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THE CONTESTED WILL CASE

FRED ERISMAN*

Few areas in the practice of law are as exacting, exciting and rewarding as the "Contested Will Case."

The adoption of the Texas Probate Code of 1955, plus numerous appeals from the Probate Court to the District Court, thence to Courts of Civil Appeals and the Supreme Court, have established approved methods and judicial precedents by which the careful attorney for the proponent or the contestant may now undertake representation of a client with confidence.

Emphasis on the need and importance of a will has intrigued the imagination of laymen in all economic circumstances and many strange results have emerged.

Holographic wills, informally written on letter stationery, scraps of paper, advertising material, or the back of an envelope, have been probated and the apparent intentions of the testator achieved.

The cases arising from an application for letters testamentary "with written will attached," will illustrate most of the technical, procedural and evidentiary problems commonly encountered in all will contest cases.

I. TRIAL PROCEEDINGS IN THE COUNTY (PROBATE) COURT

Probate procedures being the creatures of Statute, the law itself provides adequate guidance in the handling of the initial steps after the death of the testator.

The statutory application for Letters Testamentary constitutes the pleadings of the proponent of the will.¹ The Probate Code attempts to simplify the pleadings of the proponent with this provision:

No defect of form or substance in any pleading in probate shall be held by any court to invalidate such pleading, or any order based upon such pleading, unless the defect has been timely objected to and called to the attention of the court in which such proceedings were or are pending.²

In the absence of a contest in the county court, the proponent usually offers the proof required by the Probate Code through the testimony of the applicant, attesting witnesses or other available

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¹ TEX. PROB. CODE ANN. § 81(a)(b)(c) (1956).

² TEX. PROB. CODE ANN. § 9 (1956).

sources. A self proving will is proved by the properly executed instrument itself.

A. Self-Proving Wills

The Texas Probate Code provides for the execution of a will to be made "self proved" by the affidavits of the testator and attesting witnesses made before an officer authorized to take acknowledgments to deeds of conveyances and to administer oaths under the laws of this state.

There is also the provision, "A self proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise it shall be treated no differently than a will not self proved. In particular and without limiting the generality of the foregoing, a self proved will may be contested, or revoked or amended by a codicil in exactly the same fashion as a will not self proved."

The affidavit and procedure to be followed are set forth in Section 59. Once this section has been properly complied with, Probate Code Sections 84(a), 88(a)(b-3) permit the will to be admitted to probate without further proof of its execution.

The "self proving" provisions are of much importance to the proponent in the presentation of a "self proved" will in a contest in the probate court.

The burden of proof is always upon the proponent to show that the will offered for probate has not been revoked. This applies to "self proving" as well as all Texas wills. But when a properly executed written will is produced which comes from the custody of those to whom it had been delivered by the testator, or which is found among the testator's papers in a place he usually kept his valuable papers, and there is no suspicion cast upon the genuineness of the will, there exists a presumption that the will has not been revoked. Under such circumstances, a proponent has satisfied the statutory requirement to prove no revocation.³

Hence, in the probate court, it is always advisable to present proof both as to the custody of the "self proved" instrument, and that there had been no revocation.

After this proof is presented, the burden shifts to the contestant, even in the probate court, and testimony showing that the testator was of sound mind at the time the will was executed is not required

³ *Ashley v. Usher*, 384 S.W.2d 696 (Tex. Sup. 1964).

of the proponent: "the contestant must prove testamentary incapacity."⁴

If the will is self proved as authorized by the Code, testimony showing that the testator was of sound mind at the time the will was executed is not required. See Sec. 88, Vernon's Ann. Probate Code. The effect of this provision of the Code is to place the burden of proof on this issue on the contestant. We think no further change in the prior law was intended by the provisions of the Code authorizing self proving wills.⁵

The self proving provisions only have the effect of authorizing the substitution of affidavits in lieu of testimony offered before the court.⁶

B. Pleadings

We are concerned with "Contested Wills." We shall assume that upon the filing of the application for letters testamentary and the issuance of citation, the contestants make their appearance in court before the county judge and the contest is "on."

Pleadings of the contestant are not statutory as is the application of the proponent.

Since the issues in controversy may not be enlarged upon appeal to the District Court,⁷ the careful counsel for the contestant will inject every possible contention to invalidate the instrument or the proceedings. Usually these pleadings include allegations as to: (1) Testator's lack of testamentary capacity, or unsoundness of mind; (2) Undue influence in execution of the testamentary instrument; (3) Insane delusions of the testator concerning a beneficiary; (4) Forgery of the instrument either as to the maker or witnesses; (5) Failure to execute the purported will in accordance with statutory requirements; and (6) Any combination of the foregoing, with anything in addition that a resentful relative, interested person or resourceful counsel can formulate.

After the filing of the contestant's pleadings, the proponent should be ever alert to level exceptions at this "first speech to the jury." Failure to do so gives the contestant a clear field in which he may succeed in strewing seeds before the court—and more especially the jury

⁴ Lee v. Lee, 413 S.W.2d 931 (Tex. Civ. App.—Fort Worth 1967, rev. other grounds 424 S.W.2d 609).

⁵ Brewer v. Foreman, 362 S.W.2d 350 (Tex. Civ. App.—Houston 1962, no writ).

⁶ In re Price's Estate, 375 S.W.2d 900 (Tex. Sup. 1964).

⁷ Holliday v. Smith, 422 S.W.2d 791 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); Gray v. Bird, 380 S.W.2d 908 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.); Roberts v. Bush, 352 S.W.2d 337 (Tex. Civ. App.—Amarillo 1962, writ ref'd n.r.e.).

—that will grow into a fertile harvest that he would never have been able to germinate with proper proof or evidence from the proponent.

The usual exceptions: (1) Conclusions of the pleader; (2) Inflammatory and prejudicial; (3) Evidentiary; (4) Argumentative; and (5) Violation of Article 3715 (Dead Man's Statute) will often strike from the pleadings the objectionable pyrotechnics without depriving the contestant of his basic issue upon which the contest is based.

Most important to the defending proponent, the exception method requires the contestant to be more specific in his proof of the basic contentions: (1) Lack of testamentary capacity, or unsoundness of mind, are so elusive in their nature that the exceptions will not usually result in more detailed pleadings, but will strike prejudicial argument; (2) Undue influence is more specific. The proponent is entitled to know who exercised such influence, where, when and how; (3) Insane delusions are likewise capable of being made certain. What was the delusion? How did it manifest itself in the Will?; (4) Where was a forgery committed in the instrument, in content or in signature?; and (5) Specifically wherein did the execution of the instrument—or the qualifications of the attesting witnesses—fall short of the statute?

Without such exceptions the contestant is not limited to time, place nor character of proof that may be offered. Even though the exceptions may result in the contestant pleading evidence, the "forewarning" is usually worth the risk.

By supplemental pleadings, and without disturbing the basic application for letters testamentary, the diligent proponent will file a full denial of each and every allegation in the contest, and may plead (so far as contestant's exceptions to such answer will permit) the proponent's contentions, explanations and answers as to why the deceased preferred the proponent over the contestant. "So long as the pleadings do not amount to a device by which information is brought before the jury which they could not have by way of testimony admissible upon the trial they are proper."⁸

C. *Failure To Offer Contesting Proof*

Since jury trials are not available for probate matters in the county court,⁹ there is a tendency for the contestant to offer as little proof as possible in the county court proceedings. There is an element of

⁸ *Troupp v. De Bus*, 311 S.W.2d 431 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.).

⁹ TEX. PROB. CODE ANN. § 21 (1956).

danger at this point because the failure of the contestant to offer at least a scintilla of proof on each contention is sometimes considered an "abandonment" or "waiver" of such contention, and may not be available on the trial in the District Court.¹⁰

A problem of "Burden of Proof" results from failure to contest at the time the will is first offered for probate in the county court.

The rule is well settled that in a proceeding to set aside the probate of a will *that has been admitted to probate*, the burden of proof is upon the party who brings the contest.¹¹

When the instrument is a self proving will, the burden is on the contestant from the inception.¹²

In the probate court the burden is upon the proponent to meet the statutory requirements before the will may be admitted for probate.

In a recent case, even though counsel for the parties agreed that it would not be necessary for contestants to offer evidence in support of their contest in the county court and that such action would in no way prejudice the rights of the contestants to their appeal, a motion for summary judgment by the proponents of the will was sustained, and the appeal dismissed.¹³

To be binding upon the trial court, agreements made between opposing counsel must be preserved and evidenced in conformity with Tex. R. Civ. P. 11.

Failure or refusal to tender evidence in support of an action to set aside the county court order admitting a will to probate, constitutes an abandonment of the will contest suit as a matter of law.¹⁴

The contestant should make certain that there is *some* evidence in the probate proceedings to support every serious contention in the jury trial in the District Court.

D. Appeals (and Review) in the District Court

Once a judgment has been rendered in the county court, it is imperative that the losing party promptly perfect an appeal to the District Court, or bear severe consequences.

¹⁰ Thompson v. Kirkland, 422 S.W.2d 258 (Tex. Civ. App.—Texarkana 1967, no writ).

¹¹ TEX. PROB. CODE ANN. § 93 (1956); Boyd v. Frost Nat. Bank, 145 Tex. 206, 196 S.W.2d 497 (1946).

¹² Lee v. Lee, 424 S.W.2d 609 (Tex. Sup. 1968) (Tex. Civ. App.—Fort Worth 1967, 413 S.W.2d 931).

¹³ Thompson v. Kirkland, 422 S.W.2d 258 (Tex. Civ. App.—Texarkana 1967, no writ).

¹⁴ Cullinan v. Cullinan, 154 Tex. 247, 275 S.W.2d 472 (1955); Crane v. Pierce, 257 S.W.2d 510 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.); Bell v. Bell, 248 S.W.2d 978 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.).

(1.) Ordinary Appeal

The District Court has appellate jurisdiction over the county court in all probate matters.¹⁵ The parties are entitled to a trial by jury as in other civil actions in the District Court.¹⁶ Any person who may consider himself aggrieved by any decision, order, decree, or judgment of the probate court shall have the right to appeal therefrom to the District Court of the county,¹⁷ in which the probate proceedings were had.

Texas Rules of Civil Procedure¹⁸ prescribe the details incident to such appeal, with specific emphasis upon *notice*,¹⁹ *bond*,²⁰ *appeal on affidavit*,²¹ *suspension of judgment*,²² *transcript on appeal*,²³ *docketing of cause by the district clerk*,²⁴ and proceeding in the District Court.

The trial of such probate matters in the District Court is de novo and is governed by the same rules and procedures as other civil cases in that court.²⁵

These rules have been strictly enforced. Failure to file the required bond with the county clerk within fifteen days from the date of rendition of the judgment will result in a dismissal of the appeal.²⁶

It is the appealing party's duty to be sure that the transcript is not only properly prepared, but promptly filed with the clerk of the District Court within thirty days from the date of the rendition of the judgment so appealed from. (Subject to the right of extension as provided by Rule 336 upon a showing of good cause timely made.)²⁷

Failure to timely comply with Rule 336 will deprive the District Court of jurisdiction, and the trial judge will have no alternative other than to dismiss the appeal.²⁸

Where timely appeal has not been taken, the appealing party may within two years after rendition of the county court judgment

¹⁵ TEX. PROB. CODE ANN. § 5 (1956).

¹⁶ TEX. PROB. CODE ANN. § 21 (1956).

¹⁷ TEX. PROB. CODE ANN. § 28 (1956).

¹⁸ TEX. R. CIV. P. 332-339.

¹⁹ TEX. R. CIV. P. 332.

²⁰ TEX. R. CIV. P. 333.

²¹ TEX. R. CIV. P. 334.

²² TEX. R. CIV. P. 335.

²³ TEX. R. CIV. P. 336.

²⁴ TEX. R. CIV. P. 337.

²⁵ TEX. R. CIV. P. 337.

²⁶ *Roberts v. Roberts*, 405 S.W.2d 211 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.); *Brooks v. Hext*, 392 S.W.2d 500 (Tex. Civ. App.—Beaumont 1965, no writ).

²⁷ *Hamilton v. McAmis*, 401 S.W.2d 314 (Tex. Civ. App.—Tyler 1966, no writ).

²⁸ *Young v. Young*, 429 S.W.2d 527 (Tex. Civ. App.—Fort Worth 1968, writ ref'd); *Hamilton v. McAmis*, 401 S.W.2d 314 (Tex. Civ. App.—Tyler 1966, no writ).

resort to *certiorari* or *bill of review*, but he must assume the burden of proof, and, without additional proceedings, his appeal does not stay the judgment of the probate court.

(2.) Certiorari

Any person interested in proceeding in probate may have the proceedings of the county court therein revised and corrected at any time within two years after such proceedings were had by certiorari.²⁹

This is also a *de novo* procedure in the District Court, and is a restatement of Revised Civil Statute 932, which existed prior to the adoption of the Probate Code. The remedy of certiorari is distinctly statutory, and is not made dependent upon showing why an appeal was not pursued.³⁰

Texas Rules of Civil Procedure 344 through 351 are concerned with "Certiorari to County Court" and these provisions and rules must be complied with.³¹

On appeal by certiorari, the District Court may consider alleged errors of fact as well as alleged errors of law.³²

(3.) Bill of Review

Any person interested may, by a bill of review filed in the court in which the proceedings were had, have any decision, order or judgment rendered by the court, or by the judge thereof, revised and corrected on showing error therein; no bill of review shall be filed after two years have elapsed from the date of such decision, order or judgment.³³

This is a statutory proceeding and is not subject to the limitations or requirements of an equitable review. It is a direct attack on the judgment of the county court, and all persons who might be in any way affected by its result must be before the court. The jurisdiction of the District Court being appellate in nature, the issues are limited to those properly raised in the county court.³⁴

²⁹ TEX. PROB. CODE ANN. § 30 (1956).

³⁰ *Shirey v. Harris*, 288 S.W.2d 315 (Tex. Civ. App.—Fort Worth 1956, no writ).

³¹ *Moore v. McInnis*, 295 S.W.2d 707 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.).

³² *Clayton v. Clayton*, 308 S.W.2d 557 (Tex. Civ. App.—Texarkana 1957, no writ).

³³ TEX. PROB. CODE ANN. § 31 (1956).

³⁴ *Schoenhals v. Schoenhals*, 366 S.W.2d 594 (Tex. Civ. App.—Amarillo 1963, writ ref'd n.r.e.).

II. TRIAL IN THE DISTRICT COURT

With the completion of the necessary preliminaries to reach the District Court, the contested will case takes on the character of an ordinary civil case.

A. Pleadings

The pleadings have been cast in the probate court, but amendments to the pleadings may be made, exceptions urged, and repleadings had, limited only by the appellate jurisdiction of the District Court: (a) to revise, declare void or set aside orders and decrees of the county court sitting in probate, and (b) no enlargement of the issues tried in the county court will be permitted on appeal.³⁵ The trial must be conducted as if the suit had been originally brought in the District Court.³⁶

When appeal to the District Court is perfected, a trial de novo is required in that court. The parties occupy the same positions they occupied in the probate court. Subject to the right of allowable amendment, the cause stands for trial on the pleadings in the transcript sent up from the probate court.³⁷

B. Jury

If trial by jury is desired, application and deposit of the necessary jury fee should be made in accordance with TEX. R. CIV. P. 216.

C. Discovery

Discovery proceedings are available, and oral and written interrogatories may be propounded as in all other civil cases. If depositions were properly taken in the probate court they may be offered in evidence in the District Court.³⁸ Appeal to the District Court is not a new suit. It is a continuation of the original contest commenced in county court and depositions may be read in evidence upon the trial in any suit in which they were taken.³⁹

³⁵ *Holliday v. Smith*, 422 S.W.2d 791 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); *In the Matter of the Estate of Robert A. Martin, Deceased*, 284 S.W.2d 279 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.).

³⁶ *Bunting v. Chess*, 416 S.W.2d 492 (Tex. Civ. App.—Eastland 1967, writ dismissed); *A.&M. College of Texas v. Guinn*, 280 S.W.2d 373 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.).

³⁷ *Freeman v. Freeman*, 160 Tex. 148, 327 S.W.2d 428 (1959).

³⁸ *Gray v. Bird*, 380 S.W.2d 908 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.).

³⁹ *Carpenter v. Tinney*, 420 S.W.2d 241 (Tex. Civ. App.—Austin 1967, no writ).

D. *Texas Revised Civil Statutes Ann. Article 3716 ("Dead Man's Statute")*

Much thought should be given before an effort is made to request admissions, propound interrogatories, or take the deposition of an adverse party whose lips might be otherwise sealed by the application of the Dead Man's Statute.⁴⁰

The cases are legion where parties have abandoned and waived the protection of this statute, and invited damaging testimony from an otherwise disqualified witness by taking the deposition of such party, requesting admissions, or propounding interrogatories to such party.⁴¹

E. *"Open and Close"*

It is not unusual for a contestant to a will admitted to probate in the county court to attempt to obtain the right to "open and close" the trial in the District Court by filing the admission permitted by Rule 266 TEX. R. CIV. P.

The Supreme Court of Texas in a per curiam opinion concerning "testamentary capacity of the testator"⁴² seems to declare the rule to be that "the contestants could not properly secure the right to open and close the argument under Rules 266 and 269, Texas Rules of Civil Procedure, by voluntarily assuming the burden of proof on that issue. In order to gain such a right, it would be necessary that testamentary capacity be unequivocally admitted or established as a matter of law and the issue thus removed from the case."

In a case involving a self proving will,⁴³ approval was given to the trial court's refusal to permit the contestant to open and close the arguments as being harmless error, even though the contestant had the actual burden of proof on the issue of soundness of mind of the testatrix.

⁴⁰ TEX. REV. CIV. STAT. ANN. art. 3716:

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent.

⁴¹ Walker, *The Dead Man's Statute*, 27 Tex. B. J. 315 (1964); Garcia v. Barrera, 385 S.W.2d 606 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.); Burris v. Levy, 302 S.W.2d 171 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.).

⁴² Seigler v. Seigler, 391 S.W.2d 403 (Tex. Sup. 1965).

⁴³ In re Estate of Price, 401 S.W.2d 98 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.).

F. Burden of Proof

If the contest originated in the probate court, and the will was not self proving, the burden of proof both in the probate court and the District Court is upon the proponent to establish the validity of the will.⁴⁴

Any suit to annul the probate of a will already probated places the burden upon the contestants to establish the incapacity of a testator by a preponderance of the evidence.⁴⁵

Where the will in controversy is a self proving will, in order to overcome the effect of a certificate of acknowledgment, the burden of proof is upon the contestant, and the proponent is not required to prove that the testator was of sound mind at the time the will was executed.⁴⁶ It would seem, however, that the proponent should always assume the burden, and offer proof, that the will had not been revoked.⁴⁷

G. Jury Selection

Courts have judicially noted: "It is the common idea that every child has the right to some of the property of the parents upon their decease, and the mere fact alone that a child is disinherited often exerts a potent influence over the minds of the average jury. But that is not the law of this State."⁴⁸

Counsel for the proponent may find it advantageous in his preliminary statements to the panel and examination of prospective jurors: (1) To advise the panel that "this is a case in which the deceased (naming and identifying with proponents) died on _____, leaving a will in which my clients were the principal beneficiaries." (Naming, introducing and identifying each and the relationship with the deceased); (2) To make a very casual mention of the identity of the contestant and his or her relationship with the deceased, and the allegations upon which the contest is based; (3) To ask the prospective jurors to indicate by a show of hands which ones have at that very time a written will disposing of their property in the event of death. (A prospective juror with an executed will may reasonably be expected to want to enforce the terms of the written will of another);

⁴⁴ TEX. PROB. CODE ANN. § 88 (1956); *Watson v. Watson*, 340 S.W.2d 344 (Tex. Civ. App.—Fort Worth 1960, writ dismissed).

⁴⁵ *Lee v. Lee*, 424 S.W.2d 609 (Tex. Sup. 1968); *Chambers v. Winn*, 137 Tex. 444, 154 S.W.2d 454 (1941).

⁴⁶ *Brewer v. Foreman*, 362 S.W.2d 350 (Tex. Civ. App.—Houston 1962, no writ).

⁴⁷ TEX. PROB. CODE ANN. § 88(b) 1, 2, 3 (1956).

⁴⁸ *Stolle v. Kanetzky*, 220 S.W. 557 (Tex. Civ. App.—San Antonio 1920, no writ).

(4) To elicit from each prospective juror a specific statement that such juror has no prejudice, or preconceived bias against the propositions: That wills represent a most solemn and personal undertaking of the testator—That wills are made to be respected—That wills are not made to be broken—That wills may be set aside *only* for legal causes—That a will may not be set aside merely because it is not the will that some interested person or jury might think the testator should have made;⁴⁹ and (5) To commit each prospective juror (so far as the trial judge will permit) to the proposition that “until it has been established by a preponderance of the evidence that the right of the deceased to make a disposition of his or her property by will, had been forfeited, or imposed upon, that such juror would uphold the hand of the deceased in so disposing of his or her property.”

The counsel for contestant will often place great emphasis upon what he expects to show as to: age, physical and mental condition of the testator; unnaturalness of the will; opportunity afforded alleged wrongdoer to control decedent's actions; facts attending preparation and execution of the instrument; and the actual fraud that was perpetrated upon the testator.⁵⁰

Counsel either for the proponent or contestant could well set the tempo of the trial by reading the comments of Justice Fly in *Salinas v. Garcia*, 135 S.W. 588 (Tex. Civ. App. 1911, writ ref'd n.r.e.).

When there are multiple parties as proponents (usually sisters and brothers) and the contestant charges undue influence or improper conduct on the part of one or more of such proponents, Texas Rule of Civil Procedure 233 should be resorted to and individual peremptory challenges sought for each of such parties.

H. Evidence

After selection of the jury, presentation of pleadings, and swearing of the witnesses, the proponent should exercise great care to comply with the mandatory provisions of Section 88 of the Probate Code.

Even if the instrument is denominated a “Self Proving Will,”⁵¹ the impact on the jury of the first impression will be lost if the proponent is satisfied to simply make a “prima facie case.”

The number of witnesses that may be used will depend entirely upon the circumstances of the particular case. Once the statutory

⁴⁹ *Mason v. Mason*, 369 S.W.2d 829 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.).

⁵⁰ *Gunlock v. Greenwade*, 280 S.W.2d 610 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.).

⁵¹ TEX. PROB. CODE ANN. § 59 (1956).

requirements have been met, then the contestant must take the "laboring oar," not only to destroy the will itself, but to discredit, contradict and overcome the testimony that has been offered at the outset of the trial.⁵²

I. Statutory Requirements That May Be Proved by Documentary Evidence

(1.) Citation and Return Thereon

Section 128 of the Probate Code provides for the issuance of a citation to all parties interested in an estate for which there has been an application to probate a will. Citation is served by the Sheriff or Constable posting it at the door of the Courthouse of the County in which the proceedings are pending, *for not less than ten (10) days before the return day thereof.*⁵³

No application for the probate of a will, or the issuance of letters testamentary shall be acted upon until service of citation has been made the manner therein provided. *It is, therefore, necessary that proper serving of citation be called to the attention of the Judge and introduced into evidence as part of the record of the case.*

(2.) Certified Copy of Death Certificate of the Testator

Frequently the offer of a properly certified copy of the death certificate of the deceased will make a prima facie showing that the person therein named is dead, and that four years have not elapsed since his decease and prior to the application; jurisdictional and venue requirements are assisted by recitations in the certificate showing place of death, length of residence at the place of death, and in the State; and that the person named in the death certificate was at least 19 years of age, or was lawfully married.

Death certificates complying fully with the provisions of Vernon's Ann. Civ. St. Article 4477, Rule 54a, and *properly certified by the State Registrar* are not only admissible in evidence, but are prima facie evidence of the facts therein stated.⁵⁴ However, similar certifi-

⁵² Bryant v. Hamlin, 373 S.W.2d 837 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

⁵³ TEX. PROB. CODE ANN. § 33 (1957).

⁵⁴ Reserve Life Ins. Co. v. Shacklett's Estate, 412 S.W.2d 920 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.); Estate of McKinney v. Hair, 434 S.W.2d 217 (Tex. Civ. App.—Waco 1968, no writ). The correct address for the State Registrar is: TEXAS STATE DEPARTMENT OF HEALTH, State Bureau of Vital Statistics, 410 East 5th Street, Austin, Texas 78701.

cates by *local* registrars, Justices of the Peace, and like officers, may be properly excluded.⁵⁵

J. Statutory Requirements Usually Proved by the Applicant

Were it not for the operation of the Texas Dead Man's Statute, restricting testimony of certain parties as to transactions with, or statements by, the testator, many of the remaining elements necessary to probate could be established in most cases by the testimony of the applicant alone.

It is usually advantageous to introduce the applicant in court so the court and jury may have an opportunity to observe him, or her, and to show that he or she is *not disqualified by law to receive letters testamentary or of administration*.

The Probate Code clearly enumerates those disqualified:⁵⁶ a minor; an incompetent; a convicted felon under the laws either of the United States or of any Territory of the United States, or the District of Columbia, *unless fully pardoned or civil rights restored in accordance with law*; a non-resident of this State who has not appointed a resident agent to accept service of process, etc.; a corporation not authorized to act as a fiduciary in Texas; an alien disqualified by law; or a person whom the court finds unsuitable.

A few simple questions directed to each applicable item are sufficient.

Another requirement is met by asking the applicant "Are you one and the same person as blank, named as executor in this instrument?"

K. Statutory Requirements Usually Proved by the Attesting or Other Witnesses

(1.) Venue

The Probate Code⁵⁷ provides that "The county court shall have the *general jurisdiction* of a probate court. It shall probate wills . . . grant letters testamentary . . . transact all business appertaining to estates, and distribution of such estates."

But Section 6 of the Probate Code controls venue. The *particular* county court in which the will shall be admitted to probate and letters

⁵⁵ Hedtke v. Transport Ins. Co., 383 S.W.2d 474 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.); *Midwestern Ins. Co. v. Wagner*, 370 S.W.2d 779 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.); *Texas Reserve Life Ins. Co. v. Dees*, 368 S.W.2d 886 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

⁵⁶ TEX. PROB. CODE ANN. § 78 (1956).

⁵⁷ TEX. PROB. CODE ANN. § 4 (1956).

testamentary shall be granted may be in the county where the deceased resided, if he had a domicile or fixed place of residence in this State. If the deceased had no domicile or fixed place of residence in this State but died in this State, then the court in the county where his *principal property* was at the time of his death, or in the county *where he died* has jurisdiction. If he had no domicile or fixed place of residence in this State and died outside the limits of this State, then the court in the county of this State *where his nearest of kin reside* has jurisdiction. But if he had no kindred in this State, then the court in the county where his *principal estate* was situated at the time of his death has jurisdiction.

Section 8 of the Probate Code anticipates multiple filings of applications to probate, and attempts to settle this problem by providing:

When two or more courts have concurrent venue of an estate, the court in which the application for Probate Proceedings thereon is first filed, shall have, and retain jurisdiction of the estate to the exclusion of the other court or courts.

A much publicized case⁵⁸ arose from the death of a Texas testator in Cherokee County, who was born in Rusk County, and who had substantial property in Johnson County. An early filing of the purported will in Johnson County gave that Probate Court jurisdiction and controlled the subsequent appeals thereon.

It is now established law in Texas that the court in which the application is first filed, has authority to "decide the truth of the averments as to the decedent's residence, and its decision thereon is conclusive and not subject to collateral attack."⁵⁹

Part of the proponent's proof must comply with these sections. In most cases the *place of death* of the deceased is the arena for the litigation. Tax records, neighbors, voting records, poll tax receipts, automobile registrations, and bank deposits all assist in establishing venue.

(2.) Sound Mind—Testamentary Capacity—Insane Delusion

a. Sound Mind. The burden is upon the proponent to make a *prima facie* case that when the testator *signed the will*, and when *it was witnessed* as required by law, he was of sound mind.⁶⁰

This simply means that at both such times, the testator must have

⁵⁸ Kirk v. Beard, 162 Tex. 144, 345 S.W.2d 267 (1961).

⁵⁹ White v. Baker, 118 S.W.2d 319 (Tex. Civ. App.—Beaumont 1938, no writ).

⁶⁰ Agricultural and Mechanical College v. Guinn, 326 S.W.2d 609 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.).

had sufficient ability to understand: the business upon which he was engaged; the effect of the act of making a will; capacity to know the objects of his bounty and their claims upon him; and the general nature and extent of his property.

There has been much confusion in connection with the offering of proof upon this important part of a will contest case. Proponent and contestant alike have had their case reversed because they improperly offered proof over timely objection. Examples of mistakes made in this area are: (1) Not showing the witness was qualified; (2) Offering proof that invaded the province of the jury; (3) Offering proof that presented a mixed question of law and fact as to legal capacity; (4) Permitting application of a standard of testamentary capacity which did not comply with Texas law; and (5) Presenting a legal conclusion and similar objections.

The problems have arisen because certain of the questions have asked *whether the testator possessed the degree of intelligence to do what he did*, as distinguished from an opinion as to whether he was *mentally capable of knowing or understanding the nature and effect of his acts*.⁶¹

McCormick and Ray "Texas Law of Evidence," Volume 2, Sec. 1421, page 254, 256 states the rule:

No witness, whether expert or non-expert, will be permitted to express an opinion on the legal capacity of a person to perform the act in question, such as the making of a will . . . because the existence of testamentary capacity involves the application of a legal definition to the factual data of mental condition, and the opinion leaves uncertainty whether the witness is applying his own or the law's standard of required capacity.

Hypothetical questions, when properly predicated, are admissible. Likewise, opinions may be obtained from friends, neighbors, and associates, as well as doctors and experts.

It is within the discretion of the trial judge to receive such testimony once the witness has shown opportunity for observation of the habits, conduct, expressions, peculiarities, disposition, temper or character of the testator; and that his testimony is based upon his own knowledge or observation.⁶²

The writer tries to bring to court witnesses known to members of the jury to be responsible and reputable persons and who knew the

⁶¹ 40 A.L.R.2d 91 § 40.

⁶² Chambers v. Winn, 137 Tex. 444, 154 S.W.2d 454 (1941).

testator in his ordinary activities of life, work, church, family and every day life.

After accounting for their association with the testator and opportunity to be around him prior to, at the time of, and subsequent to the making of the will in controversy, we are satisfied with questions such as:⁶³ *"Mr. Witness, based upon the things you have testified about, and your observations of the testator, and your acquaintance and observations and knowledge of his habits and his nature, do you have an opinion as to whether he was of sound or unsound mind on the — day of ——— (The date of the will)?"*

After an affirmative answer, we then ask: *"What is that opinion?"* and the witness usually forcibly replies: *"He was of sound mind."*

The Beaumont Court of Civil Appeals, in writing on two cases, seems to have resolved the questions that may be asked a doctor.⁶⁴ Its holdings are:

A doctor can go further in giving his opinion regarding the mental capacity of the testator than could a layman witness.

On another trial, the physician (who treated the testator professionally during his lifetime, and otherwise showed himself acquainted with him) should be permitted to give his opinion of the testator's ability to understand: the business in which he was engaged; the effect of his act in making the will; the nature and extent of his property; his next of kin and the natural objects of his bounty and their claims upon him; to have memory sufficient to collect in his mind the elements of his business in which he was engaged; 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.⁶⁵

b. Testamentary Capacity. Testamentary capacity and sound mind mean the same thing.⁶⁶

In a fairly recent case, Chief Justice Massey of the Fort Worth Court of Civil Appeals reiterates the long established rule in Texas:⁶⁷

When the term "sound mind" is used in connection with the right and power to make and execute wills in Texas its meaning

⁶³ Hubbell v. Donaldson, 243 S.W.2d 867 (Tex. Civ. App.—Eastland 1951, no writ).

⁶⁴ Wilkinson v. Wilkinson, 322 S.W.2d 662 (Tex. Civ. App.—Beaumont 1959, writ dismissed); Welch v. Shoubrouek, 260 S.W.2d 84 (Tex. Civ. App.—Beaumont 1953, no writ).

⁶⁵ Peareson v. McNabb, 190 S.W.2d 402 (Tex. Civ. App.—Galveston 1945, writ dismissed w.o.m.).

⁶⁶ Garcia v. Galindo, 189 S.W.2d 12 (Tex. Civ. App.—San Antonio 1945, writ refused w.o.m.).

⁶⁷ Anderson v. Clingingsmith, 369 S.W.2d 634 (Tex. Civ. App.—Fort Worth 1963, writ refused n.r.e.).

is synonymous with a testator's testamentary capacity, invariably dependent upon the showing as to whether such person understood and appreciated the consequences of executing the propounded script (citing many cases).

Here a jury finding "He was of sound mind," was approved with the suggestion that a "yes" or "no" answer would have been preferable.

In this case the burden of proof was on the proponent of the will. He was obliged by the court's charge to submit and obtain a favorable finding on the issue of whether testator had "testamentary capacity" or was of "sound mind." This he did.

The definition of "Testamentary Capacity" found in *Lindley v. Lindley*⁶⁸ is substantially the same definition as used in defining "Sound Mind."

You are further instructed that to make a valid will, the person making the will must have testamentary capacity at the time of the execution of the will. By the term "testamentary capacity" as used in this charge, is meant that the person at the time of the execution of the will has sufficient mental ability to understand the business in which she is engaged, and the effect of her act in making the will, and the general nature and extent of her property. She must also be able to know her next of kin and the natural objects of her bounty and their claims upon her. She must have memory sufficient to collect in her 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.

Courts and juries can go no further than to determine whether the testator's mental capacity measures up to the standard set by the law. Though a testator may be aged, infirm and sick, he has the right to dispose of his property in any manner that he may desire if his mental ability meets the law's tests. It is not for courts, juries, relatives, or friends to say how property should be passed by will, or to rewrite a will for a testator because they do not believe he made a wise or fair distribution of his property.⁶⁹

c. Insane Delusions. Insane delusions are not by themselves grounds of attack against the probating of a will, except as they show a want of testamentary capacity. The real defense is want of testamentary capacity, whether such want of capacity is produced by ordinary and

⁶⁸ 384 S.W.2d 676 (Tex. Sup. 1964).

⁶⁹ Nowlin v. Trotman, 348 S.W.2d 169 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.).

complete insanity, or by temporary aberrations or insane delusions. The real vice, from a judicial standpoint—which in either case vitiates the instrument—is want of capacity.⁷⁰

The courts of Texas have defined "insane delusion" as "the belief of a state of supposed facts that do not exist, and which no rational person would believe."⁷¹

A person who is entirely capable of attending to his business affairs may nevertheless have his mind so warped and deranged by some false and unfounded belief that he is incapable of formulating a rational plan of testamentary disposition. 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."

When the testator's false belief amounts, in law, to an insane delusion and the terms of his will are influenced thereby, testamentary capacity is lacking even though he might know the nature and extent of his property, the effect of his will, and the natural objects of his bounty, and be able to handle complicated business matters.⁷²

The proponent *has the burden* of establishing *the absence of insane delusion*, where such a delusion is an issue.⁷³

It is well settled that an insane delusion in regard to one who would be a natural object of the testator's bounty will destroy the will on the ground of mental incapacity.⁷⁴

To justify the setting aside of a will on the ground that the testator was possessed of an insane delusion, it must be shown that the will was the product, or offspring, of delusion or at least that it was influenced by the delusion.⁷⁵

When the proponent proves that the testator was a person of sound mind, he meets the burden placed upon him, since insane delusions are generally considered in connection with testamentary capacity.

⁷⁰ *Rodgers v. Fleming*, 3 S.W.2d 77 (Tex. Comm'n App. 1928, holding approved).

⁷¹ *Knight v. Edwards*, 153 Tex. 170, 264 S.W.2d 692 (1954).

⁷² *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. Sup. 1964).

⁷³ *Gulf Oil Corporation v. Walker*, 288 S.W.2d 173 (Tex. Civ. App.—Beaumont 1956, no writ); *Lanham v. Lanham*, 146 S.W. 635 (Tex. Civ. App.—Texarkana 1912, no writ).

⁷⁴ *Stone v. Grainger*, 66 S.W.2d 484 (Tex. Civ. App.—Galveston 1933, no writ); *Rodgers v. Fleming*, 3 S.W.2d 77 (Tex. Comm'n App. 1928, holding approved).

⁷⁵ *In re Lockhart's Estate*, 258 S.W.2d 877 (Tex. Civ. App.—Amarillo 1953) *rev'd* *Knight v. Edwards*, 153 Tex. 170, 264 S.W.2d 692 (1954).

Using abundant caution with a properly competent witness, further proof may be offered by asking the witness: "*Did you ever hear the testator make any statement to the effect . . . (here setting forth the delusion that is alleged to have influenced the will)?*"

If there is any evidence of probative value that, with the inferences that may reasonably be drawn therefrom, will support a finding that the testator was laboring under such a delusion which affected the terms of the will, an additional instruction on insane delusion is required.⁷⁶

Under such circumstances, the contestant should consider a special requested issue to the effect:

Do you find from a preponderance of the evidence that at the time of the execution of the instrument before you (exhibit No. —), _____ (testator) was not influenced by an insane delusion, if any, as that term is here defined?

An "insane delusion" as that term is used in this issue means the belief of a state of supposed facts which no rational person would believe and which influenced the person executing such will to dispose of *her* property in a way which *she* would not have disposed of it, but for the insane delusion, if any.

Answer: "*She* was not so influenced"; or
"*She* was so influenced."

Answer: _____

(3.) Execution of Instrument

In order to become a "will" (except where otherwise provided by law), every such instrument must be: (1) In writing; (2) Signed by the testator in person—or by another person for him by his direction—and in his presence; and (3) Attested by two or more credible witnesses above the age of 14 years, who shall subscribe their names thereto in their own handwriting in the presence of the testator.⁷⁷

Since we have limited our discussion to such an instrument, we will expect it to contain the usual attestation clause as follows: "*The above and foregoing will of blank was here now published, signed and executed by the said blank as his last will and testament, and we at his request, and in his presence, and in the presence of each other, subscribed our names thereto as witnesses.*" (Stayton Form Book, Section 4460).

⁷⁶ Lindley v. Lindley, 384 S.W.2d 676 (Tex. Sup. 1964).

⁷⁷ TEX. PROB. CODE ANN. § 59 (1956).

The witnessing of the will and attestation thereto is essential for the non-holographic will to be admitted to probate. The recitations in the attestation clause suffice as proof (even when a witness cannot remember attesting the will),⁷⁸ and raise a presumption of the due execution of the will.⁷⁹

Let us assume one or more of the attesting witnesses is available.

Such witness (either in person or by deposition) will be sworn and will detail the circumstances under which the will was signed by the testator, when, where, and such other pertinent information as he may recall. Counsel must be careful to show that the age of such witness was above fourteen (14) years, that the testator was then over nineteen (19) years of age, lawfully married, or a member of the armed forces, etc., and that the witnesses signed their names as such *in the presence of the testator*.

In the absence of a direct attack, it is unnecessary to offer direct testimony that the witnesses to the will were credible; a credible witness attesting a will means one competent under the law to testify to the execution of a will.⁸⁰

If an attack has been made upon the witnesses in the contest, then there is the additional burden of showing such witness to be *credible*. A "credible witness" means a competent witness. It means one who is able to tell about the attestation.⁸¹ "A witness who receives no pecuniary benefits under its terms" is credible, if otherwise competent.⁸²

Attestation of a will is the act of witnessing the performance of the statutory requirements for a valid execution, and the witnesses signing their names to the instrument in the presence of the testator.⁸³ It is not required in this State that the witnesses sign the instrument in the presence of each other.⁸⁴ Generally it is not essential to the validity of a will that it should be read over to the witnesses thereto, nor that they should know its contents.⁸⁵

There have been circumstances where the witnesses were dead, had

⁷⁸ Reese v. Franzheim, 381 S.W.2d 329 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.); Wilson v. Paulus, 15 S.W.2d 571 (Tex. Comm'n App. 1929, holding approved).

⁷⁹ Seydler v. Baumgarten, 294 S.W.2d 467 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.).

⁸⁰ Ford v. Ross, 150 S.W.2d 144 (Tex. Civ. App.—Fort Worth 1941, no writ).

⁸¹ Krahl v. Lehmann, 277 S.W.2d 792 (Tex. Civ. App.—San Antonio 1955), 155 Tex. 270, 285 S.W.2d 179 (1955).

⁸² Scandurro v. Beto, 234 S.W.2d 695 (Tex. Civ. App.—Waco 1950, no writ).

⁸³ Gainer v. Johnson, 211 S.W.2d 789 (Tex. Civ. App.—Galveston 1948, no writ).

⁸⁴ Gainer v. Johnson, 211 S.W.2d 789 (Tex. Civ. App.—Galveston 1948, no writ).

⁸⁵ Davis v. Davis, 45 S.W.2d 240 (Tex. Civ. App.—Beaumont 1931, no writ).

moved away, or "forgotten" witnessing the purported will. Probate Code, Section 84 (sub-section 3) anticipates these circumstances:

Attested written will . . . may be proved: If none of the witnesses is living . . . by two witnesses to the handwriting of one or both of the subscribing witnesses thereto, or of the testator . . . If it be shown under oath to the satisfaction of the court that, diligent search having been made, only one witness can be found who can make the required proof, then by the sworn testimony . . . of such one . . . to such signatures or handwriting.

It was early determined that the testimony of the subscribing witnesses is the primary or best evidence. As a result, if one of the subscribing witnesses cannot, or will not testify as to all the facts necessary to show that the will was executed with the required formalities, there can be no resort to secondary evidence until all of the remaining subscribing witnesses have been produced—or their unavailability explained.⁸⁶

Except where the will is self proving, the failure to call subscribing witnesses raises a presumption that the will was not signed by such witnesses in the testator's presence.⁸⁷

L. Undue Influence

Although clearly and perpetually the burden of proof is the contestant's, "undue influence" closely parallels testamentary capacity, unsound mind, and insane delusions, because it involves the "freedom of the mind" and "free agency" of the testator.

A will may be avoided on the ground that the testator did not have testamentary capacity to execute it; or that undue influence was exerted on the testator to the extent that such will results from such influence. However, the two terms are separate and distinct, and if either is established the will is void.⁸⁸

A jury finding that the testatrix was lacking in mental or testamentary capacity would have precluded the existence of undue influence.⁸⁹

The contestant, either by direct proof or circumstantial evidence, must build his case upon the testator's age, relationship of the parties, disposition, affection, physical and mental condition of the testator, the ease with which he could be controlled by those in whom he had

⁸⁶ Elnell v. Universalist, 76 Tex. 514, 13 S.W. 552 (1890).

⁸⁷ Jones v. Steinle, 15 S.W.2d 164 (Tex. Civ. App.—Austin 1929, writ ref'd).

⁸⁸ Michalak v. Dzierzanowski, 270 S.W.2d 276 (Tex. Civ. App.—Austin 1954, no writ).

⁸⁹ In re Estate of Olsson, 344 S.W.2d 171 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.).

confidence, his desire for peace and quiet,⁹⁰ the conduct of the alleged wrong-doer, and all pertinent proof bringing about the "abortive" results.⁹¹

From the host of reported cases, it may be concluded that to be classed as "undue influence," such influence must place the testator in the attitude of saying: (1) It is not my will, but I must do it; (2) I must act under such coercion, compulsion or constraint, that my own free will is destroyed.⁹²

Undue influence may be established by circumstantial evidence,⁹³ but every case must be decided by its own peculiar facts.

Undue influence as an invalidating fact consists of two elements: first, the external, the words or acts of third persons which bring the pressure to bear; second, the internal, the collapse of the testator's own will, produced by such external conduct.⁹⁴ (It is held that declarations of the testator, of whatever type, are no evidence of the former but only of the latter elements.)⁹⁵

The test of undue influence is whether such control was exercised over the mind of the testator as to overcome his free agency and free will and to substitute the will of another so as to cause the testator to do what he would not otherwise have done but for such control.⁹⁶

Where witnesses are available, proof of planning and preparation of the will is the heart of an undue influence case, and the burden is on the one who attacks an instrument on the ground of undue influence to both allege and prove that it was the product of such influence.⁹⁷

Undue influence cannot be presumed or inferred from opportunity or interest, but must be proved to have been exercised in relation to the will itself, and not merely to other transactions.⁹⁸

The following jury submission, to which no objection was made by either petitioners or respondents, is described by Associate Justice Clyde Smith in his dissent (to other holdings) in *Boyer v. Pool*:⁹⁹

⁹⁰ Hart v. Hart, 110 S.W. 91 (Tex. Civ. App. 1908, no writ).

⁹¹ Gunlock v. Greenwade, 280 S.W.2d 610 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.).

⁹² Pearce v. Cross, 414 S.W.2d 457 (Tex. Sup. 1967); In re Estate of Olsson, 344 S.W.2d 171 (Tex. Civ. App.—Austin 1954, no writ); Abilene Christian College v. Landers, 371 S.W.2d 97 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.).

⁹³ Long v. Long, 133 Tex. 96, 125 S.W.2d 1034 (1939).

⁹⁴ Pearce v. Cross, 414 S.W.2d 457 (Tex. Sup. 1967).

⁹⁵ McCORMICK & RAY, TEXAS EVIDENCE, § 894 (2d ed. 1956).

⁹⁶ Boyer v. Pool, 154 Tex. 586, 280 S.W.2d 564 (1955).

⁹⁷ Curry v. Curry, 153 Tex. 421, 270 S.W.2d 208 (1954); Burns v. Brown, 248 S.W.2d 1019 (Tex. Civ. App.—Austin 1952, writ ref'd); Besteiro v. Besteiro, 65 S.W.2d 759 (Tex. Comm'n App. 1933, judgment affirmed).

⁹⁸ Pierson v. Pierson, 57 S.W.2d 633 (Tex. Civ. App.—Galveston 1933, writ ref'd).

⁹⁹ 154 Tex. 586, 280 S.W.2d 564 (1955).

Undue influence is the exercise of sufficient control over the will power and mind of the person, the validity of whose acts is brought to question, to destroy his free agency and to constrain him to do what he would not have done, if such control had not been exercised; on the other hand, if a person of his own volition and in the exercise of his own will and choice enters into a transaction, then he would not be laboring under undue influence.

This definition was followed by one special issue:

Do you find from a preponderance of the evidence in this case that at the time of the making of the will in question herein on March 5, 1949, the said Jasper Pool was induced to make said will by the exercise of undue influence upon him by Mrs. Bertie Boyer and Mrs. Bessie Blake, or either of them?

Answer: "He was induced" or "He was not induced."

Answer: _____

M. *Forgery*

Because the authenticity of the actual signatures of the testator and the attesting witnesses are so essential to a valid will, frequent claims of forgery will be encountered in will contest cases.

Revised Civil Statute 2010, section 8, now Texas Rules of Civil Procedure 93(h), requiring pleadings verified by affidavit has been held¹⁰⁰ not to apply to will contest cases because:

An application to probate a will is not in any proper sense a pleading founded in whole or in part upon the instrument in writing. The proceeding is one in rem, the very purpose of which is to establish the validity, and the execution under the essential formalities of law of the instrument as the last will and testament of the testator . . . a will is not a written instrument capable of being adduced in evidence in support of any pleading of recovery or defense until it has been admitted to probate.

It is manifest, therefore, that this article has no bearing upon a proceeding brought to probate a will, the execution of which under requisite legal formalities is the only matter for adjudication, the burden of establishing all essential elements of which is imposed upon the proponent.

A single paragraph pleading by the contestant might simply allege:

The instrument was not in fact the last will and testament of the deceased, was not written by him, or at his insistence, or request, was not signed by him, was not executed by him with the formalities required by law to make it a valid will, and was a forgery.

¹⁰⁰ Hogan v. Stoepler, 82 S.W.2d 1000 (Tex. Civ. App.—Austin 1935, no writ).

Handwriting standards of the decedent,¹⁰¹ comparison of handwriting,¹⁰² opinions of experts, chemical, microscopic, photographic, scientific and assorted demonstrations, add color and persuasion in the trial before the jury.

The following submission may be used:

Do you find from a preponderance of the evidence that the purported signature of _____, deceased, on the instrument bearing date of _____, in evidence before you and offered for probate, is the genuine signature of _____, deceased?

Answer "Yes" or "No."

Answer: _____

N. Revocation

The Texas Probate Code,¹⁰³ among other requirements, places the burden upon the proponent of a will to prove to the satisfaction of the court that the will was not revoked by the testator.¹⁰⁴ This statutory requirement must be proved whether or not there is a contest and whether or not the pleadings raise the issue.¹⁰⁵

The burden of establishing that a will has not been revoked is placed by this statute on the proponent of the will sought to be probated.

The rule is that where testator's will produced in court comes from the custody of those to whom it has been delivered by the testator, or is found among testator's papers in a place where he usually keeps his valuable papers, and there is no suspicion cast upon the genuineness of the will, there exists a presumption that the will has not been revoked. Under such circumstances, a proponent has satisfied the statutory requirement to prove no revocation.

The methods of revoking a will are as definitely prescribed in the Statute as the modes of making it, and no essential part of the one can be dispensed with any more than the other.¹⁰⁶

No will in writing, and no clause thereof or devise therein, shall be revoked, except by subsequent will, codicil, declaration in writing ex-

¹⁰¹ Nass v. Nass, 149 Tex. 41, 228 S.W.2d 130 (1950).

¹⁰² TEX. REV. CIV. STAT. ANN. art. 3737b (1957).

¹⁰³ TEX. PROB. CODE ANN. § 88(b)(3) (1956).

¹⁰⁴ Turner v. Turner, 384 S.W.2d 195 (Tex. Civ. App.—Tyler 1964, no writ).

¹⁰⁵ Ashley v. Usher, 384 S.W.2d 696 (Tex. Sup. 1964); Usher v. Gwynn, 375 S.W.2d 564 (Tex. Civ. App.—San Antonio 1964, see Ashley v. Usher, supra).

¹⁰⁶ Covington v. McDonald, 307 S.W.2d 335 (Tex. Civ. App.—Texarkana 1957, no writ); Pullen v. Russ, 209 S.W.2d 630 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.).

ecuted with *like formalities*, or by the testator destroying or cancelling the same; or causing it to be done in his presence. An obliteration of any portion of the written instrument is ineffective.¹⁰⁷

Since the only proof that can possibly be offered to prove that the will has not been revoked is negative proof, evidence from a witness that he had no knowledge of a revocation of the will, as a matter of law, is prima facie proof that the will had not been revoked.¹⁰⁸

Hence, this can most often be proved by asking an attesting witness: "To your knowledge did (testator) ever revoke this will?"¹⁰⁹

In the event the evidence of contestant is sufficient to overcome the presumption of continuity and to thereby cast upon proponent the burden of going forward with proof to establish the non-revocation of the tendered will, the court should then submit to the jury an issue or issues as to whether the proffered will has been revoked, properly placing the burden of proof upon proponent.¹¹⁰

The issue of revocation has been submitted to the jury in this form:¹¹¹

Do you find from a preponderance of the evidence that Exhibit P-1 (the instrument offered for probate) had not been revoked by Howard S. Cunningham at the time of his death?

Answer "Yes" or "No."

Answer: _____

O. *Permissive Instructions*

In addition to the usual instructions required in submitting a case to the jury on Special Issues, will contest cases may require special treatment, depending upon the facts developed.

The following instructions illustrate the character of such treatment and have been held proper under the facts then before the trial judge:

(*Texas Revised Civil Statutes Ann., Article 3716—Dead Man's Statute.*) Pursuant to Rule 182, the following charge was given:¹¹²

You are instructed as a part of the law applicable to this case that Mozelle Dyer Guinn as the surviving wife of William A. Guinn, deceased, is not permitted by law to give evidence relating to any

¹⁰⁷ Pullen v. Russ, 209 S.W.2d 630 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.).

¹⁰⁸ Wilson v. Paulus, 15 S.W.2d 571 (Tex. Comm'n App. 1929, holding approved).

¹⁰⁹ Stewart v. Long, 394 S.W.2d 25 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

¹¹⁰ Usher v. Gwynn, 375 S.W.2d 564 (Tex. Civ. App.—San Antonio 1964) aff'd Ashley v. Usher, 384 S.W.2d 696 (Tex. Sup. 1964).

¹¹¹ Ashley v. Usher, 384 S.W.2d 696 (Tex. Sup. 1964).

¹¹² Agricultural and Mechanical College v. Guinn, 326 S.W.2d 609 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.).

transaction or conversation with or statement by the said William A. Guinn, unless called to testify by A. & M. College or Texas Technological College.

(*Undue Influence*): In a case where contestants were relying upon undue influence, the following instruction was given to the jury:¹¹³

You are further advised that not every influence exerted by one person upon the mind of another, may be classed as undue influence. Persuasion, entreaty, importunity, argument, intercession and solicitation, are permissible and do not constitute undue influence unless they subverted and overthrew the will and caused the doing of something that the person subjected thereto did not desire to do.

The Supreme Court has condemned the following instruction often sought by the proponent:¹¹⁴

Every person who has attained the age of nineteen years, or who is or has been lawfully married, being of testamentary capacity, shall have the right and power to make his last will and testament under the rules and limitations prescribed by law.

Associate Justice Walker writing for the Court said:

This instruction had no place in the charge. The information it contained did not assist the jurors in passing on the issue submitted to them, and it served merely to confirm what they probably already knew about the legal effect of their answer.

P. Judgment in the District Court

Judgment on appeal or certiorari from any county court sitting in probate shall be certified to such county court for observance.¹¹⁵

When the suit in District Court is to set aside the probate of a will already admitted to probate, and the proponent of the will prevails, judgment that contestant take nothing should be entered.¹¹⁶

Q. Compromise and Settlement

As in other civil suits in the District Court, the devisees and heirs of the deceased have a right to compromise their differences and to partition the property among themselves by mutual consent, subject to the rights of creditors, and thus dispense with the necessity of probating the will.¹¹⁷

¹¹³ Taylor v. Taylor, 272 S.W.2d 636 (Tex. Civ. App.—Dallas 1954, writ ref'd n.r.e.).

¹¹⁴ Lindley v. Lindley, 384 S.W.2d 676 (Tex. Sup. 1964).

¹¹⁵ Tex. R. Civ. P. 331.

¹¹⁶ Lee v. Lee, 424 S.W.2d 609 (Tex. Sup. 1968).

¹¹⁷ Robbins v. Simmons' Estate, 252 S.W.2d 970 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.); Wade v. Wade, 140 Tex. 339, 167 S.W.2d 1008 (1943).

The law favors the settlement in good faith of will contests by a so-called "family settlement."¹¹⁸

Termination of family controversies by compromise and settlement, and the avoiding of, or forbearance from, contesting the will, furnishes a sufficient consideration to support an agreement entered into for that purpose, except as to a party thereto who is not a person in interest.¹¹⁹

CONCLUSION

Within the foregoing paragraphs we have touched very briefly on aspects of the will contest case. There are other areas which have been excluded because of space limitations.

The successful proponent must continuously keep before the jury the fact that it is their function to pass upon the conditions existing at the time of the execution of the will. The jurors' personal feelings or concepts of what *might* have been done do not reflect the problem in controversy.

The successful contestant must convince the jury that the depriving of his clients of their fair share in the estate must have resulted from the lack of testamentary capacity of the deceased, undue influence, or other defects in the execution of the purported will. Only the application of Texas law upon the scales of the wide experience and wise understanding of the jurors, can correct such fraud, prevent discrimination, and avoid a grave miscarriage of justice.

But—after the clamor of the trial has subsided, and the parties depart—Justice Norvell's quotation from an earlier case¹²⁰ stands as a tribute to the properly prepared and executed will.

The power of disposing of property is an inestimable privilege of the old. It frequently commands *attention and respect* when other motives have ceased to influence. How often, without it, would the hoary head be neglected, deserted and despised. It is indeed a sad commentary upon humanity that when filial love has failed, and gratitude and devotion have passed away, the fear and awe inspired by the power of testamentary disposition of property becomes the "shadow of a rock in a weary land," and will insure the greatest respect and most devoted attention. Except in extreme cases of imbecility, the aged and decrepit should not be deprived of this last defense against ingratitude and base neglect.¹²¹

¹¹⁸ Stringfellow v. Early, 40 S.W. 871 (Case 2) (Tex. Civ. App.—1897, no writ).

¹¹⁹ Kellner v. Blaschke, 334 S.W.2d 315 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.).

¹²⁰ Salinas v. Garcia, 135 S.W. 588 (Tex. Civ. App.—1911, writ ref'd); Sloan v. Maxwell, 3 N.J. Eq. 563 (1831).

¹²¹ Garcia v. Galindo, 199 S.W.2d 488 (Tex. Civ. App.—San Antonio 1946, rev. other grounds 199 S.W.2d 488).