed To Know Contents Of Will; Presumption Rebuttable; Burden Of Proof

The presumption that a testator knew the contents of his or her will can be overcome in suspicious circumstances. For example, the testator was shown to have been unable to read or write, was gravely ill and was being cared for by one of the beneficiaries under the will. He was alleged to have signed by a mark disinheriting his only living daughter who was also in the house with her father at that time, and was unaware that he had executed a will.

6. Subsequent Revocation

No Revival In Texas

Section 63 of the Texas Probate Code states in pertinent part that "no will in writing and no clause thereof or devised therein shall be revoked, except by a subsequent will, codicil, or declaration in writing executed with like formalities by the testator's destroying or canceling the same or causing it to be done in his presence". See *Goode v. Estate of Hoover*, 828 S.W.2d 558, 559 (Tex. App. - El Paso 1992, writ denied). There must be an intent to revoke and the capacity to revoke. See *In Re Estate of Plohberger*, 761 S.W.2d 448 (Tex. App. - Corpus Christi 1988, writ denied). There is no partial revocation by physical act for attested wills in Texas. For example, a testator may not erase, cancel or obliterate a certain clause of an attested will. See *Goode v. Estate of Hoover*, 828 S.W.2d 558, 559.

Generally, a will may be revoked by (a) a subsequent writing, such as a codicil or may be partially revoked by a later inconsistent will that does not revoke the prior will. See *Hinson v. Hinson*, 280 S.W.2d 731, 735 (Tex. 1955)(implied partial revocation);(b) by physical act; or (c) by operation of law See Texas Probate Code § 69 (a testator's divorce after making a will in favor of the spouse or appointing spouse as fiduciary, nullifies these provisions). There is also dependent relative revocation. See *Burton v. Bell*, 380 S.W.2d, 561 (Tex. 1964).

It also bears worth noting that in Texas, if a subsequent will is executed with all the requisite formalities, and then later revoked, such as through destruction of the will by the testator in order to cancel its provisions, then the act of destroying the last will of the testator will not cause "revival" of the prior will of the testator to be reactivated unless it is republished or re-executed. *Hawes v. Nicholas*, 10 S.W. 558 (Tex. 1889); see also *Aven v. Green*, 159 S.W.2d 361; 36 U.S.W.2d 660 (Tex. 1959).

7. Improper Execution
HOT SPOT: As stated in the prior subsections, if a will is not executed with the requisite formalities, it should be denied probate. One of the most common traps for the unwary in this regard is the "walking the will down the hall" problem. This refers to the problems that result when the witnesses to a will are not physically present when the testator signs the will as required by section 59 of the Texas Probate Code. Please recall that the self-proving affidavits state in pertinent part as follows:

"______, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free act and deed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request..."

Texas Probate Code § 59(a). Accordingly, if the factual recitations are not accurate, then, a variance between the recitations and the actual proof could invalidate the will, or at a minimum, negate the presumptions that arise in favor of the validity of the will upon execution of self-proving affidavits. Problems of this nature are costly. They are a direct consequence of either improperly delegating the supervision of the will execution ceremony to non-lawyers or failure by lawyers to accord this ceremony the attention and importance that it merits.

A modern approach to avoiding will contests is to videotape the will execution. A checklist, infra, has been prepared to assist the practitioner in covering the most important issues in a will execution. See Beyer, J. "Avoiding Will Contests by Videotaping the Will Execution Ceremony," 15 ST. MARY'S L.J. 1 (1983); see also Hammer v. Powers, 819 S.W.2d 889 (Tex. App. - Fort Worth 1991, no writ).

8. Prior Acceptance Of Benefits By Contestant

The acceptance of benefits under a will can be used as an affirmative defense. This, however, must be specifically plead as an estoppel defense in accordance with Rule 94, Texas Rules of Civil Procedure. This defense will generally be effective only if the benefits received by the contestant are equal to or greater than the benefits that the will contestant would received, if the will is invalidated. If the benefits accepted are less than what the contestant would receive, in the event the will is invalidated, then the estoppel argument will fail. See Holcomb v. Holcomb, 803 S.W.2d 411, 412-413 (Tex. App. - Dallas 1991, writ denied).

XI. CHANGING CIRCUMSTANCES AFTER WILL EXECUTION

A. Ademption

"Ademption" is the act by which the testator pays, gives or transfers to a legatee, in testator's lifetime, a general legacy which, pursuant to testator's will, he or she had proposed to give said legatee upon
death. Ademption also refers to the act by which a specific legacy becomes inoperative on account of the testator having parted with the subject or object of a bequest in a will.

B. Satisfaction

"Satisfaction" refers to a legacy that has been satisfied. A legacy is deemed "satisfied" if the testator makes an inter vivos gift to the legatee with the intent that it be in lieu of the legacy.

C. Exoneration

"Exoneration" is the right to be reimbursed by reason of having paid that which another should be compelled to pay. For example, a devisee who receives real property under a will, is not entitled to have the mortgage on the real property paid out of personalty which has been specifically bequeathed.

D. Accretions

"Accretions" are the gradual accumulations that are received or applied to the assets of an estate, such as through increases in value of estate assets over time. It also applies to the increase in value that a specific bequest may attain.

E. Lapse

"Lapse" in the law of wills context, is the failure of a testamentary gift. For example, if the beneficiary of a bequest predeceases the testator, and the testator's will does not anticipate this event, then the bequest will have lapsed.

F. Class Gifts

"Class Gift" is a gift of an aggregate sum to a body of persons uncertain in number at time of gift, to be ascertained at a future time, who are all to take in equal, or other definite proportions, the share of each being dependent for its amount upon the ultimate number.

G. Abatement

"Abatement" is a proportional reduction, decrease, or diminution of a pecuniary legacy which may occur when the funds or assets out of which such legacies are payable are not sufficient to pay them in full.

H. Election

"Election" (in law of wills context) refers to a widow or widower's right to choose to take the benefits under a deceased spouse's will or under the descent and distribution statute; that is, whether the surviving spouse will accept the provision made for them in the will, and acquiesce in the disposition of the deceased spouse's property, or disregard it and claim instead what the law allows a surviving spouse. An "election under the will" means that a legatee or devisee under a will is put to the choice of accepting the beneficial interest offered by the donor in lieu of some estate which the surviving spouse is entitled to, but which is taken away by the terms of the will.
XII. DISCLAIMER/RENUNCIATION BY HEIR, LEGATEE OR DEVISEE (Tex. Prob. Code § 37A.)

Does An Heir Or Beneficiary Under A Will Have To Accept The Inheritance Or Bequest?

No an heir, legatee, or devisee may disclaim his or her inheritance or any portion thereof by following the provisions set forth in Texas Probate Code Section 37A. In order to disclaim the interest, the disclaimer must be in writing and acknowledged before a notary public. The interest must be disclaimed within nine months after the death of the decedent if a present interest is disclaimed. If a future interest is disclaimed, it must be disclaimed not later than nine months after the event determining that the taker of the property or interest is finally ascertained and (his/her) interest is indefeasibly vested. If the beneficiary is a charitable organization or a governmental agency of the state, a written memorandum of disclaimer disclaiming a present or future interest shall be filed not later than nine months after the beneficiary receives the notice required by § 128A of the Probate Code.

Do Disclaimers Have To Be Filed Of Record?

Yes, the statute provides that the disclaimer of any interest is effective only when filed in a court in which proceedings concerning the decedent's estate are pending, or if no proceedings are pending, in a court in which proceedings could be pending if an estate was opened. The disclaimer must be delivered in person or by registered or certified mail to the personal representative of the descendent or to the holder of the legal title to the property to which the interest relates.

Is A Disclaimer Later Revocable?

HOT SPOT: No, when a disclaimer becomes effective, it constitutes an irrevocable refusal to accept the disclaimed interest and is binding upon the disclaimant. The right to disclaim an interest or a benefit under an interest is barred after any of the following events: An assignment, conveyance, encumbrance, pledge or transfer of the interest by the disclaimant, a contract for any of the events previously listed, and a sale or other disposition of the interest under the judicial process. In addition, the right to disclaim an interest is barred by the acceptance of the interest or benefit to the extent that the interest or benefit is accepted.

XIII. ADVANCEMENTS (Tex. Prob. Code § 44.)

Can A Gift Or Transfer Of Property Made Shortly Before Death Be Charged Against An Heir's Intestate Share?

The recent amendments have also dramatically changed the law pertaining to advancements. The section was formerly subtitled "Advancements Bought Into Hotch Potch" and is now retitled "Advancements." The section has been substantially revised to make it much more difficult for heirs to be regarded as having received an advancement. Now, gifts of property or interests or non-testamentary transfers such as by Section 446 P.O.D. accounts, will be regarded as advancements against the heir's intestate share "only if the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift or non-testamentary transfer is an advancement" under Section 44(a) of the Probate Code.

Is Property Advanced To An Heir Valued At The Time Of Death?
Property that is advanced is valued at the time that the heir came into possession or enjoyment of the property or at the time of the decedent's death, whichever occurs first, according to Probate Code Section 44(b).

If the recipient of the property fails to survive the decedent, the property is taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.

XIV. PERSONS WHO TAKE UPON INTESTACY (Tex. Prob. Code § 38.)

A. No Spouse

Under The Descent And Distribution Statute If Any Person Dies Intestate, Leaving No Spouse Then How Is The Property Distributed?

It descends in the following manner:

If any person dies intestate, leaving no spouse, the property descends in the following manner:

1. His or her children and their descendants.

2. If there are no children or descendants, then to decedent's father and mother equally. If only one parent survives, then one-half to that parent and the other half passes to any surviving siblings. If there are no siblings, then the whole estate passes to the surviving parent.

3. If there is no surviving parent, then the whole of such estate passes to the surviving siblings and to their descendants.

4. If there are no surviving siblings, then the estate is divided into two moieties; one of which passes to the paternal and the other to the maternal kindred and is then distributed according to Texas Probate Code Sec. 38(a)(4).

B. Person Dies Intestate Leaving a Spouse

If Any Person Dies Intestate, Leaving A Spouse, Then How Does The Property Descend?

It descends and should be distributed in the following manner:

1. If the deceased had a child or children or there are descendants of any child or children, then the surviving spouse takes one-third of the personal estate and the balance goes to the child or descendants. The surviving spouse shall also be entitled to an estate for life in one-third of the land of the estate.

2. If the deceased had no children or descendants, then the surviving spouse shall be entitled to all of the personal estate and one-half of the lands, and the other half shall be inherited according to the rules of descent and distribution. If the deceased has neither surviving parents nor siblings, then the surviving spouse shall be entitled to the whole of the estate.

XV. INHERITANCE BY AND FROM AN ADOPTED CHILD (Tex. Probate Code § 40.)
An adopted child shall be regarded as the child of the parent(s) by adoption, such adopted child and its descendants inheriting from and through the parent(s) of adoption.

The natural parent of such child shall not inherit from such child but the child shall inherit from and through its natural parent(s).

XVI. COMMUNITY ESTATE (Tex. Prob. Code § 45.)

HOT SPOT: Upon dissolution of the marriage by death, all property belonging to the community shall go to the surviving spouse if there is/are no child(ren) or their descendants. If there (is a)(are) child(ren) or descendants of such child(ren), then the surviving spouse shall be entitled to one-half and the other half shall pass to such child(ren) or descendants.

XVII. REQUIREMENT OF SURVIVAL BY 120 HOURS (Tex. Prob. Code § 47.)

The requirement that a person must survive the decedent by 120 hours is applicable unless a different provision has been made in a will, deed, trust, etc.

XVIII. LIMITATIONS PERIOD FOR PROBATING WILLS (Tex. Prob. Code § 73.)

Is There A Statute Of Limitations For Probating A Will?

HOT SPOT: Yes, a will cannot be admitted to probate after the lapse of four (4) years from the death of the testator. There may however, be exceptions where an applicant can prove that he or she was not in default.

XIX. LETTERS TESTAMENTARY (Tex. Prob. Code § 81.)

Is There A Statute Of Limitations For Obtaining Letters?

HOT SPOT: Yes, applications for letters testamentary must likewise be filed within four (4) years after the death of the testator.

A. Application for Letters Testamentary must Contain the Following:

1. Name and domicile of each applicant.

2. The name, age, and domicile of the decedent and fact, time and place of death.

3. Facts showing court has venue.

4. That decedent owned property and its probable value.

5. Date of the will and name of executor and, if none, the name and address to whom letters should be issued.

6. Whether a child born after making of the will survived the testator.

7. That such executor or applicant is not disqualified by law.
8. Whether the decedent was ever divorced and, if so, when and from whom.

9. Social security number of decedent and applicant.

10. Whether the state, a governmental agency of the state, or a charitable organization is named by the will as a devisee. (Tex. Prob. Code § 81.)

B. Issuance of Letters upon Qualification of Personal Representative
(Tex. Prob. Code § 78.)

When Are Letters Actually Issued?

Letters testamentary (or letters of administration if, for example, no executor was named or the one named in the will cannot serve) will be issued by the court upon the qualification by bond or oath of the appointed personal representative. Section 78 establishes that a personal representative must be eighteen (18) years of age or older, of sound mind, never convicted of a felony, and a resident of the state.

Most counties have their specific printed forms for letters testamentary or letters of administration. It should be noted that a nonresident can qualify as a personal representative provided they appoint a resident agent for service of process and post an appropriate bond.

C. Bond of Personal Representative (Tex. Prob. Code § 189 et seq.)

Unless a bond is not required by the will, before the issuance of letters, each recipient shall post a bond, payable to the county judge or probate judge of the county in which probate proceedings are pending.

XX. LOST WILLS (Tex. Prob. Code § 81(b).)

If The Original Will Cannot Be Located, Can A Copy of The Will Still Be Probated?

If a written will is not produced, then the application must also state 1) why the will is not produced; 2) the contents of the will; 3) date of will and the executor appointed; 4) name, age and marital status of each devisee. (Tex. Prob. Code §§ 76, 81(b).)

XXI. PROOF OF WILLS (Tex. Prob. Code §§ 59, 84, 85, 88.)

A. Self-Proved Wills (Tex. Prob. Code § 59.)

If a will is self-proved by the execution and attachment of the affidavits of the testator and two (2) qualified witnesses, no further proof of its execution is necessary. (Tex. Prob. Code § 84(a).)

B. Attested Written Wills (Tex. Prob. Code § 84(b).)

If a will is not self-proved it may be proved by the sworn testimony in open court of one or more of the subscribing witnesses or by sworn deposition. If none of the witnesses are available, then by testimony in open court or by deposition of two (2) witnesses to the handwriting of one or both of the subscribing witnesses.
C. Holographic Wills (Tex. Prob. Code § 60.)

A holographic will is a will or deed written entirely by the testator with his or her own hand and not witnessed.

If not self-proved, then the will may be proved by two witnesses to (his/her) handwriting. (Tex. Prob. Code § 84(b).)

Any interested person may institute suit in the proper court to cancel a will for forgery or other fraud within two (2) years after discovery of such forgery or fraud.

Persons non compos mentis (i.e., mentally disabled or incompetent) and minors shall have two (2) years after removal of their respective disabilities within which to institute such a contest.

D. Nuncupative Wills (Tex. Prob. Code § 81(c).)

Can A Verbal Will Be Probated?

A nuncupative will is a will made by the verbal declaration of the testator, and usually dependent merely on oral testimony for proof. These can be probated, however, an application for probate of a nuncupative will, in addition to requirements for written will, must contain the substance of testamentary words and names and residence of witnesses. The court in these cases is required to issue citations to all parties interested in such estate according to Texas Probate Code Sec. 128(a).

XXII. PROCEDURE PERTAINING TO FOREIGN WILLS (Tex. Prob. Code § 95(b).)

The written will of a testator not domiciled in Texas at the time of death which would affect property in this state may be admitted upon proof that it stands probated or established in any of the United States. The Texas Probate Code sets forth the requisites for the application and citation of a foreign will.

XXIII. INDEPENDENT ADMINISTRATION (Tex. Prob. Code § 145.)

Independent administration is the process of settling a decedent's estate with minimal court involvement after the probating of a will or the entry of an order granting independent administration.

This type of administration may be created by an individual through his or her will, or upon application by all distributees of an estate. This latter method requires the agreement of all distributees because it entails joining all such persons or entities (distributees) in an application to the court for one (or more persons) to be qualified as an independent executor or agreement to appoint a representative as an independent administrator.

An independent executor may, without any action in or by the court, receive presentation of any claims against the estate, pay any such claims and set aside and deliver to those entitled thereto all exempt property and family allowances for support. These actions are valid to the same extent as if they had been accomplished pursuant to orders of the court. (Tex. Prob. Code § 146.)

Any person having a claim against the estate may enforce payment by suit against the independent executor. Accordingly, any judgment recovered will run against the estate. The independent executor shall not be required to plead to any suit until after six (6) months from the date an independent administration
was created and the order appointing an independent executor was entered by the county court. (Tex. Prob. Code § 147.)


Can An Independent Executor Be Removed?

Any court having probate jurisdiction on its own motion or motion of an interested person may remove an independent executor when:

1. The independent executor fails to return within ninety (90) days after qualification, unless extended by court order, an inventory of the property of the estate;
2. Sufficient grounds exist to support belief that he has misapplied or embezzled any part of the estate;
3. He fails to make an accounting which is required by law to be made;
4. He fails to timely give notice required by § 128A of this code;
5. He is proved to have been guilty of gross misconduct or gross mismanagement in performance of duties;
6. For any reason becomes legally incapacitated from performing (his/her) fiduciary duties.

An independent executor who defends an action for his removal in good faith, whether successful or not, shall be entitled out of the estate to reasonable expenses, including attorney fees. (Tex. Prob. Code § 149C(c).)

The party seeking removal of an independent executor appointed without bond, may be paid out of the estate for reasonable expenses, including attorney fees. (Tex. Prob. Code § 149C(c).)


An administrator who succeeds an independent executor named in decedent's will may exercise the powers under the decedent's will upon application and a finding of the court that it would serve the best interest of the estate.


If there be no qualified Independent Executor or successor Independent Executor, then all distributees may apply to the court for appointment of a qualified person, firm or corporation to serve as successor independent executor. Such successor independent executor shall serve with all of the powers and privileges granted to his predecessor independent executor.


Upon receiving letters, the personal representative has a duty to collect all of the personal property and records of the deceased. A review is required of the powers of the personal representatives; those which need prior court authority are distinguished. (Tex. Prob. Code § 234.)

Are Personal Representatives Entitled To Compensation?

Personal representatives are entitled to compensation for their services; reimbursement for necessary and reasonable expenses; and expenses, including attorney fees, for defending the will.

XXIV. EXECUTORS AND ADMINISTRATORS

A. Appointment of Successor Representative (Tex. Prob. Code § 220.)

A successor representative may be appointed upon the death or resignation of a representative or when a previously named representative becomes an adult or because of the existence of a prior right.

B. Resignation (Tex. Prob. Code § 221.)

A personal representative who desires to resign his trust may do so upon a written application to the court with an exhibit with a complete and final account.

C. Removal (Tex. Prob. Code § 222(b).)

The court, on its own motion or on the motion of any interested person may remove a personal representative without notice who:

1. Neglects to qualify as prescribed by law; or
2. Fails to return an inventory and appraisement within 90 days; or
3. When required fails to give bond in the time required; or
4. Leaves the state for three (3) months without permission of the court; or
5. For whatever reason cannot be served with notices or other processes.

The court, on its own motion or on the motion of any interested person, may remove a personal representative with notice who fails to properly execute their fiduciary duties.

D. Collection And Management Of Assets (Tex. Prob. Code § 232.)

The duties and powers of the personal representative commence upon issuance of the letters testamentary or of administration. The personal representative has a duty to collect the income from the estate property in his possession and to preserve, settle, and distribute the estate in accordance with the terms of the decedent's will and the Texas Probate Code.
Every personal representative has the right to take possession of all the real and personal property of the decedent.


Under What Circumstances May A Personal Representative File Suit Or Compromise A Suit On Behalf Of The Estate?

The personal representative may prosecute any suit to prevent loss to the estate and shall have the full power to maintain a suit for demand of recovery of property due the decedent on the estate.

The personal representative may, on order of the court, effect a fair and reasonable compromise of any debt of the decedent or the estate. If any property is deemed valueless or is so encumbered, or is in such condition that it is of no benefit to the estate, the court may order the personal representative to abandon it.

XXV. CLAIMS IN DECEDENT'S ESTATE (Tex. Prob. Code § 294 et seq.)

A. Time Limitations For Filing Claims. (Tex. Prob. Code § 298.)

HOT SPOT: All claims against a decedent's estate must be filed within six (6) months after the date of first published notice to creditors. If not filed within six (6) months, the claim is postponed until claims filed within the six (6) months have been paid.

B. Order Of Payment Of Claims (Tex. Prob. Code § 322.)

When funds are available, executors and administrators shall pay claims in the following order:

1. Funeral expenses.

2. Allowances to the widow and children.

3. Expenses of administration and the expenses incurred in the management of the estate.

4. Other claims against the estate in the order of their classification.

XXVI. SALES, MORTGAGES, LEASES, AND EXCHANGES OF PERSONAL AND REAL PROPERTY (Tex. Prob. Code § 234.)

If, under the terms of the decedent's will, the personal representative is given the power to sell, mortgage, lease, or exchange property of the estate, he may proceed in accordance with such power without order of the court. However, this does not preclude a personal representative from seeking court approval of a transaction if he so desires.

Pursuant to the Probate Code, a personal representative may sell, mortgage, or lease any personal property belonging to the estate upon the filing of an application with the court stating the reasons for the sale of said property, along with a full description of the property to be sold.

After the hearing on the application, the court may order the sale, mortgage, or lease of the personal property described, or any part thereof, at either public or private sale and upon such terms and conditions as the court deems in the interest of the estate.

Property is to be sold for its fair market value.

B. Real Property (Tex. Prob. Code § 341, 344.)

A supervised personal representative may file an application to sell, mortgage, or lease any real property belonging to the estate.

The application should set forth the reasons for the sale of the property along with the complete legal description.

Upon the filing of the petition, the court will direct the type of notice to be given individuals entitled thereto.

C. Reporting Sales Of Real And Personal Property (Tex. Prob. Code § 353.)

Only the report of the sale of real property is mandatory with the court. However, it is a good practice to report not only the sale of real property but also personal property in order to keep a complete and accurate record with the court.

The report of the sale of real property shall contain the following information with regard to the sale of real estate: The date of the order of sale; the property sold; time and place of sale; name of purchaser; amount for which each parcel of property was sold; terms of the sale, and whether it was public or private; and whether the purchaser is ready to comply with the order of sale.


Both the attorney for the estate and the personal representative are entitled to compensation for the services they render.

A. Compensation For Executors And Administrators (Tex. Prob. Code § 241(a).)

Executors and Administrators are authorized to receive a compensation of five (5) percent for all sums received and sums actually paid out. This commission is not allowed for funds belonging to the testator at time of death which were held in a financial institution or brokerage house; nor for collecting insurance; nor for paying out cash to the heirs or legatees.

B. Attorney Fees For Managing Estate, Defending Will

Reasonable attorney fees are allowed in connection with the management of the estate and for defending the will. (Tex. Prob. Code §§ 242, 243.)
XXVIII. WILL FORMS; WILL REVIEW CHECKLIST; AND WILL EXECUTION CEREMONY TRANSCRIPT

SIMPLE WILL - See Appendix "F" attached.

LAST WILL AND TESTAMENT WITH TESTAMENTARY TRUST - See Appendix "G" attached.

WILL REVIEW CHECKLIST - See Appendix "H" attached.
WILL EXECUTION CEREMONY TRANSCRIPT - See Appendix "I" attached.

XXIX. TRUSTS (Tex. Prop. Code § 111.001 et seq. ("Texas Trust Code").)

A. Living Trusts

Revocable and/or irrevocable trusts are often referred to as inter vivos or "Living Trusts" and may be utilized for a number of reasons, but the primary reasons are to avoid probate, reduce taxes and provide for the management of property by persons or institutions capable of doing so. These are especially useful when a client is elderly and/or the beneficiaries of a trust are minors or need special care or attention.

B. Testamentary Trusts (Tex. Prob. Code § 58a.)

Testamentary trusts are also exceedingly useful. These types of trusts are written into and/or effectuated by a decedent's will. Again, these are perhaps most useful when the assets of a deceased person need to be managed to care for an elderly spouse or disabled person.

Testamentary trusts may also be used to postpone distributions to minors or persons who are believed not to possess the requisite maturity to manage funds and/or property. These can also be used (as can all trusts generally) to encourage relatives or loved ones to pursue certain objectives such as a college education or the like. Similarly, these can be used to manage gifts to institutions, such as charitable organizations and universities.

When a trust is created, the legal owner of your client's property is the trust. The trust property is subject to management by the designated trustee for the benefit of the beneficiaries of the trust. The testamentary version of these instruments is not utilized quite as often in Texas as in other states because the Texas Probate Code provides perhaps the most comprehensive system for independent administration of estates that exists in the United States. (Tex. Prob. Code § 145 et seq.) This type of administration greatly reduces the frequency and extent of contacts that are necessary by a personal representative of an estate with a probate court. Living trusts, however, are becoming ever more popular because they can be effectuated during a client's life (as opposed to only becoming effective upon death); can help a client preserve assets; and offer the highest degree of privacy attainable in the handling of a client's affairs.

C. "Pour-over" Provisions

Both wills and trusts often contain "pour-over" provisions whereby terms in the instrument direct that certain properties or proceeds (such as life insurance proceeds or death benefits) be paid or distributed into a trust (or to the decedent's estate as the case may be) for management by the trustee of the trust (or personal representative of the estate). (Tex. Prob. Code § 58A.)
D. Life Insurance Trusts (Consult Internal Revenue Code, 26 U.S.C.A. § 401(a); 2041 (b)(2)(A),(B).)

Life insurance trusts are used to prevent death benefit proceeds from entering an estate upon the death of an insured and thereby creating a taxable event under the Federal Estate Tax statutes and regulations. (See Federal Estate Tax and related sections infra.) These trusts can be either funded trusts, wherein the settlor of the trust retains the responsibility for making all payments for premiums and related fees and costs associated with the insurance policies or contracts conveyed to the trust, or unfunded trusts, wherein the settlor is under no such duty or responsibility. In these latter situations, the trustee is usually directed to pay provisions out of the cash value of the policies themselves or out of other trust funds. These can, however, be arranged for payment in any other lawful way. The settlor can retain certain rights or benefits of the policies such as the right or benefit of permission to borrow from or against the cash value of the policy.

XXX. GIFT TRANSFERS

Transfers or gifts of property, including funds, can be made to minors with substantial tax advantages to the donor. Care should be taken, however, to make sure these transfers comply with the Texas Uniform Gift to Minors Act. (Tex. Trust Code § 141.001 et seq.)

XXXI. "HOT SPOTS" - PROFESSIONAL RESPONSIBILITY AND ATTORNEY LIABILITY

A. Analysis Of Our State Grievance System

Last year there were over 10,000 grievances filed against Texas attorneys (a substantial increase over the prior year). Approximately 56% of these resulted in private reprimands, 21% in public reprimands, 20% in suspensions and 3% forced resignations. The good news, however, is that this trend seems to be abating. One of the primary reasons for this may be the effectiveness of the General Counsel's Ethics Hotline, which has provided thousands Texas attorneys with ethics advice. The toll free number is 1-800-532-3947.

What Are The Most Commonly Asked Questions To The Ethics Hotline?

The most commonly asked questions involved: (1) the disciplinary rules governing advertising, especially questions dealing with board certification disclaimers, (2) possible conflicts of interest in representation potentially adverse to former clients, (3) possible conflicts between current clients, or (4) involving multiple party representation, as well as questions concerning (5) lawyer's obligations upon discharge by a client, or (6) withdrawal from representation, such as delivery of the client's file and/or (7) relinquishment of claims to attorney fees. Additionally, the Hotline fielded many questions concerning (8) permissible fee arrangements, retainers, contingency fees and letters of protection for medical providers. Although the advice and opinions provided are not binding on any grievance committee or court, the service appears to be working exceedingly well. Please consider utilizing it the next time you face one of the many ethical dilemmas that face practitioners on a regular basis.

B. Analysis of National Data

What Are The Most Common Substantive Legal Errors?
The American Bar Association National Legal Malpractice Data Center, has been studying claims against lawyers for several years. These findings indicate that the kinds of errors leading to legal malpractice claims statistically break down as follows:

**Substantive Errors**

- Failure to Know Law 9.47%
- Inadequate Investigation 8.96%
- Planning Error 7.66%
- Failure to Know Deadline 6.83%
- Record Search 4.73%
- Conflict of Interest 3.35%
- Tax Consequences 1.84%
- Math Error .76%

**Total:** 43.59%

**Administrative Errors**

- Failure to Calendar 11.14%
- Procrastination 4.82%
- Failure to File 4.21%
- Failure to React to Calendar 3.48%
- Clerical Error 1.45%
- Lost File .76%

**Total:** 25.76%

**Client Relations Errors**

- Client Consent 9.19%
- Follow Instructions 5.59%
Improper Withdrawal

1.49%

Total

16.27%

Intentional Wrongs

Malicious Prosecutions

4.19%

Fraud

4.16%

Libel

1.51%

Civil Rights

1.73%

Total

11.59%

C. Scope And Objectives Of Representation

What Is The Most Effective Means Of Avoiding Grievances And Or Liability?

One of the most effective means for avoiding disciplinary grievances or liability is to limit the scope of services offered to the public, to those that you are knowledgeable about and comfortable with and limiting the number of cases or clients to a level that you will be able to service promptly and effectively. The vast majority of complaints to bar grievance committees have issues of this nature running through them regardless of the substance of the complaint. Another method for achieving this is by making sure that everything you agree to do for a client is specified in a written contract that is carefully explained to the client at the outset.

Flat fee contracts are another fertile source of disagreements between lawyers and their clients. Many of these disputes arise because the fee is too low for the attorney to do the work necessary to complete the task. If on the other hand, the fee is earned very quickly then the client feels the fee was excessive in relation to the work performed and time expended. The key to avoiding these types of disputes is to make the contract very specific in terms of what is expected of both the client and the attorney. In my experience hourly based contracts are the most effective means of carrying out professional duties and responsibilities. In some instances these can be made into modified contingency fee contracts if the client can not afford hourly based representation.

D. Recommended Procedures For The Office Practitioner

1. Supervising The Will Execution Ceremony.

Will execution ceremonies should be conducted by attorneys. This is critical in view of the fact that even the best drafted will can be invalidated if the execution is not in strict accordance with the law.

An analogous case on this subject is Palmer v. Unauthorized Practice Committee of the State Bar of Texas, 438 S.W.2d 374 (Tex. Civ. App. [14th Dist.] 1969, no writ), in which the court ruled that an individual who sells to the general public fill in the blank will forms was practicing law without a license. By implication, the delegation of will executors to non-attorney assistants is ill-advised.
2. Giving Legal Advice To Clients

Especially in a wills and probate type practice, it is critical that non-attorney assistants be specifically informed and trained on what could constitutes the practice of law. Assistants should be cautioned against even approaching this line. For example, a legal assistant must be on the alert for and not to answer questions of a hypothetical nature, such as if a client or potential client asks "what would happen if... [certain contingencies were to occur]. Answering such questions, no matter how routine could prove problematic at best.

3. Proper Use Of Legal Assistants

Legal assistants may be properly used to:

1. Gather and organize information;
2. Draft and proof read documents;
3. Initiate legal research; or
4. Serve primarily as a point of contact between the attorney and the clients

Legal assistants should not however be utilize to undertake any of the following:

1. Supervising the will execution ceremony (although it is certainly appropriate for legal assistants to participate in this process);
2. Giving legal advice to clients; and
3. Making discretionary decisions or the like.

General Guidelines for the Utilization of the Services of legal assistant by attorneys, 45 Tex. B. J. 324 (1982).

XXXIV. CONCLUSION

In summary, all of the instruments discussed in this article are an integral part of the others. The Durable Power of Attorney will allow your client to ensure that his or her affairs are managed by a trusted person during any periods of temporary or permanent incapacity. If you also prepare a Heath Care Power of Attorney and a Directive to Physicians, you will enable your client to make decisions on his or her health care in advance, including decisions on how and when to employ and/or terminate extraordinary life-sustaining measures. A Declaration of Guardianship will give your client the ability to decide who will provide that care. Revocable and irrevocable trusts can provide key management of your client's estate both during life and after death. The Last Will and Testament completes the spectrum of essential instruments for a useful and strategic estate plan by providing your client with the ability to dispose of all possessions in the manner desired.

Sound office procedures including the use of check lists and pre-formatted questionnaires can help office practitioners service their clients in a professional, expedient and cost effective manner. There is
however no substitute for listening carefully, and paying close attention to the details of this type of practice.

XXXV. Endnotes

APPENDIX "A"

DURABLE POWER OF ATTORNEY FORM

GENERAL DURABLE POWER OF ATTORNEY (TEX. PROB. CODE §§ 481 et. seq.)

State of Texas
County of __________

1. APPOINTMENT. I, _______________ (name of principal), do hereby appoint _______________ (name of agent) my true and lawful attorney-in-fact, with full power of substitution, to act on my behalf.

My attorney-in-fact herein named may be referred to herein as my attorney-in-fact or as my attorney.

2. SCOPE OF AUTHORITY. My attorney-in-fact shall have the authority customarily granted in a general power of attorney, including (but not by way of limitation) the following:

(a) To exercise, do, or perform any act, right, power, duty, or obligation whatsoever that I now have or may acquire the legal right, power, or capacity to exercise, do, or perform in connection with, arising out of, or relating to any person, item, thing, transaction, business or nonbusiness property (real or personal, tangible or intangible), or matter whatsoever. By way of illustration, and not by way of limitation, such authority shall include the power to effectively disclaim, in whole or in part, any gift or any property receivable from a decedent by reason of an insurance contract, a will, or inheritance.

(b) To ask, demand, sue for, recover, collect, receive, and hold and possess all sums of money, debts, dues, goods, wares, merchandise, chattels, effects, bonds, notes, checks, drafts, accounts, deposits, safe deposit boxes, legacies, bequests, devises, interests, dividends, stock certificates, certificates of deposit, annuities, pension and retirement benefits, stock bonus plan and profit-sharing plan benefits, stock options, insurance benefits and proceeds, documents of title, chooses in action, personal and real property, tangible and intangible property, and property rights and demands whatsoever, liquidated or unliquidated, and things of whatsoever nature or description which are now or hereafter shall be or become due, owing, payable, or belonging to me in or by any right, title, ways or means howsoever, and upon receipt thereof or of any part thereof to make, sign, execute, and deliver such receipts, releases, or other sufficient discharge for the same as my attorney shall think fit or be advised. By way of illustration, and not by way of limitation, my attorney shall be empowered to enter and to make withdrawal, either in whole or in part, from any safe deposit box.

(c) To commence, prosecute, discontinue, or defend all actions or other legal proceedings in any way affecting my estate or any part thereof or affecting any matter in which I or my estate may be in any way concerned; and to have, sue, and take all lawful ways and means and legal and equitable remedies, procedures, and writs in my name for the collection, recovery of any item or matter in which I have or may acquire an interest, and to compromise, settle, and agree for the same, and to make, execute, and deliver for me and in my name all endorsements, acquittances, releases, receipts, or other sufficient discharge for the same.

(d) To lease, purchase, exchange, and acquire, and to bargain, contract, and agree for the lease, purchase, and exchange and acquisition of, and to take, receive, and possess any real or personal property whatsoever, tangible or intangible, or any interest therein, on such terms and conditions and under such
covenants as my attorney shall deem proper.

(e) To enter into and upon all of my real property, and to let, manage, and improve the same or any part thereof, and to repair or otherwise improve or alter, and to insure any buildings or structures thereon.

(f) To sell, either at public or private sale, or exchange any part or parts of my real estate or personal property for such consideration and upon such terms as my attorney shall think fit, and to execute and deliver good and sufficient deeds or other instruments for the conveyance or transfer of the same, with such covenants of warranty or otherwise as my attorney shall see fit, and to give receipts for all or any part of the purchase price or other consideration.

(g) To engage in and actively transact any and all lawful business of whatever nature or kind for me and in my name.

(h) To sign, endorse, execute, acknowledge, deliver, receive, and possess such applications, contracts, agreements, options, covenants, deeds, conveyances, trust deeds, security agreements, bills of sale, leases, mortgages, assignments, insurance policies, bills of lading, warehouse receipts, documents of title, bills, bonds, debentures, checks, drafts, bills of exchange, notes, stock certificates, proxies, warrants, commercial paper, receipts, withdrawal receipts and deposit instruments relating to accounts or deposits in, or certificates of deposit of banks, savings and loan or other institutions or associations, proofs of loss, evidences of debts, releases, and satisfaction of mortgages, judgments, liens, security agreements and other debts and obligations, and other instruments in writing of whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted. By way of illustration, and not by way of limitation, my attorney shall be empowered to exercise any and all rights to ownership on insurance policies upon the life of any person or persons (other than any policies on the life of my attorney-in-fact), annuities, pension and retirement benefits, stock bonus plan and profit-sharing plan benefits, and stock options, including specifically the right to change the beneficiary thereon to any person other than my said attorney.

(i) To assign and convey all or any part of my assets (consisting of any property, real, personal, or mixed, tangible or intangible, of whatsoever kind and wheresoever located and whensoever acquired) into such trust or trusts as my attorney shall deem proper, irrespective of whether such trust is now in existence or hereinafter established. My attorney shall be authorized to establish any such trust on such terms as my attorney shall deem to be in my best interests. By way of illustration, and not by way of limitation, my attorney shall be empowered to create and transfer assets to (i) an irrevocable trust which will revert to my estate at my death, or (ii) a trust which will remain irrevocable during my disability.

(j) To deposit any monies which may come to my attorney as such attorney with any bank or banker or other person, either in my or my attorney's own name, and to employ or expend as my attorney shall think fit any of such money or any other money to which I am entitled which is now or shall be so deposited; to withdraw, in the payment of any debts or interest payable by me, or taxes, assessments, insurance, and expenses due and payable, or to become due and payable, on account of my real and personal estate, or in or about any of the purposes herein mentioned or otherwise for my use and benefit; or to invest in my attorney's own name or any nominee in any stocks, shares, bonds, securities, or other property, real or personal, as my attorney may think proper, and to receive and give receipts for any income or dividend arising from such investments, and to vary or dispose of such investments. By way of illustration, and not by way of limitation, such authority shall include the power to purchase government obligations which are redeemable in payment of taxes.

(k) To borrow any sum or sums of money on such terms and with such security, whether real or personal property, as my attorney may think fit, and for that purpose to execute all promissory notes,
bonds, mortgages, deeds of trust, security agreements, and other instruments which may be necessary or proper.

(l) To engage, employ, compensate and dismiss any agents, clerks, servants, attorneys-at-law, accountants, investment advisors, custodians, or other persons as my attorney shall think fit in the performance of the powers granted my attorney herein. This authority shall include employment of firms and companies in which my attorney owns an equity interest or in which my attorney is otherwise pecuniarily interested.

(m) To vote at the meetings of stockholders or other meetings of any corporation or company, or otherwise to act as my attorney or proxy in respect of any stocks, shares, or other instruments now or hereafter held by me therein, and for that purpose to execute any proxies or other instruments.

(n) To exercise any powers and any duties vested in me, whether solely or jointly, with any other or others as executor, administrator, or trustee, or in any other fiduciary capacity, so far as such power or duty is capable of validly being delegated.

(o) To make gifts and to institute gift programs to such activities and persons as my attorney shall deem appropriate.

(p) In general, to do all other acts, deeds, matters, and things whatsoever in or about my estate, property, and affairs, or to concur with persons jointly interested with myself therein in doing all acts, deeds, matters, and things herein, either particularly or generally described, as fully and effectually to all intents and purposes as I could do in my own person if personally present and competent.

3. CONSTRUCTION. This instrument is to be construed and interpreted as a general power of attorney. The enumeration of specific items, acts, rights, or powers herein does not limit or restrict, and it is not to be construed or interpreted as limiting or restricting, the general powers herein granted to my attorney.

4. REVOCATION. This general power of attorney revokes any previous powers of attorney granted by me. This general power of attorney may be voluntarily revoked by me at any time. If however, this Durable Power of Attorney has been used as a means of effectuating a real estate transaction and therefore filed in the Deed Records of the County (where the real estate is situated) then this revocation must be by my written revocation entered of record in the Deed Records of_______________ County, Texas.

5. DISABILITY. This general power of attorney shall not terminate on disability of the principal.

6. NO BOND REQUIRED. No attorney-in-fact shall be obligated to furnish bond or other security.

7. COMPENSATION. My attorney-in-fact, and any successors, shall be entitled to reasonable compensation for services rendered.

8. LIMITATIONS. Any authority granted to my attorney herein shall be limited so as to prevent this general power of attorney from causing my attorney to be taxed on my income (unless my attorney is my spouse) and from causing my assets to be subject to a general power of appointment by my attorney, as that term is defined in § 2041 of the Internal Revenue Code.

9. CONFIRMATION OF ATTORNEY’S ACTS. I hereby ratify and confirm all that my
attorney-in-fact or any successor shall lawfully do or cause to be done by virtue of this general power of attorney and the rights and powers granted herein.

10. INDEMNIFICATION OF ACTS OF ATTORNEY WHILE CARRYING OUT AUTHORITY. I hereby bind myself to indemnify my attorney-in-fact and any successor who shall so act against any and all claims, demands, losses, damages, actions, and causes of action, including expenses, costs, and reasonable attorneys' fees which my attorney at any time may sustain or incur in connection with his carrying out the authority granted him in this general power of attorney.

11. INDEMNIFICATION OF THIRD PARTIES. I hereby indemnify and hold harmless any third party who accepts and acts under this power of attorney against any and all claims, demands, losses, damages, actions and causes of action, including expenses, costs, and reasonable attorneys' fees which such third party may incur in connection with his reliance on this power of attorney.

12. GENDER AND NUMBER. Except where the context indicates otherwise, words in the singular number shall include the plural, and words in the masculine gender shall include the feminine, and vice versa.

13. HEADINGS. The headings used throughout this instrument have been inserted for administrative convenience only, and do not constitute matter to be construed in interpreting this general power of attorney.

IN WITNESS WHEREOF, I hereunto set my hand this _____ day of ________, 20__.  

__________________________________  (PRINTED NAME OF PRINCIPAL) 

State of Texas  )  
)  
County of _________ )  

BEFORE ME, the undersigned authority, on this day personally appeared ____________, known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) (is/are) subscribed to the foregoing instrument, and acknowledged to me that (he/she/they) executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this _____ day of ________, 20__.  

__________________________________  Notary Public  
In and For _________ County, Texas  
My Commission Expires: ____________  

On the _____ day of ________, 20__. ______________ requested us, the undersigned witnesses, each being eighteen (18) years of age or older, to act as witnesses to (his/her) signature on the foregoing General Durable Power of Attorney. We do hereunto subscribe our names as witnesses.
BEFORE ME, the undersigned authority, on this day personally appeared ______________, known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) (is/are) subscribed to the foregoing instrument, and acknowledged to me that (he/she/they) executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this _____ day of __________, 20__. 

___________________________________
Notary Public
In and For __________ County, Texas
My Commission Expires: ___________

COMMENT

Although Durable Powers of Attorney no longer need to be signed before witnesses and a notary, the practice of doing so is sound, especially where the incapacity of the principal is eminent or a challenge to the authority of the agent is foreseeable. Accordingly, the self-proving affidavit form is included.

Validity Of Instrument Executed By Attorney In Fact Regarding Durable Powers Of Attorney Executed After September 1, 1993

An examiner should determine that a power of attorney grants sufficient authority to validate the actions of the agent. Any instrument affecting real estate may be executed by an attorney in fact, duly appointed and empowered, unless the attorney in fact or the third party dealing with the attorney in fact had actual notice that:

1. The power of attorney was not executed, acknowledged, and recorded as required by law;
2. A revocation of the power of attorney has been recorded in the same office in which the instrument containing the power of attorney was recorded;
3. The principal has died or an order of a court has appointed a guardian of the principal's estate, unless the court order otherwise provides;
4. The principal was not disabled or incapacitated, as defined by the power; or
5. The power of attorney has expired or terminated by its own terms or by operation of law.

ADDITIONAL COMMENTS
The "Durable Power of Attorney Act," effective September 1, 1993, Tex. Prob. Code Ann. §§ 481-506, covers only durable powers of attorney and changes the prior law, addressed in Standard 8.10, above, as follows:

(1) If a durable power of attorney is used in connection with a real property transaction, the power must be recorded in the office of the county clerk of the county in which the real property is located. Tex. Prob. Code Ann. § 489.

(2) Instead of obtaining an affidavit confirming that the authority of the attorney in fact had not terminated at the time of performance, the Act contemplates that the attorney in fact will execute an affidavit, contemporaneous with the transaction, confirming that the attorney in fact has no actual knowledge of any terminating event and an affidavit that the principal is disabled or incapacitated, as defined by the power. This affidavit, which should be recorded along with the instrument of conveyance, is conclusive proof that the agent had authority at that time. Id. § 487.

(3) Unless otherwise provided in the durable power of attorney itself, a revocation of a durable power of attorney is not effective as to a third party relying on the power of attorney until the third party receives actual notice of the revocation. Id. § 488.

(4) The statute creates a statutory durable power of attorney form enabling a principal to delegate broad authority in a form that is only one or two pages long. Id. § 490. This is possible because the statute itself contains the many details normally found in a lengthy detailed form; however, the statutory form may be altered to limit the authority of the holder.

Caution: Apparently, constructive notice of the revocation of a durable power of attorney, as by virtue of its recordation, would not defeat the conclusiveness of the authority of the attorney in fact. It is recommended, however, that caution be observed in relying on a durable power of attorney where a revocation actually has been executed and filed for record before the deed of the attorney in fact. As originally enacted in 1993, Tex. Prob. Code Ann. § 492, entitled "Construction of Power Relating to Real Property Transactions," did not include the authority to execute conveyances of oil, gas, and other minerals. Thus, the holding in Bean v. Bean may apply to powers created through August 31, 1997. Effective September 1, 1997, the Act was amended to specifically authorize the holder of a power to execute oil, gas and mineral leases. Tex. Prob. Code Ann. § 492.

APPENDIX "B"

STATUTORY DURABLE POWER OF ATTORNEY FORM

§ 490. Statutory Durable Power of Attorney

(a) The following form is known as a "statutory durable power of attorney." A person may use a statutory durable power of attorney to grant an attorney in fact or agent powers with respect to a person's property and financial matters. A power of attorney in substantially the following form has the meaning and effect prescribed by this chapter. The validity of a power of attorney as meeting the requirements of a statutory durable power of attorney is not affected by the fact that one or more of the categories of optional powers listed in the form are struck or the form includes specific limitations on or additions to the attorney in fact's or agent's powers.

The following form is not exclusive, and other forms of power of attorney may be used.

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, CHAPTER XII, TEXAS PROBATE CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.
I, __________ (insert your name and address), appoint __________ (insert the name and address of the person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD.

Real property transactions;
Tangible personal property transactions;
Stock and bond transactions;
Commodity and option transactions;
Banking and other financial institution transactions;
Business operating transactions;
Insurance and annuity transactions;
Estate, trust, and other beneficiary transactions;
Claims and litigation;
Personal and family maintenance;
Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
Retirement plan transactions;
Tax matters.

IF NO POWER LISTED ABOVE IS CROSSED OUT, THIS DOCUMENT SHALL BE CONSTRUED AND INTERPRETED AS A GENERAL POWER OF ATTORNEY AND MY AGENT (ATTORNEY IN FACT) SHALL HAVE THE POWER AND AUTHORITY TO PERFORM OR UNDERTAKE ANY ACTION I COULD PERFORM OR UNDERTAKE IF I WERE PERSONALLY PRESENT.

SPECIAL INSTRUCTIONS:

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.
UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.

(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent: __________.

Signed this _____ day of __________, 20___

________________________________________

(your signature)

State of _______________________

County of _______________________

This document was acknowledged before me on

________________________________________

(date) by __________________________________________

(name of principal)

________________________________________

(signature of notarial officer)

(Seal, if any, of notary) _________________________________

(printed name)

My commission expires: __________
THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

(b) A statutory durable power of attorney is legally sufficient under this chapter if the wording of the form complies substantially with Subsection (a) of this section, the form is properly completed, and the signature of the principal is acknowledged.

APPENDIX "C"

MEDICAL POWER OF ATTORNEY
(F/K/A/ DURABLE POWER OF ATTORNEY FOR HEALTH CARE) FORM

V.T.C.A., Health & Safety Code § 166.163 Form of Disclosure Statement

The disclosure statement must be in substantially the following form:

INFORMATION CONCERNING THE MEDICAL POWER OF ATTORNEY

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

Except to the extent you state otherwise, this document gives the person you name as your agent the authority to make any and all health care decisions for you in accordance with your wishes, including your religious and moral beliefs, when you are no longer capable of making them yourself. Because "health care" means any treatment, service, or procedure to maintain, diagnose, or treat your physical or mental condition, your agent has the power to make a broad range of health care decisions for you. Your agent may consent, refuse to consent, or withdraw consent to medical treatment and may make decisions about withdrawing or withholding life-sustaining treatment. Your agent may not consent to voluntary inpatient mental health services, convulsive treatment, psychosurgery, or abortion. A physician must comply with your agent's instructions or allow you to be transferred to another physician.

Your agent's authority begins when your doctor certifies that you lack the competence to make health care decisions.

Your agent is obligated to follow your instructions when making decisions on your behalf. Unless you state otherwise, your agent has the same authority to make decisions about your health care as you would have had.

It is important that you discuss this document with your physician or other health care provider before you sign it to make sure that you understand the nature and range of decisions that may be made on your behalf. If you do not have a physician, you should talk with someone else who is knowledgeable about these issues and can answer your questions. You do not need a lawyer's assistance to complete this document, but if there is anything in this document that you do not
understand, you should ask a lawyer to explain it to you.

The person you appoint as agent should be someone you know and trust. The person must be 18 years of age or older or a person under 18 years of age who has had the disabilities of minority removed. If you appoint your health or residential care provider (e.g., your physician or an employee of a home health agency, hospital, nursing home, or residential care home, other than a relative), that person has to choose between acting as your agent or as your health or residential care provider; the law does not permit a person to do both at the same time.

You should inform the person you appoint that you want the person to be your health care agent. You should discuss this document with your agent and your physician and give each a signed copy. You should indicate on the document itself the people and institutions who have signed copies. Your agent is not liable for health care decisions made in good faith on your behalf.

Even after you have signed this document, you have the right to make health care decisions for yourself as long as you are able to do so and treatment cannot be given to you or stopped over your objection. You have the right to revoke the authority granted to your agent by informing your agent or your health or residential care provider orally or in writing or by your execution of a subsequent medical power of attorney. Unless you state otherwise, your appointment of a spouse dissolves on divorce.

This document may not be changed or modified. If you want to make changes in the document, you must make an entirely new one. You may wish to designate an alternate agent in the event that your agent is unwilling, unable, or ineligible to act as your agent. Any alternate agent you designate has the same authority to make health care decisions for you.

**THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS SIGNED IN THE PRESENCE OF TWO COMPETENT ADULT WITNESSES. THE FOLLOWING PERSONS MAY NOT ACT AS ONE OF THE WITNESSES:**

1. the person you have designated as your agent;
2. a person related to you by blood or marriage;
3. a person entitled to any part of your estate after your death under a will or codicil executed by you or by operation of law;
4. your attending physician;
5. an employee of your attending physician;
6. an employee of a health care facility in which you are a patient if the employee is providing direct patient care to you or is an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility; or
7. a person who, at the time this power of attorney is executed, has a claim against any part of your estate after your death.

§ 166.164. Form of Medical Power of Attorney (previously cited as Texas Civil Practice and Remedies Code § 135 et seq.)

The medical power of attorney must be in substantially the following form:

**MEDICAL POWER OF ATTORNEY DESIGNATION OF HEALTH CARE AGENT.**

I,_________(insert your name) appoint:
as my agent to make any and all health care decisions for me, except to the extent I state otherwise in this document. This medical power of attorney takes effect if I become unable to make my own health care decisions and this fact is certified in writing by my physician.

LIMITATIONS ON THE DECISION-MAKING AUTHORITY OF MY AGENT ARE AS FOLLOWS:_____

____________________________________________________

DESIGNATION OF ALTERNATE AGENT.

(You are not required to designate an alternate agent but you may do so. An alternate agent may make the same health care decisions as the designated agent if the designated agent is unable or unwilling to act as your agent. If the agent designated is your spouse, the designation is automatically revoked by law if your marriage is dissolved.)

If the person designated as my agent is unable or unwilling to make health care decisions for me, I designate the following persons to serve as my agent to make health care decisions for me as authorized by this document, who serve in the following order:

A. First Alternate Agent

Name:_________________________________________________________
Address:______________________________________________________
Phone___________________________________________________

B. Second Alternate Agent

Name:_________________________________________________________
Address:______________________________________________________
Phone___________________________________________________

The original of this document is kept at:
______________________________________________________________
______________________________________________________________

The following individuals or institutions have signed copies:

Name:_________________________________________________________
Address:______________________________________________________

Name:_________________________________________________________
Address:______________________________________________________

DURATION.

I understand that this power of attorney exists indefinitely from the date I execute this document unless I establish a shorter time or revoke the power of attorney. If I am unable to make health care decisions for myself when this power of attorney expires, the authority I have granted my agent continues to exist until the time I become able to make health care decisions for myself.
(IF APPLICABLE) This power of attorney ends on the following date: __________

PRIOR DESIGNATIONS REVOKED.

I revoke any prior medical power of attorney.

ACKNOWLEDGMENT OF DISCLOSURE STATEMENT.

I have been provided with a disclosure statement explaining the effect of this document. I have read and understand that information contained in the disclosure statement.

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY.)

I sign my name to this medical power of attorney on __________ day of __________ (month, year) at

__________________________________________________________________________
(City and State)

__________________________________________________________________________
(Signature)

__________________________________________________________________________
(Print Name)

STATEMENT OF FIRST WITNESS.

I am not the person appointed as agent by this document. I am not related to the principal by blood or marriage. I would not be entitled to any portion of the principal's estate on the principal's death. I am not the attending physician of the principal or an employee of the attending physician. I have no claim against any portion of the principal's estate on the principal's death. Furthermore, if I am an employee of a health care facility in which the principal is a patient, I am not involved in providing direct patient care to the principal and am not an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility.

Signature:___________________________________________________________
Print Name: ______________________________________ Date: _____________
Address:______________________________________________________________

SIGNATURE OF SECOND WITNESS.

Signature:___________________________________________________________
Print Name:______________________________________Date:________________
Address:______________________________________________________________

APPENDIX "$D$"

DIRECTIVE TO PHYSICIANS FORM

§ 166.033. Form of Written Directive

A written directive may be in the following form:

DIRECTIVE TO PHYSICIANS AND FAMILY OR SURROGATES

Instructions for completing this document:
This is an important legal document known as an Advance Directive. It is designed to help you communicate your wishes about medical treatment at some time in the future when you are unable to make your wishes known because of illness or injury. These wishes are usually based on personal values. In particular, you may want to consider what burdens or hardships of treatment you would be willing to accept for a particular amount of benefit obtained if you were seriously ill.

You are encouraged to discuss your values and wishes with your family or chosen spokesperson, as well as your physician. Your physician, other health care provider, or medical institution may provide you with various resources to assist you in completing your advance directive. Brief definitions are listed below and may aid you in your discussions and advance planning. Initial the treatment choices that best reflect your personal preferences. Provide a copy of your directive to your physician, usual hospital, and family or spokesperson. Consider a periodic review of this document. By periodic review, you can best assure that the directive reflects your preferences.

In addition to this advance directive, Texas law provides for two other types of directives that can be important during a serious illness. These are the Medical Power of Attorney and the Out-of-Hospital Do-Not-Resuscitate Order. You may wish to discuss these with your physician, family, hospital representative, or other advisers. You may also wish to complete a directive related to the donation of organs and tissues.

DIRECTIVE

I, __________, recognize that the best health care is based upon a partnership of trust and communication with my physician. My physician and I will make health care decisions together as long as I am of sound mind and able to make my wishes known. If there comes a time that I am unable to make medical decisions about myself because of illness or injury, I direct that the following treatment preferences be honored:

If, in the judgment of my physician, I am suffering with a terminal condition from which I am expected to die within six months, even with available life-sustaining treatment provided in accordance with prevailing standards of medical care:

__________ I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible; OR
__________ I request that I be kept alive in this terminal condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

If, in the judgment of my physician, I am suffering with an irreversible condition so that I cannot care for myself or make decisions for myself and am expected to die without life-sustaining treatment provided in accordance with prevailing standards of care:

__________ I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible; OR
__________ I request that I be kept alive in this irreversible condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

Additional requests: (After discussion with your physician, you may wish to consider listing particular treatments in this space that you do or do not want in specific circumstances, such as artificial nutrition and fluids, intravenous antibiotics, etc. Be sure to state whether you do or do not want the particular treatment.)

___________________________________________________________________________
___________________________________________________________________________
___________________________________________________________________________

After signing this directive, if my representative or I elect hospice care, I understand and agree that only those treatments needed to keep me comfortable would be provided and I would not be given available life-sustaining treatments. If I do not have a Medical Power of Attorney, and I am unable to make my wishes known, I designate the following person(s) to make treatment decisions with my physician compatible with my personal values:
1.__________
2.__________

(If a Medical Power of Attorney has been executed, then an agent already has been named and you should not list additional names in this document.)

If the above persons are not available, or if I have not designated a spokesperson, I understand that a spokesperson will be chosen for me following standards specified in the laws of Texas. If, in the judgment of my physician, my death is imminent within minutes to hours, even with the use of all available medical treatment provided within the prevailing standard of care, I acknowledge that all treatments may be withheld or removed except those needed to maintain my comfort. I understand that under Texas law this directive has no effect if I have been diagnosed as pregnant. This directive will remain in effect until I revoke it. No other person may do so.

Signed__________ Date__________ City, County, State of Residence __________

Two competent adult witnesses must sign below, acknowledging the signature of the declarant. The witness designated as Witness 1 may not be a person designated to make a treatment decision for the patient and may not be related to the patient by blood or marriage. This witness may not be entitled to any part of the estate and may not have a claim against the estate of the patient. This witness may not be the attending physician or an employee of the attending physician. If this witness is an employee of a health care facility in which the patient is being cared for, this witness may not be involved in providing direct patient care to the patient. This witness may not be an officer, director, partner, or business office employee of a health care facility in which the patient is being cared for or of any parent organization of the health care facility.

Witness 1 __________ Witness 2 __________

Definitions:

"Artificial nutrition and hydration" means the provision of nutrients or fluids by a tube inserted in a vein, under the skin in the subcutaneous tissues, or in the stomach (gastrointestinal tract).

"Irreversible condition" means a condition, injury, or illness:

1. that may be treated, but is never cured or eliminated;

2. that leaves a person unable to care for or make decisions for the person's own self; and

3. that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal.

Explanation: Many serious illnesses such as cancer, failure of major organs (kidney, heart, liver, or lung), and serious brain disease such as Alzheimer's dementia may be considered irreversible early on. There is no cure, but the patient may be kept alive for prolonged periods of time if the patient receives life-sustaining treatments. Late in the course of the same illness, the disease may be considered terminal when, even with treatment, the patient is expected to die. You may wish to consider which burdens of treatment you would be willing to accept in an effort to achieve a particular outcome. This is a very personal decision that you may wish to discuss with your physician, family, or other important persons in your life.

"Life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support such as mechanical breathing machines, kidney dialysis treatment, and artificial hydration and nutrition. The term does not include the administration of pain management medication, the performance of a medical procedure necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

"Terminal condition" means an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.

Explanation: Many serious illnesses may be considered irreversible early in the course of the illness, but they may not be considered terminal until the disease is fairly advanced. In thinking about terminal illness and its treatment, you again may wish to consider the relative benefits and burdens of treatment and discuss your wishes with your physician, family, or
APPENDIX "E"

DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR NEED OF GUARDIAN

V.A.T.S. Probate Code, § 679 Designation of Guardian Before Need Arises

(a) A person other than an incapacitated person may designate by a written declaration persons to serve as guardian of the person of the declarant or the estate of the declarant if the declarant becomes incapacitated. The declaration must be signed by the declarant and be:

(1) written wholly in the handwriting of the declarant; or

(2) attested to in the presence of the declarant by at least two credible witnesses 14 years of age or older who are not named as guardian or alternate guardian in the declaration.

(b) A declarant may, in the declaration, disqualify named persons from serving as guardian of the declarant's person or estate, and the persons named may not be appointed guardian under any circumstances.

(c) A declaration that is not written wholly in the handwriting of a declarant may be signed by another person for the declarant under the direction of and in the presence of the declarant.

(d) A declaration described by Subsection (a)(2) of this section may have attached a self-proving affidavit signed by the declarant and the witnesses attesting to the competence of the declarant and the execution of the declaration.

(e) The declaration and any self-proving affidavit may be filed with the court at any time after the application for appointment of a guardian is filed and before a guardian is appointed.

(f) Unless the court finds that the person designated in the declaration to serve as guardian is disqualified or would not serve the best interests of the ward, the court shall appoint the person as guardian in preference to those otherwise entitled to serve as guardian under this code. If the designated guardian does not qualify, is dead, refuses to serve, resigns, or dies after being appointed guardian, or is otherwise unavailable to serve as guardian, the court shall appoint the next eligible designated alternate guardian named in the declaration. If the guardian and all alternate guardians do not qualify, are dead, refuse to serve, or later die or resign, the court shall appoint another person to serve as otherwise provided by this code.

(g) The declarant may revoke a declaration in any manner provided for the revocation of a will under Section 63 of this code, including the subsequent reexecution of the declaration in the manner required for the original declaration.

(h) If a declarant designates the declarant's spouse to serve as guardian under this section, and the declarant is subsequently divorced from that spouse before a guardian is appointed, the provision of the declaration designating the spouse has no effect.

(i) A declaration and affidavit may be in any form adequate to clearly indicate the declarant’s intention to designate a guardian. The following form may, but need not, be used:

I, __________, make this Declaration of Guardian, to operate if the need for a guardian for me later arises.

DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR NEED OF GUARDIAN

1. I designate __________ to serve as guardian of my person, __________ as first alternate guardian of my person, __________ as second alternate guardian of my person, and __________ as third alternate guardian of my person.

2. I designate __________ to serve as guardian of my estate, __________ as first alternate guardian of my estate,
as second alternate guardian of my estate, and ______ as third alternate guardian of my estate.

3. If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes my guardian.

4. I expressly disqualify the following persons from serving as guardian of my person: ________, ________, and ________.

5. I expressly disqualify the following persons from serving as guardian of my estate: ________, ________, and ________.

Signed this ___ day of __________, 20__.

Declarant

Witness

Witness

SELF-PROVING AFFIDAVIT

Before me, the undersigned authority, on this date personally appeared the declarant, and ________ and ________ as witnesses, and all being duly sworn, the declarant said that the above instrument was his or her Declaration of Guardian and that the declarant had made and executed it for the purposes expressed in the declaration. The witnesses declared to me that they are each 14 years of age or older, that they saw the declarant sign the declaration, that they signed the declaration as witnesses, and that the declarant appeared to them to be of sound mind.

Declarant

Witness

Witness

Subscribed and sworn to before me by the above named declarant and affiants on this ____ day of ________, 20__.

Notary Public in and for the
State of Texas
My Commission expires:

(j) In this section, "self-proving affidavit" means an affidavit the form and content of which substantially complies with
the requirements of Subsection (i) of this section.

APPENDIX "F"

LAST WILL AND TESTAMENT FORM

LAST WILL AND TESTAMENT
OF
_________________________ (NAME OF TESTATOR)
(TEX. PROB. CODE § 59.)

State of Texas
County of __________

KNOW ALL BY THESE PRESENTS:

46
ARTICLE I

I, _______________ (Name of testator), of the City of _______________ (Name of city), County of _______________ (Name of county), State of Texas, being of sound and disposing mind and memory, above the age of eighteen (18) years, and desiring to provide for the disposition of my estate so that there will be no confusion concerning same after my death, do make, publish, and declare this to be my Last Will, and I hereby revoke all Wills and codicils heretofore made by me.

ARTICLE II
PAYMENT OF FUNERAL EXPENSES, DEBTS, AND TAXES

I direct that all my debts, including all expenses of last illness and funeral and burial, shall be paid by my executor as soon as reasonably convenient after my death.

ARTICLE III
DEVISE AND BEQUEATH

I give, devise, and bequeath all of my property of whatever kind and wherever situated, as follows:

(1) to my spouse, _______________ (Name of spouse), if he or she survives me;

(2) if my spouse predeceases me, to such of my children as survive me, in equal shares, provided, however, should a child of mine predecease me, survived by a child or children who survive me, such grandchild or grandchildren of mine shall take the share their parent would have taken had such parent survived me;

(3) if my spouse and all of my children predecease me, to such of my grandchildren as survive me, in equal shares;

(4) if my spouse, all of my children and all of my grandchildren predecease me, one-half to my parents, or to the survivor of them, should only one parent survive me; and one-half to the parents of my spouse, or to the survivor of them, should only one of the parents of my spouse survive me.

ARTICLE IV
APPOINTMENT OF GUARDIAN

If my spouse predeceases me and I am survived by a minor child or children, I nominate, _______________ (Name of guardian), to be guardian of the person and estate of such minor child or children. If _______________ (Name of guardian), predeceases me, or is unable or unwilling to accept such appointment, then I nominate, _______________ (Name of alternate guardian), to be the guardian of the person and estate of such minor child or children. I direct that any guardian nominated by me be exempted from the requirement of furnishing bond.

ARTICLE V
APPOINTMENT OF PERSONAL REPRESENTATIVE

I nominate, _______________ (Name of executor(trix)), to be executor(trix) of my Last Will. If my executor(trix) is unable or unwilling to accept such appointment, then I nominate, _______________ (Name of alternate executor(trix)), to be executor(trix) of my Last Will.

I hereby direct that no other action shall be had in the county court or in any other court in relation to the
settlement of or administration upon my estate than the probating and recording of this Will and the return of an inventory, appraisement and list of claims.

I authorize and empower my said executor(trix) to sell, dispose of, deliver, and convey any portion of my estate, real or personal property (except specific bequests and devises), at public or private sale for any price, on any terms and in any manner that may seem best for my estate. I direct that any executor(trix) shall be reimbursed for the reasonable costs and expenses incurred in connection with (his/her) fiduciary duties.

In testimony whereof, I have hereunto set my hand to this my Last Will, consisting of _____ pages, initialed by me at the left margin thereof, in the presence of the two witnesses who have at my request and in my presence and in the presence of each other acted as witnesses this_____ day of __________, 20__.

______________________________
Testator

______________________________
Witness (name and address)

______________________________
Witness (name and address)

STATE OF TEXAS

COUNTY OF _____

SELF-PROVING AFFIDAVIT

"Before me, the undersigned authority, on this day personally appeared, _______________ (Name of witness), _______________ (Name of witness) and _______________ (Name of testator (trix)) known to be the testator (trix) and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and all of said persons being by me duly sworn, the said _______________, testator (trix), declared to me and to said witnesses in my presence that said instrument is (his/her) last will and testament, and that (he/she) had willingly made and executed it as (his/her) free act and deed; and the said witnesses, each on (his/her) oath, stated to me, in the presence and hearing of the testator (trix) that the testator(trix) had declared to them that said instrument in (his/her) last will and testament, and that (he/she) executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of said testator and at (his/her) request; that (he/she) was at the time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age."

______________________________
Testator

______________________________
Witness (name and address)

______________________________
Witness (name and address)

SUBSCRIBED AND ACKNOWLEDGED before me, the undersigned authority, by the said _________________ (testator (trix)) and SUBSCRIBED AND SWORN to before me by the said _________________ and _________________ Witnesses, this _______________ day of
APPENDIX "G"

LAST WILL AND TESTAMENT WITH TESTAMENTARY TRUST FORM

LAST WILL AND TESTAMENT
OF
_________________________ (Name of testator)
WITH TESTAMENTARY TRUST

State of Texas )
County of ________ )

KNOW ALL BY THESE PRESENTS:

ARTICLE I

I, _______________ (Name of testator), of the City of
_________________________ (Name of city), County of _______________ (Name of county), State of Texas, being of
sound and disposing mind and memory, above the age of eighteen (18) years, and desiring to provide for the
disposition of my estate so that there will be no confusion concerning same after my death, do make, publish,
and declare this to be my Last Will, and I hereby revoke all wills and codicils heretofore made by me.

ARTICLE II
PAYMENT OF FUNERAL EXPENSES, DEBTS, AND TAXES

I direct that all my debts, including all expenses of last
illness and funeral and burial, shall be paid by my executor as soon as reasonably convenient after my death.

ARTICLE III
DEVISE AND BEQUEATH

I give, devise, and bequeath all of my property of whatever kind and wherever situated, as follows:
(1) to my spouse, _______________ (Name of spouse), if he or she survives me;

(2) if my spouse predeceases me, to such of my children as survive me, in equal shares, provided, however, should a child of mine predecease me, survived by a child or children who survive me, such grandchild or grandchildren of mine shall take the share their parent would have taken had such parent survived me;

(3) if my spouse and all of my children predecease me, to such of my grandchildren as survive me, in equal shares;

(4) if my spouse, all of my children and all of my grandchildren predecease me, one-half to my parents, or to the survivor of them, should only one of my parents survive me; and one-half to the parents of my spouse, or to the survivor of them, should only one of the parents of my spouse survive me.

ARTICLE IV
CREATION OF TRUST

Notwithstanding the provisions of Item 2, if at the time of my death any child of mine is less than twenty-one (21) years old and is entitled to receive any portion of my estate according to Item 2, then my Executor(trix), acting as trustee, shall not distribute my estate as provided in such Item 2, but shall hold the same in trust until the first of the following events occurs: (a) my youngest child attains the age of twenty-one (21) years, (b) the youngest of my children living at any one time after my death has attained the age of twenty-one (21) years, and (c) the death of the last of my children; at which time the trust hereby created shall terminate and the principal and undistributed income thereof shall be distributed to such of my issue as shall be living at the time of termination of such trust (such issue taking per stirpes and not per capita).

During the term of such trust my executor, acting as trustee thereof, may accumulate all or any part of the income thereof, or may pay or expend any part or all of the income thereof or any part of all of the principal thereof for the reasonable care, support, maintenance, education or comfort of any of my issue in the trustee's absolute discretion, not necessarily equally, but according to their needs or any other standard which my executor may deem appropriate with absolute right to pay all of such income or principal to one or more of such person to the complete exclusion of any one or more of the others.

ARTICLE V

This shall be a spendthrift trust.

As to any distribution made in accordance with the provisions hereof, my Executor may in (his/her) discretion make such distribution to any such person in any one or more of the following ways: (1) to any such person directly; (2) to the guardian, committee, conservator, or other similar official of a minor or incapacitated person; (3) to a relative of a minor or incapacitated person to be expended by such relative for the care, support, maintenance, education, or comfort of any of my issue in the trustee's absolute discretion, not necessarily equally, but according to their needs or any other standard which my executor may deem appropriate with absolute right to pay all of such income or principal to one or more of such person to the complete exclusion of any one or more of the others.

ARTICLE VI

APPOINTMENT OF GUARDIAN

If my spouse predeceases me and I am survived by a minor child or children, I nominate, _______________ (Name of guardian), to be guardian of the person and estate of such minor child or children. If _______________ (Name of guardian), predeceases me, or is unable or unwilling to accept such appointment, then I nominate, _______________ (Name of alternate guardian), to be the guardian of the person and estate.
of such minor child or children. I direct that any guardian nominated by me be exempted from the requirement of furnishing bond.

ARTICLE VII
APPOINTMENT OF PERSONAL REPRESENTATIVE

I nominate, _______________ (Name of executor(trix)), to be executor(trix) of my Last Will. If my executor(trix) is unable or unwilling to accept such appointment, then I nominate, _______________ (Name of alternate executor(trix)), to be executor(trix) of my Last Will.

I hereby direct that no other action shall be had in the county court or in any other court in relation to the settlement of or administration upon my estate than the probating and recording of this Will and the return of an inventory, appraisement and list of claims.

I authorize and empower my said executor(trix) to sell, dispose of, deliver, and convey any portion of my estate, real or personal property (except specific bequests and devises), at public or private sale for any price, on any terms and in any manner that may seem best for my estate. I direct that any executor(trix) shall be reimbursed for the reasonable costs and expenses incurred in connection with (his/her) fiduciary duties.

ARTICLE VIII
REVOCATION OF BENEFITS OR DEVISE UPON CONTEST

If any beneficiary shall contest the probate or validity of this will, or any provision thereof, or shall cause to be filed or join in any such action (unless joining issue as a party-defendant), then all benefits provided for such beneficiary shall be forfeited, except the sum of one ($1.00) dollar.

"In testimony whereof, I have hereunto set my hand to this my last will, consisting of _____ pages, initialed by me at the left margin thereof, in the presence of the two witnesses who have at my request and in my presence and in the presence of each other acted as witnesses this_____ day of __________, 20__."

______________________________
Testator

______________________________
Witness (name and address)

______________________________
Witness (name and address)

STATE OF TEXAS §

§

COUNTY OF _____ §

SELF-PROVING AFFIDAVIT

"Before me, the undersigned authority, on this day personally appeared, _______________ (Name of witness), _______________ (Name of witness) and _______________ (Name of testator (trix)) known to be the testator (trix) and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and all of said persons being by me duly sworn, the said _______________, testator (trix), declared to me and to said witnesses in my presence that said instrument is (his/her) last will and testament, and that (he/she) had willingly made and executed it as (his/her) free act and deed; and the said witnesses, each on (his/her) oath, stated to me, in the presence and hearing of the testator (trix) that the testator(trix) had declared to them that said instrument in (his/her) last will and testament, and that (he/she) executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of said testator and at (his/her) request; that (he/she) was at the time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or
of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age."

______________________________
Testator
______________________________
Witness (name and address)
______________________________
Witness (name and address)

SUBSCRIBED AND ACKNOWLEDGED before me, the undersigned authority, by the said ______________________ (testator (trix)) and SUBSCRIBED AND SWORN to before me by the said ______________________ and ______________________ Witnesses, this ________________ day of ____________________, 20___.

NOTARY PUBLIC, STATE OF TEXAS

NOTARY’S PRINTED NAME
COMMISSION EXPIRES:

APPENDIX H
WILL REVIEW CHECKLIST

The following checklist summarizes this outline into a brief checklist for reviewing wills. It was prepared by Steve R. Akers. See Anatomy Of A Will, Akers, Steve R. 23rd Annual Estate Planning And Probate Course, State Bar of Texas.

1. Preamble
   a. State name and domicile
   b. Revoke prior wills

2. Identification of Family and Property
   a. Identify spouse and children
   b. Make sure afterborn children are provided for or mentioned to avoid Section 67b
   c. Identify stepchildren and discuss whether included as beneficiaries
   d. Identify property being disposed of and whether any election intended
e. Negate exercise of any powers of appointment (if no exercise intended)

3. Appointment of Fiduciaries

a. Executor
   - Appoint independent executor(s)
     tracking Section 145(b) of Probate Code
   - Appoint successor independent executor(s)
   - Waive executor's bond

b. Trustee
   - Appoint trustee(s)
   - Appoint successor trustee(s)
   - Consider income and estate tax effects to appoint trustees
   - Waive trustee's bond

c. Guardian -- appoint
   guardian(s) -- co-guardians must be spouses, joint managing conservators or co-guardians under the laws of another state

4. Specific Bequests

a. Furnishings and personal effects
   - Include to qualify for Section 663(a)(10 treatment
   - Refer to large items if any possible confusion
   - Include casualty insurance
   - Any large outstanding encumbrances?
   - Alternate beneficiaries
   - Mechanics for allocating among multiple beneficiaries
   - Effect of reference to a separate list

b. Specific tangible property items
   - Identify sufficiently
   - Alternate beneficiaries

c. Residence or Other Real Estate
   - Identify sufficiently
   - Apply to replacement residence
   - Subject to existing encumbrance
   - Include insurance
- Alternative beneficiaries
- Consider backup bequest of sales proceeds or pecuniary legacy to avoid effect of ademption

d. Pecuniary Legacies
- Is estate large enough to accommodate
- Right to interest or pecuniary amount

e. Specific exemption equivalent bequest or marital deduction bequest
- Consider tax effect of choice of exemption equivalent versus marital deduction specific bequest
- In formula, exclude consideration of state death tax credit to the extent it increases the federal estate tax
- Direct that only assets qualifying for marital deduction may be allocated to marital deduction specific bequest, or direct that non-qualifying assets be allocated to exemption equivalent specific bequest
- For marital deduction specific bequest, assure Rev. Proc. 64-19 is satisfied (i.e., use fractional share, or use date of distribution values or minimum worth clause for pecuniary bequest)
- Provide for disclaimer of marital deduction specific bequest
- If a QTIP Trust is used (1) give directions or guidance and exonerate executor re: election, and (2) provide mechanics for payment of estate tax at spouse's subsequent death

f. Charitable Bequests
- Verify identity of beneficiaries and tax-exempt status
- Tax allocation

g. Abatement clause if many specific bequests

5. Residuary Estate

a. Dispose of all property
b. Provide contingent trusts for minors or beneficiaries under specified age

c. Provide for alternate beneficiaries, ultimately to heirs or permanent organizations (any lapse may cause partial or total intestacy)

6. Apportionment of Debts, Expenses, and Taxes

a. Do not require payment of debts

b. Allocate away from marital deduction bequest or charitable bequest

c. Except out any taxes payable under Section 2044 attributable to QTIP Trusts

d. Except out generation-skipping transfer taxes

e. Specifically state whether taxes on non-probate assets should be paid out of probate estate


a. Identify name of trust(s)

b. Identify beneficiaries

c. Standards for distributing income and principal; consider estate tax effects of distributional provisions

d. Discretionary powers workable and trustee exonerated (if desired) regarding distributions

e. Special distributions (to buy home, etc.)

f. Limited power of appointment

g. Termination provisions well-defined

h. Amounts passing on termination to alternate beneficiaries who are beneficiaries of another trust under the will pass to that trust
8. Trust and Executor Powers

*Trust Code Powers -- Trust Code gives these powers unless negated:*

a. Retain assets

b. Receive additional assets

c. Acquire remainder of undivided interests

d. Broad management and investment power

e. Investment in business entities

f. Power to sell -- including for credit

g. Lease real or personal property

h. Mineral investments (including exploration and development activities)

i. Power to borrow

j. Management of Securities

k. Holding securities in nominee form

l. Employ agents

m. Compromise and settle claims

n. Abandon worthless property

o. Distribution for minor or incapacitated beneficiary

p. Provide residence for beneficiaries and pay funeral expenses

q. Ancillary trustee

r. Prudent man standard for investments

s. Principal-income allocations

t. Accountings

u. Liability of trustee
v. Compensation of trustee

Additional Trust Provisions

a. Perpetuities savings clause

b. Spendthrift provision (consider negating application to QTIP Trust)

c. Small trust termination

d. Consolidation of trust funds

e. Merger of trusts

f. Situs, changing trust situs, choice of law

g. Receipt and allocation of employee benefits and insurance proceeds

* Additional Fiduciary Powers

a. Broadened investment powers; negate duty to diversity (if desired)

b. Power to give guarantee

c. Employ and rely on investment advisor

d. Power to lend

e. Delegation powers, especially for temporary absence

f. Hold assets (other than just securities) in nominee form

g. Broadened principal-income apportionment authority

h. Partitioned and division power

i. Business interests (exculpatory language, extra compensation, trustee can transact similar business individually)

j. Procedure for resignation

k. Exoneration of successor fiduciaries for breach by predecessor
1. Liability; exculpatory clause if desired
   m. Compensation (especially, provide reasonable compensation for executors)
   n. Removal provisions
   o. Remove self-dealing restrictions (sales between trusts, sales or purchases to or by trustees and executors)

*Special Executor Powers*

a. Incorporate trustee powers
   b. Authorize direct distributions to beneficiaries if trust terminated; loans or purchases by trust to estate
   c. Give discretion re tax elections, consider equitable adjustments for tax elections

   a. Definitions
      - Issue and children (include afterborn and adopted children)
      - Survival requirement or other simultaneous death provision
      - *Per Stirpes*
   b. Will not contractual
   c. Headings not used in construction
   d. *In terrorem* clause if desired

10. Attestation clause and self-proving affidavit

11. Will appears to be properly executed

**APPENDIX - "I"

WILL EXECUTION CEREMONY TRANSCRIPT**

Attorney:

Good morning Mr. and Mrs. Teague.
Glad you all could make it in this morning. I understand from my secretary that you all are ready to sign the Wills

... So what we need to do this morning is to look over the originals and if you're ready to sign them we'll get that done.

These are the original documents from which the copies you reviewed were made.

I'll ask you to look over those also please.

Last week we reviewed the provisions of these Wills. Each of you is leaving your property to each other and there are provisions in the will for your children in the event of both your deaths. The executors and trustees are as we discussed.

Man:

It looks okay to me.

Woman:

They look fine to me also.

Attorney:

O.K. We let's review each one page by page.

If you understand and agree with each page then please initial the bottom of each page on the blank line.

Now that we have reviewed and you all have initialed the Wills, Let me call in the witnesses.

Judy, I'm ready for the witnesses please bring them in.

Now Mr. and Mrs. Teague, we're going to have three witnesses to the Wills.

Woman:

Why is that?

Attorney:

Texas only requires two, but there are some states in the United States that still require three witnesses.

If you were to buy property in another state or move from Texas to another state, this would ensure that your Will could be probated in the other jurisdiction.

Of course, I can not represent to you what the laws are in all 50 states. Therefore if you were to buy
property in another state or move from Texas to for example Colorado or Oklahoma, or wherever, then you should have your Will reviewed by a lawyer in that other state.

Before signing your Will I need to ask each of you a number of questions.

Mr. and Mrs. Teague do each of you declare that the instrument that you have just initialed is your last Will and Testament?

Man and Woman:

Yes.

Further, do each of you declare that you are signing your Will as your free act for the purposes expressed in it?

Man and Woman:

Yes.

And finally do each of you request the persons present to serve as witnesses by signing in your presence here today?

Woman: Yes.

Man: Yes.

Attorney:

Okay. If you will please sign your full name on this page right above where it appears.

And would you please sign once again on the next page right here.
Man and Woman:

(SIGN DOCUMENTS)

Attorney:

Okay, Mr. and Mrs. Teague both of you have now executed your last will and testament. I know your family will appreciate your foresight.

Man:

Now that I've signed my part would it be okay if I left. I have an appointment that I need to make.

Attorney:

Yes of course Mr. Teague I know you have much to do. However we still have few things to take care of. Please bear with me just a few more minutes.
We’re just about finished but **it is all important that the witnesses sign in your presence.**

(Attorney addressing witnesses)

**There are a number of questions that I need to ask each of you as witnesses.**

Can each of you swear to me, before this notary, that you have heard Mr. and Mrs. Teague declare that this document which they have just signed in your presence is their last Will and Testament?

Witnesses 1, 2 and 3:
Yes.

Can each of you swear before this notary that they stated they were signing their will out of their own free will?

Witnesses 1, 2 and 3:
Yes.

Can each of you swear before this notary that Mr. & Mrs. Teague requested you to be present and sign as witnesses and that each of you is over 14 years of age, and that Mr. and Mrs. Teague are over 18 years of age?

Witnesses 1, 2 and 3:
Yes.

Can each of you swear before this notary that you believe them to be of sound mind, that each of you is signing in the presence of each other and in the presence of Mr. and Mrs. Teague her today. Can each of you so swear?

Witnesses 1, 2 and 3:
Yes.

Attorney: (addressing witnesses)

Please step over here and sign your name and fill in your address in the spaces provided.

Man: I don’t know these people. What should happen if they die before I do?

Attorney:

Well that’s a real good question.

Please recall that I explained to you last week why you would be signing twice.

And why your witnesses would be signing twice.

Remember; in Texas we use what is known as a self-proving affidavit to your Will. In fact, the
notary public, is taking the testimony of your witnesses here today.

They are testifying through their answers and their presence that each of your Wills were properly executed with all the requisite formalities under the law. Therefore, it's not necessary that any of these witnesses actually have to appear in court at the time your will is probated.

The only reason why any of them may ever need to be physically present is if someone were to challenge or contest your Will.

Of course based on what you have told me, there does not appear to be much of a risk of this happening in your situation. But, that's the reason I've asked the witnesses to include their addresses on the Will. If we ever need them, we can find them.

Okay?

Now that everyone here has signed in each others presence, it appears we may be finished. But, let me just look over these real quickly just to make sure.

(Turning to the witnesses)

Thank you all very much for serving as witnesses for Mr. and Mrs. Teague.

(Turning back to clients)

Now that you've signed your Wills we need to talk about where you plan to store them.

They should be stored where they're safe from fire and flood. Of course I will always retain a copy in my files should you ever need them, but I do not keep originals.

Woman: Why can't you, as our lawyer, keep a duplicate original; so you can have one and I'll have one and I'd feel much better that way.

Attorney:

Ms. Teague, I appreciate your confidence; however, if for some reason you ever wanted to cancel this Will, you could do so just by destroying it. But if I had a duplicate original and I was unaware of your intentions then it would cause confusion and increase the chances of a will contest. But I will say that you can deposit the Will for safe keeping with your County Clerk's office for a very nominal fee.

Woman:

Or we could probably put in our safe deposit box.

Attorney:

Do you all have a safe deposit box that's in your joint names?
Woman:

Yes.

Man:

I understand that sometime there's a problem getting into the box when somebody dies.

Attorney:

It's really more myth than it is reality. Under state law the person named as executor can go to the bank with a copy of the Will and gain access to the box for purposes of taking the original of the Will out.

Even if both of you were to die in a common accident, your son or whomever you designate, would have the same right and with a copy of the Will, of course, he or she could also enter the box.

If all else fails, if there's no copy available, the box can be opened under court order which is a relatively simple procedure.

Man:

Should either our executor or trustee have copies?

Attorney:

As I have stated in my explanatory letter to you, it's not necessary that they have a copy. However, I believe it's a good idea but of course it's a matter of personal choice.

I would certainly recommend that you tell your son that in the event something happens to both of you, you have designated him as executor in your Wills and tell him where the originals are located and where you have copies.

As to whether or not you want him to know the contents of the Will at this time, again that's really a matter of personal choice.

We have made copies for our permanent files as well as for you to keep outside your safe deposit box.

Man:

Okay.

Attorney:

Lastly, let me just mention again what we talked about in our first meeting.
You have both done something very important for your family here today by signing your last will, but you can't think of this as something you only do once and forget it for the rest of your life.

It's very important that you look at your Wills periodically.

I suggest you review them once a year, maybe at tax time or when you're thinking about business matters and see if any of the circumstances of your family or financial circumstances have changed. Or determine if changes in the tax laws require you to modify your Will.

For example if your net worth increases beyond or even approaches $600,000 individually or $1.2 million together, including life insurance proceeds then you definitely need to make some changes.

Come see me and we'll take care of it.

In any event, you should review your Wills periodically, not any less often than every two years.

If, I can be of any other service to you, I trust you will not hesitate to call upon me.

Man:

I have one last question. In the event that one of us should die, should we change our Will?

Attorney:

It's not necessary that you do. These have been drafted in such a way that they provide for that contingency. That is why you designated a guardian for your minor children and set up the trust arrangement for their benefit.

Well, once again I thank you all very much for permitting me to be of service with these family matters. If I can do anything else for you, please do not hesitate to call.

Thank you Mr. & Mrs. Teague.
THE ANATOMY OF A WILL:
PRACTICAL CONSIDERATIONS IN WILL DRAFTING*

Outline By

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State Bar of Texas
5TH ANNUAL BUILDING BLOCKS OF WILLS,
ESTATES AND PROBATE
January 16, 2004
Via Satellite

APPENDIX

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SCOPE OF PRESENTATION

PART 1. NUTSHELL OF SUBSTANTIVE LAW REGARDING VALIDITY OF A WILL

I. FUNDAMENTAL REQUIREMENTS OF A WILL
   A. What Is a "Will"?
      1. GENERALLY
      2. ORIGIN OF THE TERM "LAST WILL AND TESTAMENT"
      3. SUMMARY OF BASIC REQUIREMENTS
   B. Testamentary Intent
      1. GENERALLY
      2. INSTRUMENT CLEARLY LABELED AS A WILL
      3. MODELS OR INSTRUCTION LETTERS
      4. EXTRANEOUS EVIDENCE OF TESTAMENTARY INTENT
   C. Testamentary Capacity - Who Can Make a Will
      1. STATUTORY PROVISION
      2. JUDICIAL DEVELOPMENT OF THE "SOUND MIND" REQUIREMENT
         a. Five Part Test--Current Rule
         b. Old Four Part Test--No Longer the Law
         c. Lucid Intervals
         d. Lay Opinion Testimony Admissible
         e. Prior Adjudication of Insanity--Presumption of Continued Insanity
         f. Subsequent Adjudication of Insanity--Not Admissible
         g. Comparison of Testamentary Capacity with Contractual Capacity
            (1) Contractual Capacity in General
            (2) Testamentary and Contractual Capacity Compared
         h. Insane Delusion
            (1) Examples
            (2) Delusion Must Have no Basis in Fact
            (3) Delusion Must Affect Will Provisions
   D. Execution Requirements
      1. SUMMARY
         a. Statutory Provision
         b. Self-Proved Requirements Need Not Be Satisfied
         c. Substantial Compliance
      2. SIGNED BY TESTATOR
         a. Handwriting Not Necessarily Required
         b. Initials by Testator
         c. Mark by Testator
         d. Signature Written by Another Person
         e. Forged Signature
         f. Mark by Testator Combined with Signature by Another Person
         g. Signature in Body of Will
         h. Signing Only Self-Proving Affidavit
      3. ATTESTED AND SUBSCRIBED BY TWO CREDIBLE WITNESSES
         a. Attestation
         b. Order of Signing
         c. Number of Witnesses
            (1) Texas Statutory Requirement
            (2) Signature by More Than Two Witnesses
         d. Credibility of Witnesses; Interested Witnesses
            (1) Meaning of "Credible"
            (2) Executor as Subscribing Witness
            (3) Beneficiary as Subscribing Witness
            (4) Interested Witness Statute
            (5) Corroboration of Testimony of Interested Witness-Old Law
            (6) Corroboration of Testimony of Interested Witness-Current Law
            (7) Proof of Witness's Credibility
III. REVOCATION

A. By Subsequent Writing
   1. STATUTORY "LIKE FORMALITIES" REQUIREMENT
      a. General Rule ................................................. 17
      b. Revoking Instrument Need not be Probated or even Probatable ........................................... 17
   2. LANGUAGE IN WRITING SUFFICIENT TO CONSTITUTE REVOCATION ........................................... 17
   3. IMPLIED PARTIAL REVOCATION ................................................................... 17

B. By Physical Act

II. UPHOLDING VALIDITY OF A WILL IN A WILL CONTEST

A. Lack of Testamentary Capacity and Insane Delusion; Burden of Proof ................................................................. 11
B. Undue Influence
   1. LEGAL TEST .................................................................. 11
   2. BURDEN OF PROOF .......................................................... 12
   3. RELEVANT FACTORS ............................................................ 12
C. Fraud .................................................................................. 12
D. Mistake ................................................................................ 13
   1. MISTAKE IN THE FACTUM ...................................................... 13
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      b. Mistake in Contents ................................................................. 13
         (1) Plain Meaning or Omission ......................................................... 13
         (2) Latent Ambiguity .................................................................. 13
         (3) Mistaken Insertion ................................................................. 13
   2. MISTAKE IN THE INDUCEMENT ............................................. 13
E. Testator Did Not Know Contents of Will
   1. GENERAL RULE ................................................................. 14
   2. PRESUMPTION OF KNOWLEDGE OF CONTENTS ................. 14
   3. SUSPICIOUS CIRCUMSTANCES REBUT PRESUMPTION ............. 14
   4. BURDEN OF PROOF .............................................................. 14
F. Will Subsequently Revoked ................................................................. 14
G. Improper Execution ................................................................... 14
H. Prior Acceptance of Benefits by Contestant ................................................................. 14
I. Recovery of Attorney’s Fees
   1. BY EXECUTOR .................................................................. 15
   2. BY BENEFICIARIES ............................................................... 15
   3. Good Faith Requirement ........................................................... 15
J. Attorney Liability
   1. CURRENT TEXAS LAW--BARCEO v. ELLIOTT .......... 15
   2. PRIOR TEXAS CASES ............................................................. 16
   3. OTHER STATES ..................................................................... 16
K. Proceedings Involving Charitable Trusts ................................................................. 16

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ANATOMY OF A WILL

SCOPE OF PRESENTATION

The outline is divided into four major parts.

Part 1  Nutshell of Substantive Law Regarding Validity of a Will. Part 1 presents a "nutshell" discussion of substantive wills law doctrines regarding the validity and legal effectiveness of a last will and testament.

Part 2  Specific Will Provisions. The typical estate planning client's first comments regarding the estate planning process often are: "I only need a simple will." Therefore, it is important to understand the substantive law reasons that particular clauses are needed in wills. Part 2 reviews various specific provision contained in wills, and summarizes will law, probate law and trust law doctrines affecting the specific provisions.

Part 3  Coordinating Nonprobate Assets. Part 3 briefly describes beneficiary designations for coordinating life insurance proceeds and death benefits from employee benefit plans with the provisions in the will.

Part 4  Appendix. Part 4 contains a will form checklist and samples of basic wills.

PART 1. NUTSHELL OF SUBSTANTIVE LAW REGARDING VALIDITY OF A WILL

I. FUNDAMENTAL REQUIREMENTS OF A WILL

A. What Is a "Will"?

1. **Generally.** Broadly stated, a "will" is the legal declaration of a person's intentions which he or she wills to be performed after his or her death. "A will is generally defined as an instrument by which a person makes a disposition of his property to take effect at his death, and which by its own nature is ambulatory and revocable during his lifetime." In re Estate of Brown, 507 S.W.2d 801, 803 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.). While clearly not an advisable practice, a single document may be drafted to serve as both a will and another legal instrument. See Calhoun v. Killian, 888 S.W.2d 51 (Tex. App.--Tyler 1994, writ denied) (single document qualified as both a will and a lease); compare Dickerson v. Brooks, 727 S.W.2d 652, 654 (Tex. App.--Houston [1st. Dist.] 1987, writ ref'd, n.r.e.) (single instrument qualified as a promissory note and a non testamentary transfer under Texas Probate Code § 450(a); therefore, transfer at death was effective notwithstanding lack of donor's signature).

The Texas Probate Code clarifies the breadth of the term "Will" as follows:

"'Will' includes Codicil; it also includes a testamentary instrument which merely: (1) appoints an executor or guardian; (2) directs how property may not be disposed of; or (3) revokes another will." TEX. PROB. CODE ANN. § 3(ff) (Vernon Supp. 2002).

2. **Origin of the Term "Last Will and Testament".** The origin of the term "Last Will and Testament" itself is interesting. A common belief is that the term "Will," being an old English word, was used by the king's common law courts, who administered real property, and that the term "Testament," being a word of Latin origin, was used by Latin-trained ecclesiastical courts, which administered personal property. However, there is evidence that these common stated assumptions are incorrect, and that the words have been used interchangeably as far back as the English records go, even before the development of the Court of Chancery. See DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 331 (1963). Professor Mellinkoff's theory is that the phrase "Last Will and Testament" is traceable to the English law's custom of doubling words of English origin with synonyms of French or Latin origin (free and clear, had and received, etc.).

3. **Summary of Basic Requirements.** The basic requirements of a will are:

- It must identify the testator;
- It must be written with "testamentary intent";
• The testator must have "testamentary capacity" to execute a will (i.e., over eighteen years of age and of sound mind); and

• The will must be executed with the requisite testamentary formalities.

B. Testamentary Intent

1. GENERALLY. The testamentary intent requirement is not statutory, but is required under a well-developed body of case law. See generally Edward W. Bailey, Texas Practice - Texas Law of Wills §§ 221-226 (1968). "The animus testandi does not depend upon the maker's realization that he is making a will, or upon his designation of the instrument as a will, but upon his intention to create a revocable disposition of his property to take effect after his death. It is essential, however, that the maker shall have intended to express his testamentary wishes in the particular instrument offered for probate." Hinson v. Hinson, 280 S.W.2d 731, 733 (Tex. 1955).

2. INSTRUMENT CLEARLY LABELED AS A WILL. Typically, there will be no question regarding the testamentary intent of a testator who signs an instrument that is clearly labeled as a will and is in the general form of a will. However, an instrument in the form of a will is not executed with testamentary intent where it is executed under compulsion, merely as part of a ceremonial, or for purposes of deception. See Shiels v. Shiels, 109 S.W.2d 1112, 1115 (Tex. Civ. App.--Texarkana 1937, no writ) (instrument labeled as a will denied probate where the instrument was signed solely for the purpose of complying with requirements to enter into a lodge, but testator told witnesses that he did not want to make a will and signed the instrument only after being told he would be able to revoke it after the completion of the initiation).

3. MODELS OR INSTRUCTION LETTERS. Numerous cases have indicated that letters directing the preparation of a will or codicil may not be probated as the person's will. See Price v. Huntsman, 430 S.W.2d 831, 833 (Tex. Civ. App.--Waco 1968, writ ref'd n.r.e.) ("writings were not themselves intended to be her will or codicil, but were instructions or directions to her attorney to prepare a new will or codicil"). These cases are merely a corollary to the doctrine that the writer must manifest in the writing an intent to make a testamentary disposition of property "by that particular instrument."

4. EXTRANEOUS EVIDENCE OF TESTAMENTARY INTENT. Extraneous evidence is admissible to show testamentary intent only if the instrument itself that is offered for probate contains language evidencing testamentary intent, but is ambiguous on this point. Straw v. Owens, 746 S.W.2d 114, 117 (Tex. Civ. App.--Fort Worth 1947, writ ref'd n.r.e.) (extraneous evidence inadmissable because proposed instrument did not contain language of a testamentary nature).

C. Testamentary Capacity - Who Can Make a Will

1. STATUTORY PROVISION. Section 57 of the Texas Probate Code sets forth a two part test for testamentary capacity. The first component is a status and age requirement: In order to have testamentary capacity, the individual must (i) have attained eighteen years of age, or (ii) be or have been lawfully married, or (iii) be a member of the armed forces of the United States or of the auxiliaries thereof or of the maritime service. Tex. Prob. Code Ann. § 57 (Vernon 1980). Whether a particular individual satisfies this objective test is rarely an object of much controversy.

The second requirement of Section 57 is that the testator be "of sound mind." Tex. Prob. Code Ann. § 57 (Vernon 1980). This subjective component of the testamentary capacity test is the inquiry relevant to this article and is a frequent object of controversy. Frequently, the reporting cases simply reference the question of the testator's sound mind as one of "testamentary capacity," without mention of the status and age component.

2. JUDICIAL DEVELOPMENT OF THE "SOUND MIND" REQUIREMENT

a. Five Part Test--Current Rule. In order for an individual to be of sound mind, the evidence must support a jury finding that the individual possesses the following characteristics:

• Sufficient ability to understand the business in which he is engaged;

• Sufficient ability to understand the effect of his act in making the will;

• The capacity to know the objects of his bounty;
• The capacity to understand the general nature and extent of his property; and
• "memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least their obvious relation to each other, and to be able to form a reasonable judgment as to them."

Prather v. Mcclelland, 13 S.W. 543 (Tex. 1890).

b. Old Four Part Test--No Longer the Law. Numerous earlier decisions of the courts of civil appeals have approved a short form definition of testamentary capacity that ignores the fifth "memory requirement." See, e.g., Gayle v. Dixon, 583 S.W.2d 648, 650 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.). However, the prudent practitioner should not attempt to rely on these cases.

One commentator has suggested that the fifth requirement is very important, and that if the testator is not able to realize that a relationship exists between the separate elements, he "is probably not competent to make a will." WILLIAM MARSCHALL, Will Contests, Texas Est. Administration 204 (1975). Failure to use the long form will, at the very least, present an argument for appeal. See Gayle v. Dixon, supra; 9 LEOPOLD & BEYER, Texas Practice: Texas Law of Wills § 16.2 (2d ed. 1992) ("the safer case would seem to be to use the long form, where it is requested by either party at the trial, or where either party objects to omission of the final element").


c. Lucid Intervals. Testamentary capacity on the day the will was executed is all that is required. Croucher v. Croucher, 660 S.W.2d 55 (Tex. 1983) (medical evidence of incompetency could be considered regarding lack of capacity where the evidence was probative of testator's lack of testamentary capacity on the date of execution of the will). However, evidence of incapacity at other times is generally relevant. Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968) (evidence of incompetency at other times is admissible only if it demonstrates that the condition persists and has some probability of being the same condition which obtained at the time of the will's making); Lowery v. Saunders, 666 S.W.2d 226, 236 (Tex. App.--San Antonio 1984, writ reff'd n.r.e.); Kenney v. Estate of Kenney, 829 S.W.2d 888, 890 (Tex. App.--Dallas 1992, no writ). Accord Hammer v. Powers, 819 S.W.2d 669, 672 (Tex. App.--Fort Worth 1991, no writ) (evidence was sufficient to show witnesses' personal knowledge of testamentary capacity where witnesses observed testatrix on the day the will was executed but not at any other time; summary judgment admitting will to probate upheld); compare Alldriggs v. Spell, 774 S.W.2d 707, 710 (Tex. App.--Texarkana 1989, no writ) (evidence of incapacity at other times supports jury finding of lack of testamentary capacity notwithstanding direct evidence of capacity on the day the will was executed).

In In Re Neville, 67 S.W.3d 522 (Tex. App.--Texarkana 2002, no pet. h.), the proponents of the will, citing Lee v. Lee, supra, asserted that evidence of incapacity at other times may only be considered when there is no direct evidence of the testator's testamentary capacity on the date the will is actually signed. Rejecting this analysis, the court stated as follows.

It has always been the rule in Texas that, although the proper inquiry is whether the testator had testamentary capacity at the time he executed the will, the court may also look to the testator's state of mind at other times if those times tend to show his state of mind on the day the will was executed. Evidence pertaining to those other times, however, must show that the testator's condition persisted and probably was the same as that which existed at the time the will was signed. Whether the evidence of testamentary capacity is at the very time the will was executed or at other times goes to the weight of the testimony to be assessed by the fact finder.

In Re Neville, 67 S.W.3d at 525 (emphasis in original).

d. Lay Opinion Testimony Admissible. Lay opinion testimony of witnesses' observations of the testator's conduct, either prior or subsequent to the execution of the will, is admissible to show incompetency. Kenney v. Estate of Kenney, 829 S.W.2d 888, 890 (Tex. App.--Dallas 1992, no writ), citing Campbell, above, 774 S.W.2d at 719.
e. Prior Adjudication of Insanity--Presumption of Continued Insanity. A prior adjudication of insanity generally raises a presumption of continued insanity until the status of that person has been changed by a subsequent judgment of the county court in a proceeding authorized for that purpose. \textit{Bogel v. White}, 168 S.W.2d 309, 311 (Tex. Civ. App.--Galveston 1942, writ ref'd w.o.m.). A prior adjudication of insanity is admissible but not conclusive, and the presumption of continuing insanity may be rebutted. Further, a prior adjudication of mental illness is also admissible, but not conclusive. \textit{See Haile v. Holczclaw}, 414 S.W.2d 916 (Tex. 1967). In \textit{Haile}, fifteen days before the date he executed his will, the testator was determined to be mentally ill. He was committed to a mental hospital, and the court appointed a temporary guardian for him. Nevertheless, the testator was found to have testamentary capacity. \textit{Haile} was decided under TEX. REV. CIV. STAT. ANN. art. 5547-83, Acts 1957, p. 505, ch. 243, § 83, the predecessor to HEALTH AND SAFETY CODE ANN. § 576.002 (Vernon 1992). The current statute, unlike the statute applicable in \textit{Haile}, specifically provides that the provision of mental health services does not limit the patient's mental capacity, the revised statutory language does not seem to alter the rule of admissibility. This statement of the general wisdom is certainly accurate, but it seems an oversimplification of the rule inasmuch as it implies that contractual capacity and testamentary capacity are substantively different.

f. Subsequent Adjudication of Insanity--Not Admissible. According to the Texas Supreme Court, an adjudication of insanity subsequent to the time of the execution of a will is not admissible. \textit{See Carr v. Radkey}, 393 S.W.2d 806 (Tex. 1965) (appointment of guardian twenty-one days subsequent to execution of will inadmissible). \textit{Compare Stephens v. Coleman}, 533 S.W.2d 444 (Tex. Civ. App.--Fort Worth 1976, writ ref'd n.r.e.). In \textit{Stephens}, the trial court admitted evidence that, three days after the date he signed his will, the testator was adjudged incompetent to handle his affairs. The appellate court did not discuss whether this evidence was properly admissible, but simply noted that this subsequent adjudication did not raise a presumption of incapacity on the date the will was signed. The court upheld the trial court's finding that the testator had testamentary capacity. \textit{See also 9 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 16.5 (2d ed. 1992)}.

g. Comparison of Testamentary Capacity with Contractual Capacity

(1) Contractual Capacity in General. Section 39, Contracts, Texas Jurisprudence provides a concise summary of contractual capacity:

"Mental capacity" may be defined as the ability of a person to understand the nature and effect of the acts in which he or she is engaged and the business that he or she is transacting. One of the tests of the right to rescind or avoid a contract is whether the contracting party, at the time of making the agreement, possessed sufficient mental capacity to know and understand the nature and consequences of his or her act in entering into the contract. However, mere mental weakness is not in itself sufficient to incapacitate a person; and mere nervous tension, anxiety, or personal problems do not amount to mental incapacity to enter into contracts. Moreover, the fact that one has a firm belief in spiritualism is not sufficient to incapacitate a person, especially where such belief in founded on reading and other evidence deemed by the person to be sufficient. On the contrary, the disposition of property and the conduct of business affairs will be upheld where a grantor, though old and infirm physically and mentally, nevertheless responds to tests that are applicable generally to people in the ordinary experiences of life. Indeed, it is presumed by law that every party to a valid contract had sufficient mental capacity to understand his or her legal rights with respect to the transaction. The burden of proof with regard to overcoming this presumption rests on the person who asserts the contrary.

Where the evidence presented is sufficient to raise an issue as to the mental capacity of a party to enter into a contract, the question whether the party possessed the requisite capacity is one of fact for the jury. However, the quantum of intelligence or mental capacity to make a valid contract is a question of law.


(2) Testamentary and Contractual Capacity Compared. Less mental capacity is required for making a will than for entering into a contract. \textit{Vance v. Upson}, 1 S.W. 179 (Tex. 1886); \textit{Hamill v. Brashear}, 513 S.W.2d 602, 607 (Tex. Civ. App.--Amarillo 1974, writ ref'd n.r.e.). This statement of the general wisdom is certainly accurate, but it seems an oversimplification of the rule inasmuch as it implies that contractual capacity and testamentary capacity are substantively different.

A review and comparison of the respective authorities supports the view that the difference between contractual capacity and testamentary capacity is purely quantitative, not qualitative. Fundamentally, both tests look to the capacity of the individual to appreciate what he is doing and to understand the nature and effect of what he is doing. It is because of the differing nature and effect of contracts and wills that the requisites of this singular concept are different in the two circumstances.
Because a will has no legal effect until death and remains revocable during life, its execution cannot have any effect on the testator's own circumstances. The testator, therefore, need not have the capacity to understand the effect that signing a will has on his own circumstances (as there isn't any) in order to have the capacity to understand the effect of his act of making a will. On the other hand, the testator does need the capacity to know the objects of his bounty and the nature and extent of his property if he is to appreciate the nature and consequence of his making a disposition of his property at his death.

**h. Insane Delusion**

**General Rule.** Even though the general requirements of testamentary capacity described above are satisfied, a will or an affected portion of a will may be held invalid on the basis of an "insane delusion" if (1) the testator was laboring under the belief of a state of supposed facts that do not exist, and (2) which no rational person would believe. *Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964). There is *some* authority that the second requirement may be satisfied only by showing that an organic brain defect or a functional disorder of the mind existed. *Spillman v. Estate of Spillman*, 587 S.W.2d 170 (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.). Compare *Oechsner v. Ameritrust*, 840 S.W.2d 131, 134 (Tex. App.--El Paso 1992, writ denied) (court embraced Texas' 100 year old 2 pronged definition of insane delusion, declining to adopt more detailed definition from other jurisdictions incorporating reference to, *inter alia*, organic brain defect and function disorder of the mind).

1. **Examples.** Examples of insane delusions are described by the court in *Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964):

   Examples of such false beliefs are cases where the "testator believed, in spite of the fact that all the evidence was to the contrary, that his son had been to the planet Mars and had conspired against the United States and should therefore be disinherited; or that his wife was plotting to kill him; or that his daughter had murdered his father; or that he was hated by his brothers and sisters who were bent on persecuting him."

2. **Delusion Must Have no Basis in Fact.** "A mere mistaken belief or an erroneous or unjust conclusion is not an insane delusion if there is some foundation in fact or some basis on which the mental operation of the testator may rest, even though the basis may be regarded by others as wholly insufficient." *Navarro v. Rodriguez*, 235 S.W.2d 665, 668 (Tex. Civ. App.--San Antonio 1950, no writ) (quoting from 68 C.J. 433, *Wills*, § 30). The practitioner hoping to defeat a will on grounds of insane delusion should endeavor to specifically rebut any express or implicit facts or circumstances that might constitute a basis for the testator's belief. See *Orozco v. Orozco*, 917 S.W.2d 70 (Tex. App.--San Antonio 1996, writ denied) (testatrix believed that an individual was her son; the jury found that testatrix's belief was mistaken but also found that testatrix had testamentary capacity; held: because record contained no evidence that testatrix was *not* pregnant and did *not* give birth on the date of the individual's birth, the two jury findings were consistent).

3. **Delusion Must Affect Will Provisions.** The clearly deluded client does not necessarily lack testamentary capacity. Rather, the delusion must affect the provisions in the will in order for the will to be invalidated based on insane delusion. *Bauer v. Estate of Bauer*, 687 S.W.2d 410, 411-12 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). The mere appearance of a delusion does not in and of itself prohibit a finding of testamentary capacity. *Campbell v. Groves*, 774 S.W.2d 717, 719 (Tex. App.--El Paso 1989, writ denied) ("A person could appear bizarre or absurd with reference to some matters and still possess the assimilated and rational capacities to know the objects of his bounty, the nature of the transaction in which he was engaged and nature and extent of his estate on a given date").

**D. Execution Requirements**

1. **SUMMARY**

   **a. Statutory Provision.** Section 59 of the Texas Probate Code contains three general execution requirements for wills: (1) the will must be signed by the testator or by another person at his direction and in his presence; (2) the will must be attested by two or more credible witnesses over fourteen years of age; and (3) the witnesses must sign in the presence of the testator. TEX. PROB. CODE ANN. § 59 (Vernon Supp. 2002). The latter two items are not required for holographic wills (i.e., entirely in the testator's handwriting; see Part II.D.7 at page 15 of this Outline).

   **b. Self-Proved Requirements Need Not Be Satisfied.** Section 59 also provides that a will may be made self-proved, and sets forth the requirements for a valid self-proving affidavit. TEX. PROB. CODE ANN. § 59 (Vernon Supp. 2002). However, a will need not be executed with the additional requirements for a self-proving affidavit in order to be valid. "The only purpose of the form and contents of the Section 59 self-proving affidavit is to admit a will to probate without, and as an alternative to resorting to, the testimony of a subscribing witness." *Broach v. Bradley*, 800 S.W.2d 677 (Tex. App.--Eastland 1990, writ denied), citing *Boren v.*
If a will is self-proved, the proponent has prima facie established that the will was executed with the requisite testamentary formalities. **Bracewell v. Bracewell**, 20 S.W.3d 14, 26 (Tex. App.--Houston [14th Dist.] 2000, no pet. h). In the absence of evidence or argument to rebut the prima facie showing, no further proof of the execution is necessary. **Id.**

2. SIGNED BY TESTATOR


b. Initials by Testator. "A signature by initials is sufficient to execute the instrument as a will." **Trim v. Daniels**, 862 S.W.2d 8, 10 (Tex. App.--Houston [1st Dist.] 1992, writ denied).


d. Signature Written by Another Person. The testator's signature may be written by another person at the testator's direction and in his presence. The testator's "direction" may be indicated by express words, an affirmative response to a question, or by mere gestures. See 9 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 18.6 (2d ed. 1992). However, if the testator does not specifically indicate in some manner that someone should sign for him, the will cannot be probated. E.g., **Muhlbauer v. Muhlbauer**, 686 S.W.2d 366, 376-77 (Tex. App.--Fort Worth 1985, no writ) (wife guided husband's hand as he signed will, but witnesses to the execution could not remember whether testator specifically asked his wife to help him; court denied probate of will, observing that mere acquiescence in help from wife does not satisfy the "at his direction" requirement in Section 59 of the Probate Code).

Effective as of September 1, 1997, Section 406.0165 of the Texas Government Code provides an additional method for signing a document. A notary may sign for an individual who is physically unable to sign or make a mark on the document presented for notarization if directed by the individual to sign his name. The notary must sign the individual's name in the presence of a witness who has no legal or equitable interest in any real or personal property that is the subject of, or is affected by, the document being signed. The notary must require identification from the witness just as if the witness was the person making the acknowledgment and the notary must write beneath his signature the following or substantially similar to the following: "Signature affixed by notary in the presence of (name of witness), a disinterested witness, under Section 406.0165, Government Code."


e. Forged Signature. Obviously, a purported will containing a mere forgery of the testator's signature cannot be probated. **Aston v. Lyons**, 577 S.W.2d 516, 519 (Tex. Civ. App.--Texarkana 1979, no writ).

f. Mark by Testator Combined with Signature by Another Person. In many of the Texas cases where another person signed for the testator, the testator also made his mark on the will. E.g., **Phillips v. Najar**, 901 S.W.2d 561 (Tex. App.--El Paso 1995, no writ) (use of rubber stamp by third person to affix testatrix' signature, in accordance with her instructions, did not render her will invalid; stamp complied with procedure allowing testatrix to instruct another person to sign name by their hand and, in any event, handwritten mark by testatrix near stamp was valid substitute for signature); **Davenport v. Minshew**, 104 S.W.3d 951 (Tex. Civ. App.--San Antonio 1997, writ ref'd).

g. Signature in Body of Will. There is no Texas requirement that the will be signed "at the foot or end thereof" (as required by the English Wills Act of 1837 and by various American jurisdictions). The historic landmark English case of **Lamayne v. Stanley**, decided only four years after the enactment of the original Statute of Frauds, has been cited in several Texas cases recognizing the validity of a signature in the body of a will. However, the only Texas cases applying the doctrine involve unattested

h. **Signing Only Self-Proving Affidavit.** The self-proving affidavit is not a part of the will and under prior law, if the testator failed to sign the will, his signature on the self-proving affidavit was not sufficient and the will would not be admitted to probate. *Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1985); *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).

Effective as of September 1, 1991, Section 59 provides that "[a] signature on a self-proving affidavit is considered to be a signature to the will if necessary to prove that the will was signed by the testator or witness, or both, but in that case, the will may not be considered self-proved." *Tex. Prob. Code Ann.* § 59 (Vernon Supp. 2002). Thus, if the testator signs only the self-proving affidavit, the will can still be admitted to probate, but the conditions of Sections 84(b) and 88(b) must be satisfied as if the will were not self-proved. Even if the will at issue was executed prior to September 1, 1993, this "anti-Boren" amendment to Section 59 will be applicable where the date of death is after September 1, 1993. *Bank One, Texas v. Ikard*, 885 S.W.2d 183, 186 (Tex. App.--Austin 1994, writ denied).

3. **ATTES TED AND SUBSCRIBED BY TWO CREDIBLE WITNESSES**

a. **Attestation.** Section 59 of the Probate Code requires that the will "be attested by two or more credible witnesses ... who shall subscribe their names thereto." *Tex. Prob. Code Ann.* § 59 (Vernon Supp. 2002). This language clearly indicates that the witnesses must both "attest" and "subscribe" (or sign) the will. The attestation requirement has been described as follows:

> Attestation of a will consists in the act of witnessing the performance of the statutory requirements to a valid execution. This is done by the witnesses signing their names to the instrument in the presence of the testator.


Typically, an "attestation clause" is inserted directly preceding the witnesses' signatures reciting that the statutory execution requirements have been satisfied, but no such attestation clause is required.

b. **Order of Signing.** If the witnesses must attest performance of the statutory requirements to a valid execution, is it necessary that the testator sign the will in their presence before they sign the will? Texas cases clearly indicate that the will need not be signed by the testator in the presence of the attesting witnesses. *Matter of Estate of McGrew*, 906 S.W.2d 53 (Tex. App.--Tyler 1995, writ denied) (testator need not sign will in presence of witnesses and, thus, fact that testator executed challenged will two years before witness signed will did not render will invalid); *Venner v. Layton*, 244 S.W.2d 853 (Tex. Civ. App.--Dallas 1951, writ ref'd n.r.e.). Furthermore, several Texas cases have suggested that a will might be valid even if signed by the testator out of the witnesses' presence after the witnesses had signed. *Ludwick v. Fowler*, 193 S.W.2d 692, 695 (Tex. Civ. App.--Dallas 1946, writ ref'd n.r.e.); *Guest v. Guest*, 235 S.W.2d 710, 713 (Tex. Civ. App.--Fort Worth 1950, writ ref'd n.r.e.). However, the general rule in American jurisdictions requires that the testator sign before the attesting witnesses subscribe their names, and the careful planner should not place too much reliance on the two cited Texas cases.

c. **Number of Witnesses.**

1. **Texas Statutory Requirement.** Section 59 requires "two (2) or more credible witnesses above the age of fourteen (14) years." *Tex. Prob. Code Ann.* § 59 (Vernon Supp. 2002). While the will may be "proved" for probate by the testimony of any one of the attesting witnesses (see *Tex. Prob. Code Ann.* § 84(b)(1) (Vernon 1980)), two competent witnesses are required to have a valid will. Interestingly, one Texas case has recognized the notary's signature as constituting a witness's signature. *Reagan v. Bailey*, 626 S.W.2d 141 (Tex. App.--Fort Worth 1981, writ ref'd n.r.e.) (notary signed and notarized an acknowledgment following the testatrix's signature line, and one other witness signed; the codicil was admitted to probate).

2. **Signature by More Than Two Witnesses.** Texas attorneys differ in their practice as to whether two or three witnesses are used in execution ceremonies. Several states require three witnesses to have a valid will. However, all of the states requiring three witnesses have statutory provisions validating wills executed in accordance with the statutes of the state of execution. *Thomas Atkinson, Wills* 308, 350 (2d ed. 1953). Although the testator may move to another state or own land in another state before his death, some writers question the advisability of using more than two witnesses because the statutes of some states require that all attesting witnesses testify on probate or be accounted for. *Id.* at 351.
d. Credibility of Witnesses: Interested Witnesses. As noted above, Section 59 of the Probate Code requires that the will "be attested by two or more credible witnesses." TEX. PROB. CODE ANN. § 59 (Vernon Supp. 2002) (emphasis added).

(1) Meaning of "Credible". For purposes of Section 59 of the Probate Code, "the word 'credible' . . . does not mean 'worthy of belief', but rather, 'competent' or 'able to tell about the attestation."' Lehmann v. Krbal, 285 S.W.2d 179, 180 (Tex. 1955). See also Triestman v. Kilgore, 838 S.W.2d 547 (Tex. 1992) (For purposes of Section 59, "credible" and "competent" are synonymous). Thus, as a threshold, every witness to the will must have sufficient mental capacity to be able to observe and testify as to the proper execution of the will. See 9 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 18.14 (2d ed. 1992).

(2) Executor as Subscribing Witness. A person named as an executor in a will may nevertheless be a competent attesting witness. Connor v. Purcell, 360 S.W.2d 438 (Tex. Civ. App.--Eastland 1962, writ ref'd n.r.e.). However, most careful planners avoid using a named executor as a witness.

(3) Beneficiary as Subscribing Witness. Under Texas law, the fact that an individual who is a beneficiary also signs the will as a witness does not in and of itself render the will invalid. Scandurro v. Beto, 234 S.W.2d 695, 697 (Tex. Civ. App.--Waco 1950, no writ) ("Nor is a will void because attested by one to whom a bequest is made."). cited with approval, Triestman, above, 838 S.W.2d at 547. However, prior to the effective date of the 1955 Texas Probate Code, "[a] will [was] still invalid unless attested by two disinterested witnesses who take nothing under it." Scandurro, above, 234 S.W.2d at 697 (emphasis added).

(4) Interested Witness Statute. Section 61 of the Texas Probate Code provides that, where a will contains a bequest to an individual who is also a witness, "if the will cannot be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made." TEX. PROB. CODE ANN. § 61 (Vernon 1980). This statute appears grounded in the public policy "to uphold the rights of a testator to make such dispositions and prevent their failing because of the incompetence of the witnesses." Scandurro, above, 234 S.W.2d at 697.

Note, however, that the forfeiture is not absolute. If the witness would have been entitled to an intestate share of the estate, he is entitled to so much of the intestate share as will not exceed the value of the bequest made to him in the will). TEX. PROB. CODE ANN. § 61 (Vernon 1980).

(5) Corroboration of Testimony of Interested Witness-Old Law. Under TEX. REV. CIV. STAT. art. 4873 (1879), the predecessor to Section 62 of the Probate Code, a will could be proved by the testimony of the subscribing witnesses, even where a subscribing witness was also a beneficiary, provided that the witnesses' testimony was "corroborated by the testimony of one or more other disinterested and credible persons . . . in which event the bequest to such subscribing witness [would] not be void." (emphasis added).

This language was interpreted by the courts as requiring that the testimony of the beneficiary-witness be corroborated by someone other than the other, disinterested witness. Fowler v. Stagner, 55 Tex. 393 (1881) (gift to one of only two attesting witnesses voided under predecessor to Probate Code § 61); Scandurro v. Beto, 234 S.W.2d 695 (Tex. Civ. App.--Waco 1950, no writ) (Fowler followed on almost identical facts); see also 9 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 18.31-18.37 (2d ed. 1992) detailing the historical development of the interested witness rule in Texas.

(6) Corroboration of Testimony of Interested Witness-Current Law. Since 1955 the Probate Code has simply required that the testimony of a beneficiary-witness be corroborated "by one or more disinterested and credible persons who testify that the testimony of the subscribing [beneficiary-witness] is correct and such [beneficiary-witness] shall not be regarded as an incompetent or non-credible witness under Section 59 of this Code." TEX. PROB. CODE ANN. § 62 (Vernon 1980).

By eliminating the qualifying adjective "other", at least one commentator has concluded that "the Code leaves no ground for the inference that the testimony of both attesting witnesses, corroborated by some person other than an attesting witness, would be required to save the gift to an attesting witness." 9 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 18.37 (2d ed. 1992). This conclusion is consistent with the Interpretive Commentary to § 62, reproduced in Wilkerson v. Slaughter, 390 S.W.2d 372, 373 (Tex. Civ. App.--Texarkana 1965, writ dism'd), which states inter alia that "the last clause in this Section is intended to repudiate the holding in Scandurro] that the testimony of the disinterested witness was not sufficient corroboration of the testimony of the [beneficiary-witness] and to incorporate into the code the contrary holding in Ridgeway v. Keene" 225 S.W.2d 647 (Tex. Civ. App.--Dallas 1949, writ ref'd, n.r.e.).

Nevertheless, the prudent practitioner will continue to avoid beneficiary-witnesses at all costs. Section 62 of the Probate Code does not prohibit corroboration by an attesting witness but neither does it specifically authorize it. Further, no Texas case has been found that holds that the testimony of a disinterested attesting witness is sufficient corroboration of the beneficiary-witness's testimony. Rather, both of the relevant cases found used the testimony of an individual other than an attesting disinterested witness to corroborate the testimony of the beneficiary-witness. In Ridgeway v. Keene, 225 S.W.2d 647 (Tex. Civ. App.--
The witnesses' signatures need not necessarily appear on the same page as the decision the court stated flatly:  "A competent witness to a will is one who receives no pecuniary benefit under its terms.  (citations omitted) Conversely, a person interested as taking under a will is incompetent to testify to establish it."  838 S.W.2d at 547.  As Scandurro corroborated, a beneficiary-witness is a competent witness under Section 59).

requirement and set aside the probate of a non self proved will where, "the will itself constitutes some evidence that the witnesses were credible."  838 S.W.2d at 547.  Thus, it seems safe to rely upon this aspect of the appellate court's decision.

The risk is increased further by the Supreme Court case of Triestman v. Kilgore, 838 S.W.2d 547 (Tex. 1992). In that case the court denied the writ of error, thus upholding the appellate court decision denying probate. However, in its per curiam decision the court stated flatly:  "A competent witness to a will is one who receives no pecuniary benefit under its terms. (citations omitted) Conversely, a person interested as taking under a will is incompetent to testify to establish it."  838 S.W.2d at 547. As support for its second statement, the Supreme Court cited to, inter alia, Fowler, above, which was presumably repudiated, along with Scandurro, by the 1955 Probate Code's new Section 62 (eliminating the "other" modifier and specifically providing that, if corroborated, a beneficiary-witness is a competent witness under Section 59).

(7) Proof of Witness's Credibility. The appellate court decision in Triestman, above, focused on the credibility requirement and set aside the probate of a non self proved will where, inter alia, there had been no evidence presented to the probate court concerning the "credibility and competence" of the attesting witnesses. Estate of Hutchins, 829 S.W.2d 295 (Tex. App.--Corpus Christi 1992), writ denied per curiam, Triestman v. Kilgore, 838 S.W.2d 547 (Tex. 1992). The proponent of the will had also failed to introduce evidence that the testator was of sound mind on the date that the will was executed. Noting that the facts set out in the attestation clause are admissible as evidence, the court determined that there was evidence that the witnesses were each over the age of 14 years, that they signed at the request of the testator, in his presence and in the presence of each other, and that the testator signed in the presence of the witnesses. Implicitly, then, a prima facia case that the witnesses are credible should be made by including a statement to that effect in the attestation clause.

Even though the appellate decision stood, the Supreme Court expressly disapproved of the appellate court's analysis as to credibility (instead stating that the witnesses were credible simply by virtue of being disinterested). However, the Supreme Court noted that "the will itself constitutes some evidence that the witnesses were credible."  838 S.W.2d at 547. Thus, it seems safe to rely upon this aspect of the appellate court's decision.

e. Place for Witnesses' Signatures. The witnesses' signatures need not necessarily appear on the same page as the testator's signature. Tucker v. Hill, 577 S.W.2d 321 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.). There is no particular place on the will that the witness must sign, as long as the witness signed the will at some place with intent to attest the will.

f. Signing Only Self-Proving Affidavit. The self-proving affidavit is not a part of the will. Under prior law, if a necessary witness signed only the self-proving affidavit, he had not signed the will and the will would not be admitted to probate. Wich v. Fleming, 652 S.W.2d 353, 354 (Tex. 1985) (testator signed at end of will but witnesses only signed self-proving affidavit; will denied probate); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966).

Effective as of September 1, 1991, Section 59 provides that "[a] signature on a self-proving affidavit is considered to be a signature to the will if necessary to prove that the will was signed by the testator or witness, or both, but in that case, the will may not be considered self-proved."  TEX. PROB. CODE ANN. § 59 (Vernon Supp. 2002). Thus, if a witness signs only the self-proving affidavit, the will can still be admitted to probate but the conditions of Sections 84(b) and 88(b) must be satisfied as if the will were not self-proved.

4. WITNESSES SIGN IN PRESENCE OF TESTATOR. Texas cases have applied a "conscious presence" test:

"[T]o be within the testator's presence, the attestation must occur where testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance."  Nichols v. Rowan, 422 S.W.2d 21, 24 (Tex. Civ. App.--San Antonio 1967, writ ref'd n.r.e.).

In one case, the court found that the witness was not in the presence of the testator where the testator signed in a conference room and the witnesses signed in a secretary's office separated by two solid walls from the conference room. The testator could have seen the witnesses sign only by "arising from his chair, walking some four feet to the hallway and then walking about fourteen feet down the hallway to a point where he could have looked through the doorway and seen the witnesses as they signed their names."  Morris v. Estate of C.K. West, 643 S.W.2d 204, 206 (Tex. App.--Eastland 1982, writ ref'd n.r.e.).

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5. REQUIREMENTS OF OTHER STATES. Miscellaneous additional execution requirements under the laws of other states include the following: (1) signature of three witnesses; (2) "publication" of the will by the testator, declaring to the witnesses that they are witnessing his last will and testament; (3) signature by the testator "at the foot or end thereof"; and (4) requirement that witnesses sign in the presence of each other.

6. INTERLINEATIONS.


b. Excessive Revisions May Cause Will to Fail. If alterations may have been made such that the proponent of a will cannot establish the terms of the will at the time it was executed, the will would be denied probate. *Mahan v. Dovers*, 730 S.W.2D 467 (Tex. App.--Fort Worth 1987, no writ) (decedent had habit of changing will by pulling out pages and having them retyped and reinserted; noting that the various pages of the will had a different number of staple holes with the greatest number being in the signature page, the court held proponent of will did not meet his burden to prove that the will offered for probate was the same as the one formally executed by the decedent). Compare *Matter of Estate of McGrew*, 906 S.W.2d 53 (Tex. App.--Tyler 1995, writ denied) (marks on will made by testator's relative, who borrowed will as a form to use for her own, did not render will invalid); *Matter of Estate of Montgomery*, 881 S.W.2D 750, 753 (Tex. App.--Tyler 1994, writ denied) (certain provisions of will had been heavily obliterated by testator subsequent to proper execution; will challenged on grounds, *inter alia*, that will offered was not the same as will as properly executed; will admitted to probate where contestant failed to submit to jury the question of the validity of the attempt to eliminate the obliterated passage).

c. Interlineations During Execution. It follows that if there are any minor revisions or other interlineations made in a will immediately prior to its execution, the ability to prove that they were made before the will is executed becomes critical. The general rule in other jurisdictions is that a presumption arises that any alterations or interlineations were made *after* the execution of the will, and the burden of proof is on the proponent of the will to prove otherwise. See W.W. Allen, *Annotation, Interlineations and Changes Appearing on Face of Will*, 34 A.L.R.2d 619, § 7 (1954); *Freeman v. Chick*, 252 S.W.2d 763 (Tex. Civ. App.--Austin 1952, writ dism'd) (dictum). Indeed, an interlineation into a will drawn in a formal manner by an attorney is particularly suspicious, and the presumption might be particularly applicable in that circumstance. *Id.* at 765. Accordingly, if minor revisions or interlineations are made in a will at the execution ceremony, the testator and all witnesses should date and sign or initial the margin of the will beside the interlineation to assist in overcoming the presumption.

d. Holographic Wills. For holographic wills, an alteration made after the will is signed is treated as a valid revocation of the prior provisions and valid disposition pursuant to the new provisions, with the prior signature being adopted. *Hancock v. Krause*, 757 S.W.2d 117, 120-121 (Tex. App.--Houston [1st Dist.] 1988, no writ) (subsequent substitution of different beneficiary for a specific bequest was effective even though subsequent change was not signed).

7. HOLOGRAPHIC WILL.

a. General Requirements - In Testator's Handwriting and Signed by Him.

Statutory Provision. Section 59 of the Texas Probate Code states that a will is valid if it is (1) "signed by the testator in person or by another person for him by his direction and in his presence" and (2) is "wholly in the handwriting of the testator." TEX. PROB. CODE ANN. § 59 (Vernon Supp. 2002). In a case where a holographic codicil was not signed and an identical typewritten instrument was signed by the testator but not witnessed, the court refused probate of the codicil, holding that the two instruments could not be construed together. *In re Matter of Estate of Jansa*, 670 S.W.2d 767 (Tex. App.--Amarillo 1984, no writ).

(1) Signature Requirement. The law regarding the requirement of the testator's signature on an attested will applies equally to holographic wills, including the rule that the signature need not necessarily appear at the end of the will. See Part 1.L.D.2.g at page 10 of this Outline. “However, while the signature may be informal and its location is of secondary importance, it is still necessary that the maker intend that his name or mark constitute a signature, i.e., that it expresses approval of the instrument as his Will.” *Luker v. Youngmeyer*, 36 S.W.3d 628, 630 (Tex. App.--Tyler 2000, no pet. h.) (testatrix’s use of her name as part of the title of a trust she had previously created was insufficient to constitute a signature to express her approval of the dispositive provisions of the holographic instrument).
"Wholly in Testator's Handwriting" Requirement. The policy supporting the probate of holographic wills is that having a will entirely in the testator's own handwriting affords a safeguard against forgery and fraud which the attestation of witnesses is otherwise thought to provide. If the will consists primarily of the testator's handwriting but also other words typewritten, printed, or written by someone other than the testator, Texas courts apply a "surplusage" rule. The will is entitled to probate if the words not in the handwriting of the testator "are not necessary to complete the instrument in holographic form, and do not affect its meaning." *Maul v. Williams*, 69 S.W.2d 1107, 1109-1110 (Tex. Comm'n App. 1934, holding approved).

Certain other jurisdictions apply an "intent theory" which invalidates an unattested will if the testator "intended" the part not written by him to be a part of his will (even though the language may not affect the provisions of the will). *Atkinson, Wills* 357-59 (2d ed. 1953).

Date Not Required. Unlike certain other American jurisdictions, there is no requirement that a holographic will under Texas law be dated. *Gunn v. Phillips*, 410 S.W.2d 202, 207 (Tex. Civ. App.--Houston 1966, writ ref'd n.r.e.).

b. Testamentary Intent. The holographic will must also satisfy the other general requirements of a will (i.e., that it be written with testamentary intent, and that the testator have testamentary capacity). Many of the reported cases regarding testamentary intent have involved holographic wills. A North Carolina court has held that a holographic will can satisfy the testamentary intent requirement even though it speaks in terms of request (instead of direction) and even though it does not specifically say that it is to take effect at death (provisions for property disposition and funeral arrangements indicated intent that the instrument take effect at death). *Stephens v. McPherson*, 362 S.E. 826 (N.C. App. 1987).

c. Self-Proving Affidavit May Be Used. Section 60 of the Texas Probate Code specifically allows the testator to add a self-proving affidavit to the holographic will at the time of its execution or afterward. *Tex. Prob. Code Ann.* § 60 (Vernon 1980). Otherwise, a holographic will may be proved in probate by two witnesses to the testator's handwriting. *Tex. Prob. Code Ann.* § 84(b) (Vernon 1980). The affidavit must state that it has been "sworn to" by the witnesses and has not merely been "acknowledged" by the witnesses, *Cutler v. Ament*, 726 S.W.2d 605, 607 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.).

d. Construction Problems. The major problem with holographic wills is not their validity, but construction problems that are often generated.


II. UPHOLDING VALIDITY OF A WILL IN A WILL CONTROVERSY

A detailed review of will contests is beyond the scope of this outline, but the outline will briefly summarize the possible grounds upon which a will contest may be instituted.

A. Lack of Testamentary Capacity and Insane Delusion; Burden of Proof.

See Part II.C at page 3 of this Outline for a discussion of testamentary capacity and insane delusion. Under Section 88(b) of the Texas Probate Code, the burden of proof is on the will proponent to show the existence of testamentary capacity. *Tex. Prob. Code Ann.* § 88(b) (Vernon 1980). After the will has been probated, however, the burden of proof is on the contestant. *Cravens v. Chick*, 524 S.W.2d 425, 428 (Tex. Civ. App.--Fort Worth 1975, writ ref'd n.r.e.), 531 S.W.2d 319 (Tex. 1975); *Kenney v. Estate of Kenney*, 829 S.W.2d 888, 890 (Tex. App.--Dallas 1992, no writ). Where the will was not made self proved, testamentary capacity will not be presumed; in order for the will to be admitted to probate there must be at least some evidence that the decedent had testamentary capacity when the will was executed. *State of Hutchins*, 829 S.W.2d 295 (Tex. App.--Corpus Christi 1992), *writ denied per curiam*, *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992) (probate of non self proved will set aside where, *inter alia*, proponent of will did not introduce evidence that testator was of sound mind on the date that the will was executed).

B. Undue Influence

1. LEGAL TEST. The leading Texas Supreme Court case of *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963), lists the following legal requirements for proving the existence of undue influence:

   (1) [T]he existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence.... It cannot be said that every influence exerted by one person on the will of another is undue, for the influence is not undue unless the
free agency of the testator was destroyed and a testament produced that expresses the will of the one exerting the influence.

369 S.W.2d at 922.

The *Rothermel* case and other cases have established that merely showing opportunity to exercise influence, susceptibility of a testator to influence, or the existence of an unnatural disposition are not sufficient to establish the existence of undue influence. See generally *In the Matter of the Estate of M.L. Woods*, 542 S.W.2d 845, 847-48 (Tex. 1976); *Rothermel v. Duncan*, 369 S.W.2d 917, 923 (Tex. 1963); *Broach v. Bradley*, 800 S.W.2d 677, 680-81 (Tex. App.--Eastland 1990, writ denied); *Mackie v. McKenzie*, 900 S.W.2d 445, 449-50 (Tex. App.--Texarkana 1995, writ denied); *Longaker v. Evans*, 32 S.W.3d 725, 732 (Tex. App.--San Antonio 2000, pet. withdrawn by agr.). "Circumstantial evidence which is equally as consistent with the proper execution of the testator's intent as with undue influence is considered no evidence of undue influence." *Smallwood v. Jones*, 794 S.W.2d 114, 118 (Tex. App.--San Antonio 1990, no writ), citing *Rothermel*, 369 S.W.2d at 922. "It is only when all reasonable explanation in affection for the beneficiary is lacking that the trier of facts may take even an unnatural disposition of property as a sign of the testator's mental subjugation." *Smallwood*, 794 S.W.2d at 119, citing *Rothermel*, 369 S.W.2d at 923-24.


The existence of a confidential or fiduciary relationship to a testator is not sufficient to shift the burden of proof regarding undue influence to the proponent of the will. *Frost National Bank v. Boyd*, 196 S.W.2d 497 (Tex. 1945). However, some cases have suggested that the existence of a fiduciary relationship between the testator and the executor or beneficiaries under a purported will may raise a presumption of undue influence. *Spillman v. Estate of Spillman*, 587 S.W.2d 170, 172 (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.); see 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 51.21 (2d ed. 1992); but see *Dailey v. Wheat*, 681 S.W.2d 747 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (fact that bequest was made to attorney who occupied fiduciary relationship with deceased did not create a presumption of undue influence).

3. RELEVANT FACTORS. All material factors may be considered in determining whether undue influence existed at the time the will was executed. These include circumstances attending execution of will; relationship existing between testator and beneficiaries and others who might be expected to be recipients; motive, character and conduct of those who benefit under the will; participation, words and acts of all parties attending execution; physical and mental condition of testator at time of execution; age, weakness, infirmity and dependency on or subject to control of beneficiary; and improvidence of transaction by reason of unjust, unreasonable or unnatural disposition. *Lowery v. Saunders*, 666 S.W.2d 226, 234 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.); *In re Olsson's Estate*, 344 S.W.2d 171, 174 (Tex. Civ. App.--El Paso 1961, writ ref'd n.r.e.); *Watson v. Dingler*, 831 S.W.2d 834 (Tex. App.--Houston [14th Dist.] 1992, writ denied). On the other hand, the fact that the testator shows signs of aging but is nevertheless a "normal and healthy man for an individual of his age" is not, without more, sufficient evidence of undue influence. *Matter of Estate of Montgomery*, 881 S.W.2d 750, 756 (Tex. App.--Tyler 1994, writ denied) (insufficient evidence to support jury finding of undue influence). Compare *Moltini v. Palmer*, 890 S.W.2d 147, 149 (Tex. App.--Texarkana 1994, no writ) (evidence addressing mental capacity "does not address fully the undue influence issue"); instructed verdict upholding validity of deed affirmed. Likewise, the mere opinion and belief of the will contestant that the testator was unduly influenced is not sufficient to raise the issue of undue influence. *Green v. Ernest*, 840 S.W.2d 119 (Tex. App.--El Paso 1992, writ denied) (summary judgment upholding validity of will upheld).

C. Fraud.

A will may be denied probate if an opponent to the will can prove that the testator was induced to sign the will by deception or misrepresentation. See *Vickery v. Hobbs*, 21 Tex. 570 (1858); *Stolle v. Kanetzky*, 259 S.W. 657, 663 (Tex. Civ. App.--Austin 1924, no writ). Note that fraud and undue influence overlap as grounds for setting aside a will in that both remedies address the problem of an individual who has gone beyond the bounds of legally permissible persuasion over the testator. *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App.--Dallas 1991, writ denied).
D. Mistake.

Generally, the execution of a will may not be set aside solely on the ground that it was induced by a testator's mistake of law or fact.

1. MISTAKE IN THE FACTUM. Mistake in the factum occurs when the testator is in error regarding the identity or contents of the instrument he is executing.

   a. Mistake in Identity of Instrument. If the testator mistakenly signs his will when he thinks he is signing something else, or if he thinks he is signing his will but in fact he is signing another instrument (such as his wife's will), the instrument signed by the testator will not be admitted to probate as his will. See ATKINSON, WILLS 273-74 (2d ed. 1953).

   b. Mistake in Contents.

      (1) Plain Meaning or Omission. If there is a mistake regarding the contents of a will, extrinsic evidence may not be admitted to alter the plain meaning of words in the will or to provide a bequest that was mistakenly totally omitted. Huffman v. Huffman, 339 S.W.2d 885, 888 (Tex. 1960) (extrinsic evidence not admissible to contradict plain meaning; "the intent must be drawn from the will, not the will from the intent"); Harrington v. Walker, 829 S.W.2d 935, 938 (Tex. App.--Fort Worth 1992, writ denied) (unambiguous residuary clause resulted in partial intestacy, held: summary judgement was proper; affidavit of attorney/draftsman that testator intended Appellant to take property at issue was "not admissible to supply an omitted bequest."); San Antonio Area Foundation v. Lang, 35 S.W.3d 636, 640 (Tex. 2000) ("extrinsic evidence may not be used to create an ambiguity"). However, if the testator's incorrect understanding of the contents is claimed to be the result of fraud or undue influence, extrinsic evidence of the testator's true intent will be allowed without regard to whether the will is ambiguous. See In Re: Estate of Riley, 824 S.W.2d 305 (Tex. App.--Corpus Christi 1992, writ denied) (witness to execution testified that neither the testator's pre-execution remarks nor the testator's wife's purported reading of the will comported with the actual provisions of the will).

      (2) Latent Ambiguity. Extrinsic evidence is admissible to clarify an ambiguity in a will, including even a latent ambiguity that arises because of extrinsic facts. See McCauley v. Alexander, 543 S.W.2d 699, 700-01 (Tex. Civ. App.--Waco 1976, writ ref'd n.r.e.).

      (3) Mistaken Insertion. If a clause is inserted without the knowledge of the testator, the will might possibly be probated without the unintended clause. ATKINSON, WILLS 276-77 (2d ed. 1953); 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 51.33 (2d ed. 1992). Various will construction cases have established that words or clauses inserted in a will by mistake may be disregarded in the construction of the will to determine the testator's intent. Mercantile National Bank v. National Cancer Research Foundation, 488 S.W.2d 605, 608 (Tex. Civ. App.--Dallas 1972, writ ref'd n.r.e.).

2. MISTAKE IN THE INDUCEMENT. Mistake in the inducement exists when the testator is induced to sign the will by his mistaken belief as to some extrinsic fact. As a general rule, no remedy is available for mistake in the inducement, because of the difficulty in determining what the testator would have done in the absence of the mistake. A generally stated rule throughout the U.S. is the following dictum in Gifford v. Dyer, 2 R.I. 99 (1852):

   "The mistake must appear on the face of the will, and it must also appear what would have been the will of the testator but for the mistake."

For example, if a will says "I give all my property to my brother since my daughter Mary is dead," but Mary is in fact alive, the mistaken fact appears on the face of the will, and the mistake may be grounds for denying probate. However, if the will simply stated "I give all my estate to my brother," extrinsic evidence of the mistake as to the daughter's survival would not be admissible to deny probate of the will. See First Christian Church of Temple v. Moore, 295 S.W.2d 931, 934 n.1 (Tex. Civ. App.--Austin 1956, writ ref'd n.r.e.) ("the mistake here does clearly appear on the face of the will but there is nothing to show what the will would have been as far as the residuary clause is concerned if the mistake had not been made"); Carpenter v. Tinney, 420 S.W.2d 241, 243-44 (Tex. Civ. App.--Austin 1967, writ ref'd n.r.e.) (oral statements made by testatrix at time will executed that she wanted to leave her property to two of her four children because her husband had made a will leaving his property to the other two children held inadmissible to deny probate of her will on the ground of mistake where husband's will did not leave his property to the other two children); Bauer v. Estate of Bauer, 687 S.W.2d 410, 412 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) ("No mere mistake, or prejudice or ill-founded conclusion, can ever be the basis of setting aside a will"); Renaud v. Renaud, 707 S.W.2d 750 Tex. App.--Fort Worth 1986, writ ref'd n.r.e.) (court refused reformation, holding for intestacy, where residuary testamentary trust made no provision for disposition in the event that daughter survived beyond a stated date and daughter did, in fact, survive; "we have found that the implication sought by appellee Sara, that she be the sole beneficiary of the trust estate, is not a necessary or highly probable implication from the words of the will in question."); Knesek v. Witte, 715 S.W.2d 192 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.) (reformation denied where testatrix stated that her late husband had given her a life estate in a portion of property with remainder over to contestants but in fact...
her husband had given her the fee interest so that the property passed to other individuals as part of the residuary; held that it did not matter that testatrix was laboring under the false belief that she had only a life estate and that contestants held the remainder interest in the property); Kilpatrick v. The Estate of Harris, 848 S.W.2d 859 (Tex. App.--Corpus Christi 1993, no writ) (will was admitted to probate despite testatrix's mistaken belief that deceased husband had died without a will; however, constructive trust was imposed to enforce contract to make a will that testatrix made with husband).

While a mistake of fact or law, standing alone, may not be sufficient grounds for denying probate of a will, such a mistake can apparently add cumulative weight to an otherwise insufficient undue influence or fraud claim so that probate will be denied. See Holcomb v. Holcomb, 803 S.W.2d 411 (Tex. App.--Dallas 1991, writ denied).

E. Testator Did Not Know Contents of Will

1. GENERAL RULE. If the testator does not have any knowledge of the contents of his will, testamentary intent would be lacking and the will would be denied probate. Kelly v. Settegast, 2 S.W. 870, 872 (Tex. 1887) ("The fact that a testator knew and understood the contents of a paper which he executed as a will is a necessary fact to be established before any will can be admitted to probate.").

2. PRESUMPTION OF KNOWLEDGE OF CONTENTS. A presumption exists that a person signing a will knows its contents. Boyd v. Frost National Bank, 196 S.W.2d 497, 507-08 (Tex. 1946).

3. SUSPICIOUS CIRCUMSTANCES REBUT PRESUMPTION. The presumption that the testator knew the contents of the will disappears upon proof of suspicious circumstances. An example of suspicious circumstances sufficient to rebut the presumption is provided by the leading Texas case of Kelly v. Settegast, 2 S.W. 870 (Tex. 1887). In that case, the testator was unable to read or write, was gravely ill at the house of one of the legatees, and signed a will by mark disinheriting his only living daughter, who was in the same house at the same time and did not even know her father was making a will. Neither beneficiary in the will was related to the testator, and it was not shown that he ever gave instructions to write a will nor that he had requested one to be written.

4. BURDEN OF PROOF. While the proponent has the burden of proving that the testator had knowledge of contents of the will, proof of due execution of a will, particularly by "a person of sound mind, able to read and write, and in no way incapacitated to acquire knowledge of the contents of a paper," is sufficient proof of knowledge of contents unless suspicious circumstances exist. Boyd v. Frost National Bank, 196 S.W.2d 497, 507 (Tex. 1946).

F. Will Subsequently Revoked

Section 88(b)(3) of the Probate Code requires that the proponent of a will must prove "[t]hat such will was not revoked by the testator." TEX. PROB. CODE ANN. § 88(b)(3) (Vernon 1980). See Goode v. Estate of Hoover, 828 S.W.2d 558, 559 (Tex. App.--El Paso 1992, writ denied). Proof of due execution raises a presumption of continuity, but the presumption may be rebutted by evidence of a later will or other facts. (See Part III.D at page 29 of this Outline.) However, evidence of a later will is relevant only if the testator had testamentary capacity as of the date of the later will. Turk v. Robles, 810 S.W.2d 755 (Tex. App.--Houston [1st Dist.] 1991, writ denied).

G. Improper Execution

It goes without saying that if a will is not executed with the requisite formalities (see Part II.D at page 8 of this Outline), it may not be probated.

H. Prior Acceptance of Benefits by Contestant.

An individual who has accepted benefits under a will is generally estopped to subsequently contest the will, but only to the extent that the contest is inconsistent with the acceptance of the benefits. If the accepted benefits are no greater than those which the individual would receive if the will was defeated, the individual may contest the will notwithstanding the prior acceptance. See Holcomb v. Holcomb, 803 S.W.2d 411, 412-413 (Tex. App.--Dallas 1991, writ denied). However, estoppel is an affirmative defense which the will proponent must affirmatively plead, as required by Texas Rules of Civil Procedure 94. Tex. R. Civ. P. 94. If the will proponent fails to properly plead, the contestant who has accepted benefits may still pursue his contest. See In re Estate of Davis, 870 S.W.2d 320 (Tex. App.--Eastland 1994, no writ). In Davis, the will proponent filed a motion to dismiss a will contest but he failed to raise the estoppel/acceptance of benefits issue until the hearing. The trial court agreed that the contestant was estopped and dismissed the contest; however, the appellate court reversed.
I. Recovery of Attorney's Fees.

1. BY EXECUTOR. If the person designated as executor in a will incurs expenses in connection with his efforts to have the will admitted to probate, he is entitled to recover his necessary expenses, including reasonable attorney's fees, from the estate, without regard to whether the will is ultimately upheld. TEX. Prob. CODE ANN. § 243 (Vernon Supp. 2002).


2. BY BENEFICIARIES. Section 243 also allows a beneficiary of an alleged will to recover reasonable attorney fees when promoting or defending a will in good faith and with just cause and, like an executor, the recovery is allowable without regard to whether the action is successful. However, the statute provides that the beneficiary "may" (not "shall") recover his fees. Thus, a beneficiary's ability to recover attorneys fees and other expenses is subject to the discretion of the trial court. TEX. Prob. CODE ANN. § 243 (Vernon Supp. 2002); see also Harkins v. Crews, 907 S.W.2d 51, 64 (Tex. App.--San Antonio 1995, writ denied) ("The wording regarding recovery of fees by beneficiaries is permissive"; however, both executor and beneficiary under purported will were allowed recovery of their attorneys fees). Furthermore, the right to seek attorney's fees under the statute is vested in a person designated as a devisee, legatee, or beneficiary in a will or an alleged will. In Re Estate of Huff, 15 S.W.3d 301, 306-308 (Tex. App.--Texarkana 2000, no pet. h.) (relatives and heirs at law who intervened were not designated beneficiaries in a will or alleged will, and who were not appointed administrator of a document not admitted to probate are precluded from being awarded attorney's fees under the statute).

3. Good Faith Requirement. In any event, the executor or beneficiary seeking recovery of his attorneys fees must have acted in good faith and with just cause in order to be entitled to the recovery. TEX. Prob. CODE ANN. § 243 (Vernon Supp. 2002). If the executor or beneficiary fails to so plead and prove, no recovery will be allowed. See Alldridge v. Spell, 774 S.W.2d 707, 711 (Tex. App--Texarkana 1989, no writ) (recovery of reasonable attorney's fees denied where will proponent failed to obtain jury finding of good faith); compare Harkins v. Crews, 907 S.W.2d 51, 62 (Tex. App.--San Antonio 1995, writ denied) (jury finding that will proponents acted in good faith in offering will for probate was not inconsistent with jury finding that will proponents had procured will by undue influence; attorneys fees were allowed).

J. Attorney Liability.

1. CURRENT TEXAS LAW--BARCELO v. ELLIOTT. On May 10, 1996, by a 5 to 3 decision, the Texas Supreme Court held that the draftsman of a will or other estate planning document owes no professional duty to the intended beneficiaries, thus placing Texas in the minority view among those states that have considered the matter. Barcelo v. Elliott, 923 S.W.2d 575 (Tex., 1996).

In Barcelo, the intended beneficiaries sued the draftsman of their grandmother's will and revocable trust alleging that, due to the attorney's negligence, they were forced to accept (in settlement) a smaller share of the estate than they would have received had the estate plan been properly prepared. The plaintiffs argued that the draftsman's duty extended to them, and, alternatively, that they should recover under a third party beneficiary rule. The draftsman moved for summary judgement; the appeals court affirmed in an unreported decision, Barcelo v. Elliott, No. 1-94-00830-CV (Tex. App.--Houston [1st Dist.] February 9, 1995); and the Texas Supreme Court granted writ of error, Barcelo et al. v. Elliott, 38 S.Ct. 1110 (August 5, 1995).

The Supreme Court noted the inherent difficulty of determining the testator's intentions, the problems that would result from allowing extrinsic evidence to determine those intentions, and the difficulty of distinguishing between those cases where the draftsman was negligent and those where the draftsman was simply honoring the client's wishes. The court then stated:

"In sum, we are unable to draft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations. We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.

"We therefore hold that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust."

Barcelo, however, does not constitute an absolute protection. In Estate of Arlitt v. Patterson, 995 S.W.2d 713 (Tex. App.--San Antonio 1999, pet. denied), following considerable litigation over a 1983 will and a 1985 codicil, the decedent's wife, individually and as executor of decedent's estate, along with some of decedent's children, sued the attorneys who drafted the instruments alleging
negligence, negligent misrepresentation, negligent undertaking and breach of express and implied contract in connection with the attorneys’ estate planning services. The appellate court first notes that the negligence, negligent undertaking and breach of contract claims are legal malpractice claims under Texas law, and a plaintiff must show privity to prove the attorney owes her a duty of ordinary care. However, the appellate court held that privity is not a required element of negligent misrepresentation. Accordingly, a negligent misrepresentation claim is not equivalent to a legal malpractice claim.

The appellate court further held that by its terms, Barcelo only precludes legal malpractice claims by unrepresented beneficiaries, not claims by one of two joint clients. Accordingly, although the summary judgment denying the claims of the children was affirmed, the summary judgment denying the claims of the decedent’s wife was reversed because a genuine issue of fact existed as to whether the attorneys represented the decedent and his wife in their estate planning efforts.

2. PRIOR TEXAS CASES. Prior to Barcelo, the Texas cases had consistently denied claims by intended beneficiaries against the draftsman. For instance, the Houston Court of Appeals [1st Dist.], in a negligence action brought by the beneficiaries of a testamentary trust against the testator’s attorney, has held that the attorney was not liable to the intended beneficiaries because there was no privity of contract between them and, in dicta, the court concluded that such beneficiaries likewise had no cause of action under a third party beneficiary theory. Dickey v. Jansen, 731 S.W.2d 581 (Tex. App.--Houston [1st Dist.] 1987, writ ref’d n.r.e.).

The Dallas Court of Appeals subsequently followed Dickey in Thomas v. Pryor and the Supreme Court granted writ in on all points of error, thus setting the stage for what many observers believed would be a reversal of the privity defense to suits against draftsmen. However, the case was settled and the writ was dismissed. See Thomas v. Pryor, 847 S.W.2d 303 (Tex. App.--Dallas 1993, writ granted without reference to the merits and judgements of the courts below set aside without reference to the merits, 862 S.W.2d 462 (Tex. 1993).

3. OTHER STATES. Even in those states that do allow intended beneficiaries to sue the drafters of wills and other estate planning instruments it appears clear that attorneys have no duty to draft "litigation proof" documents. In California, where estate planning attorneys clearly owe a duty to intended beneficiaries, the attorney's duty is by no means absolute, especially where the identity of the "intended beneficiaries" is uncertain. See e.g., Ventura County Humane Society v. Holloway, 40 Cal. App.3d 897, 115 Cal. Rptr. 464 (1984).

In Ventura, the draftsman of the will included, at the testator's request, a gift to the "Society for the Prevention of Cruelty to Animals (Local or National)." Because no organization by that name existed, a lawsuit against the attorney resulted. The court held for the defendant attorney, observing that "no good reason exists why the attorney should be held accountable for using certain words suggested or selected by the testator which later prove to be ambiguous" and reasoning that, were such a duty imposed, it "would result in a speculative and almost intolerable burden on the legal profession." 40 Cal.App.3d at 904. (Even in light of Barcelo, it should be self evident that reliance on Ventura would be ill advised; the prudent estate planner will make at least some effort to verify the proper names of the client's intended beneficiaries or clearly document his reliance upon the client to verify names.)

On the other hand, where the testator's intentions and the identity of the intended beneficiaries are clearly expressed in the will, the California cases "unhesitatingly support the view that an attorney may be held liable" if his or her negligence causes the beneficiaries to suffer a monetary loss as a direct result of such negligence. 40 Cal.App.3d at 903. This would be the case where the attorney, e.g., failed to have the will properly attested, or erred in his understanding of and planning under the applicable tax laws. See, e.g., Busquet v. Livingston, 57 Cal. App. 3d 914, 129 Cap. Rptr. 514 (1976) (revocable trust prepared by attorney granted surviving spouse a power of revocation over, inter alia, the by-pass trust, resulting in otherwise avoidable taxes; attorney was held liable).

Florida case law confers standing to sue the draftsman only on those who can demonstrate that the lawyer's negligence frustrated the testator's intent and, for this purpose, extrinsic evidence is inadmissible; only the language of the will can prove the testator's intent. Kinney v. Schinholser, 663 S.W.2d 643 (Fla. App. 1995) (husbands will devised his estate in trust for the benefit of his wife and it gave her a general power of appointment over the assets, which resulted in $320,000 in taxes which would not have resulted had the assets been sheltered, however, the court found no evidence in the will which indicated an intention to minimize taxes, therefore the drafting lawyer was not liable).

K. Proceedings Involving Charitable Trusts.

Chapter 123 of the Texas Property Code provides that the Attorney General is a proper party in any proceeding involving a charitable trust. TEX. PROP. CODE ANN. § 123.002 (Vernon 1995). Notice must be given to the Attorney General of any proceeding involving a charitable trust. TEX. PROP. CODE ANN. § 123.003 (Vernon Supp. 2002). A judgment in a proceeding involving a charitable trust over a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust is voidable if the attorney general is not given notice. TEX. PROP. CODE ANN. § 123.004 (Vernon 1995). Proper venue of a proceeding brought by the Attorney General alleging breach of a fiduciary duty by the trustee of a charitable trust is in a court of competent jurisdiction in Travis County or in the county where the defendant resides or has its principal office. TEX. PROP. CODE ANN. § 123.005(a) (Vernon
The term “charitable trust” is construed very broadly to cover practically all gifts to a charitable entity, even if a traditional express trust is not created. *Nacol v. State*, 792 S.W.2d 810, 812 (Tex. App.–Houston [14th Dist.] 1990, writ denied). A “proceeding involving a charitable trust” has also been construed to find that the Attorney General has standing to intervene on behalf of a charitable trust in a heirship proceeding where the gift to the charitable entity evolved from another gift under the will of an alleged heir. *In re Estate of York*, 951 S.W.2d 122 (Tex. App.–Corpus Christi 1997, n.w.h.).

### III. REVOCATION

Under the Texas Probate Code a will may be revoked only by (i) a subsequent writing, (ii) a physical act, or (iii) operation of law. No other method of revocation is valid. *See Goode v. Estate of Hoover*, 828 S.W.2d 558, 559 (Tex. App.–El Paso 1992, writ denied); *In re Estate of Wilson*, 7 S.W.3d 169 (Tex. App.–Eastland 1999, pet. denied) (agreement incident to divorce was not sufficient to revoke will). An intent to revoke must exist for a will to be revoked under the first two methods. Therefore, lack of testamentary capacity or intent or the existence of fraud or undue influence will invalidate the "revocation." *See In re Estate of Plohberger*, 761 S.W.2d 448 (Tex. App.–Corpus Christi 1988, writ denied) (purported subsequent will that was denied probate because of undue influence did not revoke prior will); 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 33.4-33.5 (2d ed. 1992).

#### A. By Subsequent Writing.

1. **STATUTORY "LIKE FORMALITIES" REQUIREMENT**

   a. **General Rule**. While Section 63 of the Probate Code literally requires that a revocation in writing of a prior will be "executed with like formalities," this does not mean that an attested will may only be revoked by an attested writing, or that a holographic will may only be revoked by a holographic writing. *See Cravens v. Chick*, 524 S.W.2d 425, 427 (Tex. Civ. App.–Fort Worth 1975, writ ref’d n.r.e.). To the contrary, the statute simply requires that a revoking instrument, in order to be effective, must be executed "with the same formalities that are required to probate a will." *Harkins v. Crews*, 907 S.W.2d 51, 58 (Tex. App.–San Antonio 1995, writ denied).

   b. **Revoking Instrument Need not be Probated or even Probatable**. Section 3(ff) of the Texas Probate Code defines the term "will" to include an instrument which revokes another will, and thus seems to imply that revoking instruments are effective only to the extent that they could be admitted to probate as full fledged wills. TEX. PROP. CODE ANN. § 3(ff) (Vernon Supp. 2002). The passage from *Harkins* quoted above suggests that this is in fact the rule. However, Texas law is clear that revoking instruments that otherwise satisfy the "like formalities" test are effective without regard to whether they are admitted to probate, offered for probate, or even capable of being admitted to probate as a valid will. *See Harkins v. Crews*, 907 S.W.2d 51, 59 (Tex. App.–San Antonio 1995, writ denied) (it is not necessary that a purported revoking instrument be offered for probate”); *Chambers v. Chambers*, 542 S.W.2d 901, 905 (Tex. Civ. App.–Dallas 1976, no writ) (will effectively revoked prior wills even though it could not be admitted to probate because of the four-year limitation in Section 73(a) of the Probate Code); and *Matter of Rogers*, 895 S.W.2d 375 (Tex. App.–Tyler 1994, writ denied) (parties stipulated that holographic instrument was not a valid testamentary instrument due to numerous interlineations in the handwriting of persons other than the testator, nevertheless, court found that it satisfied the "like formalities" standard and was effective to revoke a prior will). If the "like formalities" test is not satisfied, the instrument is not sufficient to revoke a will. *In Re Estate of Wilson*, 7 S.W.3d 169, 171 (Tex. App.–Eastland 1999, pet. denied) (agreement incident to divorce waiving right to inherit did not comply with Section 63 and was not sufficient to revoke the will).

2. **LANGUAGE IN WRITING SUFFICIENT TO CONSTITUTE REVOCATION**. Any language clearly showing an intent to revoke a former will is sufficient, and it is not essential that specific words be employed (or even that the word "revoke" appear). However, the intent to revoke must be clearly expressed and the testator must have testamentary capacity at the time that the revocation instrument is executed. A reference to "this my Last Will and Testamet" does not, by itself, constitute an effective revocation clause. *Lane v. Sherrill*, 614 S.W.2d 619, 621 (Tex. App.–Austin 1981, no writ). However, inconsistent provisions in a former will are revoked by implication, as discussed below. *Atkinson, Wills* 448 (2d ed. 1953). The language must manifest a present intent to revoke the former will by the writing itself. *Tynan v. Paschal*, 27 Tex. 286 (1863) (testator’s letter to attorney directing the attorney to destroy his will did not constitute a valid revocation), discussed in 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 35.3 (2d ed. 1992).

3. **IMPLIED PARTIAL REVOCATION**. A will may be revoked, in whole or in part, by a subsequent inconsistent will, even if the subsequent will contains no express language of revocation. *See May v. Brown*, 190 S.W.2d 715, 718 (Tex. 1945). Unless the subsequent will contains an express clause revoking the prior will, the courts will, as far as possible, attempt to read the two wills together. *See Hinson v. Hinson*, 280 S.W.2d 731, 735 (Tex. 1955) and *Ayala v. Martinez*, 883 S.W.2d 883 (Tex. App.–Corpus Christi 1994, writ denied) (court probated decedent’s last two wills; latter will controlled where conflicts between it and the prior will were
B. By Physical Act.

1. STATUTORY REQUIREMENT. Section 63 of the Probate Code also provides that a will may be revoked "by the testator destroying or canceling the same, or causing it to be done in his presence." TX. PROB. CODE ANN. § 63 (Vernon 1980). Therefore, the statute requires (1) a physical act, by the testator or someone at the testator's direction and in his presence, and (2) the intent to revoke.

2. SUFFICIENCY OF PHYSICAL ACT TO ACCOMPLISH REVOCATION. The tearing, cutting, or obliteration of the entire will, with intent to revoke, constitutes a valid revocation. Simpson v. Neeley, 221 S.W.2d 303, 311-14 (Tex. Civ. App.--Waco 1949, writ ref'd). Defacing the signature or cutting the signature from the instrument might also constitute a valid destruction. Id. Similarly, defacing all of the provisions of the will, or writing the word "canceled," "void," or "annulled" through all of the dispositive provisions or the signature would apparently suffice as a valid revocation. See Dean v. Garcia, 795 S.W.2d 763, 765 (Tex. App.--Austin 1989, writ denied) (writing "CANCELED" [sic] and "VOID" across all gift provisions of a codicil was sufficient to revoke the codicil, but did not effectuate a revocation of the will, even though codicil included language that republished the will); 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 35.2 (2d ed. 1992). However, marking through or cutting out one or more dispositive clauses does not constitute a revocation of the will, even if the testator had the intent to revoke the entire will, because the physical act itself does not manifest an intent to revoke the entire will. See Sien v. Beitel, 289 S.W. 1057, 1058-59 (Tex. Civ. App.--San Antonio 1927, no writ).

3. MISTAKEN BELIEF OF DESTRUCTION INSUFFICIENT. If a testator intends to revoke his will by destruction, but mistakenly destroys another paper, the will is not revoked. Morris v. Morris, 642 S.W.2d 448, 449 (Tex. 1982) (testator's wife said "I will destroy [the will] for you right now" and tore an envelope into shreds, but the will was not in the envelope and not destroyed); see Sien v. Beitel, 289 S.W. 1057, 1058 (Tex. Civ. App.--San Antonio 1927, no writ) (nurse pretended to destroy will upon testator's instructions, but did not actually do so; will entitled to probate). However, if a beneficiary under the will misled the testator into thinking that he was destroying the will when in fact he was not, such person taking under the will may be required to account for the property as a constructive trustee. Morris v. Morris, 642 S.W.2d 448, 450 (Tex. 1982).

4. PARTIAL REVOCATIONS BY PHYSICAL ACT.
   b. Recognized for Holographic Wills. A holographic will may be revoked in part by physical act. Stanley v. Henderson, 162 S.W.2d 95, 97 (Tex. 1942); see Hancock v. Krause, 757 S.W.2d 117, 120-21 (Tex. App.--Houston [1st Dist.] 1988, no writ) (alteration of holographic will treated as "both a revocation of the altered provisions and a valid disposition of the new provisions, with the prior signature pages being adopted"); City of Austin v. Austin National Bank, 488 S.W.2d 586, 592-93 (Tex. Civ. App.--Austin 1972) (court recognized the Stanley v. Henderson rule, but refused to recognize partial revocation of will on procedural grounds), aff'd in part and rev'd in part on other grounds, 503 S.W.2d 759 (Tex. 1974).

C. By Operation of Law

1. SUBSEQUENT DIVORCE.
   a. General Rule. Section 69 of the Probate Code provides that if a testator is divorced after making a will, the will is to be read as if the former spouse predeceased the testator, and all provisions in the will in favor of the spouse or appointing the spouse to any fiduciary capacity "shall be null and void and of no effect." TX. PROB. CODE ANN. § 69(a) (Vernon Supp. 2002). Prior to September 1, 1997, although it was clear that bequests to a former spouse were void, it was not clear how to treat gifts to contingent beneficiaries which were dependent on the survival of the former spouse. The 1997 amendment to Section 69 adopted the holding in Calloway v. Estate of Gasser, 558 S.W.2d 571 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.) and made it clear that in the event of a subsequent divorce, property bequeathed to the spouse passes to the contingent beneficiaries who would have received the property if the ex-spouse had predeceased the testator. If the spouses subsequently remarry before the testator's death, will provisions in favor of the spouse are given effect. See Smith v. Smith, 519 S.W.2d 152, 154-55 (Tex. Civ. App.--Dallas 1974, writ ref'd).
b. **Trusts and Pour-Over Wills.** If the will is a pour-over into an existing inter vivos trust, any provisions in the trust in favor of the divorced spouse are probably still valid. No Texas case has discussed this issue, but there is no analogous statute in the Texas Trust Code to Section 69 of the Probate Code. Some cases in other states have held that statutes governing implied revocation of testamentary gifts on divorce also apply to provisions benefitting prior spouses in unfunded revocable trusts that receive assets at the decedent's death under a pour-over will. See *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985) ("Decedent's will and trust were integrally related components of a single testamentary scheme...[T]he trust, like the will, 'spoke' only at the Decedent's death. For this reason, [the prior spouse's] interest in the trust was revoked by operation of [the statute revoking testamentary gifts upon divorce] at the same time his interest under the Decedent's will was revoked"); *Miller v. First National Bank & Trust*, 637 P.2d 75 (Okla. 1981).

c. **Third Party Fiduciary Appointments may be Affected.** Subsequent divorce may also affect third party fiduciary appointments under a will. In *Fornby v. Bradley*, 695 S.W.2d 782 (Tex. App.--Tyler 1985, writ ref'd n.r.e.), the will contained an alternate executor provision that was expressly conditioned upon simultaneous death of the testator and former spouse. The court held the appointment of alternate executor provision to be invalid because the decedent and former spouse did not die simultaneously (indeed she was still living). However, the court distinguished that situation from the more common type of clause appointing an alternate executor "if my spouse predeceases me." In that latter situation, the court intimated that the alternate designation may have been given effect.


e. **Family Code Provision for Retirement Benefits.** Section 9.302 of the Texas Family Code provides that a divorce operates as an automatic revocation of a designation of the divorced spouse as beneficiary under an individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant. TEX. FAM. CODE ANN. § 9.302 (Vernon 1998). However, in reviewing a State of Washington statute similar in effect to Section 9.302, the United States Supreme Court in *Egelhoff v. Egelhoff*, 121 S.Ct. 1322 (2001), held that ERISA preempted the Washington statute since the plan at issue was governed by ERISA, thereby resulting in the divorced spouse receiving the proceeds from the life insurance and pension plan.

Two Texas appellate courts have considered the *Egelhoff* decision in connection with Section 9.302 of the Texas Family Code, reaching conflicting decisions. In *Weaver v. Keen*, 43 S.W.3d 537 (Tex. App.--Waco 2001, no pet. h.), the court held that Section 9.302, applied as federal common law, automatically terminated a former spouse's designation as beneficiary under an IRA plan. The appellate court concluded that the *Egelhoff* decision did not affect the analysis applicable to the case, and that its conclusion was supported by *Egelhoff*. Id. at 544-45. In *Heggy v. American Trading Employee Retirement Account Plan*, 56 S.W.3d 280 (Tex. App.--Houston [14th Dist.] 2001, no pet. h.), the court expressly declined to follow *Weaver v. Keen*, and held that Section 9.302 was preempted by ERISA, citing the *Egelhoff* decision.

2. **SUBSEQUENT CHILDREN.** The "pretermitted child" statute (Section 67 of the Texas Probate Code) can operate as a partial revocation. See Part 2IV.B.2 at page 53 of this Outline.

D. **Presumptions Regarding Revocation**

1. **PROPOSENT OF WILL HAS BURDEN OF PROVING WILL NOT REVOKED.** Section 88(b)(3) of the Texas Probate Code requires proof "that such Will has not been revoked by the testator." TEX. PROB. CODE ANN. § 88(b)(3) (Vernon 1980). The proponent of the will has the burden of proving that the will offered for probate has not been revoked. *Brackenridge v. Roberts*, 270 S.W. 1001, 1002 (Tex. 1925).

2. **PRESUMPTION OF CONTINUITY.** When it is shown that a will has been executed with proper formalities, a "presumption of continuity" arises in favor of the proponent. *Gillispie v. Reinhardt*, 596 S.W.2d 558, 561 (Tex. Civ. App.--Beaumont 1980, writ ref'd n.r.e.); *compare Harkins v. Crews*, 907 S.W.2d 51, 59 (Tex. App.--San Antonio 1995, writ denied) (presumption of continuity arises when will is produced without mutilation or other evidence of intent to revoke--or when will cannot be produced but it was not in the testator's possession when last seen--and the will has been duly proved to have been executed without any circumstances to cast doubt on its execution).

3. **EVIDENCE OF REVOCATION REBUTS PRESUMPTION OF CONTINUITY.** The presumption of continuity disappears if the contestant introduces evidence of revocation, and the burden of proof shifts back to the proponent of the will to prove that the will was not revoked. Some Texas cases have recognized slight evidence of revocation as rebutting the presumption of continuity. *May v. Brown*, 190 S.W.2d 715 (Tex. 1945) (presumption of continuity rebutted by proof that a later will was executed, although the later will could not be produced and there was no evidence that it contained a revocation clause or that its contents were...
totally inconsistent with the provisions of the first will); *Brackenridge v. Roberts*, 267 S.W. 244, 248 (Tex. 1924) (second will rebutted presumption of continuity even though contestants were unable to prove the subsequent will for probate). However, other cases have stated that there must be "substantial evidence" of revocation before the presumption of continuity is rebutted. *Matter of Estate of Page*, 544 S.W.2d 757, 761 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.). Even if the presumption of continuity is rebutted, the proponent may then produce evidence satisfying his burden of nonrevocation. *Morgan v. Morgan*, 519 S.W.2d 276, 278 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.).

4. **LOST WILLS.** Special revocation presumptions apply to lost wills. *Pearce v. Meek*, 780 S.W.2d 289, 291 (Tex. App.--Tyler 1989, no writ) ("When a will is in the possession of the testator when last seen, failure to produce the will after the testator's death raises the presumption that the testator destroyed the will with the intention of revoking it, and the burden is cast on the proponent to prove the contrary"). *Hibbler v. Knight*, 735 S.W.2d 924, 927-28 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.) (presumption of revocation when lost will was last seen in presence of testator may only be overcome by clear and convincing evidence); *Hoppe v. Hoppe*, 703 S.W.2d 224, 227 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) (fact that the will was left in lawyer's office and that decedent could have requested will from attorney at any time was sufficient to support jury finding that will was last seen in the possession of decedent or in a place where she had access to it); *Cable v. Estate of Cable*, 480 S.W.2d 820, 821 (Tex. Civ. App.--Fort Worth 1972, no writ) ("where will of a testator was last seen in the presence of the testator...the failure to produce such will after his death raises the presumption that the testator has destroyed his will with the intent to revoke it"). For a general summary of proof requirements to probate a lost will, see *Coulson v. Sheppard*, 700 S.W.2d 336, 337 (Tex. App.--Corpus Christi 1985, no writ).

5. **Dependent Relative Revocation.**

Although the *execution* of a will may not be set aside on the ground that it was induced by a testator's mistake of law or fact (see Part III.D at page 19 of this Outline), some courts have adopted a different attitude toward revocation which has been induced by mistake of law or fact. See 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 38.4 (2d ed. 1992) (discussing reason for the distinction).

   1. **MISTAKE OF LAW.** The application of the dependent relative revocation doctrine to a mistake of law is best demonstrated by example. Assume a testator executes Will No. 1 leaving his estate to his nephew, and later executes Will No. 2 which leaves his estate in trust for his nephew, with the remainder to his nephew's children. Later, the testator decides he would rather leave all of his estate outright to his nephew, so he destroys Will No. 2 thinking that he would thereby revive Will No. 1. Since the testator's revocation was dependent upon his mistake of law that Will No. 1 was revived, the revocation is disregarded in order to best carry out the testator's intent: He would rather have the property pass in trust for his nephew under Will No. 2 than pass by intestacy.

   However, the two Wills must be similar. For example, if Will No. 1 leaves property to a grandson, and Will No. 2 leaves property to a nephew, the dependent relative revocation doctrine would not apply to a subsequent revocation of Will No. 2 on the mistaken belief that Will No. 1 would be revived. The intention to revoke Will No. 2 would be independent of the desire to revive Will No. 1. In that situation, the testator has given indication that he did not want the property to pass to his nephew, so generally courts would attempt to carry out the testator's intent by upholding the revocation of Will No. 2 and allowing the property to pass by intestacy rather than by the terms of Will No. 2 that the testator had clearly revoked and that were clearly totally inconsistent with his desire. See generally ATKINSON, WILLS 453-54 (2d ed. 1953).

   2. **MISTAKE OF FACT.** If the subsequent revoking instrument states on its face that the partial or complete revocation is being made because of a particular mistake in fact, the revocation would be invalid under the dependent relative revocation doctrine. For example, if the subsequent revoking codicil states "I revoke the bequest to Mary since she is dead," but in fact she is not dead, the revocation would not be recognized under the dependent relative revocation doctrine.

   3. **APPLICATION OF DEPENDENT RELATIVE REVOCATION DOCTRINE IN TEXAS.** The only Texas case which has referred to the dependent relative revocation doctrine by name is *Chambers v. Chambers*, 542 S.W.2d 901, 905 (Tex. Civ. App.--Dallas 1976, no writ). Discussions in this and various other Texas cases suggest that the doctrine has some validity in Texas. See 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 38.4 (2d ed. 1992).
PART 2. SPECIFIC WILL PROVISIONS

I. EXORDIUM CLAUSE

A. Example

"I, ______________, residing and being domiciled in Dallas County, Texas, make, declare and publish this, my Last Will and Testament, and hereby revoke all previous Wills and Codicils made by me."

B. Purposes of Exordium Clause

1. IDENTIFY TESTATOR. The will should identify the testator's full legal name. If the testator also has acquired title to substantial property in a name other than his full legal name, it might also be appropriate to include "also known as" names in order to avoid later title problems. See generally 7 TEXAS TRANSACTION GUIDE § 42.121(1)(1999).

2. ESTABLISH DOMICILE. Domicile is important in determining formal execution requirements for the will, property rights, rights of the surviving spouse, and any other issues that may arise regarding the substantive law of a particular jurisdiction. In particular, domicile is important for state death tax purposes. Most states follow a general pattern of taxing all real property actually located in that state as well as all personal property of a decedent who died as a domicile of that state. The declaration made in the will is not controlling, but can certainly be a factor in determining the decedent's domicile.

3. DECLARATION AND PUBLICATION OF WILL. One of the basic requirements of a will is that it be written with "testamentary intent." Hinson v. Hinson, 280 S.W.2d 731, 733 (Tex. 1955). The exordium clause clearly indicates that the instrument is made with testamentary intent. Some states specifically require publication of the will as a part of the execution requirements. ATKINSON, WILLS 327-30 (2d ed. 1953).

4. REVOKE PRIOR WILLS. Unless a subsequent will contains an express clause revoking a prior will, courts will, as far as possible, attempt to read the two wills together. Hinson v. Hinson, 280 S.W.2d 731, 735 (1955). Therefore, the will should clearly state that it is revoking prior wills and codicils. See generally Part 1III beginning at page 25 of this Outline.

II. INTRODUCTORY PARAGRAPH IDENTIFYING FAMILY AND PROPERTY BEING DISPOSED

A. Identify Family.

Identifying the testator's spouse at the beginning of the will provides a convenient means for thereafter referring to him or her as "my wife [or husband]" or "my spouse." If the testator indicates that he will be marrying an individual in the near future, the will should specifically indicate whether bequests to that person are contingent upon the marriage.

The pretermitted child statutes in some states (not Texas) give protection to children alive at the time the will is executed if they are not "named or provided for in the will." See John B. Rees, Jr., American Wills Statutes: II, 46 VA. L. REV. 856, 893-98 (1960) (summary of pretermitted child statutes in American jurisdictions); e.g., Estate of Cisco v. Cisco, 707 S.W.2d 769 (Ark. App. 1986) (two of testator's children were deceased at time will was signed and were not "mentioned" in will; held the descendants of those children were entitled to part of estate under Arkansas law). Therefore, it is useful to identify all of the testator's children to guard against the possibility of the testator's subsequently moving to a jurisdiction with one of these types of statutes, in which event a child omitted from the dispositive scheme could argue that he or she was not "named or provided for in the will" and is therefore entitled to an intestate share of the estate.

The will should also identify the testator's stepchildren. Stepchildren or adopted children of the testator's spouse are generally not included within the definition of "children." See Carroll v. Carroll, 20 Tex. 731 (1858); B. DE R. O'Byrne and J. Kraut, Annotation, Testamentary Gift to Children as Including Step-Child, 28 A.L.R.3d 1307 (1969). Therefore, the will must specifically indicate what portion of the estate if any is left to stepchildren.
B. Identify Property Being Disposed

The will should clearly identify whether the testator is merely disposing of his or her property, or whether he is also attempting to dispose of property belonging to his or her spouse. For example, various Texas courts have been called upon to interpret whether dispositions of "all my property" means only the decedent's community one-half or the entire interest in the community asset registered in that spouse's name. See *Church of Christ v. Wildfong*, 265 S.W.2d 622 (Tex. Civ. App.--Waco 1944, no writ) (bequest of "all my property" disposes only the testator's one-half community interest). If the will is intended to dispose of any of the surviving spouse's property, it should clearly state whether the spouse is put to an election either to receive benefits under the will or to retain her property interests. See Part 2IV.A.3.b at page 46 of this Outline.

III. APPOINTMENT OF FIDUCIARIES

A. Executor

1. APPOINTMENT OF INDEPENDENT EXECUTOR

   a. Advantage of Having Independent Executor. If the executor serves as an "independent executor" under the independent administration system, the executor essentially acts free of court control and with much greater convenience and flexibility than in a "dependent administration." Effective September 1, 1999, new Probate Code Sections 149D - 149G establish a procedure for obtaining a judicial discharge for independent executors. TEX. PROB. CODE ANN. §§ 149D-149G (Vernon Supp. 2002). However, this new procedure applies only to estates of decedents dying on or after the effective date.

   b. Requirements for Appointment of Independent Executor. A testator may provide for an independent administration only by specifically appointing an independent executor. Section 145(b) of the Texas Probate Code provides as follows:

      "Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and list of claims of his estate."

   TEX. PROB. CODE ANN. § 145(b) (Vernon 1980).

   The usual language for appointing an independent executor names the designated individual or bank as an "independent executor" and also paraphrases Section 145. However, no particular words of art are necessary so long as the testator makes it clear that he desires his executor to act free of court control.

      (1) Presumption in Favor of Dependent Administration. While the courts have held that only general language indicating an intent to serve free of court control is sufficient to appoint an independent executor, when the language of the will is doubtful the doubt is resolved in favor of a dependent administration, on the theory that the testator would want all of the safeguards of the dependent administration system unless he specifically indicated to the contrary in his will. *McMahan v. McMahan*, 175 S.W. 157, 159 (Tex. Civ. App.--Dallas 1915, writ ref'd).

      (2) Appointment as "Independent" Executor Is Sufficient. The appointment of a person as "independent" executor is sufficient without additional language limiting the action of the Probate Court. *In re Dulin's Estate*, 244 S.W.2d 242, 244 (Tex. Civ. App.--Galveston 1951, no writ).

      (3) Use of "Independent" Adjective Not Necessary. The will need not necessarily describe the executor as being an "independent executor." See *Stephens v. Dennis*, 72 S.W.2d 630, 632 (Tex. Civ. App.--Eastland 1934, writ ref'd).

      (4) Mere Indication to Serve "Without Any Court Action That Can Be Avoided." The lead Texas case regarding the extent to which courts will go in finding that an independent executor was named is *Boyles v. Gresham*, 263 S.W.2d 935, 936 (Tex. 1954). The holographic will stated: "Would Like to have all of my affairs, Cash all assets including any Bank Balance turned over to Parties named below With out any Bond or any Court action that can be avoided." This language was sufficient to name an independent executor. *See also Long v. Long*, 169 S.W.2d 763, 764 (Tex. Civ. App.--San Antonio 1943, writ ref'd) (executor named to serve "without any legal requirements" held sufficient to create independent executor).

(6) Naming Persons as Independent Executor but Placing Under Probate Court Control for Specific Matters May Defeat Independent Administration. Even if a testator clearly appoints an "independent executor," or appoints an executor to serve free of court control, if the will also subjects the executor to probate court control with respect to particular matters (such as providing annual reports for court approval), the creation of an independent administration may be defeated. Hughes v. Mulanax, 153 S.W. 299, 303 (Tex. 1913) (requirement of executor to make annual reports "which annual reports shall be acted on by said court in the same manner as the annual reports of other executors and administrators" held to defeat creation of independent administration); Bain v. Coats, 244 S.W. 130, 134 (Tex. Comm'n App. 1922, holding approved) (clause appointing independent executor but placing duty on Probate Court to require "a report of all acts of my executor" held not to create an independent administration); but see John Hancock Mutual Life Insurance Company v. Duval, 96 S.W.2d 740, 741-42 (Tex. Civ. App.--Eastland 1936, writ ref'd) (direction to executor to file annual report did not defeat appointment of independent executor because court approval of the report was not intended); compare In Re Estate of Spindor, 840 S.W.2d 665 (Tex. App.--Eastland 1992, no writ) (If residuary beneficiaries are unable to agree upon property division with independent executor, independent executor is authorized under Probate Code § 150 to have the court resolve the matter).

(7) Independent Executor May Be Required to Give Bond. The mere fact that the executor is required by will to give bond does not necessarily prevent him from being appointed as an independent executor. Stephens v. Dennis, 72 S.W.2d 630, 632 (Tex. Civ. App.--Eastland 1934, writ ref'd).

d. Necessity of Naming Successor Independent Executors. The independent administration will continue only so long as the independent executor, or some substitute or successor specifically named in the will, continues to serve. Rowland v. Moore, 174 S.W.2d 248 (Tex. 1943); In re Estate of Grant, 53 S.W. 372, 373 (Tex. 1899). A testator may not delegate to another person, including the probate judge, the authority to name a successor independent executor. Therefore, the will should name several successor independent executors. General practice is to name a corporate fiduciary as the final successor to assure the availability of an independent executor able to serve in any event.

d. Court-Appointed Independent Executor or Administrator. Section 145 of the Probate Code gives the court authority to appoint an independent administrator (if there is no will or there is a will which does not name any executors able and willing to serve) or an independent executor (if the will names an executor but does not provide for an independent administration) if all of the distributees of the estate agree on the advisability of having an independent administration and collectively designate in the application for administration or for probate of the will an individual or entity to serve as the independent administrator or executor. TEX. PROB. CODE ANN. § 145(c)-(e) (Vernon 1980).

Despite the potential for appointing an independent executor or administrator if one is not properly named in a will, that process may be fairly cumbersome, particularly if there are multiple beneficiaries of the estate and if there are potential beneficiaries who are incapacitated--the court might refuse to appoint an independent executor or administrator if there are any incapacitated distributees. If the court is willing to consider appointment of an independent executor or administrator if there are incapacitated distributees, the court may require the appointment of a guardian ad litem to represent the incapacitated distributees. TEX. PROB. CODE ANN. § 145(i) (Vernon Supp. 2002). Furthermore, the court may want an inventory of the estate assets in the application for appointment of the independent executor/administrator.

Some judges typically decline to create court-ordered independent administrations over a concern that they have personal liability if they exercise discretion in appointing independent executors or administrators. The 1993 legislative session revised Sections 36, 145(q) and 154A to clarify that Section 36 (dealing with the personal liability of judges) will not subject judges to personal liability for acts committed by court-appointed independent executors or administrators. TEX. PROB. CODE ANN. §§ 36, 145(q) & 154A(i)145(b) (Vernon Supp. 2002).

2. PERSONS ELIGIBLE FOR APPOINTMENT AS EXECUTOR.

a. Statutory Provisions. Section 77 of the Probate Code indicates that the probate court will grant letters testamentary to the person named as executor in the will. If no executor is named, a list is provided of other persons who are eligible for appointment as administrator. TEX. PROB. CODE ANN. § 77 (Vernon 1980).

Section 78 of the Probate Code specifically precludes the appointment of certain individuals and entities as executor: (1) an incapacitated person; (2) a convicted felon; (3) a nonresident individual or corporation who has not filed an appointment of resident agent for service of process; (4) a corporation unauthorized to act as a fiduciary in Texas; or (5) “a person whom the court finds unsuitable.” TEX. PROB. CODE ANN. § 78 (Vernon Supp. 2002). However, a court has no discretionary power to refuse to issue
letters testamentary to a person named as executor who comes forward within the statutory time and offers to probate the will and applies for letters unless the executor is incompetent, a minor or otherwise disqualified from serving. *Sales v. Passmore*, 786 S.W.2d 35 (Tex. App.--El Paso 1995, writ dism'd by agr.)

b. *"Unsuitable" Person.* There has been very little court interpretation of the last reason for disqualification (i.e., a person whom the court finds unsuitable). The expression of an intention by the independent executor to charge excessive compensation does not make the appointee untrustworthy (because of the probate court's authority to pass upon the reasonableness of the compensation). *In re Estate of Roots*, 596 S.W.2d 240, 244 (Tex. Civ. App.--Amarillo 1980, no writ). However, factors such as advanced age, physical infirmity, mental impairment short of incompetency, as well as adverse interests that might tempt the applicant to be unfaithful might well be grounds for disqualification. *Woodward & Smith, Texas Practice: Probate and Decedents' Estates* § 260 (1971). Just because a person is a creditor who asserts a good faith claim against the estate or is a beneficiary does not mean that the person is "unsuitable" to serve as independent executor. *See Boyles v. Gresham*, 309 S.W.2d 50, 54 (Tex. 1958). However, in one case where a person named as co-executor claimed ownership of practically the entire estate by reason of joint tenancy, designation was held to be "unsuitable" to serve as executor. *Bays v. Jordan*, 622 S.W.2d 148 (Tex. App.--Fort Worth 1981, no writ).

c. *Corporate Fiduciaries Eligible to Serve.* A corporate fiduciary is a bank or trust company having trust powers, existing or doing business under the laws of Texas or of the United States which is authorized to act under the order of appointment of the court as an executor, administrator, guardian, trustee, receiver, or depositary. *Tex. Prob. Code Ann.* § 3(d) (Vernon Supp. 2002); see 12 U.S.C. § 92(a) (national bank operating in Texas may be empowered by the Comptroller of the Currency to act as an executor or administrator of a decedent's estate to the same extent that state banks in Texas may so operate).

A foreign bank or trust company organized outside the state of Texas (assuming it has the corporate power to act as an executor or administrator) may be appointed by Texas court to act as executor or administrator if the jurisdiction in which the foreign bank or trust company is organized grants authority to Texas banks and trust companies to serve in a like fiduciary capacity. *Tex. Prob. Code Ann.* § 105A(a) (Vernon Supp. 2002). Section 105A(b) lists the documents that a foreign bank or trust company must file with the Secretary of State of Texas before being authorized to do business in Texas.

When naming a corporate entity as executor, the draftsperson should be aware of the Texas Substitute Fiduciary Act (TEC. FIN CODE ANN. §§ 274.001-274.203 (Vernon 1998 & Supp. 2002)), which became law on May 28, 1987. The Act generally permits a subsidiary trust company within a bank holding company to be substituted for the member bank named as executor in the will. Where a subsidiary trust company and member bank have entered into a substitution agreement pursuant to the Act, the testator's designation of the member bank generally will be deemed to be the designation of the subsidiary trust company with respect to all executor appointments, whether the appointment has matured or is prospective. However, the will may provide that the Act shall not apply. Thus, the testator may expressly prevent substitution from taking place. The constitutionality of the Act has been upheld. *See In Re Touring*, 775 S.W.2d 39 (Tex. App.--Houston 14th 1989, no writ).

3. **SELECTION; RESTRICTIONS ON SELF-DEALING.** Various personal attributes which should be considered in selecting an executor include sound judgment, impartiality, financial ability and responsibility, integrity, experience, knowledge, permanence, loyalty, and trustworthiness. In addition, the planner should be cognizant of Section 352 of the Probate Code which specifically prohibits an executor from purchasing, directly or indirectly, any estate assets. *Tex. Prob. Code Ann.* § 352 (Vernon Supp. 2002); *See Furr v. Hall*, 553 S.W.2d 666 (Tex. Civ. App.--Amarillo 1977, writ ref'd n.r.e.); *Seven Up Bottling Co. v. Capital National Bank*, 505 S.W.2d 624 (Tex. Civ. App.--Austin 1974, writ ref'd n.r.e.). The executor is not precluded, however, from purchasing assets from a beneficiary of an estate. *Langehennig v. Hohmann*, 365 S.W.2d 203 (Tex. Civ. App.--San Antonio 1963, writ ref'd n.r.e.). In addition, a sale by executors to their relatives has been held not to violate Section 352. *InterFirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 873 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Sections 352(b) and (c) of the Texas Probate Code were added in 1985. Subsection (b) permits a personal representative of an estate to purchase assets from the estate if the will expressly authorizes the sale. Subsection (c) permits a personal representative of an estate or of an incompetent ward to carry out a written executory contract signed by the decedent or ward including a contract for deed, an earnest money contract, a buy-sell agreement, or a stock purchase or redemption agreement. *Tex. Prob. Code Ann.* § 352(b) & (c) (Vernon Supp. 2002). These provisions apply to estates under wills filed for probate after August 26, 1985. Section 352(a) was amended in 1989 to refer specifically to both of those exceptions to the general prohibition against self-dealing. *Tex. Prob. Code Ann.* § 352(a) (Vernon Supp. 2002). Subsection (c) was also amended in 1989 to make clear that an executor may purchase property from the estate in compliance with a written executory contract signed by the decedent. The 1989 amendments are merely intended to clarify the changes made in 1985.

Under section 352(d), which is applicable to sales made on or after September 1, 1991, the personal representative of an estate may purchase property from his estate upon a determination by the court that the sale is in the best interest of the estate. *Tex.
PROB. CODE ANN. § 352(d) (Vernon Supp. 2002). The comfort resulting from an advance court order approving the sale should significantly reduce the liability concern as to a self-dealing transaction.

4. CO-EXECUTORS. The will may designate one or more individuals or entities to serve as co-executors.

a. Powers of Co-Executors. Under Section 240 of the Texas Probate Code, the acts of one co-executor acting alone are valid, except with respect to conveyances of real estate, in which event all co-executors must join, unless the court authorizes less than all to act. TEX. PROB. CODE ANN. § 240 (Vernon 1980); See Kelly v. Lobit, 142 S.W.2d 301 (Tex. Civ. App.--Galveston 1940, no writ) (the act of one co-executor is regarded as the act of all); Primm v. Mensing, 38 S.W. 382 (Tex. Civ. App. 1896, no writ) (either co-executor may create debt binding on the estate).

Apparently a decedent's will could override the provisions of Section 240 to require a specified number or all personal representatives to join in any type of action, or possibly even to allow less than unanimous action by co-executors with respect to conveyances of real estate. See Becker v. American National Bank, 286 S.W. 889, 890-92 (Tex. Civ. App.--Austin 1926, no writ) (will specified that "the concurrence of two of my executors or trustees shall be deemed sufficient and legal for all purposes, saving and excepting that in regard to the sale and conveyance of real estate the concurrence of the three executors or trustees is required"); WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECESENTS' ESTATES § 702 (1971).

b. Compensation of Co-Executors. Unless a will provides to the contrary, the amount of the executor's commission is fixed by statute. TEX. PROB. CODE ANN. § 241(a) (Vernon Supp. 2002). Generally, only one statutory commission is payable to co-executors, and each of the co-executors are entitled to a pro rata amount of the statutory commission (except for special commissions paid for special work or expenses). Wright v. Wright, 304 S.W.2d 951 (Tex. Civ. App.--Amarillo 1957, writ ref'd). However, corporate trust departments generally avoid this rule by contract and do not share fees with a co-representative. See Ben G. Sewell & Paul W. Nimmons, The Executor's and Administrator's Statutory Compensation in Texas, 3 ST. MARY'S L.J. 1, 5 n.20 (1971).

c. Liabilities. Generally, both co-executors are responsible for fulfilling the duties of an executor. A very early case indicates that a third party may sue either co-administrator to recover assets which have been misappropriated. Davis v. Thorn, 6 Tex. 482 (1851). One co-executor may sue the other for a claim alleged to be due to the estate. Brown v. Fore, 12 S.W.2d 114, 116 (Tex. Comm'n App. 1929, no writ). Furthermore, a co-executor is not personally liable on a contract made for the benefit of the estate by the other co-executor if he had no knowledge of the agreement and did not participate in making it. Lobit v. Marcoulides, 225 S.W. 757, 761 (Tex. Civ. App.--Galveston 1920, writ ref'd).

5. BOND.

a. Bond Required Unless Waived. Each executor of a Texas estate (other than banks and trust companies) must generally give bond unless the will directs that the executor may serve without bond. TEX. PROB. CODE ANN. §§ 194-198 (Vernon 1980 & Supp. 2002). Typically, a decedent's will waives the requirement of bond by an executor.

b. Amount of Bond. The amount of the bond is generally equal to the value of all personal property plus the amount of revenue anticipated to be received during the first twelve months of the administration. TEX. PROB. CODE ANN. § 194(4) (Vernon Supp. 2002).

c. Bond Premium Charged to Estate. The cost of the bond is borne by the estate. TEX. PROB. CODE ANN. § 194(11) (Vernon Supp. 2002); see Usher v. Glass, Sorenson & McDavid Insurance Company, 409 S.W.2d 880, 882 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd n.r.e.) (indicating that the estate bears the cost of the bond in all situations, and not just when the bond exceeds $50,000).

d. Court May Subsequently Require Bond Even if Waived. Even if the will indicates that an independent executor is not required to give bond, the court may thereafter require a bond to be posted if it appears that the independent executor is mismanaging the estate property, has betrayed or is about to betray his trust, or has in some other way become disqualified. TEX. PROB. CODE ANN. § 149 (Vernon 1980). In that event, it is possible that the premium for the bond would not be borne by the estate. See WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECESENTS' ESTATES § 728 (1971).

B. Trustee

1. SELECTION OF TRUSTEE.
a. **Personal Attributes.** Various personal attributes to be considered in selecting the trustee include sound judgment, impartiality (or desired partiality toward decedent's preferred beneficiaries), financial ability and responsibility, integrity and honesty, locality, permanence and continuity (particularly important for long-lived trusts), loyalty, and trustworthiness.

b. **Tax Planning--Beneficiary as Sole Trustee**

1. **Income Tax Consequences.** If a beneficiary is serving as sole trustee, the trust income will be taxed to the beneficiary, regardless of whether or not it is actually distributed to him, to the extent that he has the _unilateral_ power to vest corpus or income of the trust in himself. I.R.C. § 678(a)(1). Furthermore, it is unclear whether there is an "ascertainable standard" exception in Section 678. _Compare_ Private Letter Ruling 8211057 (December 16, 1981) (trustee-beneficiary with discretionary principal interest for "support, welfare and maintenance" taxable on income under I.R.C. § 678(a)) with Private Letter Ruling 9227037 (April 9, 1992) (trustee-beneficiary with discretionary principal interest for "health, support and maintenance" held _not_ taxable on income under I.R.C. § 678(a)). _See also_ Private Letter Ruling 8939012 (June 29, 1989) (trustee-beneficiary not taxable as owner of trust under I.R.C. § 678; however, exact distribution discretion standard not clearly set forth in the ruling). However, items allocated to principal may possibly be taxable to the beneficiary only if distributed to him. _See U.S. v. De Bouchamps_, 278 F.2d 127, 130-31 (9th Cir. 1960) (sole "trustee" did not have absolute discretion to distribute trust assets to self, but only for "needs, maintenance and comfort"; held, undistributed capital gains not taxed to "trustee").

The authority of a sole trustee to make distributions that would satisfy such person's legal obligation of support will be taxed as income to the person only to the extent that such distributions are made. I.R.C. § 678(c). _See_ Private Letter Ruling 8939012 (June 29, 1989) (sole trustee not taxable under § 678 where beneficiaries were trustee's adult children and descendants to whom he owed no legal obligation of support).

2. **Effect if Beneficiary-Sole Trustee Appoints Co-Trustee.** If a beneficiary initially serves as sole trustee and appoints a co-trustee, the beneficiary who was initially the sole trustee will still likely be taxed on the trust income under Section 678. I.R.C. § 678(a)(2).

3. **Estate Tax Consequences.** The beneficiary's authority to make distributions to himself or herself should be limited by an ascertainable standard relating to health, education, support or maintenance, or else such person will have a general power of appointment over the trust assets. I.R.C. § 2041(b)(1)(A). _See generally_ John L. Peschel, _Family Members as Trustees: Tax Problems for the Trustee/Beneficiary_, 2 REV. TAX. INDIV. 351 (1978); Private Letter Ruling 8939012 (June 29, 1989) (power to distribute to others limited by ascertainable standard).

c. **Consideration of Self-Dealing Prohibition.**

1. **General Prohibition of Self-Dealing.** Section 113.053 of the Texas Trust Code prohibits the trustee from either buying or selling, directly or indirectly, any property owned by the trust or from himself individually or certain other business affiliates. _TEX. PROP. CODE ANN_. § 113.053 (Vernon 1995). Furthermore, Section 113.054 of the Texas Trust Code prohibits a trustee of one trust from selling property to another trust of which the individual is also the trustee. _TEX. PROP. CODE ANN_. § 113.054 (Vernon 1995). In addition, a large body of case law has recognized, based upon general fiduciary principles, that a trustee is prohibited from engaging in self-dealing transactions. _See Slay v. Barnett Trust_, 187 S.W.2d 377, 387-91 (Tex. 1945). [For an excellent general summary of trust laws regarding self-dealing and conflicts of interest, _see_ John R. Crews, _Conflicts of Interest, Self-Dealing Liabilities of Co-Trustees, and Other Related Matters_, 16 REAL PROP., PROB. & TR. L.J. 748 (1981); Leo Herzl & Dale E. Colling, _The Chinese Wall and Conflict of Interest in Banks_, 34 BUSINESS LAWYER 74 (Nov. 1978).]

2. **Uncertain Effect of Specific Trust Provision Authorizing Self-Dealing.** Section 113.059 of the Texas Trust Code, however, recognizes that a trustor may explicitly relieve the trustees from the statutory self-dealing restrictions (except for corporate fiduciaries). _TEX. PROP. CODE ANN_. § 113.059 (Vernon 1995). Unfortunately, there are various Texas cases containing rather general language to the effect that it is against the public policy of Texas to permit self-dealing between a person in his fiduciary capacity and in his individual capacity. _E.g._, _InterFirst Bank Dallas, N.A. v. Risser_, 739 S.W.2d 882, 888 (Tex. App.--Texarkana 1987, no writ); _Langford v. Shamburger_, 417 S.W.2d 438, 444 & 47 (Tex. Civ. App.--Fort Worth 1967, writ ref’d n.r.e.) (dictum that "it would be contrary to the public policy of this State to permit the language of a trust instrument to authorize self-dealing by a trustee"); on rehearing, court stated that the language of a trust instrument specifically authorizing self-dealing "could present a serious question of public policy"); _Three Bears, Inc. v. Transamerican Leasing Co._, 574 S.W.2d 193, 197 (Tex. Civ. App.--El Paso 1978), _rev’d on other grounds_, 586 S.W.2d 472 (Tex. 1979) (cited _Langford_ for proposition that it is against public policy for a trust instrument to authorize self-dealing in order to invalidate guaranty given by trust which also benefits trustees in other capacities; Supreme Court upheld language authorizing trustee to give the guaranty without discussing self-dealing issue). Accordingly, it is not possible to rely totally upon a provision in a trust instrument relieving the trustee from liability for engaging in a self-dealing transaction.
An excellent resource regarding the rights and duties of co-trustees is the Texas Trust Code. Section 113.085 of the Texas Trust Code indicates that the consequences of the exercise of a power held by three or more co-trustees is not liable to a beneficiary of the trust or to others for the consequences of the exercise nor is a dissenting trustee liable for the consequences of an act in which the trustee joins at the direction of the majority trustees if the trustee expressed the dissent in writing to any of the co-trustees at or before the time of joinder. However, that Section does not excuse a co-trustee from liability for failure to discharge his duties as trustee. TEX. PROP. CODE ANN. § 113.085 (Vernon 1995).

If co-trustees cannot agree on a course of action by majority vote for an issue that must be decided, there is some authority from other states that a court could appoint an additional co-trustee "upon examination by the present trustees, to cast a deciding vote." Matter of Jacobs, 487 N.Y.S.2d 992 (1985). Proper drafting will provide a means for resolving disputes among co-trustees and, where appropriate, will specify which co-trustee is to have ultimate authority to resolve disputes.

There are no Texas cases regarding whether the total amount of compensation paid to co-trustees may be more than the compensation that would be allowed to a single trustee, or how the compensation should be allocated among co-trustees. The-major rule is that the compensation paid to co-trustees should not exceed the compensation that would be paid to a single trustee. There are no Texas cases regarding whether the total amount of compensation paid to co-trustees may be more than the compensation that would be allowed to a single trustee. See RESTATEMENT (SECOND) OF TRUSTS § 242(L)(1959); G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 978 (2d ed. 1962). However, Professor Scott suggests that compensation should be allowed to co-trustees on the basis of services performed by each of them, and that the total compensation may be more than what would be paid to a sole trustee, although each individual co-trustee would not necessarily receive the compensation that he would be paid if he were the sole trustee. IIIA AUSTIN SCOTT & WILLIAM FRATCHER, THE LAW OF TRUSTS § 242.10 (4th ed. 1988).

Under generally recognized trust law doctrines, a co-trustee is liable to beneficiaries "if he participates in a breach of trust committed by his co-trustee, improperly delegates the administration, approves or conceals a breach of trust committed by the co-trustee, fails to exercise reasonable care which enables the co-trustee to commit the breach of trust, or neglects to take the proper steps to compel the co-trustee to redress a breach of trust." Report of Committee on Trust Administration and Accounting, The Co-Trustee Relationship - Rights and Duties, 8 REAL PROP., PROB. & TR. J. 9, 19 (1973).

Co-trustees have no power by agreement among themselves to divide their responsibilities and to limit the liability of any particular trustee to a portion of the trust property. GEORGE BOGERT, LAW OF TRUSTS AND TRUSTEES § 590, at 398 (1980). However, the settlor of the trust may specify limited responsibilities for particular co-trustees. See John R. Cohan, Splitting Powers Between Fiduciaries, 8 REAL PROP., PROB. & TR. J. 588 (1973); Cohan & Kahn, Living with a Co-Trustee, 109 TR. & EST. 5 (1970) (discussing planning possibilities of dividing responsibilities among co-trustees). Similarly, an investment advisor could be designated either to control or to advise with respect to trust investments without necessarily being named as a co-trustee. See Report of Committee on Investments by Fiduciaries, Responsibility of Trustee Where Investment Power Is Shared or Exercised by Others, 9 REAL PROP., PROB. & TR. J. 517 (1974).
3. **SUCCESSOR TRUSTEES.**

   a. **Need for Naming Successor Trustee.** If co-trustees are designated, upon the death or failure to serve of one or more co-trustees, the remaining co-trustees will serve as the trustee(s) unless the terms of the will or agreement provide to the contrary. **Tex. Prop. Code Ann. § 113.085(2) (Vernon 1995).** If the sole trustee fails to serve and no successor trustee is appointed in the trust instrument, the court will appoint a successor trustee. **Tex. Prop. Code Ann. § 113.083(a) (Vernon 1995).** The appointed successor trustee will have the same powers, duties, and responsibilities as the original trustee unless the court directs otherwise. **Tex. Prop. Code Ann. § 113.084 (Vernon 1995).**

   b. **Methods for Appointing Successor Trustee.** Successor trustees may be designated (a) by naming specified individuals or entities in order of preference, (b) by giving specified persons the authority to appoint successor trustees, or (c) by appointing an "Advisory Board" that will be self-perpetuating and that will have the authority to appoint successor trustees. **See generally Alan R. Bromberg & E.B. Fortson, Selection of a Trustee: Tax and Other Considerations, 19 S.W.L.J. 523, 551-52 (1965).**

4. **REQUIREMENT OF BOND.** Unless the instrument creating the trust provides to the contrary, all trustees (other than corporate trustees) are required to give a bond conditioned upon the full performance of their duties as trustee, and the amount of the bond is determined by the District Court. **Tex. Prop. Code Ann. § 113.058 (Vernon 1995).**

5. **REMOVAL POWER.** Section 113.082 of the Texas Trust Code provides for the removal of a trustee for material violation of (or attempt to violate) the trust, for becoming incompetent or insolvent, and for other causes in the court's discretion. **Tex. Prop. Code Ann. § 113.082 (Vernon 1995).** In addition, the trust instrument may provide a nonjudicial means of removal to particular beneficiaries or other individuals. However, if a beneficiary having the removal power has the authority to substitute himself as trustee, for income and estate tax purposes he will be regarded as having the powers of the trustee. **Treas. Reg. §§ 1.678(a)-(1)(a); 20.2041-1(b)(1).**

C. **Guardian**

1. **SURVIVING PARENT'S AUTHORITY TO NAME GUARDIAN**

   a. **For Minor Children.** Section 676(d) of the Probate Code authorizes the last surviving parent of a minor "by will or written declaration" to appoint a guardian of the person of his or her minor children after his or her death. On compliance with the requirements of the Probate Code, that person is also entitled to be appointed guardian of the estate by the Probate Court. **Tex. Prob. Code Ann. § 676(d) (Vernon Supp. 2002).**

   b. **For Incapacitated Adult Children.** Effective September 1, 1995, the surviving parent of an incapacitated adult may appoint by will or written declaration a guardian of the person of the incapacitated child after his or her death, but only if the surviving parent is serving as guardian of the person of the incapacitated child. On compliance with the requirements of the Probate Code, the appointed person is also entitled to be appointed guardian of the estate by the Probate Court. **Tex. Prob. Code Ann. § 677(b) (Vernon Supp. 2002).**

   c. **Appointment by Written Declaration.** Effective September 1, 1995, new Probate Code section 677A sets forth specific requisites for a valid written declaration appointing a guardian for minor children as well as for adult incapacitated children. Specifically, the declaration must have two witnesses and must include a self-proving affidavit. "A properly executed and witnessed declaration and affidavit are prima facia evidence . . . that the guardian named in the declaration would serve the best interests of the ward." A suggested form (non-mandatory) is also included in the statute. **Tex. Prob. Code Ann. § 677A (Vernon Supp. 2002).**

Under prior law, guardian appointments by written declaration were permitted but there were no specific requirements for valid declarations; thus, the new requirements, especially the requirement for a self-proving affidavit, make the written declaration less convenient. On the other hand, by providing that a properly executed and self-proving declaration makes out a prima facia case that appointing the named guardian would be in the child's best interest makes the written declarations more likely to have the intended effect. By comparison, there is no statute providing that a guardian appointment in a valid will makes out a comparable prima facia case. However, all wills must have two witnesses so, if the will is self-proved, it will fulfill all the new requirements for guardian appointments by written declaration. To that extent, it would be reasonable to argue that all guardian appointments, whether by will or by written declaration, make out the prima facia case—so long as a self-proving affidavit is attached.

2. **SELECTION OF GUARDIAN BY MINOR.** Section 680(a) of the Probate Code gives minors age 12 or older the ability to take part in the guardian selection process. **Under section 680(a), when an application for guardianship has been filed, a minor who is at least 12 may choose his own guardian if the court approves the choice and finds that the choice is in the minor's best interest. Under section 680(b), if the current guardian ceases to serve, the minor may choose "another" guardian if the court is satisfied that the person selected is suitable and competent and in the minor's best interest. Tex. Prob. Code Ann. § 680 (Vernon Supp. 2002).**
Note that the Probate Code does not specify whether the minor may override a selection made by the surviving parent. Section 676, which grants the surviving parent the right to designate the guardian of the person of any minor children, begins “[e]xcept as otherwise provided by Section 680” (which is the section giving minors the right to select their own guardian). Tex. Prob. Code Ann. § 676 (Vernon Supp. 2002). This suggests that the minor’s authority is superior to that of the surviving parent’s. However, section 680(b) implies that, if a guardian is serving pursuant to the surviving parent’s will, the minor may make a selection only if and when that guardian ceases to serve. Tex. Prob. Code Ann. § 680(b) (Vernon Supp. 2002).

3. Effect If No Guardian Appointed by Last Surviving Parent. If no guardian is appointed in the last surviving parent’s will, the Probate Court will appoint a guardian in accordance with the priorities described in Section 676(c) of the Probate Code. First in order of priorities is the nearest ascendant of the ward, and if there is more than one ascendant in the same degree, the court chooses which would be in the best interests of the minor. If there is no ascendant, the nearest of kin has priority, with the court being given discretion to choose between relatives in the same degree of kinship to serve the best interests of the minor. The court may also designate a guardian in circumstances other than those described above. Tex. Prob. Code Ann. § 676(c) (Vernon Supp. 2002).

4. Eligible Appointees. Section 681 of the Probate Code lists persons disqualified to serve as guardians, including:
- a minor;
- a person whose conduct is notoriously bad;
- an incapacitated person;
- a person who is a party (or whose parent is a party) to a lawsuit affecting the welfare of the child, unless the court determines that the claim of the guardian is not the type of claim which is in conflict with the claim of the ward, or unless the court appoints an ad litem to represent the ward in the lawsuit;
- a person having an unpaid debt to the child or asserting any claim to property adverse to the child;
- a person who by reason of inexperience or lack of education, or for other good reason, is incapable of properly and prudently managing and controlling the ward or his estate;
- a person found unsuitable by the court; and

Generally, only one person may be appointed as guardian of the person or as guardian of the estate (although the same person need not serve as both). However, a husband and wife may be jointly appointed as co-guardians and, effective September 1, 1995, both joint managing conservators and co-guardians appointed under the laws of another state may be appointed as co-guardians. Tex. Prob. Code Ann. § 690 (Vernon Supp. 2002).

5. “Party to a Lawsuit” Problem. The 1993 legislative session amended the relevant statutory language to permit an individual to be appointed as guardian, in appropriate circumstances, even though the individual (or the individual’s parent) was involved in a lawsuit affecting the welfare of the ward. The amendment also clarifies that if a spouse, parent, or child of a ward is disqualified from serving as guardian because of the “party to a lawsuit” test, that person may be appointed as successor guardian upon the removal of any conflict causing the initial disqualification; however, the pre-1993 statute, § 110, was repealed, and the amended language was not carried over to the current statute, § 681. The revision was in response to Morales v. Alvarez, 789 S.W.2d 947 (Tex. App.--San Antonio 1990, writ denied). In Morales, the husband was removed as guardian for his wife who had been rendered physically and mentally incompetent as a result of injuries received in an automobile accident. The husband filed the lawsuit against parties in the automobile accident, both individually and as next friend for his wife. The court found that the husband was disqualified from serving as guardian and removed him as guardian.

6. Selection of Guardian. The guardian is the person charged by the testator with rearing his or her minor children. Before automatically designating the testator’s parents, consider whether they would want to serve, the age gap between the grandparents and the minors, whether the grandparents live in an area with other children in the neighborhood, whether the grandparents have friends with children, and whether it is likely that the grandparents will die before the children reach eighteen years of age, causing the children to have been twice uprooted out of their home.

IV. SUBSTANTIVE LAW DOCTRINES AND GENERAL CONSIDERATIONS REGARDING DISPOSITIVE PROVISIONS

This Section IV summarizes various substantive law doctrines generally affecting the disposition of assets under a will. Section V reviews the actual dispositive provisions of wills and discusses particular types of specific bequests and residuary estate bequests.

A. Freedom of Testamentary Disposition

1. General Rule. Texas cases have often stated that a testator has a right to dispose of his property by will in any way that he sees fit. In re Bartel’s Estate, 164 S.W. 859, 866 (Tex. Civ. App.--Galveston 1914, writ ref’d) (“The right of the owner of property to dispose of it by will as he may please is one that is often of great value, especially to those who are old or infirm and dependent upon others for services and attention; and this right should be as jealously guarded as any other property right.”). See Part III.B.3 at page 18 of this Outline.
However, the fact that a testator made an "unnatural" disposition of his property is often mentioned in cases involving testamentary capacity and undue influence.

Section 69A of the Texas Probate Code, added by the 1993 legislative session, prevents a court from issuing an injunction prohibiting a person from executing a Will or a Codicil to an existing Will. TEX. PROB. CODE ANN. § 69A (Vernon Supp. 2002). Previously, one of the orders typically included in temporary orders pending in adjudication of a divorce action was an injunction against executing a will or codicil (that clause was included in the standard form of temporary orders contained in the State Bar Family Law Practice Manual).

2. POWER TO DISINHERIT; POWER TO DIRECT INTESTATE DISTRIBUTION. As of September 1, 1991, a testator may specify in his will that a particular person is to receive no part of his estate under any circumstances. TEX. PROB. CODE ANN. § 58(b) (Vernon Supp. 2002). Under prior law it was not clear whether a person could effectively disinherit an heir. For example, if a will provided that a specified person was to receive no part of the estate but the testator died partially intestate, the disinherited person could receive a share of the estate by intestacy. See Najvar v. Vasek, 564 S.W.2d 202, 207 (Tex. Civ. App.--Corpus Christi 1978, writ ref’d n.r.e.). A comparable change applicable to trusts was made to Section 112.053 of the Texas Trust Code. TEX. PROP. CODE ANN. § 112.053 (Vernon 1995). The amendments were derived from New York Estates, Powers & Trusts Law section 1-2.118. See generally, Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?, 52 U. CHICAGO L. REV. 177 (1985). Testators now have the clear authority to "cut out" an heir but caution should still be exercised where the client desires to state his reasons for the disinherance. See Part 2XI.G at page 110 of this Outline.

Also as of September 1, 1991, a testator may direct that property shall pass under the will by intestacy. When coupled with the power to disinherit, the testator has the ability to specify the general application of the rules of intestate succession yet specify that a particular relative is to receive nothing. TEX. PROP. CODE ANN. § 58(b) (Vernon Supp. 2002).

3. PROTECTION OF SURVIVING SPOUSE. Texas does not recognize a dower, curtesy, or statutory forced share for a surviving spouse. The spouse is accorded protection by the community property system.

a. Power of Disposition Over Marital Property. Each spouse generally has the power to dispose of his separate property and his one-half interest in community property. (An exception to this general rule applies to homestead and the family allowance, discussed in paragraphs c and d below).

b. Widow’s Election Will. If a spouse’s will purports to dispose of property owned by his spouse, the surviving spouse has an election either (1) to assert his or her property rights in lieu of accepting any benefits under the will, or (2) to relinquish any of the survivor's rights in property disposed of by the testator and accept benefits given to the surviving spouse under the will. Jones v. State, 5 S.W.2d 973 (Tex. Comm’n App. 1928, no writ); Smith v. Smith, 657 S.W.2d 457 (Tex. App.--San Antonio 1983, writ ref’d n.r.e.). The surviving spouse is forced to make this election only if the language of the will unequivocally disposes of the surviving spouse's property, and the courts apply a general presumption that a will does not put a surviving spouse to an election. Wright v. Wright, 274 S.W.2d 670, 674-675 (Tex. 1955); Avery v. Johnson, 192 S.W. 542, 544 (Tex. 1917). For example, a bequest of "all my property" or "all of my estate" is deemed to dispouse of only the testator’s one-half community property interest. See Church of Christ v. Wildfong, 265 S.W.2d 622 (Tex. Civ. App.--Waco 1944, no writ) (bequest to wife of "one-half of all the property, real and personal and mixed, which I own and may be entitled to at the time of my death," with the remaining one-half being bequeathed to church; court held this was not an election will, so surviving spouse was entitled to her one-half of community as well as one-half of the testator's community property).

Several cases have stated that the election doctrine could apply to reimbursement claims of surviving spouses. Dakan v. Dakan, 83 S.W.2d 620, 625-26 (Tex. 1935); Colden v. Alexander, 171 S.W.2d 328, 333 (Tex. 1943) ("in fact, she could have no interest in [asserting a claim for reimbursement] without electing to decline to take under her husband's will"); Statts v. Stovall, 544 S.W.2d 938, 940-42 (Tex. Civ. App.--San Antonio 1976, writ ref’d n.r.e.) (election doctrine applied to surviving spouse's one-half of community claim for reimbursement for improvements and principal payments made on decedent's separate property that was devised to beneficiaries other than the spouse). As discussed further below, the election doctrine may also apply to homestead and family allowance claims where the testator's intent to that effect is clear.

There have been statements in various cases that in order to make an election under a will, the beneficiary must have acted with knowledge of the general consequences of his conduct and with the intent to elect. See Dakan v. Dakan, 83 S.W.2d 620, 626 (Tex. 1935). However, this rule does not require that the surviving spouse know "the exact extent of his legal rights and the exact legal effect of his choice. To impose such a requirement would, for all practical purposes, preclude the finding of an election by a lay person..." Smith v. Smith, 657 S.W.2d 457, 461 (Tex. App.--San Antonio 1983, writ ref’d n.r.e.) (acceptance of benefits under will and acceptance of appointment as executor held under the facts of that case to constitute an election).
c. Surviving Spouse's Homestead Rights. Upon the death of a person, the person's homestead (1) is free from creditors' claims (subject to certain limitations), and (2) is subject to certain occupancy rights of the surviving spouse.

(1) Occupancy Right of Surviving Spouse. The homestead may not be distributed to beneficiaries of the estate "during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same." TEX. CONST. art. XVI, § 52; TEX. PROB. CODE ANN. § 283 (Vernon 1980).

(2) Definition of Homestead. The term "homestead" is defined by the Texas Constitution. A homestead not in a town or city cannot exceed two hundred acres of land. A homestead in a town or city may not exceed one acre of land. Either the rural or urban homestead includes any improvements on the land. TEX. CONST. art. XVI, § 51.

If used for the purposes of a rural homestead, the homestead may be in one or more parcels. TEX. PROP. CODE ANN. § 41.002(b)(1) (Vernon 2000). To establish a rural homestead, the surviving spouse must reside on part of the property, and use the property for purposes of a home. However, the surviving spouse need not reside on all the parcels so long as the other tracts are used for the support of the family. Riley v. Riley, 972 S.W.2d 149, 154 (Tex. App.--Texarkana 1998, no writ).

Prior to an amendment to the Texas Constitution on November 8, 1983, the urban homestead was limited to lots having a total value of not more than $10,000 at the time they were designated as homestead. TEX. CONST. art. XVI, § 51. For purposes of the $10,000 limit, the value of any improvements on the lots was immaterial. If the lot value did exceed $10,000 at the time designated as a homestead, the excess lot value did not constitute a portion of the homestead, and any subsequent appreciation in the value of the lot was apportioned pro rata between the homestead and nonhomestead portions of the property. All of the improvements constituted part of the homestead and were not allocated partly to the nonhomestead portion of the property. See Hoffman v. Love, 494 S.W.2d 591, 597 (Tex. Civ. App.--Dallas), writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973).

The 1983 amendment specifically provided that it would be effective for all homesteads, including homesteads acquired before adoption of the amendment. See H.J.R. No. 105, § 2. If the lot exceeds one acre, presumably only improvements located on the one acre designated as homestead will constitute part of the homestead.

(3) Excess Portion Is Subject to Partition. If, at a decedent's death, a portion of the residence does not qualify as "homestead" property within these limitations, the excess amount is subject to partition among the other estate beneficiaries. Whiteman v. Burkey, 282 S.W. 788, 789 (Tex. 1926), certified question conformed to, 286 S.W. 350, 351 (Tex. Civ. App.--Galveston 1931, no writ) (surviving husband should be given an opportunity to pay the beneficiaries of the wife's estate their portion of the excess value of the property not qualifying as "homestead," and if a sale became necessary to partition the excess, the surviving spouse should be awarded the portion of the proceeds attributable to the improvements and the fractional portion of the lot value that constitutes homestead). See Hoffman v. Love, 494 S.W.2d 591, 597 (Tex. Civ. App.--Dallas), writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973); Don D. Bush & John W. Proctor, Piercing the Homestead: The Trial of an Excess Value Case, 34 BAYLOR L. REV. 387 (1982).

(4) Nature of Decedent's Interest in Residence May Affect Occupancy Rights. The surviving spouse's homestead occupancy rights are the same whether the property was the separate property of the deceased spouse or community property. TEX. PROP. CODE ANN. § 282 (Vernon 1980). However, if the deceased spouse had previously been married and owned only one-half of the homestead, having only occupancy rights in the other half, the surviving spouse's occupancy rights attach only to the half actually owned by the decedent. In that situation, the underlying owners of the one-half that was not owned by the decedent spouse (e.g., the children of the first marriage) may partition as to their half which formerly belonged to the prior spouse. Horn v. Sankary, 161 S.W.2d 156, 158 (Tex. Civ. App.--Fort Worth 1942, no writ).

(5) Election Doctrine May Deny Occupancy Rights. The surviving spouse's homestead occupancy rights may be affected by the election doctrine. If the surviving spouse finds that the rights granted to the surviving spouse under the will are inconsistent with the occupancy rights of a probate homestead, the surviving spouse may be put to an election and denied the use of the probate homestead by accepting other benefits conferred under the will. Miller v. Miller, 235 S.W.2d 624, 626-28 (Tex. 1951).

d. Family Allowance. The surviving spouse is entitled to a family allowance for the support of the surviving spouse and minor children of the deceased for a period of one year. The allowance is made only to the extent that the surviving spouse's separate property and property of the minor children are adequate for their respective maintenance during the one-year period from the decedent's death. TEX. PROP. CODE ANN. §§ 286-288 (Vernon 1980 & Supp. 2002). The receipt of life insurance proceeds by the surviving spouse apparently is taken into consideration in determining the amount of the family allowance. See McCanless v. Devenport, 40 S.W.2d 903, 906 (Tex. Civ. App.--Dallas 1931, no writ).
1. Election Doctrine May Deny Family Allowance. The will may specifically put the surviving spouse to an election either to forego benefits under the will or to forego statutory rights to the family allowance. See Miller v. Miller, 235 S.W.2d 624, 626-28 (Tex. 1951); Lindsley v. Lindsley, 163 S.W.2d 633, 637 (Tex. 1942). Even if the will does not expressly condition the spouse's benefits under the will upon an election to forego statutory rights, an intention on the part of the testator to put the spouse to such an election may nevertheless appear from the terms of the will by "manifest implication." See Miller, 235 S.W.2d at 627; Trousdale v. Trousdale's Executors, 35 Tex. 756 (1872) (intent to put spouse to election appeared by manifest implication where spouse received everything except that which was specifically bequeathed to others; any award to her would necessarily have come from specifically bequeathed property and thus been inconsistent with and "disappointed" the will); compare Churchill v. Churchill, 780 S.W.2d 913, 914-915 (Tex. App.--Fort Worth 1989, no writ) (spouse was not put to an election where residuary estate was not sufficient to satisfy statutory allowance and testator's nontestamentary "instructions" to executors--referred to in the will--were not shown to contemplate a specific use of the residuary estate assets that would be inconsistent with using those assets to provide a statutory allowance).

2. Obtaining Family Allowance Prior to Approval of Inventory. Section 286 was amended in the 1993 legislative session to permit the beneficiaries of the family allowance to seek to have the family allowance fixed by the court prior to the approval of the inventory. TEX. PROB. CODE ANN. § 286 (Vernon Supp. 2002). Under prior law, the family allowance could be set aside to the surviving spouse and minor children only after the inventory was approved. In a contested case, this allowed the personal representative to defer the obligation of funding the family allowance by seeking extensions of time to file the inventory.

3. Exempt Property. In an insolvent estate, the court is directed to set aside property exempt from creditors' claims after the inventory has been approved by the court. The exempt property is set aside for the benefit of the surviving spouse, minor children, and married children remaining with the family. Section 271 was amended in the 1993 legislative session to permit the exempt property to be set aside prior to the approval of the inventory. TEX. PROB. CODE ANN. § 271 (Vernon Supp. 2002). The exempt personal property passes to the above-described family members only if the estate is insolvent. See TEXAS PROB. CODE ANN. § 278-279 (Vernon 1980). If the estate is not insolvent, the above-described family members are entitled to the "use and benefit" of the exempt personal property during the administration of the estate. When the administration terminates, the decedent's interest in the exempt property passes to his heirs or devisees. Bolton v. Bolton, 977 S.W.2d 157, 159 (Tex. App.--Tyler 1998, no writ).

4. Protection of Children

a. No Forced Heirship. Interestingly, Texas is one of three states (the others being Louisiana and Idaho) that at one time have applied a "forced heirship" doctrine protecting children against disinheriting. See ATKINSON, WILLS 138-40 (2d ed. 1953). Texas no longer has a forced heirship provision.

b. Pretermitted Child Statute. Under Texas law, unlike the laws of some other states, a parent need not even mention in his will any children that are alive at the time the will is executed. However, Section 67 of the Texas Probate Code does give certain protection to afterborn children if they are not mentioned or included in the will. TEX. PROB. CODE ANN. § 67 (Vernon Supp. 2002). See Part 2IV.B.2 at page 53 of this Outline.

5. Public Policy Restrictions. A condition in a will designed to encourage murder or other crime would no doubt be declared invalid. However, provisions intended to prevent the remarriage of a surviving spouse are not invalid. ATKINSON, WILLS 405-08 (2d ed. 1953); cf. Matter of Estate of Gehrt, 480 N.E.2d 151 (Ill. App. 1985) (will provision leaving property on condition that beneficiary not remarry until testamentator's death held enforceable). Similarly, bequests which might have the effect of discouraging a child from living with his natural parent, or encouraging divorce by accelerating termination of the trust upon the divorce of the beneficiary, have been declared valid by Texas courts. Jenkins v. First National Bank, 26 F. Supp. 312, 314 (N.D. Tex. 1939), aff'd, 107 F.2d 764 (5th Cir. 1939) (trust provided that income would not be paid to grandson during any time he was living with his father); Ellis v. Birkhead, 71 S.W. 31, 33-34 (Tex. Civ. App. 1902, writ ref'd) (trust terminated and daughter received remaining assets upon divorce from her husband; court concluded that provision was not "manifestly intended to incite divorce"). See generally Wanda Wakefield, Annotation, Effect of Testamentary Gift to Child Conditioned Upon Specified Arrangements for Parental Control, 11 A.L.R.4th 940 (1982) (lists numerous other annotations regarding public policy restrictions); 5A RICHARD R. POWELL, THE LAW OF REAL PROPERTY ¶ 858 (1988). A fairly recent case on public policy grounds invalidated a will provision stating that assets in a trust for certain beneficiaries would be transferred to a trust for different people if certain specified individuals were ever appointed by a court as guardian of the person or estate of those beneficiaries. Stewart v. RepublicBank Dallas, N.A., 698 S.W.2d 786 (Tex. App.--Fort Worth 1985, writ ref'd n.r.e.).

6. Property Law Restrictions. Certain doctrines of property law affecting transfers generally also apply to testamentary dispositions, such as the rule against perpetuities (see Part 2X.B.2.a at page 94 of this Outline), or the rule prohibiting direct restraints on alienation of property (see Part 2IV.D.6 at page 64 of this Outline). See 5A R. POWELL, THE LAW OF REAL PROPERTY ¶¶ 839-48 (1988).
Certain restrictions may apply under the federal copyright laws. For items copyrighted before 1978, the initial term of the copyright lasted 28 years. At the end of that term, the copyright could be renewed. Federal laws designate that the spouse and children will have this renewal right if the creator dies during the initial term. A bequest purporting to leave this renewal right to someone else would not be recognized. See Francis M. Nevins, Jr., Copyright Law v. Testamentary Freedom: The Sound of a Collision Unheard, 23 REAL PROP., PROB. & TR. L.J. 47 (1988).

7. RESTRICTIONS ON BEQUESTS TO DRAFTING ATTORNEY. Section 58b of the Texas Probate Code provides that bequests to an attorney or to an heir or employee of an attorney who prepares or supervises the preparation of a will are void unless the attorney, heir or employee is the testator's spouse, an ascendant or descendant of the testator, or related to the testator within the third degree of consanguinity or affinity to the testator. TEX. PROB. CODE ANN. § 58b (Vernon Supp. 2002). Section 58b only applies to wills executed on or after September 1, 1997. Acts 1997, 75th Leg., Ch. 1054, § 2. However, Rule 108(b) of the Texas Disciplinary Rules of Professional Conduct provides that “[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.” TEX. DISCIPLINARY R. PROF’L CONDUCT 1.08(b). Although the preamble to the Disciplinary Rules states that the rules do not define standards of civil liability of lawyers for professional conduct and that a violation of a rule does not give rise to a private cause of action, a court may use the disciplinary rules to determine whether a contract is contrary to public policy. Shields v. Texas Scottish Rite Hospital, 11 S.W.3d 457, 459 (Tex. App.—Eastland 2000, pet. denied) (bequest of over $2 million in securities and cash constitutes a substantial gift, and fails as a matter of public policy).

8. NO RESTRICTIONS ON GIFTS TO CHARITY. A number of states have enacted "Mortmain" statutes restricting gifts to charity by imposing restrictions regarding the percentage of the estate that may be given to charity by will, or prohibiting charitable gifts made by will executed within a certain period (thirty days to one year) before the testator's death. See Restrictions on Charitable Testamentary Gifts, 5 REAL PROP., PROB. & TR. J. 290 (1970). Texas has never had such a statute.

B. Substantive Law Doctrines Regarding Changes of Beneficiaries After Will Is Executed

1. DEATH OF BENEFICIARY—LAPSE

a. General Rule. If the beneficiary of a bequest predeceases the testator, and if the bequest does not state who will be entitled to receive the property in that event, the bequest "lapses" instead of passing to the heirs or personal representative of the deceased beneficiary. See Carr v. Rogers, 383 S.W.2d 383, 384-385 (Tex. 1964).

b. Lapsed Specific Bequest Passes to Residuary Estate. For the estates of decedents dying on or after September 1, 1991, a lapsed specific bequest will become a part of the residue if the will contains a residuary clause. TEX. PROB. CODE ANN. § 68(b) (Vernon Supp. 2002). Under prior law the same rule was generally applicable. See Sewell v. Sewell, 266 S.W.2d 924, 926 (Tex. Civ. App.—Texarkana 1954, writ ref’d n.r.e.). However, uncertainty could arise under prior law where a specific bequest lapsed and the residuary clause provided for the disposition of "my other property." In such a case, the specifically bequeathed property is not "my other property."

c. Lapsed Bequest in Residuary Estate. For the estates of decedents dying on or after September 1, 1991, a lapsed bequest of the residuary estate passes to the other residuary beneficiaries in proportion to their respective interests in the residue estate. TEX. PROB. CODE ANN. § 68(c) (Vernon Supp. 2002). The so called "no residue of a residue" rule previously applied by Texas courts was that the lapse of a portion of a residuary bequest (where no substitutional takers are provided) passed by intestacy rather than passing to the other residuary beneficiaries. Swearingen v. Giles, 565 S.W.2d 574, 576-77 (Tex. Civ. App.—Eastland 1978, writ ref’d n.r.e.); Estate of O’Hara, 549 S.W.2d 233, 237 (Tex. Civ. App.—Dallas 1977, no writ). This rule had been criticized as frustrating the desire of the testator manifested by his residuary clause to pass his entire estate by his will. See 9 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 28.5 (2d ed. 1992).

Even prior to the statutory revocation of the "no residue of a residue" rule, at least one court seemed uncomfortable with the rule and was able to avoid its application via a perhaps liberal construction of the will. The will at issue provided for a disposition of the estate if the testator predeceased her husband or died simultaneously, but did not specifically provide for a disposition of the estate if the testator survived her husband. The court, applying the general presumption against intestacy, held that the estate passed pursuant to the simultaneous death dispositive scheme rather than by intestacy. Chambers v. Warren, 657 S.W.2d 3 (Tex. App.—Houston [1st Dist.] 1983, writ ref’d n.r.e.).
d. **Exception: Antilapse Statute.** For the estates of decedents dying on or after September 1, 1991, Section 68 of the Probate Code provides that if (i) a bequest is made to a descendant of the testator or a descendant of the testator's parent, and (ii) such descendant was not living when the will was signed, predeceases the testator, or is treated as having predeceased the testator by virtue of a qualified disclaimer, then, the bequest will not lapse but shall pass to the descendants of such legatee, *per stirpes*. TEX. PROB. CODE ANN. § 68 (Vernon Supp. 2002).

For estates of decedent's who died prior to September 1, 1991, the antilapse statute applied only to bequests to the testator's descendants. Cases decided under prior law held that the statute was applied strictly only in the situations described in the statute. See *Logan v. Thomason*, 202 S.W.2d 212, 215 (Tex. 1947) (statute does not apply to a bequest to a collateral relative); *Andrus v. Remmert*, 146 S.W.2d 728, 729 (Tex. 1941) (statute does not apply where legatee leaves no children or descendants).

Section 68 was revised in 1993 to give guidance as to what language in a will can override the antilapse provisions of § 68(a). It provides some "safe-harbor" language not intended to be exclusive, but by way of example, which the testator could use with assurance that the antilapse provisions of § 68(a) would not apply. The amended statute provides, for example, that a bequest to "my surviving children" will pass only to children who actually survive, and the antilapse statute will not apply to the interests of any predeceasing children. The 1993 amendment also clarifies that decedents of the devisee must survive by 120 hours in order to receive assets from the estate under the antilapse statute. TEX. PROB. CODE ANN. § 68 (Vernon Supp. 2002).

e. **Exception: Class Gifts**

(1) **General Rule Regarding Lapse of Class Gifts.** If a bequest is made to a "class" of individuals (e.g., "to the children of X"), if one of the persons in the class dies before the testator's death, the remaining members of the class are entitled to receive the bequest, and the deceased beneficiary's portion does not lapse. See *Hagood v. Hagood*, 186 S.W. 220, 225 (Tex. Civ. App.--Fort Worth 1916, writ ref'd); see also *Turner v. Adams*, 855 S.W.2d 735 (Tex. App.--El Paso 1993, no writ) (where there is no express condition of survivorship, remainder estate following a life estate vests in members of class living as of testator's death). If a bequest is made to named individuals who are also described as a class, the bequest is ordinarily treated as a "gift to individuals, the class description being added merely by way of identification." *McGill v. Johnson*, 775 S.W.2d 826, 829 (Tex. App.--Austin 1989, no writ) (bequest to "my sisters, Ruth J. Gordon and Mary B. Hall").

(2) **Application of Antilapse Statute to Class Gifts.** For the estates of decedents dying on or after September 1, 1991, the antilapse statute expressly applies to class gifts. TEX. PROB. CODE ANN. § 68 (Vernon Supp. 2002). Thus, if a bequest is made "to the children of my son X" or "the children of my brother Y," and if any of the children predeceases the testator leaving surviving descendants, that child's share of the bequest will pass to his or her descendants under Section 68. This is consistent with the majority rule in the U.S., which is that antilapse statutes apply with respect to deceased class members. See JESSE DUKEMINIER & STANLEY M. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES, 652 (2d ed. 1978).

The 1993 amendment of Section 68 clarifies that the class gift provision in Section 68 does not apply to persons who were deceased when the will was executed. TEX. PROB. CODE ANN. § 68 (Vernon Supp. 2002). For example, assume T has one surviving brother and one surviving sister and one brother who died several years earlier (with surviving children). If T writes his will to leave a bequest "to my brothers and sisters," he probably did not intend to include the children of his deceased brother in that bequest. The 1993 amendment clarifies that the anti-lapse statute would not apply to the predeceased brother under this class gift.

For estates of decedents dying prior to September 1, 1991, Texas law was not totally clear as to whether the antilapse statute was applied to class gifts. One Texas court of appeals case indicated, in dictum, that the old antilapse statute would be applied to class gifts. *Burch v. McMillin*, 15 S.W.2d 86, 91 (Tex. Civ. App.--Eastland 1929, no writ). However, in a case that did not directly involve a class gift (the case involved a gift subject to express survivorship provisions), the Texas Supreme Court disapproved *Burch* to the extent that it purported to say that the antilapse statute would override express survivorship provisions. *White v. Moore*, 760 S.W.2d 242, 244 (Tex. 1988). However, the Supreme Court did not address the applicability of the antilapse statute to a simple class gift that did not expressly contain survivorship requirements. See also *Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987) (court of appeals held that bequest to "surviving children of this marriage" was a "class bequest" conditioned on survivorship and that the antilapse statute did not apply, so the property passed only to the children who survived the testator; Supreme Court held that in light of the entire will, the bequest was to the children who were surviving at the time the will was signed, so the antilapse statute applied with respect to the children who subsequently predeceased the testator).

f. **Drafting Consideration.** The lapse doctrine and the antilapse statute should not present any problems to the careful drafter. The will should specifically provide who will be substitute takers in the event that a beneficiary does not survive the testator. In stating a survivorship requirement, the will should specifically make clear when the survivorship requirement is applied (for example, at the time of the testator's death or at the termination of a trust). See *Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987) (bequest to "surviving children of this marriage" held to refer to children surviving at the time the will was signed).
2. **PRETERMITTED CHILD**. Certain protection is given to children who are born after a will is executed under Section 67 of the Probate Code. TEX. PROB. CODE ANN. § 67 (Vernon Supp. 2002). If a child is born after an original will is executed but before a codicil is executed, the child will not be entitled to protection under the Texas statute because the codicil republishes the will. Laborde v. First State Bank & Trust Co., 101 S.W.2d 389, 393 (Tex. Civ. App.--San Antonio 1936, writ ref'd).

a. **Law Effective For Decedents Dying Prior to September 1, 1989.**

(1) *Testator Has Child or Children Living at Time Will Is Executed (Section 67(a)).* If the testator has a child or children at the time the will is executed, and if a child is born or adopted after the will is executed and that child is "not provided for by settlement," the afterborn child is entitled to his or her intestate share of the estate unless (i) the surviving spouse is the father or mother of all of the testator's children (not counting adopted children), and (ii) the surviving spouse is the principal beneficiary under the will to the entire exclusion (by silence or otherwise) of the testator's other children.

One Texas case has addressed the meaning of the phrase "provided for by settlement." In re Estate of Ayala, 702 S.W.2d 708 (Tex. App.--San Antonio 1985, no writ). In that case, the decedent signed a will covering his U.S. property in 1953. After 1953, two additional children were born to him, and he subsequently signed a will in 1971 covering his Mexico assets. The 1971 will included some specific bequests to his children, including the two children born after 1953. The court concluded that the decedent did "make a settlement" for the afterborn children by making bequests to them in the 1971 will, so the pretermitted child statute did not apply to the U.S. property being disposed of by the 1953 will. Id. at 711. The case summarizes various New York cases interpreting similar statutory language that have concluded that afterborn children can be provided for "by settlement" in any number of different ways in order to preclude application of the pretermitted child statute. See e.g., In re Fabers Estate, 280 A.D. 394, 114 N.Y.S.2d 119, aff'd, 305 N.Y. 200, 111 N.E.2d 883 (1953) (factors including the size of the settlement, value of the entire estate, and provisions made for other children, among others, are to be considered in determining whether the afterborn child has been provided for "by settlement").

(2) *Testator Has No Children Living at Time Will Is Executed (Section 67(b)).* If the testator has no children living at the time the will is executed, if a child is subsequently born or adopted after the will is executed, and that child is not "provided for or mentioned," the will is VOID if the child survives for one year after the testator's death unless (i) the surviving spouse is the father or mother of all of the testator's children (not counting adopted), and (ii) the surviving spouse is the beneficiary of the estate to the entire exclusion (by silence or otherwise) of the testator's other children.

The phrase "mentioned" has been interpreted to mean that the testator had in mind the possibility of afterborn children in that they were not overlooked or forgotten by accident, inadvertence or oversight. Pearce v. Pearce, 104 Tex. 73, 134 S.W. 210, 214 (1911).

As an example of the operation of Section 67(b), assume that a person has no children at the time that he signs his will, that his wife has substantial wealth in her own right, and that his brother and sister have substantial financial needs. If the person leaves a significant portion of his estate to his brother and sister (so that his wife is not the "principal beneficiary" of his estate), and if the person has a child after the time that the will is executed, the will would be void if the child lived at least one year after the testator's death unless the testator's will made some provision or mention of afterborn children.

(3) **Distinction Between Effect if Testator Has Children Living Versus Effect if Testator Has No Children Living at Time Will Executed.** The circumstances triggering the application of Section 67(a) and 67(b) are generally the same, and the provisions under Sections 67(a) and 67(b) are generally the same. (There are some detailed differences in the triggering circumstances and provisions of Sections 67(a) and 67(b).) The primary difference is in the consequences. If children are alive at the time the will is executed, an afterborn takes his intestate share. If no child is alive when the will is executed, the will is void. For a description of the reason behind the difference in these two provisions, see 10 Leopold & Beyer, Texas Practice: Texas Law of Wills §§ 34.10 & 34.13 (2d ed. 1992).

(4) **Posthumous Children.** Any of the testator's children born after his death are included within the protection of Section 67 as described above. Section 67(b) specifically refers to the situation in which a testator "shall leave his wife enceinte of a child." Section 41(a) of the Probate Code (which gives inheritance rights to posthumous children and lineal descendants), in conjunction with Section 67(a), makes the provisions of Section 67(a) applicable to posthumous children. Section 66 of the Texas Probate Code previously dealt specifically with posthumous children, but was repealed in 1979 because it was deemed superfluous.

b. **Law Effective for Persons Dying After September 1, 1989.**
(1) Overview of Prior Law

(a) Triggering Events.--

- Afterborn child;
- "Not provided for by settlement"; "not provided for or mentioned."
- Afterborn child lives one year after testator's death (under § 67(b) but not § 67(a)).

(b) Provisos.--

- Surviving spouse is the parent of all of the testator's children;
- Surviving spouse is the principal beneficiary to the exclusion of all of the testator's other children.

(c) Effect.--

- For § 67(a) (other children alive when will executed): afterborn gets intestate share;
- For § 67(b) (no child alive when will signed): will void.

(2) Perceived Problems Under Prior Law

(a) Differences in Triggering Event Number 2.--There appears to be no reason for the distinction between whether the afterborn child is "not provided for by settlement" or "not provided for or mentioned" based upon whether there were children living when the will was signed. Because of the problems in determining what an appropriate "settlement" is, the new statute utilizes the "not mentioned or provided for" approach.

(b) Not Give Effect to Testator's Desire to Benefit Spouse.--One of the provisos under current law to prevent the application of Section 67 is that the surviving spouse be the parent of all of the testator's children. This would not seem to give effect to the testator's intention to leave all of his property to the surviving spouse in a split family situation, where the testator has children by a prior marriage. For example, if the testator has children by marriage #1, also has children by marriage #2, but wishes to leave all of his property to spouse #2, that intention would be defeated under the old law if the testator and spouse #2 have an afterborn child. In reality, the afterborn child would likely be treated more favorably than the children in existence when the will was signed, because the surviving parent would be more likely to leave assets to that child than to the children by the prior marriage. The new law deletes the requirement that the surviving spouse be the parent of all of the testator's children in order to be able to retain bequests left to the surviving spouse.

(c) Uncertainty of Spouse Being "Principal" Beneficiary.--There have been no Texas cases discussing what the term "principal" beneficiary means, and how much of the estate could be left to other beneficiaries without causing Section 67 to apply. The new law deletes the requirement that the spouse be the principal beneficiary of the estate.

(d) Posthumous Children.--Section 67(b) under the old law specifically refers to posthumous children, but Section 67(a) does not. (However, § 41(a) in connection with old § 67(a) would appear to include posthumous children.) The new statute specifically states that posthumous children will be included under the statute, regardless whether there were children alive at the time that the will was signed.

(3) General Operation of Current Law

(a) Triggering events.--

- Afterborn child.
- Not mentioned or "provided for" in the will or otherwise provided for by the testator (the statute contains a special definition of the term "provided for").
- Some of the estate is left to a person other than the parent of the afterborn child.
(b) Provisos.--None.

(c) Effect.--

- No provision for existing children (§ 67(a)(1)(A) or no existing children (§ 67(a)(2)):
  - Afterborn child gets intestate share of portion of estate not left to parent of afterborn child.

- Provision for existing children:
  - Afterborn child gets a pro rata share of the aggregate amounts left to other children, having as much the same character (life estate v. fee simple, etc.) as possible. (§ 67(a)(1)(B)).

(4) Posthumous Children. Posthumous children are specifically included under the new law, regardless of whether there were children living at the time the will was signed. TEX. PROB. CODE ANN. § 67(c) (Vernon Supp. 2002).

(5) Ratable Abatement From Shares of Others. When the afterborn child becomes entitled to a portion of the benefits left to other children or to other beneficiaries (except the surviving parent of the afterborn), the assets left to such other beneficiaries will abate ratably. "In abating the interest of such beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible." TEX. PROB. CODE ANN. § 67(b) (Vernon Supp. 2002).

(6) Contingent Beneficiary. The 1989 version of Section 67 was unclear as to whether it applied where an existing child is mentioned in the Will but actually receives no bequest and is only a contingent beneficiary. Section 67 was amended in the 1993 legislative session to clarify that the terms "provided for" and "provision is made" mean any disposition of property to or for the benefit of the pretermitted child, whether vested or contingent, including a bequest to a trustee. TEX. PROB. CODE ANN. § 67(d) (Vernon Supp. 2002).

(7) Provided for in Non-Probate Dispositions Taking Effect at Death. Inequities could result where a substantial non-probate disposition of property is made to after-born or after-adopted child and the after-born or after-adopted child also receives a pro rata portion of the probate estate under Section 67. Section 67 was amended in the 1993 legislative session to provide that it will not apply if the pretermitted child receives gifts of non-probate assets that are intended to take effect at the testator's death.TEX. PROB. CODE ANN. § 67(d) (Vernon Supp. 2002); See, Estate of Gorski v. Welch, 993 S.W.2d 298 (Tex. App.--San Antonio 1999, pet. denied). Therefore, lifetime transfers from the testator to the pretermitted child will not take the child outside the operation of Section 67. However, by way of example, naming the child as beneficiary under a life insurance policy on the testator's life will make Section 67 inapplicable to the child.)

c. Drafting Comment. The lesson to be learned from Section 67 of the Probate Code is that a testator's will should generally include afterborn children within its provisions (usually done by simply defining the term "children" to include afterborn children). Extreme caution is required if a will does not make any references to children. Texas cases suggest that any language in a will which indicates with reasonable clarity that the testator had in mind the possibility that a child or children might be born to him or her in the future would be sufficient to exclude an afterborn child from the benefits afforded under the Texas statute. See Pearce v. Pearce, 134 S.W. 210 (Tex. 1911); 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 34.17 (2d ed. 1992).

3. DIVORCE. Section 69 indicates that a spouse subsequently divorced is to be treated as having predeceased the testator and provisions in a will in favor of the former spouse will be void. TEX. PROB. CODE ANN. § 69 (Vernon Supp. 2002). See Part III.C.1 at page 28 of this Outline.

4. DEATH OF A CHILD.

a. Consider Spouses of Children. Typically, wills do not make any provisions for the spouse of a deceased child. However, the planner should not automatically assume that the testator does not want to make any provisions for spouses of deceased children.

b. Per Capita and Per Stirpes. Bequests to descendants should clearly indicate whether the distribution is per capita or per stirpes. While a gift or bequest to "issue" is generally interpreted to require a per stirpes distribution, courts in several states have reached a contrary conclusion. See 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 370 (1987). Use of the terms "in equal shares" or "share and share alike" may result in an unwanted per capita distribution.

Even if the will specifies that the distribution is to be made per stirpes, various interpretations of that term are possible, and conflicts exist among cases in various jurisdictions. For example, if a bequest is made to surviving issue per stirpes,
possible confusion exists if all of the children are deceased. Is the per stirpes distribution made by considering the deceased children as the "stirps" or roots, or is the distribution made by considering the generation nearest that of the testator in which one or more members survive (i.e., the grandchildren)? The American jurisdictions have generally split on this issue. See W.W. Allen, Annotation, Descent and Distribution to Nieces and Nephews as Per Stirpes or Per Capita, 19 A.L.R.2d 186 (1951); Robert J. Blackwell, Wills-Construction-Confusion in Division of Gifts to "Descendants," 37 MO. L. REV. 168 (1972). The term "per stirpes" should be carefully defined to avoid confusion. E.g., J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS AND ESTATES 1423 (2d ed. 1978) (suggesting the following definition of "per stirpes": "When a distribution is directed to be made to any person's descendants 'per stirpes,' the division into stirpes shall begin at the generation nearest to such person that has a living member.").

For Texas decedents dying intestate after September 1, 1991, a "per capita with representation" approach is clearly applicable. So, for example, if a decedent's son and daughter both predecease him but he is survived by 3 grandchildren--one child of the son and two children of the daughter--each grandchild takes one-third. (Under the alternative "strict per stirpes" distribution, the son's child would take one-half and the daughter's two children would share the other one-half that their mother would have taken were she alive, or one-fourth each.) TEX. PROB. CODE ANN. §§ 43 & 45 (Vernon Supp. 2002).

Under prior Texas law, community property passed to the decedent's descendants under a strict per stirpes scheme (Section 45) and separate property passed to collateral heirs per capita with representation (Section 43). However, Section 43 was unclear as to which approach would apply to separate property where the decedent's children all predeceased him but other descendants survived him. Commentators disagreed over the proper interpretation of the statute. Compare 9 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 4.4 (2d ed. 1992) with Joseph J. Finkell, Comment, Determination of Per Capita and Per Stirpes Distribution Among Grandchildren and More Remote Lineal Descendants in Texas--A Plea For Amendment, 23 S.TEX. L.J. 187, at 202-203 (1982). The 1991 legislative amendments to the Probate Code resolve the ambiguity of Section 43 in favor of a consistent per capita with representation approach (without regard to whether children survive) and eliminate the distinction between community and separate property. Other American jurisdictions are split on the per capita with representation(strict per stirpes issue.

C. Substantive Law Regarding Extraneous References - Integration, Incorporation by Reference, Facts of Independent Significance

1. INTEGRATION. The doctrine of "integration" recognizes that a will may consist of various pages of paper without signing or attesting each page, but that all of the various pages may be integrated into one will and validated by a single act of execution. Indeed, multiple instruments or writings may be "integrated" as a part of the will if they were present in the room at the time of execution. See Adams v. Maris, 213 S.W. 622 (Tex. Comm'n App. 1919, no writ) (writing on outside of envelope and letter inside envelope were both recognized as a part of the holographic will); 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 39.1 (2d ed. 1992).

2. INCORPORATION BY REFERENCE.

a. General Rule. A will may "incorporate by reference" documents that were not present at the time the will was executed if the extrinsic writing was in existence at the date of execution of the will, and is clearly identifiable from the provisions in the will. See Brooker v. Brooker, 106 S.W.2d 247, 253 (Tex. 1937) (court expressly declined to rule on whether incorporation by reference would be recognized in Texas); Welch v. Trustees of the Robert A. Welch Foundation, 465 S.W.2d 195, 199 and 201 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.) (attempt to incorporate trust created under brother's will invalid because document to be incorporated was not clearly identified, and was not identified as an existing document but rather any will that might be probated as the brother's will; on rehearing, gift to trustees named in brother's will was upheld under the facts of independent significance doctrine); Taylor v. Republic National Bank, 452 S.W.2d 560, 563 (Tex. Civ. App.--Dallas 1970, writ ref'd n.r.e.) (document attached to will was not incorporated into the will because a mere reference that a document is attached does not evidence an intent to incorporate by reference, and because the extrinsic document was not clearly identifiable from the will); Trim v. Daniels, 862 S.W.2d 8 (Tex. App.--Houston [1st Dist.] 1992, writ denied) (direction to "[handle] pursuant to the incomplete will that Doris has" was not sufficient to incorporate by reference because incomplete will was not capable of being identified and because words "pursuant to" were not equivalent to "incorporated").

b. Distinction Between Integration and Incorporation by Reference. The distinction between "integration" and "incorporation by reference" is whether the extrinsic document in question was present at the time that the will was executed. If so, the question is whether the extrinsic document was "integrated" with the will, and if not, the question is whether the extrinsic document was "incorporated by reference" into the will.
c. **Application to Holographic Wills.** American jurisdictions have differed as to whether holographic wills could incorporate by reference documents that were not entirely in the testator's handwriting.

Texas cases have refused to recognize incorporation by reference of material not in the testator's handwriting into holographic wills. *Adams v. Maris*, 213 S.W. 622 (Tex. Comm'n App. 1919, no writ); *see Hinson v. Hinson*, 280 S.W.2d 731, 736 (Tex. 1955) (dictum).

d. **Pour-Over Wills.** Section 58a of the Texas Probate Code permits devises to the trustee of any trust (including unfunded life insurance trusts) the terms of which are evidenced by a written instrument in existence before, concurrently with, or after the execution of the will, and which is identified in the will, even though the trust is subject to amendment, modification, revocation, or termination. If the trust is subsequently amended, the property may nevertheless pass to the trust and be administered under its terms, as amended. If the trust is revoked prior to the testator's death, the bequest to the trustee lapses. TEX. PROB. CODE ANN. § 58a (Vernon Supp. 2002).

Observe that the pour-over statute is broader than the general incorporation by reference doctrine, because it specifically allows subsequent amendments to the document incorporated.

Under the Uniform Testamentary Additions to Trusts Act, testamentary pour overs are validated "regardless of the existence, size or character of the corpus of the trust." UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 2-511, 8A U.L.A. comment at 114 (Supp. 1990). Although the Texas statute, prior to September 1, 1993, did not include the above quoted language, the San Antonio Court of Appeals has held that Section 58a authorizes unfunded "stand by" revocable trusts so long as the trust is named as a devisee or legatee in a valid will executed after or contemporaneously with the execution of the revocable trust. *See In Re Estate of Canales*, 837 S.W.2d 662, 666-667 (Tex. App.--San Antonio 1992, no writ).

Read broadly, the *Canales* court seems to go even further by holding either (i) that a testamentary designation as a devisee or legatee in a will constitutes "property" in the same sense that a contractual designation as beneficiary of a life insurance policy is property (see, e.g., TEXAS PROP. CODE ANN. § 111.004(12) (Vernon Supp. 2002) defining the term "property" to include a contractual designation as beneficiary of a life insurance policy), or (ii) that, more broadly, there is no difference between a nominal corpus and no corpus and that, therefore, a valid trust can exist without trust property. *See Canales*, 837 S.W.2d at 666 (a standby trust with no corpus and one with a corpus of $1 "are the same thing").

Read narrowly, *Canales* simply holds that, without regard to whether a trust can exist without trust property, Probate Code § 58a validates a testamentary pour-over to the trustee named in a revocable trust instrument (to be held and disposed of under the terms of such instrument) even if no trust under that instrument was ever funded prior to the testator's death.

Section 58a(a) was amended in the 1993 legislative session to validate a devise or bequest in a Will to any other trust, whether such trust was established before, concurrently with or after the execution of the Will that contains the bequest. TEX. PROB. CODE ANN. § 58a(a) (Vernon Supp. 2002). A bequest to an unfunded trust is specifically validated. The 1993 amendment includes language from Section 2-511 of the Uniform Probate Code.

The prudent planner will at least nominally fund his client's revocable trusts (e.g., he will recite an initial property of $1 and staple a $1 bill to the Trustee's copy of the governing instrument) to assure that a valid trust is created. Nominal funding is sufficient. *In Re Estate of Canales*, 837 S.W.2d 662, 664 (Tex. App.--San Antonio 1992, no writ).

3. **FACTS OF INDEPENDENT SIGNIFICANCE.**

a. **General Rule.** A uniformly recognized doctrine is that a will may identify (1) the beneficiaries of a bequest or (2) the property bequeathed by making reference to some events outside the will as long as such extrinsic event has some lifetime significance other than providing for the testamentary disposition. The first Texas case to recognize this doctrine by name is *Welch v. Trustees of the Robert A. Welch Foundation*, 465 S.W.2d 195, 202 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.).

b. **Identification of Persons.** A good summary of the application of this doctrine to identification of persons is contained in the *Welch* case:

It has long been the law of this state that property may be devised to a class of persons, such as children living at the date of the death of the testator, or children, including those born after the execution of the will, or first cousins. The names of those who take under the will may be supplied by parol evidence ....

465 S.W.2d at 202-201.
4. **IDENTIFICATION OF PROPERTY--CONTENTS GIFTS.** Two new subsections ((c) and (d)) were added to Section 58 of the Texas Probate Code, effective for persons dying on or after September 1, 1993. Subsection (c) provides that contents pass with a legacy only if the Will directs that the contents are included in the legacy. For gifts of real property, personal property associated with real property and the contents of property located on the real property are included with the real property devise only if the Will directs that the personal property and/or contents are included. TEX. PROB. CODE ANN. § 58(c) (Vernon Supp. 2002).

Subsection (d) defines the term "contents." The term "contents" includes only **tangible** personal property other than "titled personal property" that does not require a former transfer of title, and that is located "inside of or on a specifically bequeathed or devised item." TEX. PROB. CODE ANN. § 58(d) (Vernon Supp. 2002). Thus, the statute implicitly provides that a gift which clearly includes contents will not include any such "titled personal property." The term "titled personal property" is defined to include all tangible personal property represented by a certificate of title, written label, marking or designation that signifies ownership. For example, it would include a title certificate for a motor vehicle, motor home, motor boat, or similar property. (Even though it includes **tangible** personal property, the statute gives an example indicating that a stock certificate would also be covered even though it is intangible personal property.) Note that the statute is somewhat ambiguous as to the precise scope of "written label, marking or designation" that will qualify an item of personal property as "titled personal property." See 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 40.7 (2d ed. Supp. 2001).

There have been many "contents" cases in other jurisdictions, in which the gifts of the contents of a room or house or safe-deposit box have been upheld, on the theory that any shifting of contents would "normally have significance independent of testamentary purpose." ATKINSON, WILLS 394-95 (2d ed. 1953); D.C. BARRETT, ANNOTATION, WHAT PASSES UNDER LEGACY OR BEQUEST OF THINGS FOUND OR CONTAINED IN PARTICULAR PLACE OR CONTAINER, 5 A.L.R.3d 466 (1966). However, mere references to property described in a memorandum or certificates of deposits or deeds that may be attached to the will are invalid because these latter acts do not have lifetime motives independent of the testamentary disposition. See RAGLAND v. WAGNER, 180 S.W.2d 435, 438, 152 A.L.R. 1232 (Tex. 1944) (reference to deed that might be attached to will held invalid). However, it is difficult to rationalize one fairly recent case with this general rule. In re Estate of Brown, 507 S.W.2d 801 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.) (upheld reference to certificate of deposit enclosed in envelope on which three-line holographic will was written). Compare DAVIS v. SHANKS, 898 S.W.2d 285 (Tex. 1995) (essentially holding that, under the law prior to the 1993 amendments, the term "contents" was per se ambiguous).

5. **REFERENCE TO WILL OF ANOTHER PERSON.** A gift to the beneficiaries who may be named as legatees under the will of another person is generally valid, because the other person would presumably dispose of his own estate without regard to the effect of his dispositions upon the will of the testator. WELCH v. TRUSTEES OF ROBERT A. WELCH FOUNDATION, 465 S.W.2d 195, 202 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.); WILSON v. PHILLIPS, 459 S.W.2d 212 (Tex. Civ. App.--Fort Worth 1970, no writ).

**D. General Considerations Regarding Placing Restrictions on Bequests.**

A testator often wants to place restrictions upon bequests of property instead of merely leaving an asset outright to a beneficiary to deal with as he pleases. Of course, the most common technique for placing restrictions on property is the use of a trust arrangement. However, various other techniques, which are also possible, are considered in this section of the outline. These other techniques are important to the drafter of a "basic will" because the client often desires to impose some restrictions on a bequest but does not want the "complexity" of a trust arrangement. As indicated by the following discussion, a trust arrangement is often the simplest way to accomplish the client's desires.

1. **LIFE ESTATE.** A bequest "to A for life" creates a legal life estate. No specific words are necessary to create a life estate, but the bequest should clearly indicate that the bequest is not of an estate in fee.

a. **Generally Not Used for Personal Property.** Life estates are generally used only for real property and not for personal property interests. Life estates in personal property are not favored and will be construed as an absolute fee unless the creating language clearly and unequivocally manifests a different intention. See CITY OF AUSTIN v. AUSTIN NATIONAL BANK OF AUSTIN, 503 S.W.2d 759, 761 (Tex. 1973); McNABB v. CRECE, 125 S.W.2d 288, 289 (Tex. 1939) ("well settled rule that life estates in personal property are not favored"); IN RE ESTATE OF SRUBAR, 728 S.W.2d 437, 439 (Tex. App.--Houston [1st Dist.] 1987, no writ) (life estate in personality will be enforced if intent to grant life estate can be ascertained from the language of the will); BRIDGES v. FIRST NATIONAL BANK, 430 S.W.2d 376, 382 (Tex. Civ. App.--Dallas 1968, writ ref'd n.r.e.) (life estate in personality will be recognized if intention to create life estate can be ascertained from language in will).

b. **Rights and Responsibilities of Life Tenant.** The bequest should clearly spell out the rights and responsibilities of the life tenant.
(1) **Taxes, Maintenance Expenses, and Repairs.** Absent contrary language, the life tenant has the duty to pay all taxes and maintenance expenses, including the cost of current repairs. *Trimble v. Farmer*, 305 S.W.2d 157, 160-161 (Tex. 1957); *Roberts v. Roberts*, 150 S.W.2d 236, 238 (Tex. 1941); *Dakan v. Dakan*, 83 S.W.2d 620, 625 (Tex. 1935); *Sargeant v. Sargeant*, 15 S.W.2d 589 (Tex. 1929).

(2) **Permanent Improvements.** If a life tenant makes permanent improvements, the remaindermen are not required to reimburse him. *Collett v. Collett*, 217 S.W.2d 60, 65 (Tex. Civ. App.--Amarillo 1948, writ ref'd n.r.e.).

(3) **Right to Use Property.** Generally, a life tenant has the right to all of the ordinary uses of the property, except that he must not commit "waste." Waste includes the opening of new mines or wells by the life tenant to remove minerals, *Clyde v. Hamilton*, 414 S.W.2d 434, 439 (Tex. 1967), and failing to make reasonable repairs for the preservation of the property, see *Barrera v. Barrera*, 294 S.W.2d 865, 867 (Tex. Civ. App.--San Antonio 1956, no writ). However, the life tenant is not liable for waste arising from an act of God. *Barrera v. Barrera*, 294 S.W.2d 865, 867 (Tex. Civ. App.--San Antonio 1956, no writ) (flood damage).

(4) **Insurance Premiums.** The life tenant is not required to maintain insurance or to repay amounts expended by the estate for property insurance. *Hill v. Hill*, 623 S.W.2d 779, 781 (Tex. App.--Amarillo 1981, writ ref'd n.r.e.).

(5) **Payment of Encumbrances.** The life tenant owes a duty to protect the property from forfeiture by reason of any act or omission on his part. A life tenant is generally required to pay off interest on existing encumbrances to preserve the estate. If the life tenant pays off the principal sum of the debt, the life tenant is entitled to reimbursement or contribution from the remaindermen. *See Brokaw v. Richardson*, 255 S.W. 685, 688 (Tex. Civ. App.--Fort Worth 1923, no writ); *E.W.H., Annotation, Right to Contribution from Remainderman, of Life Tenant Who Pays Off Encumbrance on Property*, 87 A.L.R. 220 (1933).

(6) **Sale and Reinvestment.** Absent authority in the language creating the life estate, a life tenant has no implied power to expand, sell, or dispose of the property. *See Ellis v. Bruce*, 286 S.W.2d 645, 647-48 (Tex. Civ. App.--Eastland 1956, writ ref'd n.r.e.) (life estate "to be used as he may desire so long as he lives" did not confer authority to sell). Granting a power of sale does not enlarge the life estate into a fee interest or otherwise subject the property to the tenant's creditors. *See Quisenberry v. J.B. Watkins Land-Mortgage Co.*, 47 S.W. 708, 709 (Tex. 1898); *Long v. Long*, 252 S.W.2d 235, 243 (Tex. Civ. App.--Texarkana 1952, writ ref'd n.r.e.).

(7) **Lease by Life Tenant.** A life tenant apparently has a right to lease the property and enjoy the rentals from the lease. However, no leasehold estate can be created which will last longer than the life tenant's estate. *See Gibbs v. Barkley*, 242 S.W. 462, 465 (Tex. Comm'n App. 1922, holding approved).

(8) **No Bond Required.** No bond or other security is required from the life tenant for the protection of the remaindermen, although a court may require such a bond in unusual circumstances. *See Ramirez v. Flag Oil Corp.*, 266 S.W.2d 270, 271 (Tex. Civ. App.--San Antonio 1954, no writ).

(9) **Fiduciary Duties of Life Tenant.** Section 5.009 of the Texas Property Code, added in the 1993 legislative session, provides that if a life tenant has the power to sell and reinvest principal, the life tenant has all the duties of a trustee with respect to the remaindermen. TEX. PROP. CODE ANN. § 5.009 (Vernon Supp. 2002) (The draftsman of this bill stated that it was believed to be a codification of existing common law and case law in Texas.) The section provides that it does not apply if the life tenant originally received real property until such real property is sold.

c. **Vesting of Remainder Interest.** Generally, the bequest should state when the interest of the remainderman vests. If the will is silent, a devise to one for life with remainder over to another at the life tenant's death conveys a vested, not contingent, remainder to the remainderman that vests absolutely, provided that the remainderman survives the testator. Enjoyment of the property by the remainderman is delayed until the death of the life tenant but the remainder estate vests immediately. *Turner v. Adams*, 855 S.W.2d 735 (Tex. App.--El Paso 1993, no writ). If the remainderman is to take only upon survival of the life tenant, the will should specifically so provide.

2. **CONDITIONAL OR DETERMINABLE FEE INTERESTS.** Under general real property principles, it is possible to create an estate that might terminate upon the happening or failure to happen of some event. Types of defeasible fees include the fee simple determinable ("to X, for so long as the premises are used for the following purposes"), or fee simple subject to a condition subsequent ("to X, provided that if the premises shall ever cease to be used for certain purposes, the grantor shall have the right to reenter and retake the premises"). *See generally J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES* 699-70 (2d ed. 1978). However, defeasible fee estates are rarely utilized (primarily because of the greater flexibility allowed through the use of trusts.)
3. **CONDITIONAL BEQUEST.** An entire will or certain bequest made in a will may be made conditional upon the occurrence of certain events. *Bagnall v. Bagnall*, 225 S.W.2d 401, 402 (Tex. 1949). Typically, conditional bequests are based upon conditions occurring before the death of the testator. Making bequests conditioned upon postdeath events may create difficulties. *See* 1 PAGE, WILLS §§ 9.3, 9.4 (1960).

4. **TESTAMENTARY ANNUITIES.** A will may direct the payment of an annuity to a beneficiary. *Cf.* *Houston Land & Trust Co. v. Campbell*, 105 S.W.2d 430, 434-36 (Tex. Civ. App.--El Paso 1931, writ ref'd) (bequest of annuity held partially deemed); *Cleveland v. Cleveland*, 30 S.W. 825 (Tex. Civ. App. 1895) (bequest of "yearly income of $4,000, to be taken out of my estate by my executors") commences at death of testator and extends during beneficiary's natural life; court discusses a number of cases from other jurisdictions involving testamentary annuities, *rev'd*, 35 S.W. 145 (Tex. 1896) (bequest limited to $4,000 annual annuity during the term of estate administration). The annuity bequest may be established as payable out of the residuary estate, out of a trust, or by direction to the executor to purchase a commercial annuity. An annuity bequest may be helpful in situations where the testator wants a beneficiary to receive a specific annual amount, but specifically does not want to create a trust. However, if the annuity is merely payable out of the residuary estate, the bequest will create complications in delaying complete distribution under the will unless the executor is authorized to satisfy the annuity requirement by purchasing a commercial annuity.


   a. **Time Period for Exercising Option.** The testamentary option may be declared invalid as a violation of the rule against perpetuities or restraint on alienation if the time during which the option may be exercised is not limited to a reasonable period of time. *Mattern v. Herzog*, 367 S.W.2d 312, 318-20 (Tex. 1963) (option construed to last for a reasonable time not extending beyond that allowed by law for due administration of the estate); *Maupin v. Dunn*, 678 S.W.2d 180, 183 (Tex. App.--Waco 1984, no writ) (option contract violated rule against perpetuities because option extended to heirs, successors and assigns of both parties, so option would not necessarily have been exercised within the perpetuities period; court refused reformation of option to comply with perpetuities period, reasoning that the presumed reasonable time for exercising the option had already expired). *See* J.A. Bryant, Jr., *Annotation, Pre-Eumptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation*, 40 A.L.R.3d 920 (1971). *See also* *Mizell v. Greensboro Jaycees*, 105 N.C. App. 284, 412 S.E.2d 904 (N.C. App., 1992) (reservation of 25 year right of first refusal contained in dead voided as violation of rule against perpetuities).

   b. **Tax Effects.** A beneficiary who exercises a testamentary option to purchase property at less than fair market value will have a basis in the purchased property determined in part by Section 1014 (which determines the value of the option), and in part by Section 1012 (cost) of the Internal Revenue Code. *Rev. Rul. 67-96, 1967-1 C.B. 195*. A bargain sale pursuant to a testamentary option does not permit the estate to deduct a loss. *Id.; cf.* *Estate of Minnie Miller v. Comm'r*, 421 F.2d 1405 (4th Cir. 1970). For a general discussion of the general tax effects of testamentary options, see Sheldon F. Kurtz, *Purchase Options Created by Will*, 17th ANN. MIA MI EST. PL. INST., ch. 4 (1983).

   c. **Effect of Anti-lapse Statute.** The anti-lapse statute may apply if the beneficiary of the option predeceases the testator. *See* *Matter of Estate of Niehcnen*, 818 P.2d 1324 (Wash. 1991) (option granted in will to A, but if A did not exercise the option, B and C were given option to purchase; held that the anti-lapse statute applied, where A predeceased the testator survived by children of his own).

6. **RESTRAINTS ON ALIENATION.** Restraints on the authority of a transferee to "alienate" or transfer an interest in real property are invalid. *Loehr v. Kincannon*, 834 S.W.2d 445, 446 (Tex. App.--Houston [14th Dist.] 1992, no writ) (provision restricting sale or encumbrance of land for life, held unenforceable restraint on alienation); *Barrows v. Ezer*, 668 S.W.2d 854, 856 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (provisions in bequest of ranch requiring that ranch be held intact and operated as a ranch for 25 years constituted unreasonable restraint on alienation and were not given effect); *Kitchens v. Kitchens*, 372 S.W.2d 249, 252 (Tex. Civ. App.--Waco 1963, writ dism'd) (devise of land subject to its being held by devisees for ten years unless they unanimously agree to earlier sale held invalid as a restraint on alienation); *McGaffey v. Walker*, 379 S.W.2d 390, 395 (Tex. Civ. App.--Eastland 1964, writ ref'd n.r.e.) (restraint on power of devisees to sell devised property until devisees reached twenty-one years of age held invalid as a restraint on alienation); *Pritchett v. Badgett*, 257 S.W.2d 776, 777 (Tex. Civ. App.--El Paso 1953, writ ref'd) (provision in will that devisee could not sell or encumber devised land for twenty years unless joined by testator's executors held void); see generally *Options and Restraint on Alienation*, 42 TEX. L. REV. 257 (1963); 5A POWELL ON REAL PROPERTY ¶ 840-843 (1988). The restraints on alienation doctrine applies to life estates as well as to estates in fee simple. *Frame v. Whiakte*, 36 S.W.2d 149, 151 (Tex. 1931) (dictum); *but see* *Berry v. Spivey*, 97 S.W. 511 (Tex. Civ. App. 1906, no wrt).

   If a condition is placed on a contingent remainder based upon the remainderman not disposing of any interest bequeathed to him prior to the time the interest vests, the restraint on alienation doctrine is not applicable. *See* *Lowrance v. Whitfield*, 752 S.W.2d
Effective September 1, 1995, the Texas Uniform Gifts to Minor’s Act (“TUGMA”) was replaced with the new Texas Uniform Transfers to Minors Act (“TUTMA”). TEX. PROP. CODE. ANN. § 141.001 et seq. (Vernon Supp. 2002). The new law greatly expands the flexibility and application of custodial accounts to such an extent that commentators have described it as tantamount to having created a statutory trust. See, e.g. Richard L. (Lee) Jukes, The 74th Legislature - Enactments of Interest to Probate, Trusts & Estate Lawyer, HOUSTON BAR ASSOCIATION PROBATE, TRUSTS & ESTATES SECTION, August 29, 1995. Although a complete discussion of the detailed new TUTMA provisions is beyond the scope of this outline, some of the major changes relevant to will drafting are noted below.

7. PROVIDING FOR “TUTMA” CUSTODIAL ACCOUNTS FOR BENEFICIARIES UNDER AGE 21.

a. New Law Effective September 1, 1995. Effective September 1, 1995, the Texas Uniform Gifts to Minor’s Act (“TUGMA”) was replaced with the new Texas Uniform Transfers to Minors Act (“TUTMA”). TEX. PROP. CODE. ANN. § 141.001 et seq. (Vernon Supp. 2002). The new law greatly expands the flexibility and application of custodial accounts to such an extent that commentators have described it as tantamount to having created a statutory trust. See, e.g. Richard L. (Lee) Jukes, The 74th Legislature - Enactments of Interest to Probate, Trusts & Estate Lawyer, HOUSTON BAR ASSOCIATION PROBATE, TRUSTS & ESTATES SECTION, August 29, 1995. Although a complete discussion of the detailed new TUTMA provisions is beyond the scope of this outline, some of the major changes relevant to will drafting are noted below.

b. Most Custodial Accounts Now Last Until Age 21. The most conspicuous change effectuated by the new law is the extension of the duration of most custodial accounts until the “minor” reaches 21 years of age. TEX. PROP. CODE. ANN. § 141.021(1) (Vernon Supp. 2002) (note that § 141.002(11) defines “minor” to mean an individual who is younger than 21 years of age). The addition of 3 years (beyond age 18) should significantly increase the appeal of custodial accounts to many clients.

c. TUTMA Transfers not Authorized by the Will Still Terminate at Age 18. Under prior law, it was good practice--but not crucial--for the will to authorize distributions to be made to custodial accounts for the benefit of any minor distributee. This is because, without regard to whether the will addressed the issue (and even if there wasn’t a will), TUGMA allowed personal representatives to create custodial accounts. See Acts 1983, 68th Leg., R.S., ch. 576, § 1, 1983 Tex. Gen. Laws 3698 (enacting former TEX. PROP. CODE. ANN. § 141.103(c)), repealed by Act of June 17, 1995, 74th Leg., R.S. ch. 1043 §§ 1-3, 1995 Tex. Gen. Laws 5177, 5177-89.

However, effective September 1, 1995, transfers to custodial accounts by, inter alia, executors and trustees whose governing instruments do not contain an authorization to do so, terminate when the minor reaches the general age of majority (18 years). TEX. PROP. CODE. ANN. § 141.021(2) (Vernon Supp. 2002). Only if the governing instrument specifically authorizes transfers pursuant to TUTMA (or TUGMA) may an executor or trustee create a custodial account that extends until the beneficiary reaches age 21.

d. Testator may Designate Custodian. Under prior law, there was no express authorization for testator to specify who would serve as custodian for any TUGMA transfers his or her personal representative might make. Instead, the statute simply provided that the personal representative was to transfer the property to “an adult member of the minor’s family or a guardian of the minor.” TEX. PROP. CODE. ANN. § 141.003(d) (repealed 1995). TUTMA specifically provides for binding custodian designations by, inter alia, testators. TEX. PROP. CODE. ANN. § 141.006(b) (Vernon Supp. 2002).

e. Any Type of Property may be Placed in Custodianship. Under TUTMA, “any interest in property” may be the subject of a custodial arrangement. TEX. PROP. CODE. ANN. § 141.002(5) (Vernon Supp. 2002).

f. Custodians Have Broad Administrative Powers. TUTMA provides that a custodian “has all the rights, powers and authority over custodial property that unmarried adult owners have over their own property.” TEX. PROP. CODE. ANN. § 141.014(a) (Vernon Supp. 2002). However, it is clear that this expansion of custodian power remains subject to a general standard of prudent fiduciary conduct. TEX. PROP. CODE. ANN. § 141.015(b) (Vernon Supp. 2002) (“a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another”).

g. Application to Existing Custodianships. For obvious constitutional reasons, TUTMA does not extend the duration of custodial accounts created before September 1, 1995 to age 21. However, for all other purposes, TUTMA appears to apply to all custodial accounts, whether created before or after the September 1, 1995 effective date. See TEX. PROP. CODE. ANN. § 141.023 (Vernon Supp. 2002) (effect on existing custodianships) and Act of June 17, 1995, 74th Leg., R.S., ch. 1043 § 2(b), 1995 Tex. Gen. Laws
8. **DIRECTION TO SELL PROPERTY.** The will may direct the executor to sell certain assets and to distribute the proceeds to specified beneficiaries. The IRS has indicated in a private ruling that under such a will, the capital gains resulting from such sale would be included in the gross income of the beneficiaries, not in the gross income of the estate. Letter Rul. 8003013. The ruling reasoned that under local (Virginia) law, the property passed directly to the heirs or devisees (similar to Section 37 of the Texas Probate Code).

**E. Income During Estate Administration**

For an excellent summary of the rule regarding allocation of estate income among estate beneficiaries, see *Report of Committee on Probate and Estate Administration*, 102 TR. & EST. 916 (1963).

1. **GENERAL ABSENCE OF TEXAS CASES.** There is very little Texas case law regarding the allocation of income during probate among the estate beneficiaries. Prior to September 1, 1993, Texas had no statute governing allocations of estate income among beneficiaries. For periods prior to the 1993 amendment adding Section 378B of the Texas Probate Code, Section 32 of the Probate Code provides that in the absence of statutes the powers and duties of executors and administrators "shall be governed by the principles of common law." See e.g., *Stiff v. Fort Worth National Bank*, 486 S.W.2d 859, 862 (Tex. Civ. App.--Eastland 1972, writ ref'd n.r.e.) (citing authority from other jurisdictions but no Texas authority for the proposition that "income received during administration from the residuary estate goes to the residuary devisees and legatees proportionately"); and *Johnson v. McLaughlin*, 840 S.W.2d 668, 670 (Tex. App.--Austin 1992, no writ) (following *Stiff* and holding further that debts, expenses and taxes may not be charged against such income unless the will reflects a contrary intention).

2. **STATUTORY PROVISIONS**

   a. **Debits and Administration Expenses.** Section 378B of the Texas Probate Code, effective for persons dying on or after September 1, 1993, provides statutory estate income and principal allocation rules, based on Section 5 of the Revised Uniform Principal and Income Act. Generally, Section 378B provides that debts, funeral expenses, estate taxes and interest and penalties on estate taxes, general administration expenses, and family allowances are charged against principal of the estate. However, executors are allowed to allocate attorneys fees, other professional fees, executor's commissions, and court costs between income and principal as the executor determines to be just and equitable. (The Will itself could provide for a different allocation.) TEX. PROB. CODE ANN. § 378B (Vernon Supp. 2002).

   b. **Income Determined Under Texas Trust Code.** The amount of income from the estate assets (including income from property used to discharge liabilities) is determined in accordance with the rules applicable to a trustee under the Texas Trust Code. *Id.* at § 378B(b). After such income is determined, it is allocated among the various estate bequests as described below.

   c. **Specific Legatees and Devises.** Income payable pursuant to a specific bequest is determined after deducting all expenses specifically allocable to the specifically devised property, including interest accrued after the death of the testator and income taxes accrued with respect to the property. *Id.* at § 378B(c).


   e. **Remaining Bequests.** The remaining income (not allocated to specific legatees or the recipients of pecuniary bequests) is distributed after payment of all expenses (including accrued income taxes on that income) to the residuary and general devisees and legatees "in proportion to [their] respective interests in the undistributed assets of the estate". *Id.* at § 378B(d).

   f. **Revaluations for Purposes of Making Pro Rata Allocations of Undistributed Assets.** The Revised Uniform Principal Income Act requires determination of the beneficiaries' "respective interests in the undistributed assets of the estate" based on inventory values. Similar allocation acts in other states require the determination to be based on federal estate tax values. See, e.g., III. Ann. Stat. ch 30, § 506 § 6(b)(2) (Smith Hurd Supp. 1991). In order to give the executor the maximum amount of flexibility, the Texas statute gives the executor the authority to determine whether assets should be revalued, and how often, for purposes of determining the relative interests of the beneficiaries in the estate's income. Similar discretion is given to the executor in determining how frequently the beneficiaries' relative interests in estate income must be recalculated. Thus, the statute imposes no requirement on the part of the executor to recalculate the beneficiaries' proportionate interest in the undistributed assets of the estate as each expenditure that will alter the proportionate interests is made. Undistributed assets include assets used to discharge liabilities, but only until such assets are actually used to pay debts and expenses. *Id.* at § 378B(h). The commentary on this provision prepared
by the Probate Code Subcommittee of the Texas Bar Real Probate and Trust Law Section indicates that, as long as the executor acts in a manner intending to reach a fair and equitable result, no inference shall be made that the executor has breached a duty to a beneficiary by failing to revalue estate purposes for this provision.

g. Charities Receive Their Bequests Free of Income Taxes. To the extent that income passing to a charity is deductible to the estate the charity is entitled to the full amount of the income without reduction for income taxes.  Id. at § 378B(e).

3. SPECIFIC BEQUESTS. A specific devisee or legatee is generally entitled to the interest, dividends, rents, or other income on or earned by the property bequeathed to him from the date of death. TEX. PROB. CODE ANN. § 378B(c) (Vernon Supp. 2002); see Hurt v. Smith, 744 S.W.2d 1, 4-6 (Tex. 1987) (legatees of specified bequests were entitled to income earned by those assets during administration of the estate); Garmany v. Schulz, 285 S.W. 911, 912 (Tex. Civ. App.--Amarillo 1926), rev'd, 293 S.W. 165 (Tex. Comm'n App. 1927, holding approved) (rev'd on the grounds that bequests were not specific bequests of property); PH., Annotation, Accretions to Subject of Legacy, 116 A.L.R. 1129 (1938).

4. GENERAL LEGACY.

a. General Rule - Interest Allowed from When Legacy Becomes Due and Payable. A general cash legacy is not entitled to a share of the income earned by the estate, unless the will directs to the contrary. However, interest is allowed on the legacy, commencing at the time when the legacy becomes due and payable. For decedents dying prior to September 1, 1993, see Williams v. Smith, 206 S.W.2d 208, 217 (Tex. 1947) (pecuniary legacies bear interest at the legal rate from the dates when they should have been paid); Geraghty v. Randal, 224 S.W.2d 327, 331 (Tex. Civ. App.--Waco 1949, no writ) (where will provided that cash legacy was to be paid after debts and funeral expenses were paid, legatee was entitled to 6% interest from the time that debts and funeral expenses were paid). For decedents dying on or after September 1, 1993, Section 378B(f) provides for interest on pecuniary bequests.

b. When Interest Begins to Accrue. Prior to the adoption of Section 378B, Texas law was unclear as to when interest began to accrue (i.e., when the bequest was due and payable), unless the will specifically discussed the payment of interest. At any time after the expiration of twelve months after the original grant of letters testamentary, a legatee may request a partition and distribution of the estate. TEX. PROB. CODE ANN. § 373 (Vernon 1980). However, the executor may show cause why distribution of the estate should not be made at that time. See TEX. PROB. CODE ANN. §§ 377-78 (Vernon 1980); Beckham v. Beckham, 227 S.W. 940, 941 (Tex. Comm'n App. 1921). Many Texas attorneys used one year following the date of death as a general rule of thumb for determining when interest began accruing on general cash legacies.

Section 378B(f) specifically provides that interest accrues beginning one year after the court grants letters of testamentary or letters of administration. TEX. PROB. CODE ANN. § 378B(f) (Vernon Supp. 2002).

c. Interest Rate Applicable Prior to Section 378B. A 1949 case indicated that a cash legacy was entitled to 6% interest from the time that debts and funeral expenses were paid. Geraghty v. Randal, 224 S.W.2d 327, 331 (Tex. Civ. App.--Waco 1949, no writ).

There is a Texas statute that governs the payment of prejudgment interest for certain types of actions. Section 302.002 of the Texas Finance Code provides as follows:

If a creditor has not agreed with an obligor to charge the obligor any interest, the creditor may charge and receive from the obligor legal interest at the rate of six percent a year on the principal amount of the credit extended beginning on the 30th day after the date on which the amount is due. If an obligor has agreed to pay to a creditor any compensation that constitutes interest, the obligor is considered to have agreed on the rate produced by the amount of that interest, regardless of whether that rate is stated in the agreement.


Various older cases have indicated that prejudgment interest could be awarded as an element of equitable damages, and have suggested that the 6% accrual rate provided in Article 5069-1.03 (current version at Finance Code § 302.002) would apply. E.g., Miner-Dederick Const. Corp. v. Mid-Cty. Rental, 603 S.W.2d 193 (Tex. 1980).

Section 304.003 of the Finance Code (original version at Article 5069-1.05) provides the rate of interest for post-judgment interest. TEX. FIN. CODE ANN. § 304.003 (Vernon Supp. 2002). That interest is a floating rate, and is currently 10% (and has been 10% for an extended period of time). The Texas Supreme Court in Cavinar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985), decided that prejudgment interest should be recoverable in personal injury and death cases in accordance with the statutory rates prescribed for post-judgment interest (i.e., 10%). The Court also stated that the interest should be compounded daily.
Various cases have suggested that the rule in *Cavnar* regarding prejudgment interest should apply in "all types of cases." E.g., *Allied Bank West Loop, N.A. v. C.B. & Associates, Inc.*, 728 S.W.2d 49, 59 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.) (10% compounded daily allowed in suit based on negligence and conversion).

The Texas Supreme Court has stated, however, that the article 5069-1.03 (current version at Finance Code § 302.002) 6% interest rate will continue to apply in situations that are covered by article 5069-1.03. *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930-31 (Tex. 1988) (damages based on breach of contract for improper installation of a roof were "unascertainable" within the meaning of article 5069-1.03, in that the contract did not fix "a measure by which the sum payable can be ascertained with reasonable certainty"; therefore, article 5069-1.03 could not apply, so 10% interest, compounded daily, was the appropriate interest rate). Several court of appeals cases subsequent to *Perry Roofing* have held that the 6% rate would apply, because the fact situations in those cases involved damages that were ascertainable from the face of the contracts involved. *Wheat v. American Title Ins. Co.*, 751 S.W.2d 943 (Tex. App.--Houston [1st Dist.] 1988, no writ) (payment of commissions to insurance agent on insurance policies); *Allen v. Allen*, 751 S.W.2d 567 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (payment of one-half of royalties pursuant to property settlement incorporated in divorce decree).

Under the Supreme Court's reasoning in *Perry Roofing*, whether the 6% or 10% rate applies depends upon whether article 5069-1.03 (current version at Finance Code § 302.002) applies, and that will depend upon whether the beneficiary's right to the pecuniary legacy is an "account or contract ascertaining the sum payable." A pecuniary legacy would clearly seem to be an ascertainable sum. The beneficiary would be required to establish that such legacy was payable at least by a particular date certain, satisfying the "date certain" requirement stated by the Supreme Court in *Houze v. Surety Corp. of America*, 584 S.W.2d 263, 268 (Tex. 1979). The major issue is whether the right to receive a pecuniary legacy under a will is an "account or contract." No cases have addressed this issue. Prior to *Cavnar*, courts awarded prejudgment "equitable interest" at a 6% rate. Therefore, whether the interest was being awarded under article 5069-1.03 or was being awarded as "equitable interest" in the discretion of the court made very little difference, so there were very few cases discussing which approach applied. It is conceivable that the Texas courts will ultimately hold that a pecuniary legacy is in effect an "account" and that article 5069-1.03 applies, thus providing a 6% simple interest rate. There can be no uncertainty regarding that issue until it is resolved by the Texas courts.

d. **Interest Rate Applicable Under Section 378B.** Under Section 378B(f) (applicable for estates of persons dying after September 1, 1993) the Article 5069-1.03 rate (current version at Finance Code § 302.002) (currently 6%) applies.

e. **Income Tax Treatment.** For income tax purposes, interest payments on general legacy could be treated (1) as compensation for the use of money and therefore deductible by the estate and includable in the gross income of the beneficiary, or (2) estate distributions under Sections 661 and 662 of the Internal Revenue Code which would be treated as income to the beneficiary only if the estate had "distributable net income" in the year interest was paid to him. See generally 1 A. JAMES CASNER, ESTATE PLANNING § 4.2.3, at 277-78 n. 14-15 (5th ed. 1984). The Fifth Circuit follows the former approach. *U.S. v. Folckemer*, 307 F.2d 171, 173 (5th Cir. 1962).

5. **DEMONSTRATIVE LEGACIES.** "Demonstrative legacies" of a specific cash amount payable out of particular property are hybrid in nature, and whether a particular bequest carries the right to income depends upon the construction of the particular bequest and no general rule can be formulated. P.H., Annotation, *Aecessions to Subject of Legacy*, 116 A.L.R. 1129, 1146 (1938).

6. **RESIDUARY BEQUESTS.** Residuary devisees and legatees are generally entitled proportionately to all income of the general estate not otherwise disposed of (to specific legatees, as interest to general legatees, or to an annuitant). HIA A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 234.3 (4th ed. 1988); *Stiff v. Fort Worth National Bank*, 486 S.W.2d 859, 862 (Tex. Civ. App.--Eastland 1972, writ ref'd n.r.e.) (citing authority from other jurisdictions but no Texas authority for the proposition that "income received during administration from the residuary estate goes to the residuary devisees and legatees proportionately"); *Johnson v. McLaughlin*, 840 S.W.2d 668, 670 (Tex. App.--Austin 1992, no writ) (following *Stiff* and holding further that debts, expenses and taxes may not be charged against such income). This general approach is followed in Section 378B(d). For a discussion of the income tax effects of funding residuary bequests, see 1 A. J. CASNER, ESTATE PLANNING § 4.1 (5th ed. 1984).

7. **BEQUEST IN TRUST.** Most jurisdictions recognize that estate income or interest allocable to a specific or residuary bequest paid in trust is received by the trust as income. Therefore, the income beneficiary of the trust is entitled to receive such amounts. See IIIA A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 234.2-234.3 (4th ed. 1988). This generally recognized rule is now codified in Section 113.103 of the Texas Trust Code. TEX. PROP. CODE ANN. § 113.103 (Vernon 1995). See also TEXAS PROP. CODE ANN. § 378B(g) (Vernon Supp. 2002).
8. **WILL PROVISION CONTROLS.** Allocations of probate income and expense will be governed by specific provisions in a will. See Texas Probate Code § 378B(a) & (b) (Vernon Supp. 2002) (first clause of each subsection); Revised Uniform Principal and Income Act § 5(a)(1962). The will should specifically discuss income attributable to particular bequests where the allocation of that income is significant or might be uncertain. In particular, consider discussing the allocation of estate income with respect to marital deduction bequests and charitable bequests to assure the availability of the full amount of the respective marital or charitable deduction. See 4 A. J. CASNER, ESTATE PLANNING § 13.14.16 at 222, § 14.6.3 at 342 (5th ed. 1988). In the absence of contrary provisions in the will, specific bequests other than pecuniary bequests to a spouse or charity receive the net income from the specific bequest property (§ 378B(c)), pecuniary bequests bear interest beginning after one year (§ 378B(f)), and residuary bequests to a spouse or charity receive a pro rata amount of the estate income not allocated to specific bequests or pecuniary bequests (§ 378B(d)).

F. **Planning for Disclaimers.**

With respect to all bequests in the will, the planner should specifically contemplate where the bequeathed assets should go in the event that the primary beneficiary disclaims his or her interest in the bequest. Section 37A of the Texas Probate Code provides that disclaimed property passes as if the person disclaiming predeceased the decedent unless the decedent's will provides otherwise. TEXAS PROB. CODE ANN. § 37A (Vernon Supp. 2002).

1. **Disclaimer by Spouse of Interest in Property Under One Transfer but not Under Other Transfers.** Section 37A(f), as amended in the 1993 legislative session, clarifies that a surviving spouse may disclaim one transfer, and accept an interest in the same property under another transfer. For example, if a surviving spouse wishes to disclaim a specific devise or bequest so that the asset can become a part of the residuary estate which will pass to a by-pass trust, the surviving spouse is able to do so. TEXAS PROB. CODE ANN. § 37A(f) (Vernon Supp. 2002).

2. **Disclaimer of Survivorship Property.** Section 37A, as amended in 1993, clarifies that a disclaimer by a surviving joint tenant, or the surviving spouse under an agreement between spouses that created a right of survivorship in community property, is permitted with respect to such property at the death of the predeceasing joint tenant or spouse. For purposes of the time period for the survivor's making a disclaimer of an interest in such property, the transfer creating the disclaimable interest occurs as of the date of death of the predeceasing joint tenant or predeceasing spouse, so that the survivor has nine months thereafter to complete a disclaimer.

3. **Future Interest Accelerated.** Prior to the legislative amendments made in 1993, the statute was unclear as to whether or not a future interest is accelerated by a disclaimer. For example, Barrows vs. Ezer, 668 S.W.2.d 854 (Tex. Civ. App.-Houston [14th Dist.] 1984, writ ref’d n.r.e.), involving an outright bequest, in essence applied the doctrine of acceleration to pass an outright bequest to a secondary devisee where the primary devisees disclaimed. On the other hand, Aberg vs. First National Bank in Dallas, 450 S.W.2d. 403 (Tex. Civ. App. -- Dallas 1970, writ ref’d n.r.e.), involving a contingent remainder interest in a trust, held that the future remainder interest was not accelerated by disclaimer of a prior beneficial interest. Section 37A was amended in 1993 to make clear that a disclaimer would accelerate future interests. A corresponding change was made to Section 112.010 of the Texas Trust Code, governing disclaimers of interests under trusts. TEX. PROP. CODE ANN. § 112.010 (Vernon 1995).

4. **Delivery of Notice of Disclaimer.** Prior to September 1, 1993, Section 37A(b) provided different provisions regarding the deadline for delivery of notice of disclaimer than the deadline for filing the disclaimer. The statute was amended effective September 1, 1993 to eliminate the inconsistency between the filing and the notice requirements so that both will have the same deadline.

5. **Creditor Effects of Disclaimer.** Prior to the changes made in the 1993 legislative session, Section 37A was unclear as to whether a disclaimer would relate back for all purposes to the death of the decedent and whether the disclaimed property would be subject to the claims of any creditor of the disclaimant. One Texas case, Dyer vs. Eckols, 808 S.W. 2d. 531 (Tex. App. -- Houston [14th Dist.] 1991, writ diss’d by agreement), addressed this issue, and the court held that the disclaimer related back to the death of the decedent for all purposes. Id. at 533. The court implied that the disclaimer was not a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act because the disclaimant never possessed the property disclaimed. Id. at 534. The court also stated that, because the Texas Uniform Fraudulent Transfer Act does not mention disclaimers, a disclaimer is not a transfer under the Act. Id. at 535. But see In re Stevens, 112 B.R. 175 (Bkrtcy. S.D. 1989) (disclaimer is a “transfer” for purposes of the fraudulent transfer provision of the Federal Bankruptcy Code). Section 37A was amended in 1993 to provide that a disclaimer shall relate back for all purposes to the death of the decedent and shall not be subject to the claims of any creditor of disclaimant. (Corresponding changes were made in 1993 to Section 112.010(d) of the Texas Property Code and Section 24.002(12) of the Texas Business and Commerce Code.) But see Drye v. United States, 120 S.Ct. 474 (1999) (disclaimer under Arkansas law did not defeat federal tax lien -- state law determines an individual’s rights or interests, but federal law determines whether these rights or interests are property or rights to property within the meaning of the federal tax lien statutes).
V. DISPOSITIVE PROVISIONS FOR SPECIFIC BEQUESTS.

A. Substantive Law Doctrines Affecting Specific Bequests Generally.

1. ADEMPTION.

   a. General Rule.

      (1) Ademption by Extinction. "Absent a contrary intention expressed in the will, the alienation or disappearance of the subject matter of a specific bequest from the testator's estate adeems the devise or bequest." Shriners Hospital, etc. v. Stahl, 610 S.W.2d 147, 150 (Tex. 1980). Any proceeds received upon the disposition of the property by the testator passes under the residuary clause unless the will provides to the contrary. Id. at 152. A bequest may be partially adeemed if a portion of the specifically bequeathed property is disposed of prior to death. San Antonio Area Foundation v. Lang, 35 S.W.3d 636, 642 (Tex. 2000); Rogers v. Carter, 385 S.W.2d 563, 565 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.). See generally John C. Paulus, Ademption by Extinction: Smiting Lord Thurlow's Ghost, 2 TEX. TECH. L. REV. 195 (1971).

      (2) Ademption by Satisfaction. A specific bequest, general bequest, or residuary bequest is deemed to be satisfied if the testator, after making the will, makes an inter vivos gift of an equal sum to the legatee with the intent to nullify the prior bequest. See Heirs of Hunsucker v. Hunsucker, 455 S.W.2d 780, 783 (Tex. Civ. App.--Waco 1970, writ ref'd n.r.e.); 9 Leopold & Beyer, Texas Practice: Texas Law of Wills § 25.1 (2d ed. 1992).

   b. Ademption Doctrine Applies Only to Specific Bequests. The doctrine of ademption applies only to specific bequests. Rogers v. Carter, 385 S.W.2d 563, 566 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.). The doctrine does not apply to general legacies (e.g., a bequest of $500), or to demonstrative legacies (e.g., a bequest of $500, to be paid out of the proceeds of sale of IBM stock).

   Because of the ademption doctrine (as well as the abatement doctrine), it is important to determine whether a particular bequest is a specific, demonstrative, general or residuary bequest. The distinctions between these different types of bequests were explained by the Texas Supreme Court in Hurt v. Smith, 744 S.W.2d 1, 4 (Tex. 1987).

   c. Construction--Ademption Doctrine Not Favored. Courts generally attempt to construe wills in a manner that will avoid application of the ademption doctrine. See e.g., Welch v. Straach, 518 S.W.2d 862, 868 (Tex. Civ. App.--Waco), rev'd on other grounds, 531 S.W.2d 319 (1975) (bequest of 'homestead' was not adeemed by a purchase of new residence following execution of will).

      (1) Construing Bequest as General or Demonstrative Legacy. If possible, courts will tend to construe bequests as general or demonstrative legacies rather than specific legacies if the doctrine of ademption is involved. For example, a bequest of "100 shares of IBM stock" is held to be a general bequest for purposes of the ademption doctrine. See O'Neill v. Alford, 485 S.W.2d 935, 939 (Tex. Civ. App.--Houston [1st Dist.] 1972, no writ) (dictum). However, a bequest of "my 100 shares of IBM stock" is typically held to be a specific bequest to which the ademption doctrine will apply. See generally Hurt v. Smith, 744 S.W.2d 1, 4 (Tex. 1987) (discussion of distinctions between specific, demonstrative, and general bequests); Opperman v. Anderson, et al., 782 S.W.2d 8 (Tex. App.--San Antonio 1989, writ denied); Jacobs v. Sellers, 798 S.W.2d 24 (Tex. App.--Beaumont 1990, writ denied) (classification of bequest as general, demonstrative, specific, or residuary depends upon testator's intent as determined from the entire will).

      (2) Form Change. If the property subject to the bequest undergoes a mere change in form, the ademption doctrine does not apply. The classic example of a mere form change is a specific bequest of securities, which are exchanged for new securities where the corporation has undergone a reorganization, merger, or consolidation. See Paulus, Ademption by Extinction: Smiting Lord Thurlow's Ghost, 2 TEX. TECH. L. REV. 195, 199-200 (1971); See Guy v. Crill, 654 S.W.2d 813 (Tex. App.--Dallas 1983, no writ) (bequest of stock was made "together with all dividends, rights and benefits declared thereon"; court held the bequest included stock of a bank holding company into which the stock described in the will had been converted). Stock splits and stock dividends generally pass to the specific legatee. O'Neill v. Alford, 485 S.W.2d 935, 939-940 (Tex. Civ. App.--Houston [1st Dist.] 1972, no writ); Morriss v. Pickett, 503 S.W.2d 344, 349 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.).

      (3) Proceeds. The mere change of form exception does not apply to proceeds received upon the sale of a specifically bequeathed asset. Shriners Hospital, etc. v. Stahl, 610 S.W.2d 147, 150 (Tex. 1980). However, a beneficiary may have a right to such proceeds under circumstances where the specifically bequeathed item was disposed of other than by the testator's own volition and/or where the testator could not have subsequently revised his will. See id., 610 S.W.2d at 150 (indicating, in dicta, that a specific legatee might be able to trace proceeds where the property was disposed of in an involuntary conversion or by a guardian under circumstances in which the testator had no capacity or opportunity to adjust his will). Compare Hunter v. NCNB
Texas Nat. Bank, 857 S.W.2d 722 (Tex. App.--Houston [14th Dist.] 1993, writ denied), where a named devisee under the will of the incompetent decedent attempted to prevent a proposed sale of the subject property by the trustee of the decedent's revocable trust. Citing Texas Probate Code § 94 (will not effective until admitted to probate), the court denied the devisee's claim, making it clear that a potential devisee has no right in the decedent's property and therefore no right to prevent a sale merely because the sale would cause an ademption of her devise.

Where the bequest itself, however, is of the proceeds from the sale of certain assets during the estate administration, there is no ademption of proceeds from the sale of such assets before death if such proceeds are traceable to the sale. Bates v. Fuller, 663 S.W.2d 512 (Tex. App.--Tyler 1983, no writ).

(4) Testator's Intent. Generally, the testator's intent at the time that he subsequently disposes of an asset is not relevant in determining whether the ademption doctrine will apply. However, in determining whether any of the various exceptions to the ademption doctrine might apply, the courts have, as a pragmatic matter, given weight to the testator's intent. See 9 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 24.2 (2d ed. 1992).

No Texas case has addressed the situation where a guardian makes a gift of property specifically bequeathed in the incompetent person's will. Compare In re Estate of Mason v. Fairbank, 42 Cal. Rptr. 13 (Cal. 1965) (no ademption); In re Wrights Will, 7 N.Y.2d 365 (Ct. App. 1960) (bequest does adeem).

d. Property Under Contract to Sell at Death. If the bequeathed property is subject to an enforceable contract of sale at the time of death, the ademption doctrine generally applies, because under the doctrine of equitable conversion, the beneficial ownership and risk of loss of the property passes to the vendee upon the execution of the contract. Therefore, the specific devisee would not receive the purchase price. See ATKINSON, WILLS 744 (2d ed. 1953). But see Willie v. Waggoner, 181 S.W.2d 319, 322 (Tex. Civ. App.--Austin 1944, writ ref'd) (ademption doctrine did not apply where contract of sale contained liquidated damages clause giving vendee an election to perform or pay liquidated damages).

2. ABATEMENT. "Abatement" is the reduction of bequests if the estate is insufficient to pay all of the testator's debts and other bequests. See generally ATKINSON, WILLS 754 (2d ed. 1953).

a. Order of Abatement in Absence of Will Provision. Section 322B of the Texas Probate Code, which became effective September 1, 1987, provides that bequests will abate in the following order (unless the will provides otherwise):

- property not disposed of by the will, but passing by intestacy;
- personal property of the residuary estate;
- real property of the residuary estate;
- general bequests of personal property;
- general devises of real property;
- specific bequests of personal property; and
- specific devises of real property.


This order of abatement applies for all debts and expenses of administration other than estate taxes. (The allocation of estate taxes is governed by Section 322A of the Probate Code.)

Texas cases had established the same general order of abatement. See Thompson v. Thompson, 236 S.W.2d 779, 789 (Tex. 1951) (personal property should be used before real property for payment for estate debts and taxes); Avery v. Johnson, 192 S.W. 542, 545 (Tex. 1917) (specific devise of realty is satisfied before general devise of realty); McNeil v. Masterson, 15 S.W. 673, 674 (Tex. 1891) (specific bequests of realty and personal property were satisfied before residuary estate bequest); Warren v. Smith, 620 S.W.2d 725, 726-27 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.) (personal property is primary fund for payment of debts and legacies; presumption that charges against the estate should be paid from the residue whether the residue be personal or real property). See generally WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 952 (1971); 8 TEXAS TRANSACTION GUIDE ¶ 43.23 (1999). See also Part 2VIII at page 88 of this Outline regarding apportionment of debts and expenses.
b. Abatement Provision in Will Controls. If the will expressly indicates the order of abatement, the abatement provision will be followed. TEX. PROB. CODE ANN. § 322B(d) (Vernon Supp. 2002); see Kennard v. Kennard, 84 S.W.2d 315, 321 (Tex. Civ. App.--Waco 1935, writ dism'd). The abatement provision may provide for a pro rata abatement among various bequests, or may provide that certain specific bequests shall not abate until all other bequests have been fully abated. If the will contains numerous specific bequests, the abatement provision may be very important to prevent substantial diminution of the residuary estate, which generally passes to the testator's preferred beneficiaries.

3. EXONERATION OF ENCUMBRANCES. Unless the terms of a will provide to the contrary, a specific bequest of encumbered property entitles the beneficiary to have the lien paid out of the personal property in the residuary estate. Currie v. Scott, 187 S.W.2d 551, 554 (Tex. 1945) (dictum). However, if the personal property in the residuary estate is insufficient to satisfy the encumbrance, real properties or personal property specifically bequeathed to other beneficiaries may not be used to satisfy the encumbrance. Id. at 555. (Query whether Section 322B changes this result, in providing that general or specific bequests of personal property abate before specific gifts of real property.) The exoneration doctrine does not apply if the testator had merely acquired the property subject to a mortgage and was not personally liable on the underlying obligation.

This doctrine may have a very substantial effect upon the amount of net assets received by each beneficiary of the estate. Observe that the amount of encumbrance on a bequest might be substantially greater than the equity interest in that property.

4. INCOME TAX EFFECTS OF FUNDING SPECIFIC BEQUESTS. Generally, when a beneficiary of an estate receives a distribution, the estate is entitled to a distribution deduction under Section 661 of the Internal Revenue Code and the beneficiary recognizes gross income under Section 662 of the Internal Revenue Code, up to the extent of the estate's distributable net income, or "D.N.I." (determined under Section 643). However, Sections 661 and 662 do not apply to specific bequests that are described in Section 663(a)(1) of the Internal Revenue Code. Therefore, satisfaction of a specific bequest typically does not "carry out" estate D.N.I. to the legatee. See Rev. Rul. 86-105, 1986-2 C.B. 82 (specific bequest of "assets, in cash or in kind or partly in each, the selection of which shall be in the absolute discretion of my executor, with a fair market value at the date of distribution equal to [SX]" satisfied the requirements of Section 663(a)(1)); Treas. Reg. § 1.663(a)-1(b) (specific bequest under marital deduction formula clause does not satisfy Section 663(a)(1) because amount of bequest cannot be ascertained at testator's death).

B. Specific Bequest Provisions.

1. TANGIBLE PERSONAL PROPERTY.
   a. Income Tax Effect. Tangible personal property is often disposed of in a specific bequest so that its distribution will not be deemed to carry out estate income to the beneficiary. See Part 2VA.4 at page 76 of this Outline.
   
   b. Description of Bequeathed Property. The bequest should clearly describe the bequeathed article and the legatee. In particular, substantially valuable types of items should be specifically mentioned or they may be considered as investments and governed by the residuary estate disposition.

   (1) Meaning of "Personal Belongings" Unclear. Items that will be included in a bequest of "personal belongings" is unclear. See Goggans v. Simmons, 319 S.W.2d 442, 445-46 (Tex. Civ. App.--Fort Worth 1958, writ ref'd n.r.e.) (bequest of "furnishings" in a home and "all my personal belongings" did not include stock and bank deposits, but did include automobile); Erwin v. Steele, 228 S.W.2d 882 (Tex. Civ. App.--Dallas 1950, writ ref'd n.r.e.) (bequest of "personal belongings" in connection with references to jewelry and family property included articles of "personal nature which had an enduring personal value derived by the deceased from gifts, association and personal use," but did not include automobile). In light of this vagueness, the more common forms of tangible personal property should be specifically described.

   (2) "All Other Tangible Personal Property". The term "household furnishings" is not defined in any Texas cases, and the term "personal belongings" depends upon the context in which it is used. Therefore, a general description such as "all other tangible personal property" is needed to insure the inclusion of all items of tangible personal property in the bequest.

   (3) Applicability to Cash Deposits. Cash on deposit is not included within the term "tangible personal property." Similarly, a bequest of "cash on hand" will not include cash on deposit. Thompson v. Thompson, 236 S.W.2d 779, 790-91 (Tex. 1951). However, a bequest of "cash on hand" may include cash collected by an executor as well as cash in the testator's possession at his death. Summerhill v. Hanner, 9 S.W. 881, 883 (Tex. 1888). Therefore, it would seem best to exclude "cash on hand" from the tangible personal property bequest.
(4) Bequest of Contents. The effect of a gift of an item of personal property which includes contents (i.e., a cedar chest) is unclear under Texas law. See Part 2IV.C.4 at page 60 of this Outline.

c. Allocation Among Various Beneficiaries. If the testator desires to make a bequest of tangible personal property to a group of persons, various alternatives are available, such as (1) giving the executor discretion in allocating the assets, (2) allowing beneficiaries to select items in an order predetermined by either lot, age, or sex, or (3) bequeathing the item to one individual who can be relied upon to follow the testator's general wishes in making subsequent gifts of such items to the intended beneficiaries. The testator could indicate that he may leave a list describing his desired allocation of assets among the group of individuals, and make a precatory request of the executor that such list be followed.

d. Delivery Expenses. The will should specifically indicate if expenses incurred in delivering tangible personal property are to be paid from the estate as an administration expense.

e. Insurance. A bequest of an item of personal property does not, in the absence of a contrary provision in the will, pass policies of insurance covering such items to the beneficiary. See In Re: Barry's Estate, 252 P2d 437 (Okla. 1952); cf. Springfield Fire & Marine's Co. v. Boone, 194 S.W. 1006 (Tex. Civ. App.--Texarkana 1917, writ ref'd) (inter vivos transfer of property did not include insurance).

2. REAL ESTATE.

a. Description of Devised Property. Identification of realty devised by will need not necessarily be as specific as required to satisfy the Statute of Frauds. Baines v. Ray, 251 S.W.2d 565, 567 (Tex. Civ. App.--Galveston 1952, writ ref'd n.r.e.). A description of property by street address is sufficient, because it furnishes sufficient information by which the property may be identified and located by a surveyor. Id. A reference to "my home" or "my land" may also be sufficient. See Hedick v. Lone Star Steel Co., 277 S.W.2d 925, 930-31 (Tex. Civ. App.--Texarkana 1955, writ ref'd n.r.e.).

The will should identify the devised real property with sufficient certainty so that there can be no confusion as to its identity. Ideally, city property should be located by street address, followed by the lot and block number of the subdivision or addition involved as stated in a recorded map or plat. Rural properties should be described by metes and bounds descriptions. A bequest of "buildings" or "houses" includes the real estate on which they are situated, unless the general context provides otherwise. See Gidley v. Lovenberg, 79 S.W. 831 (Tex. Civ. App. 1904, no writ).

b. Residence. If the testator arguably has two residences, the will should specifically identify the intended property. The description should generally refer to the residence at the time of the testator's death. Otherwise, a residence acquired after the execution of the wills would not be substituted for the specific residence referred to in the will. Wolf v. Hartmangrubber, 162 S.W.2d 112, 116 (Tex. Civ. App.--Fort Worth 1942, no writ); Edds v. Edds, 282 S.W. 638, 640 (Tex. Civ. App.--Austin 1926, writ ref'd).


d. Encumbrance. Particularly with respect to real estate, the planner should keep in mind that encumbrances against specifically devised property will be exonerated unless the will provides to the contrary. See Part 2VA.3 at page 76 of this Outline.

e. Out-of-State Real Property. An estate administration in the jurisdiction in which the real property is located may very well be needed in order to pass title to the out-of-state real property to the estate beneficiaries. A procedure should be included for designating an ancillary executor to deal with any such properties.

If out-of-state real property is devised, the will should specifically designate whether any outstanding encumbrances should be exonerated, because the laws of some states do not provide for exoneration of liens. In that event, there would be uncertainty as to whether Texas law (i.e., law of the domicile) or the law of the other state (i.e., law of the situs) would control. See Higginbotham v. Manchester, 154 A. 242, 79 A.L.R. 85 (1931) (law of domicile controlled); Tunis v. Dole, 89 A.2d 760 (1952) (law of situs controlled).

f. Cemetery Lots. Cemetery lots do not pass under a will, unless the will makes an explicit reference to the lot. Otherwise, cemetery lots will be reserved for the decedent's surviving spouse and (if any spaces remain) for the decedent's children. See TEX. HEALTH & SAFETY CODE ANN. § 711.039(e) (Vernon Supp. 2002).
3. STOCK.

a. Changes in Capital Structure. Consider including bequest of any stock attributable to the bequeathed property received through a change in the capital structure, such as a merger or consolidation, or a change of name of the underlying company. See Guy v. Crill, 654 S.W.2d 813 (Tex. App.—Dallas 1983, no writ) (bequest of stock "together with all dividends, rights and benefits declared thereon" included stock of bank holding company into which the bequeathed stock had been converted).

b. Stock Dividends and Splits. The majority U.S. rule is that stock dividends paid prior to date of death do not pass to the specific legatee. However, some jurisdictions award stock dividends paid prior to date of death to the specific legatee. See J.R. Kemper, Annotation, Change in Stock or Corporate Structure, or Split or Substitution of Stock of Corporation, as Affecting Bequest of Stock, 46 A.L.R.3d 7, 64-86 (1972); Note, Rights to Stock Accretions Which Occur Prior to Testator's Death, 30 ALBANY L. REV. 182, 188-192 (1971). There is no Texas case on point regarding stock dividends paid before date of death. Presumably, Texas would follow the majority rule.

Dividends declared and paid after the date of death pass to the specific legatee. See Ruble v. Ruble, 264 S.W. 1018 (Tex. Civ. App.—Waco 1924, no writ) (income accruing after date of death from bequeathed property passes to specific legatee).

If a will makes a specific bequest of stock, stock splits after the date of execution of the will pass to the specific legatee. Morriss v. Pickett, 503 S.W.2d 344, 347-49 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.). For purposes of this rule, a bequest of "100 shares of XYZ stock" is construed to be a specific bequest. O'Neill v. Alford, 485 S.W.2d 935, 939-40 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ). Observe that for purposes of applying the ademption doctrine, "100 shares of XYZ stock" is held not to be a specific bequest.

Prior to September 1, 1993, the Texas Probate Code did not specifically address whether a bequest of securities included securities of the same organization received by the testator after the date of the Will as a result of a stock split, stock dividend, or reorganization. Section 70A, added by the 1993 legislative session, provides that under certain circumstances a bequest of securities includes increases and/or mutations in the securities occurring after the date of the Will, including stock splits, stock dividends, and new issues of stock acquired in a reorganization, redemption, or exchange. TEX. PROB. CODE ANN. § 70A (Vernon Supp. 2002). However, securities acquired through the exercise of purchase options or through a plan of reinvestment, would not be included in the bequest. Thus, section 70A appears to codify Texas case law with respect to the treatment of stock splits, and changes the majority rule that Texas presumably would follow with respect to the treatment of stock dividends. Section 70A also codifies the existing case law that cash distributions, such as accrued interest to date of death or cash dividends declared and payable as of a record date before the testator's death, do not pass as a part of the bequest of the security as to which the distribution relates. Section 70A is derived from section 2-605 of the Uniform Probate Code.

4. PECUNIARY LEGACIES.

a. Description. The will may make a general legacy of a specified dollar amount (as opposed to a bequest of specific property or of a specified percentage of the estate), which may be payable either in cash or in cash and/or property to be selected by the executor.

A bequest of "cash" generally does not include stocks, bonds, securities or other property, but does include checks and bank deposits on hand at the death of the testator. Stewart v. Selder, 473 S.W.2d 3, 8-9 (Tex. 1971). The term "funds on deposit" has been interpreted to include certificates of deposit. In re Estate of Srubar, 728 S.W.2d 437, 439 (Tex. App.—Houston [1st Dist.] 1987, no writ). However, a bequest of "money" or "funds" should generally be avoided because of the inherent ambiguity and the risk that a court would give those terms a much broader meaning than just including the testator's cash. See Paul v. Ball, 31 Tex. 10 (1868) ("money" may be used generally to include personal property such as notes receivable, bonds, mortgages and other claims for property); Goggans v. Simmons, 319 S.W.2d 442, 445 (Tex. Civ. App.—Fort Worth, writ ref'd n.r.e.) (the term "funds" may have reference to any kind of property, real as well as personal); compare West Texas Rehabilitation Center v. Allen, 810 S.W.2d 870 (Tex. App.—Austin 1991, no writ) (cash bequest of "money to be paid from funds" on deposit "in any and all financial institutions or brokerage houses" did not include that portion of a brokerage cash management account consisting of stocks, bonds and mutual funds).

b. Is Estate Large Enough to Accommodate? Caution should be exercised in making substantial dispositions of the estate by way of pecuniary legacies, because the estate may not be large enough to satisfy all of the pecuniary legacies. Pecuniary legacies typically abate after residuary bequests, but before money bequests payable out of specific sources and bequests of specific property. See Part 2VA.2 at page 75 of this Outline.
c. **Effect of Pecuniary Legacies Upon Residuary Estate.** The existence of substantial pecuniary legacies may drastically affect the testator's intentions if the estate is valued at less than he anticipates, or if the debts payable by his estate are greater than anticipated. The residuary legatees are generally the testator's prime concern, but they bear all of the risk of undervaluation or depreciation in the estate, unless the will provides to the contrary. One method of handling the shrinking problem is to provide that cash bequests will be paid only if the estate is valued at more than a specified minimum amount. Alternatively, the cash bequests may be described in terms of specified fractions of the adjusted gross estate, net estate, or other portion of the estate, possibly not to exceed a fixed amount. See generally John P. Ludington, Annotation, *Base for Determining Amount of Bequest of a Specific Percent or Proportion of Estate or Property*, 87 A.L.R.3d 605 (1978).

d. **Use in Connection with Specific Bequests to Avoid Ademption.** One method of avoiding ademption of bequests of specific property is for the will specifically to state that if the bequeathed item is not owned by the testator at his death, the legatee will receive a cash legacy equal to a specified amount, the value of the bequeathed property at the time of its disposition, or the proceeds of the property if it is sold.

e. **Right to Interest on Pecuniary Amount.** See Part 2IV.E.4 at page 68 of this Outline.

f. **In-Kind Distributions; Use Date of Distribution Values.** Where a pecuniary bequest is satisfied by the distribution of property in-kind, Texas law is now clear that the property distributed is to be valued at its date of distribution value for purposes of satisfying the gift. **TEX. PROB. CODE ANN. § 378A(b)** (Vernon Supp. 2002). Prior to September 1, 1991, there was no statutory provision in Texas prescribing the valuation for in-kind distributions.

5. **FORMULA MARIITAL DEDUCTION OR EXEMPTION EQUIVALENT SPECIFIC BEQUESTS.**

a. **General Description.** A typical estate tax planning device used in large estates is to leave as much property as possible, without causing an estate tax to be paid at the first spouse's death, into a bypass trust that will not be subject to estate tax at the surviving spouse's subsequent death, and to leave the remainder of the estate at the first spouse's death to the surviving spouse, either in trust or outright, in a manner that will qualify for the federal estate tax marital deduction. This section of the outline briefly describes the three basic types of marital deduction formula clauses. However, a detailed discussion of drafting formula clauses is beyond the scope of this outline. Some of the more recent form books listed in the bibliography contain forms for marital deduction formula clauses.

b. **Specific Bequest of Exemption-Equivalent Amount; Residuary Estate to Marital Deduction Bequest.** If the exemption-equivalent amount (presently $1,000,000) is less than the marital deduction amount, any adverse income tax consequences of funding specific pecuniary bequests with in-kind distributions would be lessened by using the specific bequest for the exemption-equivalent amount.

Using an exemption-equivalent specific bequest permits the executor to fund the marital deduction bequest with income in respect of a decedent ("IRD") (which is often advantageous because the income tax associated with that income will then be borne by the marital deduction fund rather than by the exemption fund and because it is a type of asset that usually does not appreciate in value); if a pecuniary marital deduction specific bequest were used, funding the bequest with IRD items would conceivably trigger all of the gain attributable to the IRD.

Finally, this organization often makes the will easier for the client to understand than if a marital deduction specific bequest is used, because the specific bequest is then a specified determinable amount (i.e., approximately $1,000,000, with "everything left" passing under the residuary estate.

c. **Marital Deduction Specific Bequest.**

   (1) **Fractional Share Marital Deduction Bequest.** The formula will establish the amount of the marital deduction bequest, and the bequest will direct the executor to satisfy that amount by conveying an equal undivided fractional interest in each estate asset available for distribution. The total value of such fractional interests will equal the formula amount. This type of clause is generally rather inflexible and difficult to administer.

   (2) **Pecuniary Marital Deduction Bequests.** Revenue Procedure 64-19 requires that pecuniary marital deduction bequests be one of three types in order to qualify for the marital deduction:

   (a) **Use Date of Distribution Values.—**In funding the bequest, the executor would use the date of distribution values of any assets distributed in-kind in satisfaction of the bequest. A disadvantage is that gain will be recognized for income tax purposes if the distribution value of an asset exceeds its estate tax value. **Treas. Reg. § 1.1014-4(a)(3).**
(b) Use Estate Tax Values with a "Minimum Worth" Requirement.--In selecting assets for funding the pecuniary amount, the executor would use the estate tax value of the assets, but the distributed assets must in the aggregate have a date of distribution value equal to the formula amount. This arrangement avoids any taxable gain upon funding and permits the executor to shift maximum appreciation during the administration to the bypass trust by allocating the most highly appreciated assets to the residuary estate. A disadvantage is that the bypass trust will be diminished if the estate depreciates during the administration. Furthermore, the executor would be placed in a difficult position in a hostile family situation in deciding what assets should be used to fund the marital deduction bequest. See generally R. Covey, The Marital Deduction and the Use of Formula Provisions, 113-119, 123 (2d ed. 1978).

(c) Use Estate Tax Values with a "Fairly Representative" Requirement.--Estate tax values of assets distributed in-kind would be utilized, but the executor would have to distribute assets that were fairly representative of the appreciation and depreciation of estate assets during administration. This approach would also avoid taxable gain upon funding. The funding process under this approach is more flexible than with a fractional share bequest, but administrative difficulties might still be encountered in determining which assets are "fairly representative" of the estate's appreciation or depreciation. Furthermore, detailed valuations of all estate assets may be required at the distribution date in order to assure "fairly representative" treatment. See 4 A. J. Casner, Estate Planning § 13.10.2 at 124 n.11 (5th ed. 1988) for an excellent summary of the allocation process.

Section 378A was added to the Texas Probate Code, effective for persons dying on or after September 1, 1987. It indicates that, unless the will provides to the contrary, if the personal representative has the power to fund a pecuniary bequest with assets at their values for estate tax purposes, in satisfaction of a gift intended to qualify for the federal estate tax marital deduction, the personal representative must fund the bequest with assets that are fairly representative of the appreciation or depreciation of all property available for distribution. TEX. PROB. CODE ANN. § 378A (Vernon Supp. 2002).

Section 378A was amended effective September 1, 1991 to apply to not only gifts intended to qualify for the marital deduction, but to gifts "that otherwise would qualify" for the marital deduction. The amendment was intended to deal with marital gifts in Texas wills written prior to 1982. Prior to the Economic Recovery Tax Act of 1981 ("ERTA"), gifts of community property could not qualify for the marital deduction so pre-1982 gifts of community property could not logically have been intended to qualify. Additionally, ERTA enabled usage of the Qualified Terminable Interest Property ("QTIP") trust as a receptacle for marital deduction bequests. Many pre-1982 marital bequests were to trusts which, in fact, could qualify as QTIPs, although it is obvious that the testators did not "intend" such bequests to so qualify.

d. Unidentified Asset Rule. Only certain types of assets will qualify for the marital deduction, as described in Section 2056(B)(1) of the Internal Revenue Code. If any assets that would not qualify for the marital deduction may be allocated to the bequest intended to qualify for the marital deduction, the amount of marital deduction allowed will be reduced to the extent of the aggregate value of the nonqualifying assets that could be used to satisfy the bequest. Accordingly, the will should make clear that the marital deduction bequest may only be satisfied out of assets that qualify for the estate tax marital deduction.

e. GST Concerns. Any substantive discussion of the federal Generation-Skipping Transfer Tax ("GST" tax), Chapter 13 of the Internal Revenue Code (§§2601 et. seq.) is well beyond the scope of this outline. Suffice it to say that the regulations create a strong bias in favor of "fairly representative" funding, discussed above, over any other funding technique. See Treas. Reg. § 26.2642-2.

6. CHARITABLE BEQUESTS.

a. Identification of Charity. The correct title of each charitable beneficiary should be verified. Differentiate between local and national organizations.

b. Verify Exempt Status. The planner should verify that the charity is an exempt organization under 501(c) of the Internal Revenue Code. IRS publication 78 contains a listing of charitable institutions that have requested and that have been granted exempt status by the Internal Revenue Service. However, this list is not all-inclusive of organizations that would qualify for the estate tax charitable deduction. (For example, many churches do not obtain a specific exemption ruling.)

7. CANCELLATION OF DEBTS.

a. Will Provision Canceling Debt Is Valid. Various Texas cases have recognized the validity of provisions in wills canceling the indebtedness of specific beneficiaries. McNabb v. Cruze, 125 S.W.2d 288, 289-90 (Tex. 1939).
b. **Substantive Law Regarding Effect of Outstanding Debt from Beneficiary to Testator.** Merely making a legacy to a debtor does not cancel the debt. A debtor who is a specific devisee need not pay the indebtedness in order to receive his specific device. *Russell v. Adams*, 299 S.W. 889, 894 (Tex. Comm'n App. 1927, holding approved). However, an intestate beneficiary must have the outstanding indebtedness offset against his share of the estate. *Oxsheer v. Nave*, 40 S.W. 7 (Tex. 1897). There are no Texas cases regarding whether a general or residuary legatee must have his indebtedness offset against his share of the estate.

**C. Exercise of Power of Appointment.**

1. **PRESUMPTION THAT WILL DOES NOT EXERCISE POWERS OF APPOINTMENT.** Under Texas law, the residuary clause will not generally be considered to be an exercise of powers of appointment held by the testator. The donee’s intent to exercise the power must be so clear that no other reasonable intent can be imputed under the will. *Republic National Bank of Dallas v. Fredericks*, 283 S.W.2d 39, 47 (Tex. 1955). *See also Foster v. Foster*, 884 S.W.2d 497 (Tex. App.--Dallas 1993, no writ) (will granting power of appointment did not specify the manner of exercise; court held that power vested at donor’s death and was validly exercised by a written but unrecorded instrument executed prior to the trial court’s declaratory judgment that a power of appointment had in fact been created).

   A substantial minority of states have adopted the rule that a residuary clause does exercise a general power of appointment unless a contrary intent affirmatively appears in the will. *See* S.R. Shapiro, Annotation, *Effect of Statute Upon Determination Whether Disposition of All or Residue of Testator’s Property, Without Referring to Power of Appointment, Sufficiently Manifests Intention to Exercise Power*, 16 A.L.R.3d 911 (1967).

2. **CONFLICT OF LAWS - WILL SHOULD EXPRESSLY NEGATE EXERCISE.** In most states, the law of the state in which the donor (not the donee) of the power resides governs the exercise of the power. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 275, Reporter's Note; P.H. Vartanian, Annotation, *Conflict of Laws as to Exercise of Power of Appointment*, 150 A.L.R. 519, 531 (1944). Therefore, if the donor resided in one of the minority jurisdictions holding that a residuary clause presumptively exercises a power of appointment, the donee living in Texas may be held to have exercised the general power of appointment under the residuary clause in his will, even though no mention is made of the power of appointment. *Cf. First National Bank of Chicago v. Ettlinger*, 465 F.2d 343 (7th Cir. 1972).

   In order to avoid inadvertent exercise of a power of appointment, the will generally should contain a provision specifically stating that it is not exercising any powers of appointment held by the testator (unless, of course, the testator specifically wants to exercise the power of appointment).

**VI. DISPOSITION OF RESIDUARY ESTATE.**

**A. Generally.**

The residuary estate clause provides for the disposition of all assets of the estate, after providing for debts and administration expenses, that are not specifically bequeathed to other specified individuals or entities.

**B. Residuary Clause Important to Prevent Partial Intestacy.**

If any part of a decedent's estate is not disposed of by a specific bequest and is not covered by a residuary estate clause, that portion of the estate will pass by intestacy. *Farah v. First National Bank of Fort Worth*, 624 S.W.2d 341, 347 (Tex. App.--Fort Worth 1981, writ ref'd n.r.e.). Accordingly, the planner should assure that the residuary estate clause is worded broadly enough to dispose of the decedent's entire estate not otherwise disposed of by specific bequests.

1. **PRESUMPTION AGAINST INTESTACY.** There is a general rule of construction which presumes that the testator intended to dispose of his entire estate and not pass any of his property by intestacy. *Haile v. Holtzclaw*, 414 S.W.2d 916, 922 (Tex. 1967). Under this presumption, a residuary clause is typically given rather liberal interpretation to cover all of the testator's property not otherwise disposed of. *See* Urban v. Fossati, 266 S.W.2d 397, 398 (Tex. Civ. App.--San Antonio 1954, writ ref'd n.r.e.). However, the presumption against intestacy will not be sufficient to create a residuary clause in a will if none exists, *Alexander v. Botsford*, 439 S.W.2d 414, 416-17 (Tex. Civ. App.--Dallas 1969, writ ref'd n.r.e.). *See also Harrington v. Walker*, 829 S.W.2d 935 (Tex. App.--Ft. Worth 1992, writ denied) (residuary clause expressly and unambiguously did not apply to a certain portion of the estate--in this case, the property remaining upon termination of a particular trust--held: partial intestacy resulted as to that property notwithstanding the "obvious" intent of the testator to dispose of the entire estate by will).
2. **INTESTATE DISPOSITION OF COMMUNITY PROPERTY.** Section 45 of the Texas Probate Code was revised effective September 1, 1993 to provide that the community property of a married person who dies intestate will pass to the surviving spouse if the decedent is not survived by children (or descendants of deceased children) or if all the children and other descendants of the decedent are also the children and descendants of the surviving spouse. TEX. PROB. CODE ANN. § 45 (Vernon Supp. 2002). If the decedent is survived by any children or descendants who are not also children or descendants of the surviving spouse, the intestacy law is unchanged. The change recognizes that community property is created during marriage, and should be retained by the surviving spouse of the marriage -- if the children of the deceased spouse are also children of the surviving spouse. In those limited instances, the change will simplify probate administration and, in some cases, will eliminate the need for guardianship proceedings for minors.

**C. Property Covered by Residuary Estate Clause.**

A residuary estate clause disposing of “all the rest, residue and remainder of the property which I may own at the time of my death” will include the following properties:

- Property which the testator simply has not expressly mentioned in prior dispositions;
- Property owned by the testator but unknown to or forgotten by him, Johnson v. Moore, 223 S.W.2d 325, 329 (Tex. Civ. App.--Austin 1949, writ ref'd);
- Property acquired by the testator after execution of the will, Haley v. Gatewood, 12 S.W. 25, 26 (Tex. 1889);
- Remainder or reversion interests owned by the testator, and which pass to the testator's estate because not conditioned upon his survival at the time of vesting;
- Conditional bequests for which the stated condition has not occurred by the time of distribution;
- Real or personal property covered by specific bequests which lapse because the beneficiary predeceased the testator (assuming the antilapse statute does not apply), Shriner's Hospital for Crippled Children of Texas v. Stahl, 610 S.W.2d 147, 152 (Tex. 1980);
- Proceeds from the sale of property subject to specific bequests that have been adeemed, id.;
- Bequests forfeited by beneficiaries under an in terrorem clause, see Part 2XI.F at page 108 of this Outline; and
- Specific bequests which are incomplete or indecipherable.

As discussed in Part 2VC at page 83 of this Outline, a residuary clause generally is not interpreted to exercise a power of appointment held by the testator.

**D. Provisions for Successor Beneficiaries.**

The residuary clause in particular should provide for as many contingent beneficiaries as are necessary under the particular circumstances to assure that the testator will not die intestate as to the residue. Naming heirs at law or a charity as the final alternate taker will generally accomplish this purpose. For the estates of decedents dying on or after September 1, 1991, any lapsed portion of the residuary estate passes to the other residuary beneficiaries. TEX. PROB. CODE ANN. § 68 (Vernon Supp. 2002). Therefore, an intestacy generally will not occur unless all named residuary beneficiaries predecease the testator. Under prior law, the share of a predeceasing residuary beneficiary passed by intestacy (under the rule that there was "no residue of the residue") unless the residuary estate bequest constituted a class gift. Swearingen v. Giles, 565 S.W.2d 574, 576-77 (Tex. Civ. App.--Eastland 1978, writ ref'd n.r.e.). See Part 2IV.B.1.c at page 51 of this Outline.

**E. Pour-Over Disposition.**

In a “pour-over will,” the residuary estate will typically be left to the trustee of a trust created during the testator's lifetime. Section 58a of the Texas Probate Code specifically recognizes the validity of such bequests to trustees. TEX. PROB. CODE ANN. § 58a (Vernon Supp. 2002). See Part 2IV.C.2.d at page 59 of this Outline. However, in order to avoid possible intestacy, the will should provide for a contingent disposition in the event that, for any reason, the trust should not be in existence at the testator's death.
VII. TRUST PLANNING

A. Contingent Trust for Beneficiaries Below Specified Age or Incapacitated

The will should avoid leaving substantial property outright to minor or incapacitated beneficiaries, because a cumbersome guardianship proceeding might be required to administer such asset until the beneficiary reaches age eighteen or regains capacity. One alternative is to provide that any bequests to a beneficiary who is incapacitated or under age eighteen or other specified age (age 22 or 25 is often used because the beneficiary would generally have completed his or her college education by that time) would pass to a contingent trust for his or her benefit. Alternatively, the executor could be given the authority to distribute bequests for a minor beneficiary to a custodian under the Texas Uniform Transfers to Minors Act. See Appendix B for forms for making bequests to contingent trusts.

B. Major Trust Provisions.

1. TRUSTEE AND SUCCESSOR TRUSTEES. See Part 2III.B at page 39 of this Outline.

2. DISTRIBUTIONS DURING TRUST TERM.

   a. Beneficiaries. Each trust may be structured to have only one primary beneficiary, or the trustee may have the flexibility to make distributions among several beneficiaries from a single trust. If the trustee has "sprinkle" powers, the testator should describe his or her priorities, if any, among the trust beneficiaries.

   In determining whether to create separate trusts for each minor child or whether to create one trust for the benefit of all children until the youngest living child reaches a specified age, there should be at least enough assets in each trust to provide for special medical or other needs of a particular beneficiary. Many attorneys use a rule of thumb that the assets in each trust should be at least $50,000 to $100,000. For example, if the testator has three children and has a net estate of $100,000, one contingent trust would be used for all of the children. If the testator has a net estate of $300,000, separate trusts could be used for each of the three children. Appendix B contains a form for creating separate trusts for each child of the testator and a separate form for creating a single trust for all of the testator's children.

   b. Income Distributions. The testator has flexibility to provide for mandatory income distributions, to give the trustee power to sprinkle income among various beneficiaries, to give the trustee discretion to accumulate income, and to give the trustee particular standards to be used in determining to make income distributions.

   c. Principal Distributions. The same flexibilities regarding income distributions are also available with respect to distributions of trust corpus. In addition, the testator may provide for mandatory distributions on the occurrence of certain events (such as, for example, marriage), or for particular purposes (such as, for example, purchase of a home). The trustee should be given a standard for determining when to invade trust corpus for the benefit of beneficiaries.

   d. Distributions Considerations. The trust may provide that resources available to a beneficiary outside the trust (i) are to be considered, (ii) are not to be considered, or (iii) may or may not be considered by the trustee. If the instrument is silent on this issue, the law is not clear as to whether the trustee should consider outside resources. Texas cases have not been consistent on this issue. Compare First National Bank of Beaumont v. Howard, 229 S.W.2d 781, 786 (Tex. 1950) (should consider all income available to the beneficiaries from any sources in determining whether to make distributions from principal) with Lucas v. Lucas, 365 S.W.2d 372 (Tex. Civ. App.--Beaumont 1962, no writ) (in divorce case, wife was entitled to inquire into income from various trusts of which husband was discretionary beneficiary for the purpose of court's setting amount of husband's temporary alimony and child support); and Penix v. First National Bank of Paris, 260 S.W.2d 63, 67 (Tex. Civ. App.--Texarkana 1953, writ ref'd) (trustee required to consider need for distribution "without regard to the financial ability of [the beneficiary's] parents"). The majority rule is that if the trust instrument is silent on this issue, the trustee should not consider other resources available to a beneficiary. See Gatehouse's Will, 149 Misc. 648, 267 N.Y. Supp. 808 (Sur. Ct. 1933); RESTATEMENT (SECOND) OF TRUSTS § 128, Comment e (1959) (inference that beneficiary is entitled to support out of trust fund even though he has other resources); Richard Covey, PRACTICAL DRAFTING 687-92 (1985); II A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 128.4 at 353-360 (4th ed. 1987); G. BOGERT, LAW OF TRUSTS & TRUSTEES § 811 at 229-238 (1981).

An unpublished opinion by the Austin Court of Civil Appeals addresses this issue. Urban v. Estate of Henderson, No. 3-93-128-CV (Tex. App.-- Austin November 24, 1993, unpublished opinion). The testamentary trust in that case provided that the trustee should make distributions to provide for the support and maintenance of the primary beneficiary "taking into consideration any other sources of support she may have from other sources." The opinion approved the trial court's finding, as a matter of law,
that this language was construed to mean that the trustee "is obligated and permitted to consider any other payments the primary beneficiary ACTUALLY RECEIVES for her support and maintenance from any other person or entity," and that "the trustee was not authorized to consider other income from [the primary beneficiary's] estate, or the fair market value of another trust of which she is beneficiary, except to the extent that she elects to use those sources for her support." (emphasis added to capitalized words). The opinion contrasted the distribution standard for the primary beneficiary with the standard provided for other beneficiaries--the instrument directed the trustees to consider other beneficiaries' sources of "income." The opinion stated that the term "income" is broader than the term "support," because income "can be used for support but it can also be used for other purposes."

3. TERMINATION PROVISIONS

   a. Time. The trust may provide for termination distributions to be made all at once, spaced out over several payments at particular times (such as when the beneficiary reaches specified ages), or simply at the discretion of the trustee. In any event, the trust must terminate within the perpetuities period unless the trust is totally for charitable beneficiaries. TEXAS TRUST CODE § 112.036 (Vernon 1995).

   b. Beneficiaries. The trust must specify who will receive the trust assets upon termination. Alternate beneficiaries should be designated in case a primary beneficiary dies prior to termination date. If the will does not provide for the disposition of the property of a trust upon termination of the trust, the property passes by intestacy. Harrington v. Walker, 829 S.W.2d 935 (Tex. App.--Ft. Worth 1992, writ denied).

4. POWERS OF TRUSTEES. The trust should clearly delineate the trustee's powers in managing and distributing the trust assets. See Part 2X at page 92 of this Outline.

VIII. PAYMENT OF DEBTS AND ADMINISTRATION EXPENSES.

A. Debts and Expenses That Are Charged to the Estate.

   1. DEBTS. Section 37 of the Texas Probate Code requires that devisees and legatees take their respective portions of the estate subject "to the payment of the debts of the testator .... except such as exempted by law." TEX. PROB. CODE ANN. § 37 (Vernon Supp. 2002). Sections 319, 320, and 322 of the Probate Code direct executors and administrators to pay all claims approved by the court. TEX. PROB. CODE ANN. §§ 319, 320 & 322 (Vernon Supp. 2002).

      a. Requirement of Paying "Just Debts." A specific will clause requiring that the executor pay all of the testator's "just debts" raises the question whether the executor is required to pay debts barred by limitations, and whether the executor is required to pay installments on long-term indebtedness that are not yet due. See TEX. PROB. CODE ANN. § 298(b) (Vernon Supp. 2002) (claims barred by limitations should not be allowed by representatives or approved by the court).

      b. Discretion to Pay Just Debts. A provision in the will authorizing, but not requiring, the executor to pay the testator's "just debts" might give the executor some flexibility in paying debts that are recognized as being "just," but that are, due to some technicality, perhaps not legally enforceable against the testator's estate. To give the executor maximum flexibility, the clause might also give the executor the authority to renew and extend any indebtedness owed by the estate.

   2. COMMUNITY DEBTS. Community debts are primarily payable out of the community shares of both spouses. See Nesbitt v. First National Bank of San Angelo, 108 S.W.2d 318, 320 (Tex. Civ. App.--Austin 1937, no writ); TEX. PROB. CODE ANN. § 156 (Vernon 1980). A direction in a will that "my just debts be paid" does not require that the decedent's one-half interest in the community estate be used to pay the entire community debts. See Grant v. Marshall, 280 S.W.2d 559, 562 (Tex. 1955).

   3. FUNERAL EXPENSES. Funeral expenses and expenses of last illness are charges against both the community property, Pickens v. Pickens, 83 S.W.2d 951, 954 (Tex. 1935), and the separate property of the deceased spouse, Goldberg v. Zellner, 235 S.W. 870, 873-74 (Tex. Comm'n App. 1921, holding approved). Funeral expenses and expenses of last illness are given first priority under the classification statute of the Texas Probate Code. See TEX. PROB. CODE ANN. §§ 320, 322 (Vernon Supp. 2002).

     Section 320A of the Probate Code provides that funeral expenses and items incident thereto, "such as tombstones, grave markers, crypts or burial plots," shall be charged entirely to the decedent's estate and none of these expenses shall be charged against the community interest of the surviving spouse. TEX. PROB. CODE ANN. § 320A (Vernon Supp. 2002). (This statute was enacted in response to Rev. Rul. 66-21, 1966-4 C.B. 15 to clarify that the entire amount of the funeral expense would constitute a deduction for federal estate tax purposes.)
4. **CHARITABLE PLEDGE.** In the absence of a specific will provision authorizing payment of outstanding charitable pledges, a charitable pledge may be paid by an executor only if it constitutes a legally enforceable debt, which depends upon whether the pledge can be sustained as a bilateral or unilateral contract, or whether the charitable organization has accepted the pledge offer under the doctrine of promissory estoppel by a substantial change in its position in its reliance upon the pledge. *See Thompson v. McAllen Federated Woman's Bldg. Corp.,* 273 S.W.2d 105, 108-09 (Tex. Civ. App.--San Antonio 1954, writ dism'd).

**B. Allocation of Debts and Expenses Among Estate Assets.**

Once the executor has determined that a particular debt is payable out of estate assets, he must then determine which particular estate assets (and estate beneficiaries) should bear that debt. For a discussion of the allocation of debts and expenses between income and principal, see Part 2IV.2 at page 67 of this Outline.

1. **ABSENCE OF WILL PROVISION.**

   a. **Intention of Testator Controls if Ascertainable.** Apportioning the burden of general estate debts is determined by the intention of the testator. *TEX. PROB. CODE ANN. § 322B(d) (Vernon Supp. 2002); see Kennard v. Kennard,* 84 S.W.2d 315, 320 (Tex. Civ. App.--Waco 1935, writ dism'd) (testator's intention determined even though there was no specific will provision dealing with apportionment of debts).

   b. **Unsecured Debts and Administration Expenses.** If the will contains no manifestation of a contrary intent, the general apportionment list described in Section 322B(a) of the Probate Code controls. See Part 2VA.2 at page 75 of this Outline (regarding abatement). As indicated in the abatement list, intestate property is the first source for payment of debts, and the residuary estate is the next source.

   c. **Secured Debts.** Section 306 of the Texas Probate Code gives the holder of a secured claim an election (a) to have the claim treated as matured and to be paid in the due course of administration; or (b) to have the claim continue as a preferred debt and lien against the specific property (but not payable out of other estate assets) and be paid pursuant to the terms of the contract. *TEX. PROB. CODE ANN. § 306 (Vernon Supp. 2002).*

   In the event that the first alternative is chosen, the claim is apportioned among the estate assets according to the general abatement list. *See TEX. PROB. CODE ANN. § 322B(b) (Vernon Supp. 2002) (by inference, indicates that abatement list applies to secured claims that are treated as matured, secured claims); Wyatt v. Morse,* 102 S.W.2d 396, 398 (Tex. 1937). If the second alternative is chosen by a secured creditor, that creditor cannot collect any deficiency if his security is insufficient to pay the claim. *TEX. PROB. CODE ANN. § 306(c) (Vernon Supp. 2002); Wyatt v. Morse,* 102 S.W.2d 396, 399 (Tex. 1937); *see Gross National Bank of San Antonio v. Merchant,* 459 S.W.2d 483, 486 (Tex. Civ. App.--San Antonio 1970, no writ).

   2. **WILL PROVISIONS.** Possible will provisions giving direction regarding the apportionment of debts include (i) specifying payment of debts or particular debts (which would have the effect of invoking the general abatement list described in Part 2VA.2 at page 75 of this Outline, thus ordinarily making the debts payable out of the residuary estate), (ii) specifying payment from a particular source (although if that source was insufficient, the creditor could look to the balance of the estate for payment of the debt, *Dallas Joint Stock Land Bank of Dallas v. Forsyth,* 109 S.W.2d 1046, 1050 (Tex. 1937)), or (iii) directing payment of debts and coordinating with any abatement clause provided for specific bequests.

**IX. APPORTIONMENT OF TAXES.**

A. **Absence of Tax Apportionment Provision in Will.**

1. **PRIOR TO ADOPTION OF SECTION 322A.** There are various provisions in the Internal Revenue Code regarding apportionment among estate assets of estate taxes attributable to certain types of assets. I.R.C. § 2205 (taxes paid out of assets not in possession of executor must generally be reimbursed by the executor out of estate assets in his possession); § 2206 (life insurance); § 2207 (general power of appointment assets); § 2207A (qualified terminable interest property). If none of these sections was applicable (or if the will negated their application), federal estate taxes and Texas estate taxes were apportioned prior to adoption of Section 322A of the Texas Probate Code (effective September 1, 1987) in the same manner as general debts and estate administration expenses (thus invoking the list described in Part 2VA.2 at page 75 of this Outline). *Simott v. Gidney,* 322 S.W.2d 507 (Tex. 1959). *See generally, Report of Committee on Planning and Drafting Administrative Provisions,* 19 REAL PROP. PROB. & TR. J. 495 (1984).

   Prior to the adoption of Section 322A, Texas law was unclear regarding the apportionment of estate taxes to nonprobate assets. Section 442 of the Texas Probate Code provides that non-probate multi-party accounts are chargeable with debts, taxes, and expenses of administration after probate assets have been exhausted. *TEX. PROB. CODE ANN. § 442 (Vernon 1980). However, there*
was considerable uncertainty for other types of nonprobate assets. The Supreme Court expressly left open the apportionment question with respect to nonprobate assets in *Sinnott v. Gidney*, 322 S.W.2d 507, 513 (Tex. 1959). One Texas court of civil appeals case had concluded that estate taxes should not be apportioned to nonprobate assets. *Brenan v. LaMotte*, 441 S.W.2d 626 (Tex. Civ. App.--San Antonio 1969, no writ). However, the *Brenan* case was severely questioned by commentators. See *Hammond, Ancillary Probate*, TEXAS STATE BAR ADVANCED ESTATE PLANNING INSTITUTE, at U-7 (1981).

2. **APPORTIONMENT UNDER SECTION 322A.** The prior approach of paying death taxes out of the probate estate (and particularly the residuary estate) was changed by Section 322A of the Texas Probate Code, effective September 1, 1987. (Effective September 1, 1991, Section 322A was amended further in various respects.) Absent an apportionment provision in a will or other appropriate instrument to the contrary, federal estate taxes and Texas inheritance taxes are apportioned to the persons receiving assets that are included in the decedent's estate, based upon "taxable value of [each] person's interest in the estate." *Tex. Prob. Code Ann.* § 322A(b)(1) (Vernon Supp. 2002). Therefore, tax apportionment is no longer based on distinctions between probate vs. nonprobate property or distinctions between residuary vs. specific, general, or demonstrative legacies. Bequests that qualify for estate tax deductions (marital deduction bequests or charitable bequests) do not have to bear any of the death taxes. The executor has a duty to charge each beneficiary for his pro rata part of the tax; he does not have the discretion to avoid such apportionment. For a discussion of the allocation of taxes between income and principal, see Part 2IV.E.2 at page 67 of this Outline.

**B. Tax Apportionment Provision in Will Controls.**

The federal apportionment statutes specifically are prefaced with the phrase "unless the will provides otherwise" and Texas cases have recognized that the general rule announced in *Sinnott v. Gidney*, apportioning taxes in the same manner as the general rules for apportioning debts and expenses of administration, may be overridden by a provision in the will. *E.g.*, *Pipkin v. Hays*, 482 S.W.2d 59, 61-62 (Tex. Civ. App.--Austin 1972, writ ref'd n.r.e.). Section 322A(b)(2) of the Texas Probate Code allows a testator, settlor, or holder of a power of appointment to apportion the estate tax or grant another person the power to apportion estate tax differently than provided in the Texas statute. *Tex. Prob. Code Ann.* § 322A(b)(2) (Vernon Supp. 2002).

1. **PRIOR LAW.** For persons dying before September 1, 1991, an instrument could only allocate taxes to property passing under that instrument. For example, a will could not allocate taxes to the assets in a revocable trust; likewise, a revocable trust could not allocate taxes to assets passing under the will. Only language in the revocable trust itself could allocate taxes on probate assets (or any other assets in the taxable estate but not in the trust estate) to trust assets.

Further, an apportionment clause in an instrument would only apportion taxes on property passing under that instrument "unless the instrument [provided] otherwise." For example, if a will provided simply that "all taxes due upon my death shall be paid from my residuary estate," this probably would not have covered death taxes due on nonprobate assets.

2. **LAW EFFECTIVE AFTER SEPTEMBER 1, 1991.** For persons dying on or after September 1, 1991, Section 322A(b)(2) is amended to provide that "except as otherwise provided in a will, the direction for the apportionment or nonapportionment of estate tax is limited to the estate tax on the property to which the instrument applies." *Tex. Prob. Code Ann.* § 322A(b)(2) (Vernon Supp. 2002). Therefore, the decedent's will can allocate estate taxes to insurance proceeds, assets in a revocable trust, or other nonprobate assets, but § 322A(b)(4) provides that the will cannot allocate more than a pro rata share of the tax to an interest passing under an instrument created by another person. *Tex. Prob. Code Ann.* § 322A(b)(4) (Vernon Supp. 2002). If there is a conflict in tax apportionment provisions in two or more instruments executed by the same person, "the instrument disposing of or creating an interest in the property to be taxed controls." *Id.* at § 322A(b)(3).

3. **DRAFTING CONSIDERATIONS.**

   a. **Generally.** The tax apportionment clause should precisely state (i) what gifts or beneficiaries are freed from the burden of taxes, (ii) what taxes are affected (whether federal estate taxes, state inheritance taxes, etc. with respect to probate assets, revocable trust assets, insurance proceeds, etc. are covered), and (iii) where the tax burden is placed. See generally Phillip H. Suter, *Techniques to Apportion Estate Taxes Will Have to Be Reviewed Due to the New Tax Law*, 9 EST. PL. 96 (1982). For examples of a number of different apportionment clauses, see McGrath, *Provisions Relating to the Payment of Estate and Inheritance Taxes*, 138 P.L.I. TAX LAW AND ESTATE PLANNING SERIES--ADVANCED WILL DRAFTING 1983, 197, 217-42 (1983).

   b. **Typical Approach--Apportioning Taxes to Residuary Estate.** Traditionally, most will tax apportionment clauses have apportioned death taxes to the residuary estate. However, the planner should be wary of the potential inequities that might result, particularly where the beneficiaries of nonprobate assets included in the decedent's taxable estate are not the same as beneficiaries of the residuary estate.
If the testator intends that estate taxes on probate and nonprobate assets be paid out of the residuary estate, the will should specifically say so. For example, the clause might state that "all taxes due upon my death as a result of the inclusion of probate and nonprobate assets in my gross estate shall be paid from my residuary estate."

C. Conflict of Laws Regarding Apportionment.

There is a split of authority on the conflict-of-laws question of which jurisdiction's apportionment rule is applied if property subject to tax in a decedent's estate is located outside of the jurisdiction of domicile. See E. H. Schopfer, Annotation, What Law Governs Apportionment of Estate Taxes Among Persons Interested in Estate, 16 A.L.R.2d 1282 (1951). The traditional view has been primarily to apply the apportionment law of the situs (particularly with respect to real property), but the modern trend has been to give primary emphasis to the apportionment law of the domicile. See Isaacson v. Boston Safe Deposit & Trust Co., 91 N.E.2d 334, 16 A.L.R.2d 1277 (Mass. 1950) (traditional view); Doetsch v. Doetsch, 312 F.2d 323 (7th Cir. 1963) (looking to law of the decedent's domicile to resolve tax apportionment). The only Texas case discussing the conflict of laws question with respect to apportionment of estate taxes looked to the law of the situs without an analysis of the conflict of laws issues involved. Brenan v. LaMotte, 441 S.W.2d 626 (Tex. Civ. App.--San Antonio 1969, no writ). The conflict of laws issue is uncertain in Texas because of the lack of analysis of the issue in that one Texas case, and the absence of any writ history in that case.

X. GENERAL PROVISIONS REGARDING FIDUCIARIES AND ADMINISTRATION OF TRUSTS AND THE ESTATE.


1. TEXAS TRUST CODE FIDUCIARY POWERS. The Texas Trust Code passed by the Texas legislature in 1983 includes many new and expanded administrative powers "so that it would be possible for trust documents to be drafted without unintentional omissions of power provisions." McMahan, Recent Legislative Developments--Texas Trust Code, STATE BAR OF TEXAS ADVANCED ESTATE PLANNING AND PROBATE COURSE, Q-7 (1983). Many of the powers of the Trust Code repeat the substance of the paragraphs of Section 25 of the Texas Trust Act, but many of the provisions are entirely new in the Trust Code.

2. ADVANTAGES OF MERELY INCORPORATING TRUST CODE POWERS. A will that merely incorporates the fiduciary power provisions of the Trust Code would be shorter and simpler to the typical client. One of the stated purposes of the Texas Trust Code Committee was to adopt complete enough statutory powers so that "in many instances, it will be possible for attorneys to draft brief documents, without repetition of the powers granted to the trustee in [the Texas Trust Code]." Texas Trust Code Committee, Policy Statement and Commentary, at 12 (March 1983).

Unlike the statutory clause legislation adopted in some other states, there is no necessity for the draftsman to incorporate the Texas statutory powers by reference in order for them to apply. See Report of Subcommittee of Committee on Estate and Tax Planning, Administrative Clauses: Incorporation by Reference, 3 REAL PROP., PROB., & TR. J. 524 (1967). However, if the draftsman does want to rely primarily upon the fiduciary powers stated in the Trust Code, an express provision in the will should (i) incorporate the powers of fiduciaries provided in the Trust Code as then in effect and as the powers may be broadened by subsequent amendment and (ii) grant all additional powers that are necessary or appropriate to carry out the terms of the will. See TEXAS TRUST CODE §§ 113.002 & 113.024 (Vernon 1995) (allowing a trustee to exercise any powers in addition to the stated Trust Code powers that are necessary or appropriate to carry out the purpose of the trust) and In Re: Church & Inst. Facilities Development Corp. v. First Nat'l Bank of Amarillo, 122 B.R. 958, 961-62 (N.D. Tex. 1991) (upholding trustee's subordination of lien by reference to Texas Trust Code Sections 113.002 & 113.024).

3. DISADVANTAGES OF MERELY INCORPORATING TRUST CODE POWERS. Some draftsman may be unwilling to merely rely upon an incorporation of the powers of the Trust Code for the following reasons: (i) uncertainty as to the effect of the legislature's amendment to or deletion of a previously granted power; (ii) a written list of the powers allows the testator and his intended beneficiaries to more clearly understand how the trust operates; (iii) the trustee may be able to act more confidently and efficiently if powers are expressly stated; (iv) third parties dealing with the trustee may be more readyly satisfied as to the trustee's authority if specific powers are listed; (v) the testator may own property in states other than Texas, and the desired powers may be unavailable unless provided in the will, or may not be known to third parties or lawyers acting in other jurisdictions; (vi) specifically stating the powers allows the testator to read exactly what powers he is giving to his trustee. See generally Joel A. Levin, Sufficient Administrative Authority May Require Special Provisions Beyond State Fiduciary Powers, 11 EST. PL 336 (1984); Lacovara, "Unless Otherwise Provided"--Statutory Will Clauses and Other Drafting Opportunities, 103 TR. & EST. 741, 743 (1964); J. FARR & J. WRIGHT, AN ESTATE PLANNER'S HANDBOOK 449 (4th ed. 1979) ("We continue to believe that good drafting will spell out in the instrument the desirable [fiduciary power] provisions for each client").
4. **APPLICABILITY OF TRUST CODE PROVISIONS.** The Texas Trust Code is effective January 1, 1984, and applies to all Texas trusts created after that date and to all transactions occurring subsequent to that date with respect to trusts already in existence on January 1, 1984. TEXAS PROP. CODE ANN. § 111.006 (Vernon 1995). The Trust Code provisions will automatically apply unless the trust instrument provides otherwise. TEX. PROP. CODE ANN. § 113.001 (Vernon 1995). The Trust Code is considered an amendment of the Texas Trust Act, and references in trusts to the Texas Trust Act will be deemed to refer to the Trust Code. TEX. PROP. CODE ANN. § 111.002(b) (Vernon 1995).

**B. ADDITIONAL FIDUCIARY PROVISIONS NOT INCLUDED IN TEXAS TRUST CODE.**

1. **OVERVIEW.** If the will merely incorporates provisions of the Texas Trust Code with respect to the powers of trustees and executors, various additional provisions, which are not automatically provided under the Texas Trust Code, should be included in the will. This section of the outline briefly summarizes those additional administrative provisions that should be included. The additional provisions have been separated into trust provisions, general fiduciary provisions, and executor provisions.

2. **GENERAL TRUST PROVISIONS**

   a. **Perpetuities Savings Clause.** Section 112.036 of the Trust Code codifies the Texas rule against perpetuities. TEX. PROP. CODE ANN. § 112.036 (Vernon 1995). Section 5.043 of the Property Code permits a reformation or construction of trust instruments to the extent necessary to satisfy the rule against perpetuities. TEX. PROP. CODE ANN. § 5.043(a) (Vernon 1995). See also Sellers v. Powers, 426 S.W.2d 533, 536 (Tex. 1968) (portions of trust instrument violating the rule against perpetuities are excised). Several Texas cases held that the reform statute only applied to charitable trusts. Foshee v. Republic National Bank, 617 S.W.2d 675 (Tex. 1981); Ball v. Knox, 768 S.W.2d 829 (Tex. App.--Houston [14th Dist.] 1989, no writ) (dictum). Effective September 1, 1991, Section 5.043 is specifically applicable to legal and equitable interests, "including noncharitable gifts and trusts."

   In order to avoid the necessity of a judicial proceeding to correct an inadvertent violation of the rule against perpetuities, the will should contain a clause specifically stating that no trusts will continue beyond twenty-one years after the death of the last of the beneficiaries. The clause should also specifically indicate where the trust assets will pass in the event of a termination under the perpetuities provision. For a discussion of planning strategies to avoid perpetuities violation, see Ronald C. Link, Revised Provisions of Restatement of Property Provide Important Lessons for Estate Planners, 13 Est. Pl. 20 (1986).

   b. **Spendthrift Provision.** Section 112.035 of the Trust Code indicates that a settlor may provide in a trust instrument that a beneficiary's interest in the trust may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. TEX. PROP. CODE ANN. § 112.035(a) (Vernon Supp. 2002). A mere reference to the fact that the trust is a "spendthrift trust" is sufficient to achieve that result under Section 112.035(b) of the Trust Code. TEX. PROP. CODE ANN. § 112.035(b) (Vernon Supp. 2002). Prior law had also recognized the validity of spendthrift provisions. E.g., Hines v. Sands, 312 S.W.2d 275 (Tex. Civ. App.--Fort Worth 1958, no writ). However, unless the will includes a spendthrift provision, beneficiaries will be entitled to assign their beneficial interests in the trust.

   The Texas statute provides that declaring a trust to be a spendthrift trust automatically incorporates restraints against assignment and alienation to the maximum extent provided by law. However, valid spendthrift restraints do not prevent certain types of involuntary invasions. For example, TEX. FAM. CODE ANN. § 154.005 (Vernon 1996) allows a court to order a trustee to provide support for a child of a parent-beneficiary of the trust. See Kolpack v. Torres, 829 S.W.2d 913 (Tex. App.--Corpus Christi 1991, writ denied) (distributions from discretionary trust to support beneficiary's child may be ordered only if the parent-beneficiary is first obligated to the particular amount of child support being sought from the trust); First City Nat'l Bank of Beaumont v. Phelan, 718 S.W.2d 402 (Tex. App.--Beaumont 1986, writ ref'd n.r.e.) (net income from spendthrift trust can be collected for payment of beneficiary's arrearages in child support, even though collection may take place after child has reached age 18); Lucas v. Lucas, 365 S.W.2d 372, 376 (Tex. Civ. App.--Beaumont 1962, no writ) (trustee may consider needs of dependents of trust beneficiary in determining amounts of discretionarly distributions); and Comment, The Trust in Marital Law: Divisibility of a Beneficiary Spouse's Interest on Divorce, 64 Tex. L. Rev. 1301, 1334-1336 (1986) (discussing accessibility of trust benefits for child and spousal support). TEX. HEALTH & SAFETY CODE ANN. §§ 552.018 & 593.081 (Vernon Supp. 2002) grants rights of invasion to pay the support costs of an institutionalized beneficiary as to trust principal exceeding $250,000 and income attributable to such excess principal. In addition, courts from other jurisdictions continue to allow invasions for special classes of claimants (such as governmental or tort claims and claims for payment for necessities).

   If the testator wishes to clarify that the trust may not be reached by special classes of claimants against a trust beneficiary, consider specifying in the spendthrift clause that the beneficiary's interest may not be involuntarily attached by any claimant, including governmental or tort claims, and any person or agency seeking spousal or child support or payment for services or goods deemed to be necessities.
Note that a spendthrift provision limits the beneficiaries' power to dispose of their interests in the trust, but does not limit the trustee's power to make dispositions of trust assets. *Dierschke v. Central Nat'l Branch of First Nat'l Bank at Lubbock*, 876 S.W.2d 377 (Tex. App. -- Austin January 12, 1994, no writ) (trustee had power to enter into partition agreement regarding undivided in land owned by trust despite existence of spendthrift provision).

c. **Small Trust Termination Provision.** The will should include a provision authorizing the termination of trusts anytime that the assets of the trust become so small as to make the ongoing administration of the trust economically unfeasible. If a beneficiary is also serving as trustee, the drafter should exercise caution to assure that the trustee is not given a general power of appointment. Without such a provision, the trustee would not be authorized to distribute the trust assets and terminate the trust unless distributions were authorized under the standards for making distributions of principal and income or unless a court would judicially terminate the trust because of changed circumstances. See *Texas Trust Code* § 112.054 (Vernon 1995). See generally Rept. of Committee on Formation, Administration and Distribution of Trusts, *Procedures for Terminating Small Trusts*, 19 REAL PROP., PROB. & TR. L.J. 988 (1984).

d. **Consolidation of Trust Funds.** The trustee should be authorized to consolidate assets of various trusts created by the will at the trustee's discretion. This power may allow a greater return on investments and reduce accounting and related costs. Without such an explicit trust provision, the trustee would not be permitted to mingle the properties of the various trusts, even though they were created under the same will. H A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 179.2 (4th ed. 1987).

e. **Merger Provision.** Effective September 1, 1991, the Trust Code authorizes the merger of two or more identical trusts into a single trust "if the trustee reasonably determines that merging the trusts could result in a significant decrease in current or future federal income, gift, estate, generation-skipping transfer taxes, or any other tax imposed on trust property." *Tex. Prop. Code Ann.* § 112.057(c) (Vernon 1995). To facilitate (i) merger of substantially identical trusts (instead of completely identical trusts), and (ii) merger for administrative convenience or other purposes (other than federal tax savings), express merger authority (broader than the Trust Code authority) should be included.

f. **Trust Division.** Effective September 1, 1991, the Trust Code authorizes the division of a single trust into two or more identical trusts "if the trustee reasonably determines that the division of the trust could result in a significant decrease in current or future federal income, gift, estate, generation-skipping transfer taxes, or any other tax imposed on trust property." *Tex. Prop. Code Ann.* § 112.057(a) (Vernon 1995). This authority facilitates estate tax planning (e.g., instead of making a partial QTIP election, a marital deduction QTIP trust can be divided into two trusts and the QTIP election can be made with respect to only one of the trusts) and generation-skipping transfer tax planning (See PLR 9002014). To facilitate division for administrative convenience or other purposes (other than federal tax savings), express division authority (broader than the Trust Code authority) should be included.

g. **Trust Situs, Changing Trust Situs, and Choice of Law.** The trust situs and governing law is typically controlled by the trust instrument. The ability to change the situs of the trust could be helpful in the event of a change of trustees, change of location of beneficiaries, change of the location of trust assets, or for other miscellaneous reasons. The law regarding change of the situs of a trust is somewhat uncertain, and a specific provision authorizing such a change and detailing the mechanics for such a change is beneficial. See generally Hendrickson, *Change of Situs of a Trust*, 118 TR. & EST. (January-July, 1979).

If the trust has some "points of contact" with the governing law selected by the testator (such as where the trustee is domiciled in that state or the situs of the property is located in that state), the selection of law in the will be honored. The choice of governing law, however, would probably not be honored if no other "points of contact" exist. See 5 A. SCOTT, LAW OF TRUSTS §§ 591, 592, 606, 607 (1967).

h. **Receipt and Allocation of Employee Benefits and Insurance Proceeds.** The trustee is authorized under the Trust Code to receive additions to the trust assets in Section 113.004. *Tex. Prop. Code Ann.* § 113.004 (Vernon 1995). However, if the will creates several trusts, merely designating the testamentary trustee as the beneficiary of employee death benefits or insurance proceeds would leave the trustee in a quandary as to how the assets should be allocated among the various trusts. The will should specifically cover this contingency.

3. **GENERAL FIDUCIARY POWERS.** This section of the outline discusses powers important for both trustees and executors. Typically, the will details these powers for the trustees, and states that the executors have all of the powers of the trustees. Where appropriate, the outline discusses the effect of certain power provisions upon executors under Texas law.

a. **Investment Powers.** Although the Texas Trust Code gives the trustee relatively broad powers with respect to investments, the trustee is still restricted from investing in speculative or extrahazardous investments, and has a general duty of reasonable diversification of investments. See *Texas Trust Code* § 113.056(a) (Vernon 1995) ("not in regard to speculation"); *Restatement (Second) of Trusts* § 228 (1959) (reasonable diversification of investments to distribute risk of loss); *Jewett v. Capital*
Effective September 1, 1999, new Texas Trust Code Section 113.060 authorizes a trustee to delegate investment decisions. However, the trustee remains responsible for the investment agent's decisions unless the trustee complies with the statutory criteria. TEX. PROP. CODE ANN. § 113.060 (Vernon Supp. 2002).

b. Retention of Assets

(1) General Rule. Section 113.003 of the Texas Trust Code authorizes the trustee to retain assets initially contributed to the trust or added to the trust, without regard to diversification or liability for any depreciation or loss resulting from the retention. TEX. PROP. CODE ANN. § 113.003 (Vernon 1995). This statute appears to negate certain duties otherwise imposed upon trustees, as described in the following sections of the RESTATEMENT (SECOND) OF TRUSTS: (i) the duty to distribute the risk of loss by a reasonable diversification of investments, § 228; (ii) the duty to dispose of assets initially put in a trust which would not be a proper investment, § 230; (iii) the duty to dispose of property which, though a proper investment when initially acquired, subsequently becomes an improper investment, § 231; and (iv) the duty to make trust property productive, § 181. See Howell Ward, The Texas Trust Act: Discretionary Power of a Trustee, 40 TEX. L. REV. 356, 357-61 (1962). Note that there is a potential conflict between this power and the general duty set forth in Sections 113.056(a) and (c).

(2) The Neuhaus Case. A relatively recent Texas case addresses the effect of Section 113.003 upon the fiduciary's liability for retaining trust assets. Neuhaus v. Richards, 846 S.W.2d 70 (Tex. App.--Corpus Christi 1992), set aside without reference to merits, 871 S.W.2d 182 (Tex. 1994). In that case, McAllen State Bank stock was part of the original trust corpus. That bank was acquired by First City, and the trustee substituted First City stock for the McAllen State Bank stock.

The Neuhaus case suggests that Section 113.003 "appears to statutorily relieve the trustee of any liability for retention of either (1) initial trust corpus, or (2) property that is added to the trust." Id. at 77-78. The court indicated that this protection would be construed as narrowly as possible, however, in light of the fact that the legislative history regarding the adoption of Texas Trust Code (which first enacted Section 113.003) indicated that the bill was intended merely to update existing law and not to impair traditional principles of equity and common law. The court observed that Section 113.003 appears to be a substantial departure from the provisions of the prior Texas Trust Act, and Section 113.003 should be construed as narrowly as possible.

In light of that background, the court held that Section 113.003 would not apply to substituted or exchanged shares of stock. In addition, the court determined that the substituted stock is not stock that has been "added" to the trust under Section 113.003, but that the "added" provision is interpreted narrowly to apply only to newly acquired trust assets added by gift rather than assets purchased or received in exchange for other trust funds or assets.

However, the Neuhaus decision, having been set aside by the Supreme Court, has limited value as precedent.

(3) Prudent Investor Rule. Even if the instrument authorizes the trustee to hold assets without regard to "diversification, risk or nonproductivity," a court may nevertheless find that the prudent investor standard for investments applies unless the instrument specifically provides to the contrary. See First Alabama Bank of Huntsville v. Spragins, 475 So.2d 512 (Ala. 1985) (lack of diversification provision would not override or lessen the prudent man standard for trust investments where bank-trustee held stock in its holding company as a major trust asset).

(4) Executors. With respect to executors, the courts have imposed an even greater duty upon the executor to conserve the estate assets and not speculate with estate assets. See Humane Society of Austin and Travis County v. Austin National Bank, 531 S.W.2d 574, 580 (Tex. 1976) (primary duty of executor is to preserve estate for distribution); Merrill Lynch Pierce Fenner & Smith, Inc. v. Bocock, 247 F. Supp. 373, 379 (S.D. Tex. 1965) (emphasizing importance that trustee not speculate with trust assets). If the assets are perishable or extremely likely to deteriorate in value, the executor is under a duty to sell them under Section 333 of the Texas Probate Code unless the will relieves him of such duty. TEX. PROP. CODE ANN. § 333 (Vernon Supp. 2002). This power, if applicable to the executor, would avoid the forced sale requirements with respect to personal property provided in Section 333. Section 238 of the Texas Probate Code authorizes the retention of a business interest unless the will directs otherwise. TEX. PROP. CODE ANN. § 238 (Vernon Supp. 2002).
The Texas Trust Code authorizes the trustee to "encumber" trust assets, but Section 113.015 of the Texas Trust Code authorizes the trustee to borrow and to mortgage, pledge, or otherwise encumber all or any part of the trust assets. See Transamerica Leasing Co. v. Three Bears, Inc., 586 S.W.2d 472, 475 (Tex. 1979) (power to invest in a lease implicitly authorized the trustee to guarantee performance of an interested party's obligations under a lease).

An express power of sale is particularly important for executors. Section 332 of the Texas Probate Code authorizes sales of real and personal property by an executor without court order where the will confers a power of sale. TEX. PROP. CODE ANN. § 332 (Vernon 1980). If no power of sale is included in the will, independent executors may only sell assets without court approval for the purpose of paying debts and expenses. See Buckner Orphans Home v. Maben, 252 S.W.2d 726, 728 (Tex. Civ. App.--Eastland 1952, no writ).

I. Power of Sale

Section 113.010 of the Texas Trust Code authorizes a trustee to sell or enter into options to sell real or personal property for cash or credit, with or without security, either publicly or privately. TEX. PROP. CODE ANN. § 113.010 (Vernon 1995). Prior to enactment of the Trust Act, a trustee had no power to sell trust property unless such power was given by the trust instrument or unless all beneficiaries consented to the sale. See Gahagan v. Texas & Pacific Railway Co., 231 S.W.2d 762, 768 (Tex. Civ. App.--Dallas 1950, writ ref'd n.r.e.).

In Gatesville Redi-Mix, Inc. v. Jones, 787 S.W.2d 443 (Tex. App.--Waco 1990, writ denied), a long-term lease by an independent executor was held to be invalid. The court reasoned that the will did not authorize the independent executor to lease the property, and the lessee who attempted to uphold the validity of the lease could not sustain its burden of showing that the lease was to the interest of the estate under court's interpretation of Section 361 of the Probate Code.

J. Power to Lend to Beneficiaries or Others

Section 113.052(b)(1) provides that the Trust Code does not prohibit a loan from a trustee to a beneficiary (presumably, even if the beneficiary is also the trustee) if the loan is expressly authorized or directed by the trust instrument. TEX. PROP. CODE ANN. § 113.052(b)(1) (Vernon 1995). No other provision of the Trust Code specifically authorizes loans to beneficiaries, and, absent a specific trust provision authorizing loans, one commentator suggests that it is doubtful whether a trustee has authority to lend trust funds to anyone. See Transamerica Leasing Co. v. Three Bears, Inc., 586 S.W.2d 472, 475 (Tex. 1979) (power to invest in a lease implicitly authorized the trustee to guarantee performance of an interested party's obligations under a lease).

K. Power to Give Guarantee

Effective September 1, 1999, Section 113.060 of the Trust Code authorizes a trustee to delegate investment decisions. However, the trustee remains responsible for the investment agent's decisions unless the trustee complies with the statutory criteria. TEX. PROP. CODE ANN. § 113.060 (Vernon Supp. 2002). See generally Responsibility of Trustee Where Investment Power Is Shared or Exercised by Others, 9 REAL PROP., PROB. & TR. J. 517 (1974); RESTATEMENT (SECOND) OF TRUSTS §§ 170, 171, 186, 225 (1959). In order to give protection to the trustee and executor, the testator might want specifically to exonerate them from any liability for investments made on the advice of reasonably competent investment advisors.

L. Power to Retain and Rely on Investment Advisor

Section 113.052(b)(1) provides that the Trust Code does not prohibit a loan from a trustee to a beneficiary (presumably, even if the beneficiary is also the trustee) if the loan is expressly authorized or directed by the trust instrument. TEX. PROP. CODE ANN. § 113.052(b)(1) (Vernon 1995). No other provision of the Trust Code specifically authorizes loans to beneficiaries, and, absent a specific trust provision authorizing loans, one commentator suggests that it is doubtful whether a trustee has authority to lend trust funds to anyone. See INTERFIRST BANK DALLAS, TEXAS WILL MANUAL SERVICE XII-6 n.3 (Galvin ed. 1980)). The will should contain a provision authorizing loans to beneficiaries on such terms as the trustee may determine. Such a provision might allow the trustee to make cash available to beneficiaries without making actual distributions for federal income tax purposes.

M. Power to Borrow

Section 113.015 of the Texas Trust Code authorizes the trustee to borrow and to mortgage, pledge, or otherwise encumber all or any part of the trust assets. TEX. PROP. CODE ANN. § 113.015 (Vernon 1995). However, an executor generally cannot borrow funds without court order unless the administration is independent or unless express authority is given in the will. See TEX. PROP. CODE ANN. § 329 (Vernon 1980 & Supp. 2002) (describing valid reasons for an procedure governing borrowing by personal representatives); William I. Marschall, Jr., Independent Admin. of Decedent's Estates, 33 TEX. L. REV. 95, 111-12 (1954). Therefore, incorporating this provision for the executor is important.

N. Delegation Powers

A trustee or a co-trustee generally does not have the authority to delegate his discretionary power to another. Transamerica Leasing Co. v. Three Bears, Inc., 586 S.W.2d 472, 476 (Tex. 1979); RESTATEMENT (SECOND) OF TRUSTS § 225(2)(1959). A delegation power may be helpful particularly among co-trustees during temporary periods of absence, or to allow delegation of specific duties to individual co-trustees who have particular expertise with respect to those particular duties.

j. Power to Hold Assets in Nominee Form. A trustee is generally prohibited from taking title to any trust assets in the name of a third party. IIA A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 179.5 (4th ed. 1987). Section 113.017 of the Trust Code authorizes a trustee to hold stock in the name of a nominee, but does not authorize acquisition of assets in nominee form for any other types of assets. TEX. PROP. CODE ANN. § 113.017 (Vernon 1995). The trustee might desire, for a variety of reasons, to purchase other types of assets in nominee form.

Section 398A of the Texas Probate Code authorizes a personal representative to hold stock and other personal property in nominee form, but explicitly makes the personal representative liable for acts of the nominee with respect to such property. TEX. PROP. CODE ANN. § 398A (Vernon 1980). Furthermore, Section 398A of the Texas Probate Code, unlike Section 113.017, requires that property held nominally must remain in the possession and control of the personal representative. At least one commentator has argued that the provisions of Section 398A may not be changed by terms in the will to the contrary. See INTERFIRST BANK DALLAS, TEXAS WILL MANUAL SERVICE X-11-4 n.3 (Galvin ed. 1980).

k. Principal and Income Apportionment; Power to Retain Underproductive Property. Sections 113.101--113.111 of the Texas Trust Code provide extremely detailed provisions regarding principal-income allocations for income and expense items. TEX. PROP. CODE ANN. §§ 113.101 - 113.111 (Vernon 1995 & Supp. 2002). The will might contain a provision giving the trustee authority to allocate items of income and expense between principal and income in a reasonable manner. This would permit the trustee to be guided by provisions in the Trust Code, but give flexibility in deviating from those provisions where reasonable to do so. In particular, the trustee might determine to set aside a reserve depletion for natural resource income analogous to the federal income tax depletion rules, rather than using the 27-1/2% depletion allowance provided in Section 113.107(d) of the Trust Code, so that the principal and income allocation for state law purposes would coincide with the allocation for federal tax purposes. If a trust instrument gives the trustee discretion in making principal-income allocations for income and expense items, no inference arises from the fact that the trustee makes an allocation contrary to provisions in the Trust Code. TEXAS TRUST CODE § 113.101(b) (Vernon 1995).

By a 5-to-3 decision (and over the dissenting opinion of Justice Wallace), the Texas Supreme Court concluded in a 1988 decision, that under section 113.110, a duty to sell underproductive property arises one year after the property becomes underproductive. Under the court's holding, the trustee has no discretion in determining whether to sell underproductive property; if the trust property is underproductive, it must be sold and the proceeds must be divided between the income beneficiary and the remainder beneficiary in accordance with section 113.110(a). Perfect Union Lodge v. InterFirst Bank of San Antonio, 748 S.W.2d 218, 221 (Tex. 1988). Neither the Texas Trust Code provisions nor general rules of common law clearly supported the holding in Perfect Union Lodge. Rather, the relevant code provisions and rules of common law were both inconclusive.

The Texas Legislature made various amendments to section 113.110 in 1989 in response to the Perfect Union Lodge case. Section 113.110(a) was amended to state more clearly that the underproductive property statute (which contains provisions for the division of net proceeds upon the eventual sale of underproductive property) will apply only if the trustee is required to sell or otherwise dispose of such property. Section 113.110(e) was amended to state more specifically the statute should not be construed as requiring a trustee to sell or dispose of trust property. "The determination as to whether the trustee is required to sell or dispose of property shall be made in accordance with the requirements set out in the governing instruments, other provisions of this Code, and the common law." The amendments became effective September 1, 1989. TEX. PROP. CODE ANN. § 113.110(a) & (e) (Vernon 1995).

If the will authorizes the trustee to retain underproductive property, and if the will contains a trust designed to qualify the marital deduction under section 2056(b) of the Internal Revenue Code, the surviving spouse should be given the power to require the trustee either to make the trust property productive or to convert it within a reasonable time. See Treas. Reg. § 20.2056(b)-5(f)(4).

l. Partition and Division Power. The Trust Code contains no provision authorizing a partition of trust assets other than the real property management provisions in Section 113.009. TEX. PROP. CODE ANN. § 113.009 (Vernon 1995). This power would not appear to extend to making distributions among trust beneficiaries. Similarly, an independent executor has no power to partition assets among estate beneficiaries unless the will so provides. Clark v. Posey, 329 S.W.2d 516, 519 (Tex. Civ. App.--Austin 1959, writ ref'd n.r.e.); WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDELENTS' ESTATES § 510 (1971); TEX. PROP. CODE ANN. § 373-387 (Vernon 1980 & Supp. 2002) (general provisions for court-ordered partitions) and § 150 (Vernon 1980) (partition by independent executors). The will should give the fiduciaries the power to make non-pro-rata distributions of estate and trust assets.

Note that under Texas Probate Code § 150, if (i) the estate contains assets that are not capable of a fair and equitable partition and distribution and (ii) the will does not provide a means for partition of the estate, then an independent executor (who
normally would make the determination on his own) may seek court approval of a proposed partition and distribution of the estate assets. See In Re Estate of Spindor, 840 S.W.2d 665 (Tex. App.--Eastland 1992, no writ) (if residuary beneficiaries are unable to agree upon property division with executor, executor is authorized to have the court resolve the matter).

m. Powers Regarding Business Interests. If the testator owns a substantial interest in a closely held business or businesses, he might want to give specific instructions to his fiduciaries regarding his wishes with respect to those interests. The testator may want to make specific directions regarding the voting of stock, see III A. Scott & W. Fratcher, Law of Trusts § 193.1 (4th ed. 1987), or regarding dividend policy, see Paul N. Frimmer, Beneficiaries' Rights to Distributions When Business Interests Are Held in Trust, 16 Real Prop., Prob. & Tr. J. 359 (1981). The Texas Trust Code clearly authorizes the trustee to retain any such investments in Section 113.003, and furthermore authorizes investments in business entities, including sole proprietorships, partnerships, limited partnerships, and corporations. Tex. Prop. Code Ann. § 113.003 (Vernon 1995). If the fiduciary is personally involved in the business (as an owner, officer, or director), the will should specifically authorize the trustee to retain that business interest and to take actions with respect to that interest, despite the fact that the trustee is also interested in the business. Otherwise, the trustee's duty of loyalty and general prohibition against self-dealing transactions might present problems with respect to anticipated actions regarding that business interest. For example, questions might arise as to the fiduciary's taking advantage of various investment opportunities individually where the particular business entity also makes similar investments or has similar business activities. See III A. Scott & W. Fratcher, Law of Trusts § 170.23 (4th ed. 1987); Texas Trust Code § 114.001(c)(2) (Vernon 1995) (trustee liable for any profit made by trustee through a breach of trust).

This provision is important for executors. Section 238 of the Texas Probate Code authorizes an executor to continue a business under order of the court. Tex. Prob. Code Ann. § 238 (Vernon Supp. 2002). Section 238A discusses the executor's becoming a partner in a partnership in which the decedent owned an interest. Tex. Prob. Code Ann. § 238A (Vernon 1980). No other section of the Texas Probate Code discusses or explicitly authorizes investments by executors in business entities other than the authority in Section 238 to retain business interests. Such investments would seemingly not be allowed in light of the executor's general primary duty to preserve and settle the estate. See Woodward & Smith, Texas Practice: Probate and Decedents' Estates §§ 692, 699 & 700 (1971).

n. Resignation of Fiduciary. In the absence of a provision in the will permitting a trustee to resign, the trustee must obtain court approval before being relieved of his duties as trustee. Restatement (Second) of Trusts § 106 (1959). Similarly, executors must obtain Probate Court approval before resigning. Tex. Prob. Code Ann. § 221 (Vernon 1980 & Supp. 2002). Section 113.081 of the Trust Code specifically permits a trustee to resign in accordance with the terms of the trust instrument. Tex. Prop. Code Ann. § 113.081 (Vernon 1995). The will should generally contain specific provisions authorizing the procedure by which a trustee may resign without first securing court approval. A similar provision could be inserted for executors, but it is not clear that such a provision would override Section 221 of the Probate Code.

o. Exoneration of Successor Fiduciaries. A successor trustee may be liable for a breach of trust committed by the predecessor trustee if the successor fails to take proper steps to compel the predecessor to redress the breach of trust. Texas Trust Code § 114.002 (Vernon 1995) (making successor trustee liable for a breach of trust by a predecessor trustee if successor trustee knows or should have known of such a breach of trust); III A. Scott & W. Fratcher, Law of Trusts § 223.3 (4th ed. 1988); see InterFirst Bank-Houston, N.A. v. Quintana Petroleum Corporation, 699 S.W.2d 864, 879 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.) (beneficiary released and indemnified successor trustees from any liability for investigate or review administration by former trustees; held that successor trustee was protected by such release and indemnity). Unless the will exonerates a successor fiduciary from acts or omissions of the prior fiduciary, the successor fiduciary may have no alternative but to require an independent audit, thereby taking reasonable steps to assure that there were no breaches of trust by the predecessor fiduciary. Such an audit could be expensive and would be charged to the trust estate.

p. Exculpatory Clause. There is no provision in either the Texas Trust Act or the Trust Code specifically authorizing exculpatory provisions. However, Section 22 of the Texas Trust Act and Section 113.059 of the Trust Code do permit a Trustor to relieve the trustee from any duty, or limitation imposed by statute.

(1) Texas Cases Constructure Exculpatory Clauses Strictly. Various Texas cases have recognized the validity of exculpatory clauses, but have construed them strictly against the trustee. See Jewett v. Capital National Bank of Austin, 618 S.W.2d 109, 112 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.) (exculpatory clauses should be strictly construed against trustee); Burnett v. First National Bank of Waco, 567 S.W.2d 873, 876 (Tex. Civ. App. 1978--Tyler, writ ref'd n.r.e.) (clause stating that the trustee would not be liable "for any honest mistake in judgment" held not to relieve trustee from negligent actions short of dishonesty); Corpus Christi National Bank v. Gerdes, 551 S.W.2d 521, 524 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.) (exculpatory clause providing that no trustee should "be liable for any mistake or error of judgment or negligence but shall be liable only for her or its own dishonesty" held to be valid; court distinguished the Langford case).
The Risser case states that an exculpatory clause will not protect a trustee who uses the trustee position to obtain an advantage by action inconsistent with the trustee's duties and detrimental to the trust, or who takes actions in bad faith or acts "intentionally adverse or with reckless indifference to the interests of the beneficiary." \textit{InterFirst Bank Dallas, N.A. v. Risser}, 739 S.W.2d 882, 888 (Tex. App.--Texarkana 1987, no writ). In addressing whether the trustee acted in "bad faith," the court focused on the following facts regarding a purportedly improper sale: (1) that the trustee sold the asset without notifying trust beneficiaries, (2) that the trustee did not obtain an outside appraisal, (3) that the trustee did not seek competitive bidding, (4) that the trustee sold the asset to a creditor of the corporate trustee, and (5) that the sale price was approximately one-third of market value. \textit{Id.}, at 891, 895-905. See also the discussion of the \textit{Neuhaus case} at Part 2X.B.3.b.(2) at page 97 of this Outline.

Notwithstanding the general rule of narrow construction of exculpatory clauses, they are still enforceable. In \textit{Jochec v. Clayburne}, 863 S.W.2d 516 (Tex. App.--Austin 1993, writ denied), the trust instrument authorized the trustee to engage in transactions with "any person, firm, corporation or any trustee under any other trust." Holding that the quoted language was ambiguous and not sufficient in and of itself to authorize self-dealing, the court turned to extraneous evidence. Because the settlor was aware of the trustee's conflict of interest generally and the complained of self-dealing transaction specifically, and did not complain, the court concluded that "he intended the language in the trust instrument to modify the duty of fidelity." \textit{Id.} at 520. The court acknowledged the general rule requiring strict construction of exculpatory clauses but concluded that "this strict construction rule should be applied only in circumstances where the intention the parties cannot be discerned from the parties' actions or conduct." \textit{Id.} The court reversed the trial court's judgement in favor of the beneficiaries because the court's charge failed to instruct the jury that when an instrument contains an exculpatory clause, the trustee's duties are governed by the terms of the instrument.

(2) Possible Public Policy Limitations Regarding Self-Dealing. Various cases have suggested that "the language of a trust instrument cannot authorize self-dealing by a trustee, because that would be contrary to public policy." \textit{InterFirst Bank Dallas, N.A. v. Risser}, 739 S.W.2d 882, 888 (Tex. App.--Texarkana 1987, no writ); \textit{Blieden v. Greenspan}, 742 S.W.2d 93 (Tex. App.--Beaumont 1987), rev'd on other grounds, 751 S.W.2d 858 (Tex. 1988); \textit{Langford v. Shamburger}, 417 S.W.2d 438, 444, 447 (Tex. Civ. App.--Fort Worth 1967, writ ref'd n.r.e.). \textit{See Three Bears, Inc. v. Transamerica Leasing Co.}, 574 S.W.2d 193, 197 (Tex. Civ. App.--El Paso 1978) (citing \textit{Langford} for proposition that it is against public policy for a trust instrument to authorize self-dealing, and court invalidated guaranty given by trust which also benefitted trustees in other capacities), rev'd, 586 S.W.2d 472, 475 (Tex. 1979) (trust instrument authorized trustee to give guaranty, and court did not discuss the self-dealing issue); \textit{Langford v. Shamburger}, 392 F.2d 939, 946 (5th Cir. 1968) (intentional omission cannot be excused by an exculpatory clause limiting the liability of a trustee to matters of gross negligence).

q. Compensation of Fiduciaries.

(1) Trustee Compensation. The Trust Code authorizes reasonable compensation for trustees. \textsc{Texas Trust Code} § 114.061 (Vernon 1995). However, the testator may have specific wishes regarding compensation of trustees, and in particular, bank trust departments may want specific language in the will regarding trustee compensation to make clear that the bank will be compensated according to its standard trustee fee schedule and according to the amount of time and work involved.

(2) Executor Compensation. Section 241(a) of the Texas Probate Code provides a statutory fee for executors. \textsc{Tex. Prob. Code Ann.} § 241(a) (Vernon Supp. 2002). In practice, the statutory fee is unsatisfactory, resulting in commissions that may have very little relation to the actual amount of work involved. However, a provision in a will pertaining to the executor's compensation will override Section 241(a). \textit{See Lipstreu v. Hagan}, 571 S.W.2d 36, 38 (Tex. Civ. App.--San Antonio 1978, writ ref'd n.r.e.). Even if a clause provides specified compensation to an executor, the compensation will be payable only if the person actually serves as executor. \textit{In re Estate of Hodges}, 725 S.W.2d 265, 268-269 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.) (no executor appointed because of family settlement agreement).

(3) Compensation Rate Specified in Will Controls. If the will specifies the method or rate for compensating fiduciaries, such amount is conclusive and the fiduciary cannot later complain that the sum is inadequate if he accepts the office as fiduciary. \textit{See Allen v. Berrey}, 645 S.W.2d 550, 553 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.) (independent executor compensation); \textit{Stanley v. Henderson}, 162 S.W.2d 95, 97 (Tex. 1942) (discussing trustee compensation).

(4) Tax Issues. Reasonable fiduciary compensation will be deductible as an administrative expense for either income tax purposes or estate tax purposes. \textsc{See I.R.C.} § 642(g). The fiduciary will generally include such compensation in his taxable income; however, so long as the fiduciary is not a professional fiduciary and does not actively participate in the conduct of trade or business included in the assets of the estate, his compensation will not be subject to the FICA self-employment tax. \textsc{Rev. Rul.} 58-5, 1958-1 C.B. 322.

r. Removal of Fiduciary. Section 113.082 of the Texas Trust Code authorizes removal of trustees for particular causes, and Sections 149C and 222 of the Probate Code authorize removal of independent executors and personal representatives, respectively, for specified causes. \textsc{Tex. Prob. Code Ann.} § 113.082 (Vernon 1995); \textsc{Tex. Prob. Code Ann.} §§149C & 222 (Vernon Supp. 2002). If the testator wishes to give some individual the authority to remove a fiduciary without cause, there should be a
specific provision in the will to that effect. A new sentence was added to the Trust Code specifically recognizing removal of trustees in accordance with the terms of a trust instrument. In particular, an individual or individuals may be authorized to remove corporate fiduciaries without cause. Such a provision may give the testator comfort in knowing that someone will have leverage to persuade a corporate trustee to be cooperative with the needs of the estate beneficiaries.

s. Environmental Law Issues. Section 113.025(a) of the Texas Trust Code, added effective September 1, 1993, clarifies the powers of the trustee to manage environmental risks. Section 113.025(a) would enable (but not require) the trustee or a potential trustee to inspect trust property or property that the trustee has been asked to hold in trust to determine if the property complies with environmental laws. The statute clarifies that a potential trustee who exercises this power is not presumed to have accepted the trust property pursuant to Section 112.009. Section 113.025(b) enables the trustee to take any action that the trustee believes necessary to prevent, abate, or otherwise remedy an actual or potential violation of an environmental law affecting property held in trust. TEX. PROP. CODE ANN. § 113.025 (Vernon 1995). Section 114.001(d) generally limits a trustee's liability to a gross negligence or bad faith standard for any action taken or not taken pursuant to Section 113.025 or other actions taken to comply with environmental law requirements. TEX. PROP. CODE ANN. § 114.001(d) (Vernon Supp. 2002).

4. SPECIAL PROVISIONS REGARDING EXECUTORS.

a. Incorporate Powers of Trustee. The will should specifically incorporate for the executor all of the powers given to the trustee under the provisions of the will and under the provisions of the Texas Trust Code. This is especially important because, as noted above, the executor will lack many powers that are useful in administering an estate unless those powers are expressly granted.

b. Relationship of Estate to Testamentary Trusts. For administrative convenience, the executor should be authorized to make immediate distributions of properties directly to trust beneficiaries rather than making distributions to testamentary trusts if events have occurred which would require the trustee to make immediate distributions from such trusts. In addition, some draftsmen explicitly authorize the trustee to make loans and advancements to the estate, or to purchase assets from the estate, in order to furnish liquidity (particularly where the testamentary trust is named the beneficiary of life insurance policies or employee death benefits) in order to supply cash for the payment of debts, taxes, and general administration expenses.

c. Tax Elections. Under the Internal Revenue Code, fiduciaries generally have all of the tax rights and privileges of the person whom they represent. I.R.C. § 6903(a). Some tax elections are specifically made applicable to executors. E.g., I.R.C. § 6013(a)(3) (election to file joint return for decedent and surviving spouse). However, draftsmen often particularly authorize the executor, in its sole discretion, to exercise tax elections available to the executor.

(1) Reminder. One of the advantages of including such a clause is merely to serve as a reminder to the executor of some of the specific tax elections available to the executor.

(2) Equitable Adjustments Attributable to Tax Elections. The clause should specifically state whether or not the executor should make compensating adjustments between income and principal or among beneficiaries as the result of tax elections. For an excellent discussion of the potential inequities that might arise as a result of various tax elections and of the law regarding adjustments among beneficiaries' interest as a result of such elections, see Reed Quilliam, Jr., Rights and Conflicts of Beneficiaries During Administration, 1980 S.W. LEGAL FOUNDATION WILLS AND PROBATE INSTITUTE H-273 (1980); see also Moore, Conflicting Interests in Post Mortem Estate Planning, 9th ANN. U. OF MIAMI INST. ON EST. PL. 19-1 (1975); and Taggart, Adjustments Required with Tax Elections Alter Interests Among Beneficiaries, 128 P.L.I. TAX LAW AND ESTATE PLANNING SERIES--POST MORTEM ESTATE PLANNING 219 (1981).

XI. MISCELLANEOUS PROVISIONS.

A. Will Not Contractual.

For wills made after September 1, 1979, a contract to make the will or not revoke the will can be established only if provisions of the will specifically state that a contract does exist and state the material provisions of the contract. The execution of reciprocal wills does not by itself suffice as evidence of the existence of a contract. TEX. PROB. CODE ANN. § 59A (Vernon 1980). One Texas case interpreting Section 59A has stated that it "does not require the word 'contract' or a phrase reciting 'this will is a contract' to appear in the body of the document." Coffman v. Woods, 696 S.W.2d 386, 387 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) (joint will provision stating that spouses agree the will cannot be changed without the consent in writing of the other constitutes a contractual will).

Prior to the passage of Section 59A, determining whether a contract existed regarding the making or not revoking of a will was a fact issue. See generally Meyer v. Texas National Bank of Commerce of Houston, 424 S.W.2d 417 (Tex. 1968); Kirk v. Beard, 345
S.W.2d 267 (Tex. 1961); Pearce v. Meek, 780 S.W.2d 291-294 (Tex. App.--Tyler 1989, no writ); and Kilpatrick v. Estate of Harris, 848 S.W.2d 849 (Tex. App.--Corpus Christi 1998, no writ). A specific statement in the will that it was not contractual would resolve any doubt. Even after the passage of Section 59A of the Probate Code, such a statement is helpful in making clear to both spouses that either of them may change their wills at any time that they wish to do so. But see Stephens v. Stephens, 877 S.W.2d 801, 804 (Tex. App.--Waco 1994, writ denied) (“Making a contractual will does not take away the right of either party to revoke it”).

B. Definition of Issue and Children

1. DEFINE "ISSUE" TO INCLUDE ALL DESCENDANTS. The term "issue" should specifically be defined to refer to all descendants of the person indicated, and not just children of the person indicated, because some courts have construed the terms "issue" and "children" interchangeably. See Guilliams v. Koonsman, 279 S.W.2d 579, 583 (Tex. 1955); E.S.O., Annotation, "Issue" Used as Word of Purchase, 2 A.L.R. 930 (1919). However, Texas courts have generally established that the word "issue" interpreted in its ordinary sense embraces all descendants when there is nothing in the language of the instrument to show that a narrower interpretation was intended. Atkinson v. Kettler, 372 S.W.2d 704, 711-12 (Tex. Civ. App.--Dallas 1963), rev'd on other grounds, 383 S.W.2d 557 (Tex. 1964).

2. LIMITED TO LEGITIMATE ISSUE UNLESS OTHERWISE PROVIDED. The terms "issue" and "children" are generally limited to legitimate issue and children, respectively, to remove the incentive from beneficiaries "popping out of the woodwork" claiming that they are long-lost illegitimate children of the testator. Texas cases have generally recognized that references to a "child," "issue," or "children," without more, does not include illegitimate children. Hayworth v. Williams, 116 S.W. 43, 45 (Tex. 1909); Tindol v. McCoy, 535 S.W.2d 745, 751 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.).

3. INCLUDE AFTERBORN CHILDREN. The definition of children should specifically include afterborn children. Otherwise, Section 67 of the Probate Code might apply to invalidate the will. See Part 2IV.B.2 at page 53 of this Outline.

4. SPECIFICALLY INDICATE WHETHER ADOPTED ISSUE AND CHILDREN INCLUDED. The terms "issue" and "children" should specifically be defined to indicate whether adopted children are included in order to avoid possible confusion. Section 162.017(c) of the Family Code provides that "the terms 'child,' 'descendant,' 'issue,' and other terms indicating the relationship of parent and child include an adopted child unless the context or express language clearly indicates otherwise." TEx. Fam. CODE ANN. § 162.017(c) (Vernon 1996). One court of appeals case stated, however, that this adoption statute (the predecessor section) "is no more than an aid to be employed in the construction of the will, and is not controlling." Sharp et. al. v. Broadway Natl. Bank, 761 S.W.2d 141, 145 (Tex. App.--San Antonio 1988, no writ) (court relied primarily on the following provision in will to conclude that testator's intent was not to include adopted children of his brother as beneficiaries: "so that my relatives of the whole blood and/or their issue shall receive the greatest benefit therefrom and not any strangers, relatives of the half blood, or their issue"). See Ortega v. First RepublicBank Fort Worth, N.A., Trustee, 792 S.W.2d 452 (Tex. 1990) (trust beneficiaries included "any other great-grandchildren who may be born after my death": such language indicates intent to exclude adopted children). See generally, TEx. PROB. CODE ANN. § 3(b) (Vernon Supp. 2002); 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 47.10-47.13 (2d ed. 1992).

The Texas Supreme Court has held that an adopted adult is included under a bequest to "descendants" under a will specifically defining descendants to include adopted children and issue. Lehman v. Corpus Christi Nat'l Bank, 668 S.W.2d 687 (Tex. 1984). Some courts from other jurisdictions have reached opposite results. E.g., First Nat'l Bank of Dubuque v. Mackay, 338 N.W.2d 361 (Iowa 1983) (the phrase "legally adopted child" carries an expectation of a parental relationship, requiring the adopted child to have been a minor reared in the adopted home). See O. Webster & C.C. Marvel, Annotation, Adopted Child as Within Class in Testamentary Gift, 86 A.L.R.2d 12 (1962).

One Texas court of appeals decision suggests that the term "issue" carries a greater connotation of blood relationship than the term "descendants." Diemer v. Diemer, 717 S.W.2d 160, 162 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

C. Definition of Survival.

Section 47 of the Texas Probate Code includes a 120-hour survival requirement of devisees and beneficiaries, and the statute was amended effective September 1, 1993, to provide that it applies to real property joint tenancies and to community property held by spouses with right of survivorship. TEx. PROB. CODE ANN. § 47 (Vernon 1980 & Supp. 2002). Despite the existence of Section 47, the testator will generally want to condition a bequest upon a greater period of survival, such as 30 or 60 days, to avoid the necessity of administering the same property in successive estates. However, because any such express survival provision will supplant the general rule of Section 47, the draftsman must be careful to prepare a provision that thoroughly addresses the survival issue. TEx. PROB. CODE ANN. § 47(f) (Vernon 1980); See Acord Estate v. Commissioner, 946 F.2d 1473, 91-2 USTC ¶ 60,090 (9th Cir., 1991) (will survival provision rendered Arizona's 120-hour survival statute inapplicable, resulting in distribution to spouse who survived by only 38 hours); and Thomasson v. Kirk, 859 S.W.2d 492 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (upholding as valid a
requirement that beneficiaries survive until "the administration of my estate is complete and divided," with result that beneficiary who
died five years after decedent did not take).

D. Definition of Per Stirpes.

The will should contain an explicit definition of per stirpes, to clarify where the determination of the "stirps," or family lines, should begin. See Part 2IV.B.4.b at page 57 of this Outline for such a definition.

E. Headings Not Used in Construing Will.

The basic principle of the construction of wills is to ascertain the testator's intentions. A will is generally construed so as to
give effect to every part of the instrument. Republic National Bank of Dallas v Fredricks, 283 S.W.2d 39, 42-43 (Tex. 1955).
Therefore, unless the will provides otherwise, any headings in the will would apparently be taken into consideration in construing
the will. Because the headings are necessarily extremely brief and cannot possibly accurately describe the entire subject matter
covered in the particular provision, draftsmen typically provide that any headings used in the will shall not be used in construing
the will.

F. In Terrorem Clause.

A forfeiture or a no-contest provision may be inserted specifying that a beneficiary who contests a will shall receive no benefits
under the will. See generally, Jo Ann Engelhardt, In Terrorem Inter Vivos: Terra Incognita, 26 REAL PROP., PROB. & TR. J. 3 (Fall

1. TEXAS CASES GENERALLY RECOGNIZE VALIDITY. Various Texas cases have recognized the validity of forfeiture
would be applicable if a contest is brought to thwart a testator's will); McLendon v. Mandel, No. 0S-90-01329-CV (Tex. App.--Dallas

2. FORFEITURE CLAUSES GENERALLY NOT ENFORCED WHERE BENEFICIARY CONTESTS WILL FOR
REASONABLE CAUSE. Texas apparently follows the majority view in holding that although forfeiture clauses are valid and
enforceable, a forfeiture of rights under the terms of the Will will not be enforced where the contestant pleads and proves that his
contest of the will was made in good faith and upon reasonable cause. Hammer v. Powers, 819 S.W.2d 669 (Tex. App.--Fort Worth
1991, no writ); Calvery v. Calvery, 55 S.W.2d 527, 530 (Tex. Comm'n App. 1932, opinion adopted 1932) (apparently dictum, because
court held the action was not a will contest). See also Gunter v. Pogue, 672 S.W.2d 840, 842-45 (Tex. App.--Corpus Christi 1984, writ
ref’d n.r.e.) (courts stated that no Texas cases have clearly held that a good faith and probable cause exception exists in a case
involving a will contest where there was a forfeiture provision in the will, but concluded after reviewing the various Texas cases that
have discussed the exception that "given the proper circumstances, Texas would and probably should adopt the good faith and
probable cause exception"; upheld forfeiture because contestants did not request a good faith and probable cause finding, and they
had burden to establish that contest was brought in good faith and upon probable cause in order to defeat the forfeiture provision);
First Methodist Episcopal Church South v. Anderson, 110 S.W.2d 1177, 1184 (Tex. Civ. App.--Dallas 1937, writ dism’d); W. Harry Jack,
No Contest or In Terrorem Clauses in Wills--Construction and Enforcement, 19 S.W.L.J. 722 (1965).

3. ACTIONS NOT CAUSING FORFEITURE. The forfeiture clause will not be given effect if a suit is merely brought
to construe a will as opposed to contesting it. Calvery v. Calvery, 55 S.W.2d 527, 530 (Tex. Comm'n App. 1932, opinion adopted);
Upman v. Upham, 200 S.W.2d 880, 883 (Tex. Civ. App.--Eastland 1947, writ ref’d n.r.e.). Furthermore, a request for accounting, petition,
and distribution under a will is not a contest within the terms of a forfeiture clause. In Matter of Minnick, 553 S.W.2d 503, 507-508
(Tex. App.--Amarillo 1983, no writ). A beneficiary's/judgment creditor’s application for a turnover order requesting that any proceeds
another beneficiary receives from the estate be used to satisfy the judgment does not come within the scope of a forfeiture clause.

The mere filing of a petition to determine the testator's intent does not invoke an in terrorem clause unless the clause
specifically states that "merely filing" a petition will cause a forfeiture under the in terrorem clause. Sheffield v. Scott, 662 S.W.2d
674 (Tex. App.--Houston [14th Dist.] 1983, writ ref’d n.r.e.); In re Estate of Hamill, 866 S.W.2d 339 (Tex. App.--Amarillo 1993, no writ)
("merely filing" of will contest not sufficient to trigger forfeiture if contest is later dismissed "prior to any legal proceedings being held
on the contest and if the action is not dismissed pursuant to an agreement settling the suit"). Filing a declaratory judgment suit
requesting a court to decide if entering into a family settlement agreement would cause forfeiture does not activate a forfeiture
provision that applied if a devisee were to "question or contest any provision of this will."
In re Estate of Hodges, 725 S.W.2d 265,
268 (Tex. App.--Amarillo 1986, writ ref’d n.r.e.).
If the clause provides that a beneficiary will forfeit his or her interest in the estate if he or she aids the contest of another (even though he or she does not personally contest the will), it appears that the clause could be valid, but only to a limited extent. Public policy "dictates that a will cannot require beneficiaries to lie, misrepresent the facts, or decline to answer questions posed while giving sworn testimony on the witness stand" and "courts need not enforce a disposition under a will if it violates the law or public policy." Thus, a forfeiture clause should not be enforceable solely on the ground that the beneficiary voluntarily rendered damaging yet truthful testimony. See Hazen v. Cooper, 786 S.W.2d 519, 520-521 (Tex. App.--Houston [14th Dist.] 1990, no writ) (material issue as to the truthfulness of the beneficiary's damaging, voluntarily rendered testimony precluded summary judgement enforcing forfeiture clause against her). Likewise, public policy should prohibit a forfeiture triggered solely by the filing of a suit for breach of fiduciary duty. McLendon v. McLendon, 862 S.W.2d 662 (Tex. App.--Dallas 1993, writ denied) ("The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship").

4. **Clause Should be Baited.** The testator should leave a sufficient amount to relatives intended to be discouraged from contesting the will so that the forfeiture clause will serve as a real disincentive from contesting the will. Otherwise, the beneficiary has nothing to lose from contesting the will, and the forfeiture clause is basically meaningless.

5. **Effect on Availability of Marital Deduction.** One might argue that the existence of an in terrorem clause might cause the value of a bequest to a surviving spouse to be reduced. However, the IRS has ruled in a Technical Advice Memorandum that a conditional bequest subject to the condition that the spouse agree not to contest the will did not affect the availability of the estate tax marital deduction for the full value of the bequest. Technical Advice Memorandum 8727002.

G. **Stating Reasons Why Particular Beneficiaries Receive Nothing; Testamentary Libel**

The testator may leave out or expressly disinherit a particular relative. (See Part 2IVA.2 at page 45 of this Outline). In such a case and in other situations, the testator may wish to specify the reasons for his actions. The testator may desire to specify the reason that a particular relative has not received any benefit under the will. In certain circumstances, specifying such a reason could prevent hurt feelings on the part of that beneficiary, particularly in situations where the omission is simply because there were other beneficiaries who were more needy. See Ellsworth v. Ellsworth, 151 S.W.2d 628 (Tex. Civ. App.--El Paso 1941, writ ref'd). However, the clause should be stated carefully so that it cannot be construed as making the will conditional upon the facts stated.

Be very wary about allowing the testator to use his or her will as a chance to take a parting blow at anyone. An increasing number of testamentary libel cases have arisen in recent years. Some cases suggest that it does not take an overly provocative statement to induce a finding of testamentary libel, because in such cases juries tend to determine whether the will is fair rather than whether the statement is libelous. See Brown v. DeFrey, 134 N.E.2d 469 (N.Y. 1956) (jury found that the following statement was libelous, granting damages equal to approximately one-half of the estate: "I am mindful of the fact that I have made no provision for John H. Brown, my husband. I do so intentionally because of the fact that during my lifetime he abandoned me, made no provision for my support, treated me with complete indifference, and did not display any affection or regard for me."). See Leona M. Hudak, The Sleeping Tort: Testamentary Libel, 12 CAL. W.L. REV. 491 (1976); Ozborne M. Reynolds, Jr., Defamation from the Grave: Testamentary Libel, 7 CAL. W.L. REV. 91 (1971); A.L. Schwartz, Annotation, Libel by Will, 21 A.L.R.3d 754 (1968).

H. **Designation of Attorney for Estate.**

The will may attempt to include a provision directing the personal representative to retain a specified attorney to represent the estate. However, such a provision does not bind the personal representative and may be disregarded. Mason & Mason v. Brown, 182 S.W.2d 729, 733-34 (Tex. Civ. App.--Dallas 1944, writ ref'd w.o.m.). But see Kelly v. Marlin, 714 S.W.2d 303 (Tex. 1986) (designation of real estate agent treated as conditional bequest to the agent). However, in some cases the fiduciary may welcome a precatory suggestion by the testator as an expression of his preference.

I. **Attestation Clause.**

The attestation clause appears directly above the witnesses' signatures, restates the basic execution requirements, and specifically states that the witnesses are "attesting" the will. See TEX. PROB. CODE ANN. § 59 (Vernon Supp. 2002) (requirement that the will "be attested by two ... witnesses ... who shall subscribe their names thereto"). The attestation clause is not essential to the validity of the will, but can assist in making out a prima facie case that the will was duly executed, even though the witnesses predeceased the testator or cannot recall the events of execution. Matter of Estate of Page, 544 S.W.2d 757, 760 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.); see R.D. Hursh, Annotation, Weight and Effect of Presumption or Inference of Due Execution of Will, 40 A.L.R.2d 1223 (1955). However, the prima facie case of valid execution by an attestation clause and self-proving affidavit may be rebutted by contradictory testimony. See Jimmy Swaggart Ministries v. Tex. Commerce Bank Nat'l Ass'n, 662 S.W.2d 774 (Tex. App.--Houston [14th Dist.] 1983, no writ hist.).
J. Self-Proving Affidavit.

Section 59 of the Texas Probate Code provides a procedure for making a will “self-proved” by attaching a notarized certificate as described in Section 59, TEX. PROB. CODE ANN. § 59 (Vernon Supp. 2002). The self-proved will may be admitted to probate without the testimony of any of the subscribing witnesses. Because this greatly simplifies and quickens the process of admitting a will to probate, every will should be made self-proved.

Effective as of September 1, 1991, the self-proving affidavit must state that it has been “sworn to” by both the testator and the witnesses. Under prior law, the affidavit had to be “sworn to” by the witnesses and “acknowledged” by the testator; if the witnesses merely “acknowledged” the affidavit, the will would not be self-proved. Cutler v. Ament, 726 S.W.2d 605, 607 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). As amended, Section 59 provides that substantial compliance with the prescribed form is sufficient and specifically provides that self-proving affidavits that are “sworn to” by the witnesses and “acknowledged” by the testator will suffice. See also Bank One, Texas v. Ikard, 885 S.W.2d 183, 187 (Tex. App.--Austin 1994, writ denied) (self proving affidavit held to substantially comply with statutory form where the words “that said instrument is his last will and testament, and” were left out).

In executing the will, the testator and witnesses should be careful to sign both the will itself and the self-proving affidavit. Effective as of September 1, 1991, if the testator or a witness fails to sign the will a signature on the self-proving affidavit may be treated as a signature on the will, although in such a case the will not be treated as self-proved. (See Parts II.D.2.h and II.D.3.f at pages 10 and 14 of this Outline.) Thus, if a signature is missing from either the will or the affidavit, the advantages of the self-proving affidavit will be lost. Under prior law where the will lacked a necessary signature, it was invalid. See Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985); Boren v. Boren, 402 S.W.2d 728 (Tex. 1966) (witnesses did not sign immediately after the will but only signed the attached self-proving affidavit; will held not validly executed); Wich v. Fleming, 652 S.W.2d 353, 354 (Tex. 1983) (testator signed at end of will, but witnesses only signed self-proving affidavit; will denied probate).

PART 3. COORDINATING NONPROBATE ASSETS

A. Significance.

Nonprobate assets pass pursuant to directions other than under the owner's will. Examples of nonprobate assets include life insurance proceeds payable to a designated beneficiary, death proceeds from employee benefit plans payable to a designated beneficiary, annuities, joint tenancy properties passing by right of survivorship (including nontestamentary transfers provided for in Chapter XI of the Texas Probate Code), Series "E" federal savings bonds, and certain government benefits made payable directly to specified persons (such as the social security death benefit for a surviving spouse).

These nonprobate assets may, in many cases, comprise a very significant part of the client's total assets. Coordinating the beneficiaries of these benefits with the last will and testament is therefore critical.

B. Drafting Considerations.

Ordinarily, these benefits are made payable directly to the client's spouse if the spouse is surviving. A 10-day, 30-day or 60-day survival requirement is often stated to avoid multiple administration problems if the spouse dies in a common accident or soon after the owner spouse. See TEXAS PROBATE CODE ANN. § 47(e) (Vernon 1980) (120-hour survival requirement for life insurance proceeds). If there is no surviving spouse, and if contingent trusts are established under the will for minor beneficiaries, the proceeds should ordinarily be made payable to the trustee of those trusts under the person's will or to the person's estate (in which event the proceeds would pass under the will with other probate assets). Naming the person's estate as the beneficiary, however, may subject the proceeds to debts of the estate (including, for example, tort claims that may arise if the person dies in an accident in which he negligently causes damage to others).

C. Buy-Sell Agreements.

If the client owns an interest in any closely held partnership or corporation, the client's interest may be subject to being purchased at his death under a buy-sell agreement. Any such agreements should be reviewed to assure that the purchase price under the agreement is still valid, and to coordinate the effects of such a purchase with the will provisions. See Part III.A.3 at page 37 of this Outline regarding self-dealing limitations on executors that may affect implementing sales under buy-sell agreements.
PART 4. APPENDICES

Appendix A  Checklist for Will Review.

The following checklist summarizes this outline into a brief checklist for reviewing wills.

1. Preamble
   a. State name and domicile
   b. Revoke prior wills

2. Identification of Family and Property
   a. Identify spouse and children
   b. Make sure afterborn children are provided for or mentioned to avoid Section 67b
   c. Identify stepchildren and discuss whether included as beneficiaries
   d. Identify property being disposed of and whether any election intended
   e. Negate exercise of any powers of appointment (if no exercise intended)

3. Appointment of Fiduciaries
   a. Executor
      - Appoint independent executor(s), tracking Section 145(b) of Probate Code
      - Appoint successor independent executor(s)
      - Waive executor's bond
   b. Trustee
      - Appoint trustee(s)
      - Appoint successor trustee(s)
      - Consider income and estate tax effects to appointed trustees
      - Waive trustee's bond
   c. Guardian -- appoint guardian(s) -- (co-guardians must be spouses, joint managing conservators or co-guardians under the laws of another state)

4. Specific Bequests
   a. Furnishings and personal effects
      - Include to qualify for Section 663(a)(1) treatment
      - Refer to large items if any possible confusion
      - Include casualty insurance
      - Any large outstanding encumbrances?
      - Alternate beneficiaries
      - Mechanics for allocating among multiple beneficiaries
      - Effect of reference to a separate list
   b. Specific tangible property items
      - Identify sufficiently
      - Alternate beneficiaries
   c. Residence or Other Real Estate
      - Identify sufficiently
      - Apply to replacement residence
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Appendix

- Subject to existing encumbrance
- Include insurance
- Alternate beneficiaries
- Consider backup bequest of sales proceeds or pecuniary legacy to avoid effect of ademption

d. Pecuniary Legacies
- Is estate large enough to accommodate
- Right to interest or pecuniary amount

e. Specific exemption equivalent bequest or marital deduction bequest
- Consider tax effect of choice of exemption equivalent versus marital deduction specific bequest
- In formula, exclude consideration of state death tax credit to the extent it increases the federal estate tax
- Direct that only assets qualifying for marital deduction may be allocated to marital deduction specific bequest, or direct that nonqualifying assets be allocated to exemption equivalent specific bequest
- For marital deduction specific bequest, assure Rev. Proc. 64-19 is satisfied (i.e., use fractional share, or use date of distribution values or minimum worth clause for pecuniary bequest)
- Provide for disclaimer of marital deduction specific bequest
- If a QTIP Trust is used (1) give directions or guidance and exonerate executor re: election, and (2) provide mechanics for payment of estate tax at spouse's subsequent death

f. Charitable Bequests
- Verify identity of beneficiaries and tax-exempt status
- Tax allocation

g. Abatement clause if many specific bequests

5. Residuary Estate

a. Dispose of all property

b. Provide contingent trusts for minors or beneficiaries under specified age

c. Provide for alternate beneficiaries, ultimately to heirs or permanent organizations (any lapse may cause partial or total intestacy)

6. Apportionment of Debts, Expenses, and Taxes

a. Do not require payment of debts

b. Allocate away from marital deduction bequest or charitable bequest

c. Except out any taxes payable under Section 2044 attributable to QTIP Trusts

d. Except out generation-skipping transfer taxes

e. Specifically state whether taxes on nonprobate assets should be paid out of probate estate


a. Identify name of trust(s)

b. Identify beneficiaries

c. Standards for distributing income and principal; consider estate tax effects of distributional provisions

d. Discretionary powers workable and trustee exonerated (if desired) regarding distributions

e. Special distributions (to buy home, etc.)

f. Limited power of appointment
8. **Trust and Executor Powers**

*Trust Code Powers -- Trust Code gives these powers unless negated:*

a. Retain assets

b. Receive additional assets

c. Acquire remainder of undivided interests

d. Broad management and investment power

e. Investment in business entities

f. Power to sell -- including for credit

g. Lease real or personal property

h. Mineral investments (including exploration and development activities)

i. Power to borrow

j. Management of securities

k. Holding securities in nominee form

l. Employ agents

m. Compromise and settle claims

n. Abandon worthless property

o. Distribution for minor or incapacitated beneficiary

p. Provide residence for beneficiaries and pay funeral expenses

q. Ancillary trustee

r. Prudent man standard for investments

s. Principal-income allocations

t. Accountings

u. Liability of trustee

v. Compensation of trustee

*Additional Trust Provisions*

a. Perpetuities savings clause

b. Spendthrift provision (consider negating application to QTIP Trust)
c. Small trust termination
d. Consolidation of trust funds
e. Merger of trusts
f. Situs, changing trust situs, choice of law
g. Receipt and allocation of employee benefits and insurance proceeds

Additional Fiduciary Powers

a. Broadened investment powers; negate duty to diversity (if desired)
b. Power to give guarantee
c. Employ and rely on investment advisor
d. Power to lend
e. Delegation powers, especially for temporary absence
f. Hold assets (other than just securities) in nominee form
g. Broadened principal-income apportionment authority
h. Partition and division power
i. Business interests (exculpatory language, extra compensation, trustee can transact similar business individually)
j. Procedure for resignation
k. Exoneration of successor fiduciaries for breach by predecessor
l. Liability; exculpatory clause if desired
m. Compensation (especially, provide reasonable compensation for executors)
n. Removal provisions
o. Remove self-dealing restrictions (sales between trusts, sales or purchases to or by trustees and executors)

Special Executor Powers

a. Incorporate trustee powers
b. Authorize direct distributions to beneficiaries if trust terminated; loans or purchases by trust to estate
c. Give discretion re tax elections, consider equitable adjustments for tax elections


a. Definitions
   - Issue and children (include afterborn and adopted children)
   - Survival requirement or other simultaneous death provision
   - Per stirpes
b. Will not contractual
c. Headings not used in construction

d. *In terrorem* clause if desired

10. Attestation clause and self-proving affidavit

11. Will appears to be properly executed