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ARTICLE

WILL CONTESTS: FROM START TO FINISH

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I. INTRODUCTION

The focus of this Article is primarily on the practical problems facing attorneys and courts when evaluating and proving up a will or trust contest. The focus extends further into the special procedural and evidentiary rules applicable to these actions, the use and misuse of summary judgment proceedings in these cases, and some observations regarding developing trends and strategies in will and trust contest litigation.[1]

Threshold evaluation questions are the first issue this Article addresses. Section II explores these requirements, such as whether a potential contestant has standing, "unnatural dispositions" of estate property, recognition of "no contest" clauses, burdens of proof allocations, and other practical problems facing potential contestants. In sum, section II of this Article raises and addresses issues related to getting into the courthouse doors for a will or trust contest.

Section III takes the next pragmatic step in addressing potential grounds for will contests. The section does so by providing an in-depth analysis of the statutory requirements for a valid will, the issue of insane delusion, the requirements of testamentary capacity, and the possibilities of undue influence. Section IV further addresses the always-pertinent question of jurisdiction. Further, this section outlines the general rules of Probate and Trust Code jurisdiction.

Following the jurisdictional questions, section V addresses venue in probate and trust matters.

Section VI provides an important pleading checklist for practitioners. The checklist can act as a guide to ensure pleading defects do not arise. Section VI also makes note of "citation" and "notice" rules while also addressing various other points of interest that are vital to successful will and trust contests.

Section VII examines special discovery tools as outlined in the Probate Code that are crucial to the preparation of either side of a will contest. These tools include the use of a demand for delivery of a will, potential

1. On occasion, this Article refers to opinions not released for publication pursuant to Texas Rule of Appellate Procedure 47. This fact is noted, and while not cited as authority, these opinions are included as potentially helpful examples of current judicial thinking on still-developing legal issues.

waivers, and pre-death filing of wills.

The next section addresses evidentiary issues that plague practitioners in will contests. The section not only addresses these issues, but also provides efficient ways to resolve many of the complex problems.

Building off section VIII, section IX focuses on pre-trial evidence rules, evaluating motions in limine and pre-trial conference orders, and the benefits of these proceedings for will contestants.

Section X addresses summary judgment rulings. The section lays out how to keep the summary judgment in perspective, the varying types of summary judgments, and effective responses to opposing parties' summary judgment motions.

Section XI touches on proponent's counter-attacks to will contests; some of these counter-attacks include utilization of the tort of tortious interference with inheritance rights, malicious prosecution, and more.

Section XII provides the practitioner with guidelines to make the most of the document execution process. While no process is perfect, these tools can potentially mean the difference between a probate litigator's dream and an estate planner's nightmare.

In summation, this Article strives to raise pertinent issues in will and trust contest litigation, provide pragmatic approaches to these issues, and thus provide guidance in handling these often-complex problems.

II. THRESHOLD EVALUATION QUESTIONS

A. *Is It an "Unnatural Disposition?"*

1. General Rules

The first question when evaluating any potential will contest is whether the will contains an "unnatural disposition" of the testator's property. Judges consider an unnatural disposition, along with other circumstances, in determining whether a will was a product of undue influence.[2] Although proof of an unnatural disposition *alone* is not sufficient to invalidate a will,[3] Texas courts have long recognized that it is an early

2. *See* Long v. Long, 133 Tex. 96, 125 S.W.2d 1034, 1036 (Tex. 1939) (clarifying that unnatural terms affecting property distribution may be a factor in undue influence).

3. Cameron v. Hous. Land & Trust Co., 175 S.W.2d 468, 470 (Tex. Civ. App.—Galveston 1943, writ ref'd w.o.m.); *In re* Bartels' Estate, 164 S.W. 859, 866 (Tex. Civ. App.—Galveston 1914, writ ref'd.).

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consideration for every will contest.[4] As one court stated, an unnatural disposition is a "circumstance which should arouse the suspicion and strict scrutiny of the court[s]."[5]

An unnatural disposition arises where the natural objects of a testator's bounty are excluded from his or her will.[6] Natural objects of a testator's bounty generally include a spouse, descendants, and parents.[7] Collateral heirs, such as siblings, nieces, and nephews, do not automatically fit into this class.[8] A disposition, even though unusual in an objective sense, or unnatural in the strictest legal meaning, will not be sufficient (standing alone) to overturn a will if there was a reasonable, logical, or rational basis for *this* particular testator to select the challenged plan.[9] However, an unexplained unnatural disposition may amount to evidence of lack of testamentary capacity or other suspicious circumstances.[10]

Additionally, a disposition is unnatural if it creates an unequal division between persons who would normally take equal portions of the testator's bounty—such as brothers and sisters.[11] Yet this is not an absolute rule. For example, a testator's disposition to one brother to the exclusion of his or her sisters is not unnatural where the testator was especially close to his

4. *See Long*, 125 S.W.2d at 1036–37 (noting in will cases, courts look to undue influence after a showing of mental capacity, and reviewing evidence of an unnatural disposition when determining whether undue influence existed). *But see* In re Estate of Lynch, 350 S.W.3d 130, 135 (Tex. App.—San Antonio 2011, pet. denied) ("[We are] unwilling to hold that in all cases a person cannot both lack testamentary capacity and be unduly influenced).

5. Renn v. Samos, 33 Tex. 760, 765 (Tex. 1870).

6. Morris v. Morris, 279 S.W. 806, 807 (Tex. Comm'n App. 1926, judgm't adopted); *see* Douthitt v. Haynie, 398 S.W.2d 831, 832 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (asserting testamentary disposition in favor of an unrelated person to the exclusion of brothers, sisters, nieces, and nephews was unnatural).

7. *See, e.g.*, Craycroft v. Crawford, 285 S.W. 275, 278 (Tex. Comm'n App. 1926, holding approved) (articulating the special bonds between child, parent, and spouse that fall within the purview of natural affection).

8. *See, e.g.*, Estate of Davis v. Cook, 9 S.W.3d 288, 294–95 (Tex. App.—San Antonio 1999, no pet.) (clarifying it was not unnatural to devise to a charity to the exclusion of collateral heirs).

9. *See Douthitt*, 398 S.W.2d at 832–33 (showing even though the disposition excluding relatives in favor of a non-relative was unnatural, sufficient connections existed between the testatrix and beneficiary to uphold the will); *see also Cook*, 9 S.W.3d at 294–95 (finding a "direct connection" between the testatrix and each of the charitable beneficiaries); Oglesby v. Harris, 130 S.W.2d 449, 451 (Tex. Civ. App.—Austin 1939, writ dism'd) (recognizing the testator was an old friend of the beneficiary, and finding morally indebtedness to the beneficiary sufficient to overcome the inference of undue influence).

10. *See* Dominguez v. Duran, 540 S.W.2d 567, 571 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (restating that an unnatural disposition, without a reasonable explanation, may be considered in evaluating evidence of testamentary capacity).

11. *See* Long v. Long, 133 Tex. 96, 125 S.W.2d 1034, 1036 (Tex. 1939) (opining evidence of distribution that differs from the laws of descent and distribution is a circumstance to consider when evaluating undue influence).

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or her brother.[12] Similarly, a Texas appellate court previously held an unequal division of property between siblings because of family discord did not constitute an unnatural disposition.[13]

A good rule of thumb as to what courts consider a natural object of the testator's bounty, or what might be considered a natural disposition, is to follow the Texas Legislature's dispositive scheme in the statutory provisions for intestate succession[14] and the other public policy statutes affecting inheritance rights.[15] However, because the very purpose for making a will may be the testator's desire to avoid the statutory rules of intestacy, even these guidelines are not conclusive.[16]

2. Is It Unnatural for *This* Specific Testator?

A court must determine what is unnatural on a case-by-case basis taking into account the unique character and habits of the testator in question, the relationship between the various parties, and any other factors that might bear on his or her testamentary intent.[17]

3. Prior Wills

Did the testator execute any other unchallenged wills that made the same or a similar disposition?[18] What if a person once included has now been excluded? The question then becomes what might have happened

12. *See* McKenzie v. Grant, 93 S.W.2d 1160, 1171 (Tex. Civ. App.—San Antonio 1936, writ dism'd) ("It appears that [testator] gave his property to the member of his own family with whom he was most closely associated, and apparently to whom he was most devoted.").

13. Estate of Davis, 920 S.W.2d 463, 467 (Tex. App.—Amarillo 1996, writ denied); *accord In re* Estate of Graham, 69 S.W.3d 598, 610–11 (Tex. App.—Corpus Christi 2001, no pet.) (discussing facts and evidence that provided reasons why testator favored certain nieces over other nieces and nephews).

14. *See generally* TEX. PROB. CODE ANN. §§ 38–39, 42–43, 45 (West 2003); *Id.* §§ 40–41, 44 (West Supp. 2012) (providing for recipients, including children, parents, and spouses, of a testator's bounty, depending on the factual situation).

15. *See, e.g., id.* § 40 (explaining that, to avoid discouraging adoption, adopted children are treated the same as natural born children for inheritance purposes under the intestacy laws).

16. *See, e.g.*, McGill v. Johnson, 799 S.W.2d 673, 676 (Tex. 1990) (concluding it was the testator's intent to avoid intestacy by disposing of all his property through his will).

17. *See In re* Estate of Steed, 152 S.W.3d 797, 808–09 (Tex. App.—Texarkana 2004, pet. denied) (explaining the different factors used to examine undue influence, including the nature of the relationship between the parties and the circumstances surrounding the making of the will).

18. *See, e.g.*, Brewer v. Foreman, 362 S.W.2d 350, 355 (Tex. Civ. App.—Houston 1962, no writ) (acknowledging the lack of close family relationships coupled with the testatrix's two prior wills that excluded her relatives in favor of non-relatives provided some evidence that the disposition was not procured by undue influence).

during the intervening period that might legitimately explain any changes to a prior will?[19]

4. Prior Gifting History

Are there any prior gifts to beneficiaries that justify an unequal disposition of property in the will? Large gifts to a beneficiary during the testator's lifetime can cut both ways. On the one hand, it shows the testator's affection for the person. On the other hand, the testator, when drafting the will, may have concluded that this particular beneficiary already received a sufficient amount.[20]

5. *Inter Vivos* Trusts and Joint Accounts

Did the testator establish any trusts during his or her lifetime that resulted in the transfer of a substantial portion of his or her estate outside of his or her will? Be sure to check for trusts that might have previously been modified, revoked, or even terminated. Also, check for payable on death (POD) accounts,[21] joint accounts with rights of survivorship,[22] life insurance policies,[23] retirement accounts,[24] powers of appointment,[25] and other non-probate transfers.[26]

6. Marital Property Agreements

Is there a marital agreement (whether before or after the marriage) that

19. *See* Burkett v. Slauson, 256 S.W.2d 179, 182 (Tex. Civ. App.—El Paso 1952, writ dism'd) (finding evidence of testatrix's prior will excluding contestant admissible, along with testatrix's letter from the same time period, in seeking to understand changes to the will as they relate to mental capacity or undue influence).

20. *See* Mason v. Mason, 369 S.W.2d 829, 839 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.) (stating even though the testator's son received a less-than-expected share of his father's estate because of a devise to the testator's second wife and half-brother, evidence of a lifetime of generosity to the son did not support finding of unnatural disposition); Wilson v. Paulus, 300 S.W. 661, 664 (Tex. Civ. App.—Galveston 1927) (noting testator's statement in will regarding prior advancements explained the exclusion of certain grandchildren), *rev'd on other grounds*, 15 S.W.2d 571 (Tex. 1929).

21. *See* Punts v. Wilson, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004, no pet.) (emphasizing valid payable on death (P.O.D.) funds belonged to the beneficiary and were not part of the decedent's estate).

22. *See* Stegall v. Oadra, 868 S.W.2d 290, 291–92 & n.3 (Tex. 1993) (detailing the various types of accounts, including accounts with right of survivorship, which are non-testamentary transfers).

23. *See* TEX. PROB. CODE ANN. § 450 (West 2003) (stating an insurance policy is non-testamentary).

24. *See id.* (identifying retirement accounts as non-testamentary).

25. *See* TEX. PROP. CODE ANN. §§ 181.082–83 (West 2007) (detailing the exercise of powers of appointment which may affect distribution of a downstream estate).

26. *See generally* PROB. § 450 (listing transfers that are not subject to probate).

transfers property, waives rights, explains, or otherwise influences the estate distribution?[27]

7. Tax Considerations

What is the net effect of the change in disposition after estate taxes? Was the increased gift one that was tax deductible?[28]

8. Any Other Facts?

Considerations include marital discord, family feuds, mental weakness, physical infirmities, and "control by another." Every family has its share of dysfunctions, which a practitioner must consider in determining whether a will amounts to an unnatural disposition.[29]

9. Examples of Dispositions Not Considered Unnatural

a. Gifts to Charities

In *Estate of Davis v. Cook*,[30] a devise to a charity that excluded collateral heirs (nieces and nephews) was held not unnatural even though the charitable organization actively solicited the gift and provided estate planning advice to the elderly testatrix.[31]

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27. *See, e.g., id.* § 472 (West 2003) (proclaiming a marriage agreement may affect the distribution of property between spouses and ex-spouses).

28. *See* Mackie v. McKenzie, 900 S.W.2d 445, 450 (Tex. App.—Texarkana 1995, writ denied) (concluding a disposition leaving 75% to charitable foundation and 25% to hospital, following discussions of tax implications and methods by which to avoid payment of estate taxes with both an attorney and foundation director was not unnatural).

29. *See* Oechsner v. Ameritrust Tex., N.A., 840 S.W.2d 131, 136–37 (Tex. App.—El Paso 1992, writ denied) (explaining the testator's second will and codicil disinheriting children, and leaving the entire estate to a hospital and the family home to his housekeeper, was not an unnatural disposition due to testator's belief that children attempted to take property from him and had previously influenced his deceased wife to disinherit him). *But see* Holcomb v. Holcomb, 803 S.W.2d 411, 415 (Tex. App.—Dallas 1991, writ denied) (holding a disposition unnatural and a product of undue influence where testator desired equal division between his son and daughter, where his earlier will gave most property to his daughter to compensate for his son's inheritance from his ex-wife, and where his son convinced testator to change the will to an equal share, thus providing a larger overall share to the son).

30. Estate of Davis v. Cook, 9 S.W.3d 288 (Tex. App.—San Antonio 1999, no pet.).

31. *Id.* at 294–95; *accord* Naihaus v. Feigon, 244 S.W.2d 325, 328–29 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.) (explaining it is not unusual for testatrix to leave little to her collateral kin when they were not close, instead favoring a local rabbi with whom she had a personal relationship); *In re* Caruther's Estate, 151 S.W.2d 946, 948 (Tex. Civ. App.—Beaumont 1941, writ dism'd) (recognizing public policy favors charitable gifts, particularly when distant heirs are more apt to exert influence for selfish reasons).

b. Gifts to Caretakers

In *Bridges v. Howell*, where the estate was relatively small, the testatrix's devise of her entire estate to the daughter who took care of her, to the exclusion of her other four children, was not considered unnatural.[32]

c. Long-Term Second Wife and Step-Children

In the frequent battle between the second or third spouse and children from a previous marriage, the length of the subsequent marriage and the affection manifested between the spouses may often be the most relevant factors. In a case where the evidence demonstrated the testator loved his second wife and her children, and where the testator was exceedingly generous to his son from a previous marriage during his lifetime, the court determined that the will giving a substantial portion of his estate to his wife for her lifetime and then to his grandchildren and step-grandchildren was not unnatural.[33]

B. *Does the Potential Contestant Have Standing?*

1. General Principles

Standing is the legal right of a person to maintain an action. In *Chalmers v. Gumm*,[34] the Supreme Court of Texas held standing in a will contest

32. *See* Smallwood v. Jones, 794 S.W.2d 114, 119 (Tex. App.—San Antonio 1990, no writ) (holding the devise of 80% to caretaker sister and 20% to son was not unnatural); Pearce v. Cross, 414 S.W.2d 457, 458 (Tex. 1966) (deciding that the testatrix's son-in-law, the widower of her deceased daughter who lived with testatrix, even after her daughter died and cared for testatrix, was considered a natural object of her bounty as opposed to her sister and nephew), *rev'd on other grounds by In re* Estate of Steed, 152 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. denied); Brewer v. Foreman, 362 S.W.2d 350, 355 (Tex. Civ. App.—Houston 1962, no writ) (establishing the testatrix's exclusion of collateral relatives in favor of unrelated caretakers was not unnatural when there was no evidence of a close family relationship); Bridges v. Howell, 122 S.W.2d 665, 668 (Tex. Civ. App.—El Paso 1938, no writ) (concluding a relatively small estate would not yield very much if divided between five children, and thus finding it not unnatural that the entire estate went to the daughter who cared for testatrix in her final months, perhaps to compensate for services).

33. Mason v. Mason, 369 S.W.2d 829, 838–39 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.); *accord* Long v. Long, 196 S.W.3d 460, 467 (Tex. App.—Dallas 2006, no pet.) (asserting despite suspicious timing of testator's cancer diagnosis, his marriage to second wife and the execution of his will, which left her the bulk of his estate was not necessarily an unnatural disposition); *Estate of Steed*, 152 S.W.3d at 812 (emphasizing it is not unnatural to make one relative a larger bequest than others); Horton v. Horton, 965 S.W.2d 78, 87–88 (Tex. App.—Fort Worth 1998, no pet.) (determining the devise of entire estate to his second wife of 20 years was not unnatural). *But see In re* Estate of Olsson, 344 S.W.2d 171, 179 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (finding a controlling, unemployed husband, age 45, guilty of exercising undue influence over testatrix, age 74, in procuring an unnatural will which excluded testatrix's children from first marriage).

34. Chalmers v. Gumm, 137 Tex. 467, 154 S.W.2d 640 (1941).

could be waived if not tried before trial.[35] However, the continued efficacy of *Chalmers* for will contest standing was clearly called into doubt by the 1993 decision *Texas Ass'n of Business v. Texas Air Control Board*,[36] which held "standing, as a component of subject matter jurisdiction, *cannot be waived* in this or any other case and may be raised for the first time on appeal by the parties or by the court."[37] Additionally, the *Air Control* court expressly acknowledged it was overturning other cited judicial precedents to the contrary.[38]

Raising the issue of a party's standing at the earliest possible opportunity is ideal. The result of delaying a determination of standing can be economically disastrous for all parties. Lack of standing will void any judgment entered in the proceeding.[39] The court's only option upon finding that one party lacks standing is to dismiss the entire proceeding for lack of subject matter jurisdiction.[40] If lack of standing is not determined until the trial is over, the entire effort and expense is wasted.[41]

Any party contesting a will has an affirmative obligation to plead and, if necessary, prove that he or she has standing to bring the action.[42] In some instances, lack of standing is apparent from the face of the pleadings.[43] In most cases, however, the standing issue is fact dependent, especially with regard to res judicata, disclaimer, assignment, or estoppel.[44]

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35. *Id.* at 643.

36. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440 (Tex. 1993).

37. *Id.* at 445–46 (emphasis added); *accord* Coastal Liquids Transp. L.P. v. Harris Cnty. Appraisal Dist., 46 S.W.3d 880, 884 (Tex. 2001) (distinguishing standing from capacity because capacity may be waived, while standing cannot); Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist., 925 S.W.2d 659, 662 (Tex. 1996) (citing *Tex. Air Control Bd.* for the proposition that because standing implicates subject matter jurisdiction, it may be raised for the first time on appeal).

38. *Tex. Air Control Bd.*, 852 S.W.2d at 445–46.

39. *See* Crawford v. McDonald, 88 Tex. 626, 33 S.W.325, 328 (Tex. 1895) (stating the rule that lack of subject matter jurisdiction will render any judgment void).

40. City of Beaumont v. West, 484 S.W.2d 789, 791 (Tex. Civ. App—Beaumont 1972, writ ref'd n.r.e.) ("If at any time during its progress it becomes apparent that the court has no authority under the law to adjudicate the issues presented, it becomes the duty of the court to dismiss it.").

41. *See Tex. Air Control Bd.*, 852 S.W.2d at 448 (holding standing is a requirement of subject matter jurisdiction that a litigant can raise for the first time on appeal). A court, realizing a lack of subject matter jurisdiction, would have no choice but to dismiss the case, regardless of sunk costs by the parties. *See West*, 484 S.W.2d at 791.

42. Abrams v. Ross' Estate, 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923, judgm't adopted).

43. *See* TEX. R. CIV. P. 93 (listing matters, including issues with bearing on standing, that require verification by record "unless the truth of such matters appear of record").

44. *See* City of Dall. v. First Trade Union Sav. Bank, 133 S.W.3d 680, 685 (Tex. App.—Dallas 2003, pet. denied) ("[S]ome standing questions require a trial court to consider evidence, in addition to pleadings, before the court can determine whether it has subject[]matter jurisdiction." (citing Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555 (Tex. 2000))), *disapproved of on other grounds by* Rusk State Hosp. v. Black, No. 10-0548, 2012 WL 3800218 (Tex. Aug. 31, 2012).

Practitioners may need to conduct discovery on these standing issues, along with an evidentiary hearing.[45]

2. Texas Probate Code Sections 10 and 93: "Interested Person"

"Any person interested in an estate" may file an opposition under section 10 of the Texas Probate Code before admitting a will to probate.[46] For contests filed after admission, section 93 also defines the contestant's standing in terms of "any interested person."[47] Section 3(r) of the Probate Code defines an interested person as "heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of an incapacitated person, including a minor."[48]

Despite the fact that section 10 specifically refers to a "person interested in an *estate*,"[49] this definition is too broad with respect to standing issues relating to a will contest. The interest a person must have for standing to oppose or contest a will under sections 10 or 93 must be in the actual transfer or disposition of the testator's estate, *either* under the will *or* by the statutes of descent and distribution if the will is not admitted to probate.[50] Further, one must have a pecuniary interest that will be "affected by the probate or defeat of the will."[51] A general interest in the estate administration is also insufficient to confer standing in a will contest. Therefore, a creditor of the testator lacks standing to contest a will because its claim will be allowed or disallowed regardless of who is determined to be the ultimate devisees or heirs of the decedent.[52]

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45. *See id.* (concluding more evidence was required to determine whether there was subject matter jurisdiction in the case, and thus it was not error to allow merits of the case to develop before determining jurisdiction).

46. *See* TEX. PROB. CODE ANN. § 10 (West 2003) ("Any person interested in an estate may, at any time before any issue in any proceeding is decided upon by the court, file opposition thereto in writing and shall be entitled to process for witnesses and evidence, and to be heard upon such opposition, as in other suits.").

47. *See id.* § 93 (West 2003) ("After a will has been admitted to probate, any *interested person* may institute suit in the proper court to contest the validity thereof, within two years after such will shall have been admitted to probate . . . .") (emphasis added).

48. *Id.* § 3(r) (West Supp. 2012).

49. *Id.* § 10 (West 2003) (emphasis added).

50. *See* Abrams v. Ross' Estate, 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923, judgm't adopted) (noting those contesting the will had a pecuniary interest in protecting the title to their recently purchased land).

51. *See* Logan v. Thomason, 146 Tex. 37, 202 S.W.2d 212, 215, 217 (1947) (finding if the interest is lacking, the party is a "mere meddlesome intruder"); *Abrams*, 250 S.W. at 1021 (recognizing the interest in the estate must be affected by whether or not the will is admitted to probate).

52. *See Logan*, 202 S.W.2d at 217 (stipulating Texas statutes do not include creditors as proper parties to contest or probate a will); *see also* Daniels v. Jones, 224 S.W. 476, 477 (Tex. Civ. App.—San

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3. Other Probate Code Sections that May Affect Standing

For an exhaustive examination of almost every conceivable claim of standing in the will contest context, one need only read the numerous reported decisions involving the Estate of Mrs. Sarita K. East discussed in *Trevino v. Turcotte*.[53] Delving into case law may also prove helpful, as Texas jurisprudence has no shortage of cases involving will contest standing, or lack thereof.[54] Additionally, other Probate Code sections that may affect the questions of will contest standing include:

Section 37A—Means of Evidencing Disclaimer or Renunciation of Property or Interest Receivable From a Decedent[55]
Section 37B—Assignment of Property Received From a Decedent[56]
Section 38—Persons Who Take Upon Intestacy[57]
Section 39—No Distinction Because of Property's Source[58]
Section 40—Inheritance by and From an Adopted Child[59]
Section 41—Matters Affecting and Not Affecting the Right to Inherit[60]
Section 41(a)—Persons Not in Being[61]

Antonio 1920, writ ref'd) (acknowledging the testator's creditors lacked any right or authority to challenge the will).

53. Trevino v. Turcotte, 564 S.W.2d 682 (Tex. 1978). This case involved the question of whether a deceased executor's heirs qualified as interested persons in an estate. *Id.* at 684. The court held they did not meet section 93's requirements for standing and estopped the heirs from contesting probate of Mrs. Sarita K. East's will. *Id.*

54. *See In re* Estate of Bivins, No. 07-01-0131-CV, 2002 WL 1478661, at *1 (Tex. App.—Amarillo July 10, 2002, no pet.) (not designated for publication) (deciding the contestant, who was the contingent beneficiary of the trust, had standing to attack the will even when he also sought to enforce another will that would have left the bulk of the estate to the trust); Foster v. Foster, 884 S.W.2d 497, 501 (Tex. App.—Dallas 1993, no writ) (holding appointee under exercise of power of appointment had standing); Maurer v. Sayre, 833 S.W.2d 680, 681, 683 (Tex. App.—Fort Worth 1992, no writ) (finding alternate beneficiary on life insurance policy had standing to contest will); *In re* Estate of Hodges, 725 S.W.2d 265, 269 (Tex. Civ. App.—Amarillo 1986, writ ref'd n.r.e.) (determining independent executor who was not also a beneficiary lacked standing to object to a family settlement agreement); Muse, Currie & Kohen v. Drake, 535 S.W.2d 343, 344 (Tex. 1976) (determining that the court-appointed administrator lacked standing to contest a will); Aven v. Green, 159 Tex. 361, 320 S.W.2d 660, 662–63 (1959) (stating a devisee whose interest was predicated solely on a will that was already denied probate lacked standing to contest an earlier will); Dickson v. Dickson, 5 S.W.2d 744, 747 (Tex. Comm'n App. 1928) (concluding devisee of heir who died after decedent had standing to contest will). *But see* Travis v. Robertson, 597 S.W.2d 496, 498 (Tex. App.—Dallas 1980, no writ) (holding once a will is admitted to probate, the executor named therein does have standing to defend it under Texas Probate Code section 243).

55. TEX. PROB. CODE ANN. § 37A (West Supp. 2012).

56. *Id.* § 37B.

57. *Id.* § 38 (West 2003).

58. *Id.* § 39.

59. *Id.* § 40 (West Supp. 2012).

60. *Id.* § 41.

Section 41(b)—Heirs of Whole and Half Blood[62]
Section 41(c)—Alienage[63]
Section 41(d)—Convicted Persons and Suicides[64]
Section 42—Inheritance Rights of Children[65]
Section 42(a)—Maternal Inheritance[66]
Section 42(b)—Paternal Inheritance[67]
Section 42(c)—Homestead Rights, Exempt Property, and Family Allowances[68]
Section 42(d)—Marriages Void and Voidable[69]
Section 43—Determination of Per Capita and Per Stirpes Distribution[70]
Section 44—Advancements[71]
Section 45—Community Estate[72]
Section 46—Joint Tenancies[73]
Section 47—Requirement of Survival by 120 Hours[74]
Section 47(a)—Survival of Heirs[75]
Section 47(b)—Disposal of Community Property[76]
Section 47(c)—Survival of Devisees or Beneficiaries[77]
Section 47(d)—Joint Owners[78]
Section 58b—Devises and Bequests That Are Void[79]
Section 67—Pretermitted Child[80]

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61. *Id.* § 41(a).
62. *Id.* § 41(b).
63. *Id.* § 41(c).
64. *Id.* § 41(d).
65. *Id.* § 42 (West 2003).
66. *Id.* § 42(a).
67. *Id.* § 42(b).
68. *Id.* § 42(c).
69. *Id.* § 42(d).
70. *Id.* § 43.
71. *Id.* § 44 (West Supp. 2012).
72. *Id.* § 45 (West 2003).
73. *Id.* § 46.
74. *Id.* § 47.
75. *Id.* § 47(a).
76. *Id.* § 47(b).
77. *Id.* § 47(c).
78. *Id.* § 47(d).
79. *Id.* § 58(b) (West Supp. 2012). Noteworthy, the 2005 amendments expanded the class of individuals related to an attorney that would render a devise or bequest void to include the attorney's parents, descendants of the attorney's parents, and spouses thereof. *Id.* Further, the 2001 amendments to section 58b expanded the class of individuals who fall within the exception to this rule to include the relatives of the testator within the third—not the second—degree of consanguinity and affinity, the testator's spouse, ascendants, and descendants. *Id.*
80. *Id.* § 67.

Section 68—Prior Death of Legatee[81]
Section 69—Will Provisions Made Before Dissolution of Marriage[82]
Section 70A—Increase in Securities; Accessions[83]

4. Loss of Standing

Persons who may have possessed the requisite standing at one time to contest a will, may nevertheless lose it by their acts or the acts of others in privity with them. Most of the following lack-of-standing claims are also recognized as affirmative defenses under Texas Rule of Civil Procedure 94.[84] Attorneys should specifically plead each claim to notify the opposing party and the court that a standing issue, which may require discovery and an evidentiary hearing, is present in the case.[85]

a. Res Judicata

The doctrine of res judicata precludes the re-litigation of finally adjudicated claims, or claims arising from the prior action's subject matter that *could* have been litigated.[86] The elements of a res judicata claim are: "(1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised *or could have been raised* in the first action."[87]

Obviously, res judicata bars a person who unsuccessfully contests a will from bringing another contest, even on a different ground of attack. The tricky question in a will contest action is what constitutes sufficient "privity" to trigger the res judicata bar if the first action was brought by someone else? At least one court of appeals viewed privity in terms of a "class" of beneficiaries:

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81. *Id.* § 68 (West 2003).

82. *Id.* § 69 (West Supp. 2012).

83. *Id.* § 70A (West 2003).

84. *See* TEX. R. CIV. P. 94 ("[A] party shall set forth affirmatively . . . assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.").

85. *See* Sonat Exploration Co. v. Cudd Pressure Control, Inc., 340 S.W.3d 570, 577 (Tex. App.—Texarkana 2011, no pet.) ("The purpose of Rule 94 is to give the opposing party notice of the defensive issues to be tried.").

86. Barr v. Resolution Trust Corp. *ex rel.* Sunbelt Fed. Sav., 837 S.W.2d 627, 628 (Tex. 1992).

87. Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 652 (Tex. 1996) (emphasis added) (citing Tex. Water Rights Comm'n v. Crow Iron Works, 582 S.W.2d 768, 771–72 (Tex. 1979)).

> People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action. Privity exists if the parties share an identity of interests in the basic legal right that is the subject of the litigation. When litigating interests in a probate estate, there is no such privity between [potential beneficiaries] as will make a judgment rendered in a suit in which one or more of them were parties binding and conclusive on others who were not parties or represented . . . [unless the non-party] is represented by others of the same class . . . .[88]

Specifically, the *In re Estate of Ayala*[89] court held that the doctrine of res judicata prevented three of the testator's children, who had not joined in their brother's earlier unsuccessful contest of their father's will, from bringing their own will contest because, as members of the "same class of heirs or devisees," they were in privity with their brother.[90]

In *Neill v. Yett*,[91] the Austin Court of Appeals effectively expanded the definition of claim preclusion privity in probate proceedings to any person interested in the estate who fails to bring an action to set aside a probated will within the time provided by section 93 of the Texas Probate Code.[92] The *Neill* court held the testator's granddaughter was barred from asserting a claim for tortious interference with inheritance rights because there was a final and valid probate court judgment admitting her grandfather's will to probate that was inconsistent with, and thus precluded, the assertion of her claim.[93] The fact that the granddaughter had not personally participated in the prior probate proceedings did not prevent the judgment from precluding her later action.[94] The court relied on the doctrine of constructive notice to find that the granddaughter had actual notice of the prior proceedings, and that she was bound by the order admitting the will to probate because "[p]robate proceedings are actions *in rem* and bind all persons unless set aside in the manner provided by law."[95]

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88. *In re* Estate of Ayala, 986 S.W.2d 724, 727 (Tex. App.—Corpus Christi 1999, pet. denied) (citations omitted) (internal quotation marks omitted).

89. *In re* Estate of Ayala, 986 S.W.2d 724 (Tex. App.—Corpus Christi 1999, pet. denied).

90. *Id.* at 727.

91. Neill v. Yett, 746 S.W.2d 32 (Tex. App.—Austin 1988, writ denied).

92. *Id.* at 34.

93. *Id.* at 35.

94. *Id.* at 36.

95. *Id.* at 36 (citing Ladehoff v. Ladehoff, 436 S.W.2d 334, 336–37 (Tex. 1968)); *see* Stovall v. Mohler, 100 S.W.3d 424, 429 (Tex. App.—San Antonio 2002, pet. denied) (Green, J., concurring) (finding granddaughter who was non-suited from an earlier will contest proceeding was nonetheless barred by res judicata on basis of in rem proceeding).

b. Section 37A Disclaimers

A disclaimer of interest in a decedent's estate filed under section 37A of the Texas Probate Code is irrevocable,[96] and once filed, the disclaimed interest passes to the next taker as though the disclaimant pre-deceased the testator.[97] An attorney must file a disclaimer within nine months of the decedent's death,[98] well before the limitations period for filing a will contest under section 93 expires.[99] What happens if a different will that changes the "next taker" is offered for probate after a section 37A disclaimer is filed? If a disclaimant files a total disclaimer in the estate, he or she does not have standing to contest the new will, but the original next taker would have standing.[100] Partial disclaimers under section 37A(e), and disclaimers of a certain, defined interest under a specific will may leave the door open if an alternative will is subsequently discovered.[101] These exceptions, however, will also lessen the tax savings of the disclaimer and still may not be effective to salvage standing for the original devisee.[102]

c. Assignment

Standing to contest a will may also be lost if the devisee or heir assigns his or her interest (under a will or by inheritance) to a third party. The Texas Probate Code expressly authorizes an "assignment of property received from a decedent" unless the assignment "would defeat a spendthrift provision imposed in a trust."[103] Once the assignment is

96. *See* TEX. PROB. CODE ANN. § 37A(k) (West Supp. 2012) ("Any disclaimer filed and served under this [s]ection shall be irrevocable.").

97. *See id.* § 37A(c) ("Unless the decedent's will provides otherwise, the property subject to the disclaimer shall pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent . . . .").

98. *See id.* § 37A(h) (listing the time requirements for filing a disclaimer).

99. *See id.* § 93 (West 2003) (providing a two-year period for contesting probate).

100. *See id.* § 37A(e), (k) (West Supp. 2012) (stating a disclaimer filed under this section is irrevocable and once in effect the property being disclaimed passes as though it happened before the death of the decedent, effectively cutting off all future takers from contesting the will).

101. *See id.* § 37A(l) (providing a disclaimer is only effective with regard to property expressly referred to, thus excluding property that might arise under a later will).

102. *See* Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (finding the purpose of section 37A was for total disclaimers to receive preferential treatment for estate taxes, and to change the laws of descent and distribution, which may affect who has standing as an interested person in an estate).

103. PROB. § 37B(e) (West Supp. 2012); *accord* Morris v. Halbert, 36 Tex. 19, 20 (1871) ("Upon the death of the ancestor, the legal title descends to the heir, subject to the expenses of administration and the payment of debts."); Geraghty v. Randals, 224 S.W.2d 327, 331 (Tex. Civ. App.—Waco 1949, no writ) ("Unless prohibited by the terms of the will or by statute, it is a general rule that pecuniary legacies bear interest from the time they are due and payable . . . nor is the right to receive it affected by delay in the administration or by suit or contest to construe the will.").

made, the assignee acquires whatever standing his or her assignor possessed.[104]

d. Estoppel

A person who is estopped from contesting a will due to his or her acceptance of benefits thereunder does not qualify, as an interested person with standing to contest that will.[105] The law is well-settled in Texas that a person cannot take a beneficial interest under a will and at the same time (or subsequently) try to defeat any part of the will.[106] A beneficiary under a will must accept or reject the whole contents of the instrument.[107] The fact that beneficiaries may not know all the facts at the time they accepted benefits will not, in the absence of fraud, prevent the estoppel from being effective against them.[108] Most courts follow the "whole contents" (all or nothing) rule set forth in *Smith v. Butler*.[109]

Two opinions, however, indicate a possible change. In *In re Estate of McDaniel*,[110] the court held that the proper test for determining whether a beneficiary under a will received benefits that estop him or her from contesting a will was "whether the benefits granted him by the will are or are not something of which he could legally be deprived without his consent."[111] Another court, relying on *Trevino* for the threshold question of whether benefits received made the "challenge of the will *inconsistent* with the acceptance of benefits," held the party relying on the affirmative defense of estoppel must demonstrate that the contestant had in fact

104. *See* Dickson v. Dickson, 5 S.W.2d 744, 746 (Tex. Comm'n App. 1928) (determining assignees, grantees, and donees have the same interest as the assignor to contest the validity of a will). *But cf.* Trevino v. Turcotte, 564 S.W.2d 682, 690 (Tex. 1978) (holding that, as a matter of public policy, a person otherwise estopped from contesting a will by his or her own acts may not acquire standing through an assignment).

105. *See Trevino*, 564 S.W.2d at 689–90 (concluding parties who are estopped from contesting a will cannot alternatively contest the will as interested parties pursuant to a separate interest); Sheffield v. Scott, 620 S.W.2d 691, 693–94 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (finding a lack of the requisite interest to challenge a will due to benefits received under the will).

106. *See Trevino*, 564 S.W.2d at 689–90 (decrying the inequity of claiming benefits under a will and later challenging the will in a manner inconsistent with accepting benefits).

107. *See* Smith v. Butler, 85 Tex. 126, 19 S.W. 1083, 1085 (1892) (quoting Philleo v. Holliday, 24 Tex. 38, 45 (1859) (asserting in order to benefit from a will it must be wholly adopted)).

108. *See Sheffield*, 620 S.W.2d at 694 (asserting the irrelevance of lack of knowledge on the question of estoppel for those who accept benefits under a will (citing *Trevino*, 564 S.W.2d at 686)).

109. *See* Smith v. Butler, 85 Tex. 126, 19 S.W. 1083, 1085 (1892) (quoting *Philleo*, 24 Tex. at 45) (explaining one who accepts benefits under a will assents to its terms); *Sheffield*, 620 S.W.2d at 694 (quoting *Trevino*, 564 S.W.2d at 685) (discussing and adopting the fundamental rule that a person cannot take a beneficial interest and claim an interest that might defeat the operation of the will).

110. *In re* Estate of McDaniel, 935 S.W.2d 827 (Tex. App.—Texarkana 1996, writ denied).

111. *Id.* at 829 (citing Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670, 676 (1955)).

"received benefits to which she would not be entitled under either will, or even under the laws of intestacy."[112] The Texas Supreme Court has not conclusively decided the test for estoppel that ultimately prevails in will contests.

C. *Is There a No-Contest Clause That Matters?*

1. What Is There to Lose?

If the potential contestant will only receive a nominal bequest under the will, the risk of losing this bequest may be acceptable. A large bequest, however, presents a more difficult question and is a far more effective deterrent. In such cases, a careful look at the precise language of the no-contest clause and its potential application to the contestant is imperative.[113]

2. Will It Be Enforced?

Texas embraces the concept that competent testators, free from undue influence or fraud, have the absolute right to dispose of their property as they desire, without regard to what their family or the court may think is appropriate.[114] The no-contest clause, sometimes referred to as an *in terrorem* or "forfeiture clause," is a logical extension of this right.[115] The testator simply makes the acceptance of his or her will, *as written*, a condition precedent to receiving a bequest. Thus, a contestant who unsuccessfully challenges a will with a no-contest clause may lose the right to a distribution under that will.[116] However, no-contest clauses are not favored by the courts. Perhaps this is because no judge is truly willing to allow a testator to have the last word:

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112. Holcomb v. Holcomb, 803 S.W.2d 411, 414 (Tex. App.—Dallas 1991, writ denied) (quoting *Trevino*, 564 S.W.2d at 689 (Tex. 1978)).

113. *See, e.g.*, Estate of Newbill, 781 S.W.2d 727, 729 (Tex. App.—Amarillo 1989, no writ) (examining the language of the document to determine whether the forfeiture clause applied).

114. *See, e.g.*, Perry v. Rogers, 114 S.W. 897, 899 (Tex. Civ. App.—Texarkana 1908, no writ) (opining a testator who complies with the law can freely dispose of property).

115. *See* Gunter v. Pogue, 672 S.W.2d 840, 842–43 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (connecting the broad power of disposition to the enforcement of no-contest clauses).

116. *See* Hammer v. Powers, 819 S.W.2d 669, 672–73 (Tex. App.—Fort Worth 1991, no writ) (concluding appellants forfeited their rights pursuant to a no-contest clause); *Gunter*, 672 S.W.2d at 844–45 (determining will contestants who could not show good faith and probable cause were not entitled to distributions); Massie v. Massie, 118 S.W. 219, 219 (Tex. Civ. App.—Dallas 1909, no writ) (discussing a contestant whose conduct invoked a no-contest clause and thus was owed nothing under the will); *Perry*, 114 S.W. at 899 (holding a forfeiture clause appropriately deprived appellant of devise).

> There are public policy considerations both favoring and disfavoring enforcement of no-contest clauses in wills. The view favoring enforcement of these clauses is that they allow the intent of the testator to be given full effect and avoid vexatious litigation, often among family members of the same family. Such contests often result in considerable waste of the estates and hard feelings that can never be repaired. On the other hand, those who are attempting, in good faith, to determine the true intent of the testator should not be punished upon a showing that they brought a contest in good faith and had probable cause for bringing such contest. It may be said that enforcement of *in terrorem* clauses under certain circumstances may be tantamount to a denial of access to the courts. Some jurisdictions allow the good faith and probable cause exception to defeat a forfeiture clause in a will. However, there are other jurisdictions declining to follow such rule.[117]

Although enforceable, courts strictly construe no-contest clauses in an effort to avoid forfeiture whenever possible.[118] Texas courts also seem willing to accept "good faith and probable cause" as a mitigation defense or excuse.[119] None of these cases, however, has actually applied this defense to salvage what would otherwise amount to a forfeited bequest.[120] In addition, none of the courts in the reported Texas cases to date has considered the enforceability of a clause that attempts to prohibit even the mere filing of a contest, or one filed whether or not brought in good faith and with probable cause.

In any case, the contestant waives the issue unless he or she pleads the good faith and probable cause exception and obtains an affirmative jury finding on the issue.[121] Cases addressing good faith and probable cause under section 243 of the Texas Probate Code may provide guidance on the

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117. *Gunter*, 672 S.W.2d at 842–43 (internal citations omitted).

118. *See* Sheffield v. Scott, 662 S.W.2d 674, 676 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) ("As a general rule forfeiture provisions in a will are to be strictly construed . . . .").

119. *See* Calvery v. Calvery, 122 Tex. 204, 55 S.W.2d 527, 530 (1932) ("[A] forfeiture of rights under the terms of a will not be enforced where the contest of the will was made in good faith and upon probable cause.") (citations omitted); *Hammer*, 819 S.W.2d at 673 (examining the requirement of good faith and probable cause to avoid forfeiture under a will with a no-contest clause); *Sheffield*, 662 S.W.2d at 676 (discussing the requirement of both probable cause and good faith in avoiding forfeiture).

120. *See Calvery*, 55 S.W.2d at 529–30 (finding an attempt to convert a life estate to a fee simple interest under the rule in Shelley's case did not amount to a will contest); *Hammer*, 819 S.W.2d at 673 (concluding appellants did not demonstrate good faith and probable cause); *Sheffield*, 662 S.W.2d at 677 (construing appellants' action as a "mere filing" of a contest motion insufficient to trigger the no-contest clause).

121. *See Gunter*, 672 S.W.2d at 844 ("If appellees had sought to defeat the forfeiture clause, they had the burden to come forward with proof that their original actions of contest were based in good faith and with probable cause."); *Hammer*, 819 S.W.2d at 673 (holding contestants failed to plead or prove that the contest was "in good faith and upon probable cause").

relevant facts.[122]

A no-contest clause may also be invalid as applied to minors and incompetent beneficiaries because, if the clause was enforced, a guardian acting at the court's direction would be divested of the responsibilities otherwise imposed on him or her by law.[123] Broad application of this exception, however, would certainly frustrate the testator's intent to reduce or eliminate litigation concerning the estate. The better course of action for a guardian representing a potential minor or incompetent contestant would be to exercise due diligence to investigate the facts before filing a contest, thus, arguably making the good faith and probable cause defense available if the contest is unsuccessful.[124] If a third party files a contest, the guardian or attorney *ad litem* for an incapacitated beneficiary may prefer to remain neutral and simply ride the contestant's coattails. Importantly, the result of the contest, good or bad, will be res judicata to the incapacitated beneficiary's interest if he or she is in privity with, or is within the same class of beneficiaries as the contestant.[125] Therefore, the guardian should ensure the contestants pursue the claim competently and diligently, and that the interests of the incapacitated beneficiary are not adversely affected by any settlement or judgment.

3. Events Not Triggering No-Contest Clauses

a. A request for turnover relief that "did not oppose the will or attempt to invalidate any of its provisions."[126]

b. Concurrently filing an application to probate a will with an alternative application to probate an earlier will.[127]

c. A suit to construe a will by filing an action for declaratory

122. *See* Ray v. McFarland, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.) (finding sufficient evidence to support jury's conclusion that the will contestant did not act in good faith, or with just cause, when challenging a will that stripped her of benefits under a previous will); Collins v. Smith, 53 S.W.3d 832, 842–43 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (upholding jury's finding that appellants did not act "in good faith and with just cause" when offering a 1994 will when evidence showed testator was of sound mind when executing a 1998 will).

123. *See* Stewart v. RepublicBank, Dallas, N.A., 698 S.W.2d 786, 787 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (finding persuasive the rationale of other jurisdictions that invalidated forfeiture clauses where the guardian contested on behalf of a minor (citing Farr v. Whitefield, 33 N.W.2d 791 (Mich. 1948))).

124. *See Gunter*, 672 S.W.2d at 845 (finding it incumbent on appellees to obtain a finding of "good faith and probable cause" on a will admitted to probate).

125. *See In re* Estate of Ayala, 986 S.W.2d 724, 727 (Tex. App.—Corpus Christi 1999, no pet.) (holding appellants were barred by res judicata due to their brother's prior unsuccessful contest).

126. Badouh v. Hale, 22 S.W.3d 392, 397 (Tex. 2000).

127. *See* Estate of Foster, 3 S.W.3d 49, 52 (Tex. App.—Amarillo 1999, pet. denied) (concluding filing for probate of a will in the alternative did not constitute a contest).

judgment.[128]

d. A request for partition or accounting.[129]

e. A suit to ascertain the testator's intent.[130]

f. A suit to establish the community or separate character of property.[131]

g. A suit against the fiduciary for conversion and to recover trust property.[132]

h. An action to remove an executor.[133]

i. An action to establish the validity of debt allegedly owed by the estate.[134]

j. The "mere filing" of a will contest that was withdrawn or dismissed on procedural grounds before any other action was taken.[135]

4. No-Contest Clauses In Trust Actions

Until August 2001, Texas courts published no opinions construing or applying a no-contest clause in the context of trust litigation. Case law in

128. Calvery v. Calvery, 122 Tex. 204, 55 S.W.2d 527, 530 (1932); *In re* Estate of Hodges, 725 S.W.2d 265, 268 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.); Roberts v. Chisum, 238 S.W.2d 822, 825 (Tex. Civ. App.—Eastland 1951, no writ); Upham v. Upham, 200 S.W.2d 880, 883 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.).

129. *See In re* Estate of Minnick, 653 S.W.2d 503, 507–08 (Tex. App.—Amarillo 1983, no writ) (citations omitted) ("If [appellant] is contending that the requests for accounting, partition, and distribution are contests within the terms of a forfeiture clause, the law is well settled to the contrary.").

130. *See* First Methodist Episcopal Church S. v. Anderson, 110 S.W.2d 1177, 1184 (Tex. Civ. App.—Dallas 1937, writ dism'd w.o.j.) (deciding a suit, brought upon probable cause and good faith "to ascertain the intention of the testator," was not an attempt to vary the will).

131. *See* Ferguson v. Ferguson, 111 S.W.3d 589, 599 (Tex. App.—Fort Worth 2003, pet. denied) (finding widow's challenge of inventory characterizing certain assets as separate rather than community property did not offend the *in terrorem* clause); Hodge v. Ellis, 268 S.W.2d 275, 287 (Tex. Civ. App.—Fort Worth 1954) (holding a trespass to try title suit to determine community property status was not a contest), *aff'd in part, rev'd in part*, 155 Tex. 351, 277 S.W.2d 900 (1955).

132. *See* Dulak v. Dulak, 496 S.W.2d 776, 780, 782 (Tex. Civ. App.—Austin 1973) (determining suit to recover property due under a will was "[f]ar from attacking the validity of their father's will"), *rev'd on other grounds*, 513 S.W.2d 205 (Tex. 1974).

133. *See* McLendon v. McLendon, 862 S.W.2d 662, 679 (Tex. App.—Dallas 1993, writ denied) (finding an *in terrorem* clause does not bar action against a co-executor for alleged breach of fiduciary duty), *disapproved on other grounds*, Tex. Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240 (Tex. 2002); Estate of Newbill, 781 S.W.2d 727, 729 (Tex. App.—Amarillo 1989, no writ) (deciding appellee's challenge of executor's appointment did not offend a forfeiture clause).

134. *See In re* Estate of Hamill, 866 S.W.2d 339, 345 (Tex. App.—Amarillo 1993, no writ) (claiming "[a]n action to determine the validity of a debt assertedly owed by an estate" is comparable to suits for declaratory judgment or to challenge an executor's suitability in that they do not constitute a contest of the will).

135. *See* Sheffield v. Scott, 662 S.W.2d 674, 677 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (noting the clause in question did not speak to the "mere filing" of a contest).

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other states is equally scant. Courts addressing this issue, however, appeared to treat no-contest clauses in trusts similar to no-contest clauses found in wills.[136]

In the 1991 unpublished opinion of *McLendon v. Mandel*,[137] the Dallas Court of Appeals, recognizing the lack of Texas cases "determining the validity of a dispute[] and forfeiture clause in an *inter vivos* trust," simply declared that the issue would be decided by analogy to "similar estate law cases."[138] In that case, as in many of the will contest cases, the court found that the dispute provision did not violate public policy, but also held that the beneficiary's action for breach of fiduciary duty did not fall within the strictly construed terms of the provision.[139]

The first published opinion in Texas dealing with a trust's no-contest clause was issued on August 30, 2001. In *Conte v. Conte*,[140] one co-trustee of a family trust brought a declaratory judgment action to determine whether an action to remove another co-trustee would violate the trust's *in terrorem* provision.[141] The clause under consideration provided as follows:

> If *any beneficiary or remainderman* under this trust agreement *in any manner, directly or indirectly, contests or challenges this trust or any of its provisions*, any share or interest in any trust established by this instrument given to that contesting beneficiary or remainderman under this instrument is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary or remaindermen had predeceased the Grantors without descendants.[142]

Additionally, the trust lacked provisions to remove a trustee.[143] The trial court granted the plaintiff co-trustee's partial summary judgment motion and held, as a matter of law, that the proposed removal action by one co-trustee against another co-trustee would not violate the clause.[144] The court of appeals, applying what it deemed to be a required strict

136. *See* Poag v. Winston, 241 Cal. Rptr. 330, 337 (Ct. App. 1987) (discussing the general rule of strict construction in no-contest clauses for both wills and trusts); *see also* Jo Ann Engelhardt, *In Terrorem Inter Vivos: Terra Incognita*, 26 REAL PROP. PROB. & TR. J. 535, 556–61 (1991) (noting some courts apply a probable cause exception, and a rule of strict construction, for both wills and trusts).

137. McLendon v. Mandel, No. 05-90-01329-CV, 1991 WL 167093 (Tex. App.—Dallas August 30, 1991, writ denied) (not designated for publication).

138. *Id.* at *3.

139. *See id.* at *1–3 (holding dispute provision was not void as against public policy, but that these provisions also did not prevent suit against the trustee).

140. Conte v. Conte, 56 S.W.3d 830 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

141. *Id.* at 831.

142. *Id.*

143. *Id.*

144. *Id.*

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construction rule to the clause—and without citation to any authority—held a co-trustee did not fall within the class of persons potentially covered by the clause and that, despite targeting a co-trustee, a removal action was not a contest of a provision of the trust.

> The *in terrorom* clause states that a beneficiary or remainderman is prohibited from "contest[ing] or challeng[ing] this trust or any of its provisions." Applying a strict construction to the clause, as we must, we find two bases to support the trial court's judgment. First, this language does not prohibit or even address actions *by a trustee.* Thus, an action by one trustee to remove another would not violate the clause. Second, neither this clause nor any other provision of the trust *addresses the removal of a trustee*; the trust agreement does not expressly prohibit anyone, whether remainderman, beneficiary, or co-trustee, from seeking removal of a trustee. Therefore, the trust provisions of the Texas Property Code, not the trust, govern removal of a trustee. Because the trust is silent regarding the removal of a trustee, even a beneficiary or remainderman who sought removal of a trustee would not violate the *in terrorem* clause. Thus, we agree with Susan that the declaratory judgment is consistent with a strict construction of the *in terrorem* clause.[145]

The court bolstered its conclusion by analogizing the case to will contests where courts held an action to remove an executor, or to challenge his or his qualifications to serve, does not trigger the no-contest clause.[146]

More recently, the Houston First District Court of Appeals construed a similar *in terrorem* clause in *Di Portanova v. Monroe.*[147] In that case, the guardian of the trust beneficiary's estate sought a declaration giving the trustees authorization to fund a proposed gift to the trust beneficiary's personal guardians.[148] Even though the court held that there was no justiciable controversy because the action infringed on discretion allocated solely to the trustees, the court held the estate guardian did not violate the trust's *in terrorem* clause because it "did not seek to modify, vary, set aside, or nullify the terms."[149]

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145. *Id.* at 832 (emphasis added) (footnotes omitted) (citation omitted).

146. *Id.* at 832–33 (citing McLendon v. McLendon, 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied), *disapproved on other grounds*, Tex. Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240 (Tex. 2002)); *In re* Estate of Newbill, 781 S.W.2d 727, 729 (Tex. App.—Amarillo 1989, no writ).

147. *See* Di Portanova v. Monroe, 229 S.W.3d 324, 327–28 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (considering the effect of an *in terrorem* clause in a declaratory judgment action involving a beneficiary and trustee).

148. *Id.* at 328.

149. *Id.* at 333.

D. *Limitations*

1. Texas Probate Code Section 10: Opposition

Section 73 of the Texas Probate Code states that a party must offer a will and a court must admit the will to probate within four years of the testator's death.[150] Under section 10 of the Texas Probate Code, a party may file an opposition at any time before a court admits the will to probate.[151] Therefore, the initial limitations period for opposing an unprobated will is within four years after the testator's death.[152]

An extension beyond the four-year limitations period under section 73 is allowed for probate of the will as a muniment of title if the proponent of the will proves no default in failing to timely apply.[153] Courts have defined "default" as the failure to act with reasonable diligence, and is normally a fact question.[154] Evidence of one proponent's default will not extinguish the right of other proponents who are not in default to offer the will.[155] Therefore, filing a timely section 10 opposition even at a late date, is not only possible, but may be crucial. Essentially, even though a will offered for probate more than four years after the testator's death may be probated only as a muniment of title, orders granting letters of administration or admitting a will to probate outside the limitations period are neither void nor subject to collateral attack.[156]

2. Texas Probate Code Section 93: Contest

a. General Rule: Two Years After Probate Order

Under section 93 of the Texas Probate Code, a party must file a contest

150. TEX. PROB. CODE ANN. § 73 (West 2003).

151. *Id.* § 10.

152. *Id.* §§ 10, 73.

153. *In re* Estate of McGrew, 906 S.W.2d 53, 55–56 (Tex. App.—Tyler 1995, writ denied) (citations omitted).

154. Kamoos v. Woodward, 570 S.W.2d 6, 8 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Brown v. Byrd, 512 S.W.2d 753, 755 (Tex. Civ. App.—Tyler 1974, no writ); *see Estate of McGrew*, 906 S.W.2d at 56 (finding no default under section 73 where appellant failed to present evidence showing a lack of diligence in probating a will (citing *Brown*, 512 S.W.2d at 755)).

155. *See* Lutz v. Howard, 181 S.W.2d 869, 872 (Tex. Civ. App.—Eastland 1944, no writ) (articulating one proponent's default does not extinguish the right of other proponents to offer a will).

156. *See* Nelson v. Bridge, 98 Tex. 523, 86 S.W. 7, 9–10 (1905) (suggesting a court is not stripped of jurisdiction in attempting to grant administration or probate a will after four years elapses); Townsend v. Phillips, 545 S.W.2d 898, 900 (Tex. Civ. App.—Texarkana 1977, no writ) (opining that a person may move to probate a will outside the four-year period where a different party began the probate process during the statutory period but was unable to produce the will).

within two years after the will's admission to probate.[157] Opposing a probated will by filing an application for the probate of an earlier-dated will is considered a contest and will be barred if not brought within the two-year period.[158] Courts do not, however, consider filing an application for probate of a *later-dated* will a contest to the earlier will and is, therefore, exempt from the two-year limitations period.[159] Although it must still meet the requirements of section 73, section 93 expressly creates an exception to the two-year limitations rule for minors and persons *non-compos mentis* by providing an additional two years within which they may institute a will contest after removal of any disability.[160] Consistent with the limitations requirements in other types of cases, the timely filing of the contest alone is not sufficient—due diligence must be exercised in securing service of process as well.[161]

b. Fraud and the Discovery Rule

In cases involving fraud, breach of fiduciary duty, or forgery, the statute of limitations under section 93 is tolled until the wrong is "discovered or should have been discovered by exercise of ordinary care and diligence."[162] To avoid the application of the section 93 limitations because of fraud, the party alleging the fraud must prove that the fraud was "extrinsic" rather than "intrinsic."[163] "Fraud is considered 'intrinsic'

157. PROB. § 93 (West 2003). Note that the section 93 limitations period runs from the date of the order admitting the will—not from the date of the testator's death.

158. *See* Klein v. Dimock, 705 S.W.2d 405, 407 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.) (finding the probate of an earlier will to be "a direct attack upon the later"); Stoll v. Henderson, 285 S.W.3d 99, 106 (Tex. App.—Hous. [1st Dist.] 2009, no pet.) (citing *Klein v. Dimock* in affirming that the offer of a later will, solely to prove revocation, is a contest to which two-year statute of limitations applies); *see also* Stovall v. Mohler, 100 S.W.3d 424, 427–29 (Tex. App.—San Antonio 2002, pet. denied) (holding section 93 applies when "a party attempts to probate an earlier will after a later will has been admitted to probate," despite the fact that the later will was subsequently found invalid due to forgery).

159. *See* Estate of Morris, 577 S.W.2d 748, 752 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (concluding a timely probate of a testator's final will is not a contest of the previous will).

160. PROB. § 93; *see* Ladehoff v. Ladehoff, 436 S.W.2d 334, 337–38 (Tex. 1968) (noting section 93 grants a minor an additional two years to commence a contest after removal of the disability).

161. *See* Kotz v. Kotz, 613 S.W.2d 760, 762 (Tex. Civ. App.—Beaumont 1981, no writ) (dismissing suit filed one day before expiration of statute of limitations where service was not diligently pursued and no request for trial was made for five years).

162. *See* PROB. § 93 (allowing suit within two years of removal of disabilities); Aston v. Lyons, 577 S.W.2d 516, 519 (Tex. Civ. App.—Texarkana 1979, no writ) (citations omitted); *accord* Neill v. Yett, 746 S.W.2d 32, 35 (Tex. App.—Austin 1988, writ denied) ("Limitations begin to run when the fraud is discovered or from the time the fraud might have been discovered through reasonable diligence." (citing Sherman v. Sipper, 137 Tex. 85, 152 S.W.2d 319 (1941))).

163. *See Neill*, 746 S.W.2d at 35 (citation omitted) (requiring extrinsic fraud instead of intrinsic fraud to invalidate a probate judgment).

when the fraudulent acts pertain to an issue that was, or could have been, litigated in the original suit" or, in will contest cases, during the original proceeding in which the will was admitted to probate.[164] Fraud is considered to be extrinsic "when the fraudulent acts prevent a party from either having a trial or prevent him from having a fair opportunity to present his case."[165]

c. Constructive Notice Versus Discovery Rule

As previously noted, the discovery rule portion of section 93 tolls the running of the statute of limitations until the wrong is "discovered or should have been discovered by the exercise of ordinary care and diligence."[166] Through the application of the doctrine of constructive notice, some cases indicate that limitations may begin to run against will contestants on the date the will is filed for probate, even though they had no actual notice of the filing, or even of the testator's death.[167] If carried to its logical extreme, this doctrine may render the discovery rule provisions of section 93 meaningless in any case where an unnatural disposition is, or should be, apparent from the face of the will.

The constructive notice doctrine is considered appropriate in probate proceedings because these proceedings are actions in rem rather than in personam and, therefore, bind all persons with or without actual notice unless set aside as provided by law.[168] Because of the in rem nature of probate proceedings, due process does not require personal service in will contests.[169] A person interested in the decedent's estate is charged with constructive notice of all information contained in the documents filed in the probate proceeding without regard to actual notice or diligence. Thus,

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164. *Id.*

165. *See id.* (holding fraud apparent from the face of the will, in this case, omission by the testator, was intrinsic fraud that would not toll limitations); *see also* Mills v. Baird, 147 S.W.2d 312, 316–17 (Tex. Civ. App.—Austin 1941, writ ref'd) (defining fraud as extrinsic when it "prevents a party from having a trial or from presenting all of his case to the court").

166. *Aston*, 577 S.W.2d at 519 (citations omitted).

167. *See Neill*, 746 S.W.2d at 36 (charging appellant with notice after she received nothing in her grandfather's will).

168. *See* Ladehoff v. Ladehoff, 436 S.W.2d 334, 336–37 (Tex. 1968) (asserting an in rem proceeding, such as the admission of a will to probate, is binding on the whole world independent of notice (citing McCamant v. Roberts, 66 Tex. 260, 1 S.W. 260 (1886))); *Neill*, 746 S.W.2d at 36 (defining probate proceedings as actions in rem); *see also* TEX. PROB. CODE ANN. § 2(e) (West 2003) (recognizing the administration of an estate as a proceeding in rem).

169. *See Neill*, 746 S.W.2d at 36 (charging interested persons in an estate with notice of the substance of the probate record (citing Mooney v. Harlin, 622 S.W.2d 83 (Tex. 1981))); Estate of Ross, 672 S.W.2d 315, 318 (Tex. App.—Eastland 1984, writ ref'd n.r.e.) (holding failure to obtain personal service does not violate due process), *cert. denied*, 470 U.S. 1084 (1985).

in *Mooney v. Harlin*,[170] the claim of the testator's long-time companion was time barred because the suit was filed four years and seven months after the will was admitted to probate and an examination of the probate records would have disclosed the alleged fraud, namely that the testator made no provision for her in his will.[171]

"Constructive notice in law creates an irrebuttable presumption of actual notice."[172] The "strong public interest in according finality to probate proceedings" justifies the harsh results that can arise from the application of the constructive notice doctrine in these cases.[173] In *Little v. Smith*,[174] the Supreme Court of Texas, however, refused to extend the doctrine of constructive notice to an adoptee who, due to her inability to access her adoption records, did not know she was biologically related to the testator within the two-year limitations period under section 93. The *Little* court noted, "Constructive notice is usually applied when a person knows where to find the relevant information but failed to seek it out."[175] Nevertheless, the court refused to create an exception to section 93 for adoptees because the strong public policy favoring the confidentiality of adoption proceedings might be negatively impacted by allowing these contestants to go forward.[176]

d. Texas Probate Code Sections 89A, 89B, and 89C: Probate As Muniment of Title

A testamentary instrument may be probated as a "muniment of title" more than four years after the decedent's death, and courts are fairly liberal in finding sufficient proof of an "excuse" for the proponent's failure to timely offer the will.[177] A party challenging a probate court's admission

170. Mooney v. Harlin, 622 S.W.2d 83 (Tex. 1981).

171. *Id.* at 85; *accord Neill*, 746 S.W.2d at 36 (holding testator's granddaughter, who was omitted from will, had constructive notice of that fact once the will was admitted to probate).

172. *Mooney*, 622 S.W.2d at 85 (citations omitted).

173. Little v. Smith, 943 S.W.2d 414, 421 (Tex. 1997); *see* In re Estate of Rothrock, 312 S.W.3d 271, 274 (Tex. App.—Tyler 2010, no pet.) ("[T]he policy of the law is to enforce the timely probate of wills."); *Mooney*, 622 S.W.2d at 85 (holding companion of thirty-two years had constructive notice of man's death and thus claim for fraud was barred by statute of limitations); *Neill*, 746 S.W.2d at 36 (deciding granddaughter had constructive notice of grandfather's will because she received no benefit from its probate).

174. Little v. Smith, 943 S.W.2d 414 (Tex. 1997).

175. *Id.* at 421 (citations omitted); *see* Frost Nat. Bank v. Fernandez, 315 S.W.3d 494 (Tex. 2010) (confirming the *Little* court decision by rejecting application of the discovery rule for adoptee heirship claims).

176. *Id.* at 422 (noting the legislative scheme that protects the identities of biological parents).

177. *See, e.g.*, *In re* Estate of McGrew, 906 S.W.2d 53, 56 (Tex. App.—Tyler 1995, writ denied) (admitting will to probate sixteen years after testator's death on showing that plaintiffs were not in

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of a will as a muniment of title must show clear abuse of discretion.[178] Section 89A of the Texas Probate Code specifies the contents of an application to probate a will as a muniment of title.[179] Section 89B outlines the proof required to probate a will as a muniment of title.[180] An order admitting a will to probate as a muniment of title as part of the county records reflects that title passed from the decedent to the new owners specified in his or her will, thereby creating a link in the chain of title.[181] A party may also probate holographic wills as muniments of title.[182]

e. Texas Probate Code Sections 31 and 93: Statutory and Equitable Bills of Review

There is a two-year limitations period for statutory bills of review filed under section 31 of the Texas Probate Code.[183] A party must file an equitable bill of review to set aside a prior adverse judgment after a trial court loses plenary power and within the residual four-year statute of limitations period as set forth in section 16.051 of the Texas Civil Practice & Remedies Code.[184] Either type of bill of review may be available to a potential will contestant; however, the statutory bill of review for setting aside orders of a probate court under section 31 of the Texas Probate Code is *not* an exclusive remedy.[185] To set aside an order using a bill of review, the petitioner must plead and prove: (1) the existence of a meritorious defense; (2) that petitioner was precluded from raising due to "fraud, accident, or wrongful act of his opponent"; and (c) that the failure to present such defense was "unmixed with any fault or negligence of his

default); Chovanec v. Chovanec, 881 S.W.2d 135, 137 (Tex. App.—Houston [1st Dist.] 1994, no writ) (offering will as muniment of title thirteen years after death).

178. *See* Washington v. Law, 519 S.W.2d 953, 954 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (requiring appellant to prove a clear abuse of discretion (citing Landry v. Travelers Ins. Co., 458 S.W.2d 649 (Tex. 1970))).

179. TEX. PROB. CODE ANN. § 89A (West 2003).

180. *Id.* § 89B.

181. *Id.* § 89C(c).

182. *See, e.g.*, Trim v. Daniels, 862 S.W.2d 8, 9, 11 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (affirming summary judgment on a holographic will admitted to probate as a muniment of title).

183. PROB. § 31 (stating the guidelines for bills of review).

184. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West 2002) (requiring every action with no express limitations period to be brought within four years after the cause of action accrues).

185. *See* Power v. Chapman, 994 S.W.2d 331, 334 (Tex. App.—Texarkana 1999, no pet.) (rejecting assignment of error when trial court, contrary to appellant's claim, did not hold that the statutory bill of review was an exclusive remedy).

own."[186]

Statutory bills of review under section 31 are procedurally less restrictive than equitable bills of review; however, a party who ignores available legal remedies cannot use a bill of review to set aside an adverse judgment.[187] To succeed under a section 31 statutory bill of review, the error need not appear on the face of the record; the petitioner may allege and prove error to the trial court by a preponderance of the evidence at a trial.[188]

f. Trust Actions

The four-year limitations period is applicable to contests to set aside an *inter vivos* trust on grounds of fraud (including undue influence), breach of contract, or breach of fiduciary duty.[189] The residual four-year limitations period should apply to actions to set aside an *inter vivos* trust on all other equitable grounds, including claims that the settlor lacked the requisite mental capacity when he or she executed the trust.[190]

E. *Who Will Have the Burden of Proof?*

Knowing which party has the burden of proof on a given issue in a will contest is essential to (a) determining the sufficiency of the pleadings and special exceptions;[191] (b) determining the order of the trial and who has

186. *Id.* at 335 (quoting Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 407 (Tex. 1987)); *accord* Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996, 998 (1950) (requiring a party to prove a meritorious defense, demonstrate inability to raise this defense due to fraud, accident, or other wrongful conduct by opponent, and show a lack of their own negligence or fault). *See generally Haisler v. Coburn*, 10-09-00275-CV, 2010 WL 2953372, at *2 (Tex. App.—Waco July 28, 2010, pet. denied) (finding that "[o]nly extrinsic fraud will support a bill of review").

187. *See Power*, 994 S.W.2d at 335 (refusing to grant bill of review on statutory or equitable grounds where petitioner failed to exercise available remedies within the statute of limitations). *But see* Hamilton v. Jones, 521 S.W.2d 350, 353 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (citations omitted) (stating the ordinary requirement of diligence in seeking a new trial and pursuing a standard appeal does not apply under section 31 of the Texas Probate Code).

188. *See* Hoover v. Sims, 792 S.W.2d 171, 173 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (citations omitted) (asserting that error need only be proven by a preponderance of the evidence, and need not appear on the face of the record).

189. *See* CIV. PRAC. & REM. § 16.004 (West 2002) (laying out the four-year limitation period for fraud, breach of fiduciary duty, and contract to convey real property).

190. *Id.* § 16.051; *see* Mitchell v. Long, No. 01-94-00848-CV, 1996 WL 659412, at *4 (Tex. App.—Houston [1st Dist.] Nov. 14, 1996, pet. dism'd) (not designated for publication) (agreeing with lower court that a suit to set aside trust amendments based on lack of capacity fell within section 16.051's four-year limitation).

191. *See* Turcotte v. Trevino, 499 S.W.2d 705, 720 (Tex. App.—Corpus Christi 1973, writ ref'd n.r.e.) (noting appellants' pleadings were adequate to "clothe them with the necessary 'interest' to contest the will"), *rev'd on other grounds on appeal after remand*, 564 S.W.2d 682 (Tex. 1978). Thus, any insufficiency in the pleadings would expose a party to special exceptions. TEX. R. CIV. P. 91.

the right to open and close at the trial;[192] (c) drafting, responding to, and ruling on traditional and no-evidence motions for summary judgment;[193] and (d) submitting jury questions.[194] Unlike most other forms of litigation, the burden of proof in will contests is a moving target depending on when the contest is filed and the types of issues involved. In the simplest terms, burden of proof consists of two components. The first requirement, or burden, is coming forward with "some" evidence to support the claim.[195] Then, assuming this evidence component is satisfied, there is the second burden of obtaining an affirmative finding on the facts essential to the claim by the trier of fact, otherwise known as the "burden of persuasion."[196] While the burden of coming forward with some evidence may shift from one party to the other as the trial progresses, the second component—the burden of persuasion—never shifts. Thus, the overall burden of proof will always remain on the party who started with it.[197]

1. Proponent's Burden of Proof Before the Will Is Admitted to Probate

The proponent of a will that is contested or opposed prior to the time the will is admitted to probate has the burden to prove that (a) the testator was of age and had testamentary capacity at the time the will was executed;[198] (b) the will was not revoked;[199] and (c) the will was executed with the requisite formalities under section 59 of the Texas Probate

192. *See* TEX. R. CIV. P. 265 (allowing party with burden of proof to address jury first, followed by the adverse party); *Id.* R. 266 (indicating plaintiff has the right to open and conclude unless burden of proof rests with defendant).

193. *See id.* R. 166a(c), (i) (allowing a party to move for no-evidence summary judgment where there is no evidence of an element the adverse party has the burden of proving, or traditional summary judgment where the movant can show there is "no genuine issue as to any material fact" and thus is entitled to judgment as a matter of law).

194. *See id.* R. 278 (stating questions may not be submitted to the jury if raised by a general denial, rather than a written pleading, and that the burden of proof remains the same as under a general denial); *Id.* R. 279 (describing the process of curing an omission of an element of a claim from the jury charge).

195. *See, e.g.*, *In re* Estate of Flores, 76 S.W.3d 624, 629 (Tex. App.—Corpus Christi 2002, no pet.) (citations omitted) (noting a respondent in a no-evidence motion for summary judgment must bring forth more than a scintilla of probative evidence to entitle the respondent to trial).

196. *See, e.g.*, *id.* (articulating in a will contest where the will is admitted to probate, the burden falls to the contestant to demonstrate "by a preponderance of the evidence that the will is invalid").

197. *See, e.g.*, Huckaby v. Huckaby, 436 S.W.2d 601, 604–05 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (citing the established rule that one offering a will to probate ultimately bears the burden of persuasion that it was not revoked).

198. TEX. PROB. CODE ANN. § 88(b)(1) (West Supp. 2012).

199. *Id.* § 88(b)(3).

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Code.[200]

This burden of proof never shifts to the contestant, even if the will is "self-proved" as allowed by law.[201] The self-proving affidavit is merely one method by which the proponent of the will can meet the initial task of coming forward with some evidence on each of these essential requirements.[202] If the self-proving affidavit is valid on its face or otherwise admitted into evidence by the court over the contestant's objections, the proponent will have satisfied the initial evidentiary burden, and the burden of coming forward with some evidence to rebut the prima facie case created by the self-proving affidavit will then shift to the contestant. However, this does not equate to a shift in the burden of proof.

2. Contestant's Burden of Proof After the Will Is Admitted to Probate

Once a proponent admits the will to probate, the burden of proof to negate the prima facie case of testamentary capacity, non-revocation, and valid execution created by the order admitting the will is on the contestant.[203]

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200. *Id.* § 59 (West 2003); *Id.* § 88(b)(2) (West Supp. 2012); *see* Douthitt v. McLeroy, 539 S.W.2d 351, 352 (Tex. 1976) (per curiam) (finding the burden of proof on attestation remained with the proponent of a will that contained signatures on the self-proving affidavit, and not on the will itself); *In re* Estate of Montgomery, 881 S.W.2d 750, 753 (Tex. App.—Tyler 1994, writ denied) (declaring a will was signed, witnessed, and executed in accordance with the requirements of section 59); *In re* Estate of Hutchins, 829 S.W.2d 295, 299 (Tex. App.—Corpus Christi 1992, writ denied) (stating that wills failing to comply with all provisions of section 59 are void); Broach v. Bradley, 800 S.W.2d 677, 680 (Tex. App.—Eastland 1990, writ denied) (citation omitted) (pointing out that section 59 requires a self-proving affidavit only as an alternative to subscribing witnesses).

201. *See* Croucher v. Croucher, 660 S.W.2d 55, 57 (Tex. 1983) (determining burden to prove capacity did not shift despite self-proving will (citing Reynolds v. Park, 485 S.W.2d 807 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e))).

202. *See id.* at 56 (allowing testimony of witnesses and acquaintances to prove capacity); *In re* Estate of Price, 375 S.W.2d 900, 903 (Tex. 1964) ("Of course the self[-]proving provisions have only the effect of authorizing the substitution of affidavits in lieu of testimony offered before the court."), *superseded by statute on other grounds as stated in* Stiles v. Resolution Trust Corp., 867 S.W.2d 24 (Tex. 1993); *In re* Estate of Rosborough, 542 S.W.2d 685, 688 (Tex. Civ. App.—Texarkana 1976, writ ref'd. n.r.e.) (deciding the self-proving affidavit is an "alternative mode of proving a will"); *see also* Mahan v. Dovers, 730 S.W.2d 467, 470 (Tex. App.—Fort Worth 1987, no writ) (holding even though the will was self-proved, questions regarding possible substitution of pages precluded admission of will to probate).

203. *See In re* Estate of Flores, 76 S.W.3d 624, 629 (Tex. App.—Corpus Christi 2002, no pet.) (placing the burden on the contestant to show a will is invalid (citing Williams v. Hollingsworth, 568 S.W.2d 130, 132 (Tex. 1978))); Guthrie v. Suiter, 934 S.W.2d 820, 829 (Tex. App.—Houston [1st Dist.] 1996, no writ) (acknowledging an accepted self-proving will establishes a prima facie case and requires the contestant to provide refuting evidence); Gasaway v. Nesmith, 548 S.W.2d 457, 459

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3. Contestant's Burden of Proof: Undue Influence, Fraud, and Mistake

The contestant always has the burden of proof on the issues of undue influence, fraud, or mistake, regardless of when the contestant files the contest.[204] If a fiduciary relationship exists between the testator and the favored beneficiary, however, the "presumption of unfairness" may shift the burden of going forward with evidence of the transaction's fairness—for instance, demonstrating the testator would not have signed but for the undue influence—to the proponent.[205]

III. POTENTIAL GROUNDS FOR WILL CONTESTS

A. *Statutory Requirements for Proof of a Valid Will*

Practitioners must meticulously examine a will to determine if it appears defective or insufficient to meet any of the statutory execution requirements. An attorney should check the self-proving affidavit for facially apparent defects or for conflicts between the self-proving affidavit and the will that might preclude the use of the affidavit as proof.

B. *Texas Probate Code Section 59: Specific Requirements for Validity*

The elements required for proof of due execution of a will in Texas are set forth in section 59 of the Texas Probate Code.[206] If the will is validly self-proved, then no further proof of execution is required after admission into evidence.[207] Conversely, if a will is not self-proved, or if a self-

(Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (providing once "a will has been duly admitted to probate, the burden is upon the contestant of the will to establish its invalidity" (citing Renn v. Samos, 33 Tex. 760 (1870))).

204. *See* Cobb v. Justice, 954 S.W.2d 162, 165 (Tex. App.—Waco 1997, pet. denied) (declaring the burden of proving undue influence falls on the contestant (citing Evans v. May, 923 S.W.2d 712, 715 (Tex. App.—Houston [1st Dist.] 1996, writ denied))).

205. *See* Spillman v. Estate of Spillman, 587 S.W.2d 170, 172 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (suggesting evidence of fiduciary relationship creates a "presumption of undue influence" that "establish[es] the burden of producing evidence"); Rounds v. Coleman, 189 S.W. 1086, 1089 (Tex. Civ. App.—Amarillo 1916, no writ) (addressing the possibility that a fiduciary relationship will raise a presumption of undue influence); *cf.* Price v. Taliaferro, 254 S.W.2d 157, 163 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.) (noting that a devisee must prove the transaction was fair to overcome the presumption raised by the existence of a fiduciary relationship).

206. *See* TEX. PROB. CODE ANN. § 59 (West Supp. 2012) (outlining the requirements for proper execution of a will).

207. *See* Bracewell v. Bracewell, 20 S.W.3d 14, 26 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (finding the admission into evidence of a self-proved will creates a prima facie case of proper execution); *see also* Estate of Graham, 69 S.W.3d 598, 603 (Tex. App.—Corpus Christi 2001, no pet.) (noting self-proving affidavit amounts to prima facie evidence of will execution). Note that in

proved will is admitted into evidence, but a contestant makes an appealable objection, or presents evidence to rebut any necessary element contained in the self-proving affidavit, then additional proof of each requirement enumerated in sections 59, 88b(1), and 88b(2) must be provided.[208]

1. The will must be in writing. The purpose of requiring written wills is to "enable the testator to place it beyond the power of others, including the courts, to change or add to the will after his death or to show that he intended something different from the expressed language of the will."[209]

2. It must be "signed by the testator in person or by another person for him by his direction and in his presence."[210] Almost any form of signature, including the mark of the testator, in almost any location on the document, is sufficient as long as it appears from the face of the document the testator made the signature for the purpose of "express[ing] approval of the instrument as his will."[211] If another person signs for the testator, it must be at the testator's direction, not at the suggestion of another person who thinks the testator needs help.[212]

Graham, the heirs filed a contest after the proponents admitted the will to probate. *Id.* at 602. The self-proving affidavit, although held to be in substantial compliance with section 59, does not contain a jurat—only an acknowledgment. *Id.* at 604. It is questionable whether the court's conclusion would be the same, or correct, if the objection to the affidavit was made before the will was admitted to probate. Cutler v. Ament, 726 S.W.2d 605, 607 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (holding acknowledgment of witnesses not equivalent to sworn jurat, and therefore, not sufficient under section 59).

208. *See* PROB. § 84(b) (stating requirements to prove a will when it is not self-proven).

209. Preston v. Preston, 617 S.W.2d 841, 844 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.) (citing Huffman v. Huffman, 161 Tex. 267, 339 S.W.2d 885, 888 (1960)). *But see* Act of March 16, 1955, 54th Leg., R.S., ch. 55, § 65, 1955 TEX. GEN. LAWS 88, 109 (allowing for probate of oral or nuncupative wills under limited circumstances; however, this statute was repealed and only applies to wills executed prior to September 1, 2007), *repealed by* Act of May 15, 2007, 80th Leg., R.S. ch. 1170, § 5.05, 2007 TEX. GEN. LAWS 4000, 4005.

210. PROB. § 59.

211. *See In re* Estate of Flores, 76 S.W.3d 624, 630 (Tex. App.—Corpus Christi 2002, no pet.) (using the Texas Penal Code definition of forgery, the court held the expert's testimony that testator's initials on each page of will and signature were genuine was sufficient to overcome claim of forgery); Luker v. Youngmeyer, 36 S.W.3d 628, 630–31 (Tex. App.—Tyler 2000, no pet.) (evaluating three separate pages, and concluding that the testator's signature functioned as a title for a trust rather than a testamentary disposition); Orozco v. Orozco, 917 S.W.2d 70, 73 (Tex. App.—San Antonio 1996, writ denied) (holding an "X" on the will by a testator a sufficient signature); Phillips v. Najar, 901 S.W.2d 561, 562 (Tex. App.—El Paso 1995, no writ) (finding a signature valid where, at testator's request, a rubber stamp of her signature was used, followed by an "X" in testatrix's handwriting beside the stamped signature); Barnes v. Horne, 233 S.W. 859, 859–60 (Tex. Civ. App.—Austin 1921, no writ) (determining a letter concluding "Your brother, Ed" was sufficiently signed); Lawson v. Dawson's Estate, 53 S.W. 64, 65 (Tex. Civ. App.—Dallas 1899, writ ref'd) (holding a handwritten will beginning "I, J. P. J. Dawson . . . make this, my last will and testament," sufficiently signed).

212. *See* Muhlbauer v. Muhlbauer, 686 S.W.2d 366, 376–77 (Tex. App.—Fort Worth 1985, no

3. The testator must sign the will with testamentary intent. The intent required for a document to constitute a will is the intent "to make a revocable disposition of property to take effect after the testator's death."[213] Courts determine intent based on the language in the will.[214] The context of an instrument's execution "may be looked to in determining whether the maker intended it to be a testamentary disposition of his property or merely to be used for some other purpose."[215]

4. The testator must know and understand the contents of the document he or she signs as his or her will. Absent suspicious circumstances, courts presume the testator meets this requirement.[216] At least one court held evidence of the testator's mistake about the contents of his or her will must be issue-specific.[217]

5. The will, if not wholly in the testator's handwriting, must be "attested by two or more credible witnesses above the age of fourteen years who shall subscribe their names thereto in their own handwriting in the presence of the testator."[218] Unless the will is holographic, two

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writ) (deciding that where testator's wife, at suggestion of his attorney, guided his hand, the signature requirement was not satisfied).

213. Cason v. Taylor, 51 S.W.3d 397, 405 (Tex. App.—Waco 2001, no pet.) (citation omitted); *accord* Estate of Graham, 69 S.W.3d 598, 608 (Tex. App.—Corpus Christi 2001, no pet.) (defining testamentary intent as the intent for a specific document to dispose of an estate); Price v. Huntsman, 430 S.W.2d 831, 832–33 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) (stating testamentary intent "does not depend upon the maker's realization that he is making a will"). "It is essential, however, that the maker shall have intended to express his testamentary wishes in the particular instrument offered for probate." *Price*, 430 S.W.2d at 833 (quoting Hinson v. Hinson, 154 Tex. 561, 280 S.W.2d 731, 733 (1955)). "And an instrument cannot be given effect as a will or codicil 'unless it was written and signed within the intention to make it a will . . . .'" *Id.* (quoting Caywood v. Caywood, 216 S.W.2d 821, 823 (Tex. Civ. App.—Waco 1949, writ ref'd)).

214. *See* Ayala v. Martinez, 883 S.W.2d 270, 272 (Tex. App.—Corpus Christi 1994, writ denied); *Cason*, 51 S.W.3d at 405 (holding intent was established by the language of the will (citing *Ayala*, 888 S.W.2d at 272)).

215. Shiels v. Shiels, 109 S.W.2d 1112, 1113 (Tex. Civ. App.—Texarkana 1937, no writ).

216. *See* Collins v. Smith, 53 S.W.3d 832, 837 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (noting the exception to the presumption that a testator knows the contents of a testamentary instrument signed by said testator where suspicious or unexplained circumstances exist); Gilkey v. Allen, 617 S.W.2d 308, 311 (Tex. Civ. App.—Tyler 1981, no writ) (citing the well-established rule that a testator of sound mind and capable of reading and writing is presumed to know the contents of the instrument signed); Boyd v. Frost Nat'l Bank, 145 Tex. 206, 196 S.W.2d 497, 507 (1946) (stating a testator is charged with knowledge of the contents of his or her will absent suspicious circumstances (citing Kelley v. Settegast, 68 Tex. 13, 2 S.W. 870, 872 (1887))).

217. *See In re* Estate of Flores, 76 S.W.3d 624, 630–31 (Tex. App.—Corpus Christi 2002, no pet.) (deciding testator's mistake as to declaration in the will—that he had one deceased child—was not relevant to issue of whether testator was mistaken as to other parts of the will, including his intent to disinherit the contestant).

218. TEX. PROB. CODE ANN § 59(a) (West Supp. 2012).

witnesses must attest to its validity. The witnesses' signatures may appear on a page separate from the testator's signature if it is clear the two pages go together.[219] If a notary who is present at the will's execution meets all the tests for a subscribing witness, the notary may testify to prove up the will, even though he or she signed as a notary, rather than a witness.[220]

Witnesses play an important role in the will execution process. Understanding the intricacies of the law in this area may increase chances of successful probate and help to anticipate potential attacks. As noted above, one of the most basic requirements is that the witnesses must sign their names in the presence of the testator. Texas courts are lenient with this requirement, adopting a "conscious presence test," which means that the witness must be in the testator's presence or near enough so that only slight exertion is necessary to view the attestation.[221] A witness signing in a completely separate room, however, is not in the conscious presence of the testator.[222] On the other hand, witnesses need not sign in each other's presence, nor must the testator sign in the presence of the witnesses or at the same time.[223] The bottom line is that courts are concerned with whether each witness signed the will in the presence of the testator, not vice versa.

Under Texas Probate Code section 61, courts presume witnesses credible unless they are also devisees or legatees under the will—meaning that those who stand to financially gain are not disinterested witnesses.[224]

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219. *In re* Estate of Plohberger, 761 S.W.2d 448, 450 (Tex. App.—Corpus Christi 1988, writ denied). *But see* Mossler v. Johnson, 565 S.W.2d 952, 956–57 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (determining a signature in the body of a will, rather than in a place designated for the witness's attestation, was consistent with the witness's testimony that she did not have intent to attest, thus finding the will not validly witnessed).

220. Estate of Teal, 135 S.W.3d 87, 91 (Tex. App.—Corpus Christi 2002, no pet.).

221. *See* Nichols v. Rowan, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (finding the existence of conscious presence if the testator could see the witnesses by moving slightly).

222. *See* Morris v. Estate of West, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (refusing to hold that the witnesses were in the testator's presence at the time they signed the document). The court noted that two solid walls separated the testator and the witnesses, who were in a different room, and observed that the testator would need to walk "four feet to the hallway" and an additional fourteen feet more until "he could have looked through the doorway and seen the witnesses" signing the documents). *Id.*

223. *See In re* Estate of McGrew, 906 S.W.2d 53, 58 (Tex. App.—Tyler 1995, writ denied) (recognizing a will as valid even though testator signed two years before witnesses); James v. Haupt, 573 S.W.2d 285, 289 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (citations omitted) (noting the order of signing is not important as long as it forms "parts of the same transaction").

224. *See* TEX. PROB. CODE ANN. § 61 (West 2003) ("Should any person be a subscribing witness to a will, and also be a legatee or devisee therein . . . such bequest shall be void . . . ."); Triestman v. Kilgore, 838 S.W.2d 547, 547 (Tex. 1992) (per curiam) (citation omitted) (stating the

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To put section 61 in context, assume that a testator includes her best friend in the will as a beneficiary and asks her to be a subscribing witness. This should immediately raise red flags to a skilled probate litigator because, as noted above, bequests to witnesses are generally void. The testator's best friend would be compelled to testify as a subscribing witness, but would unfortunately not receive her generous bequest.[225]

Furthermore, consider another scenario where a testator generously provides for her son in her will, yet makes the mistake of using him as a subscribing witness. This is slightly different because intestacy laws mandate that the testator's son "would have been entitled to a share of the estate" even if she never made a will.[226] Unlike the testator's best friend who received nothing, the son would get the lesser amount of the bequest in the will, or what he is entitled to under intestacy laws.[227] Also, as a strategic reminder, it is necessary to note that these rules do not preclude other attacks on the credibility of witnesses allowed by the general rules of evidence.[228] Finally, the witnesses do not have to know they are witnessing a will as opposed to some other legal document.[229]

C. *Texas Probate Code Section 88(b) Requirements*

In addition to the execution requirements of section 59 of the Texas Probate Code, section 88(b) sets forth the other facts a proponent must prove before probating a will.

1. Adult Status

If the testator's will is not self-proved, the proponent must offer proof that "the testator, at the time of executing the will, was at least eighteen

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provisions of the will reflecting no pecuniary benefits to witness was evidence that the witness was competent).

225. Note section 62 provides an exception to this rule, and a possible way for the testator's best friend to receive her bequest. Under this section, "[T]he bequest to the subscribing witness shall not be void if his testimony proving the will is corroborated by one or more disinterested and credible persons who testify that the testimony of the subscribing witness is true and correct." PROB. § 62 (West 2003).

226. *See id.* § 61 (stating the effect of a bequest when the beneficiary is also a subscribing witness).

227. *See id.* (providing that "he shall be entitled to as much of such share as shall not exceed the value of the bequest to him in the will").

228. *See, e.g.*, Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968) (explaining lay testimony may help establish testator's mental condition on the date will is executed).

229. *See* Davis v. Davis, 45 S.W.2d 240, 241 (Tex. Civ. App.—Beaumont 1931, no writ) (citation omitted) (clarifying if publication is not required by statute, there is no requirement that witnesses know they are signing a will); Brown v. Traylor, 210 S.W.3d 648, 666 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (approving the holding in *Davis*, 45 S.W.2d at 240).

years of age, or was or had been lawfully married, or was a member of the armed forces of the United States or of the auxiliaries thereof, or of the Maritime Service of the United States . . . ."[230] Proof of only one form of adult status is required.[231]

2. Testamentary Capacity

Section 88(b)(1) also requires proof that the testator was of sound mind when the will was executed.[232] Texas courts construe "sound mind," as used in the Probate Code, to mean "testamentary capacity."[233]

a. Testamentary Capacity Defined

To have testamentary capacity, the testator must "at the time of the execution of the will," have sufficient mental ability (1) "to understand the business in which she is engaged"; (2) to understand "the effect of her act in making the will"; (3) to know "the general nature and extent of her property"; (4) to recognize her "next of kin and the natural objects of her bounty"; and (5) to have sufficient memory "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."[234]

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230. PROB. § 88(b)(1).

231. *See In re* Estate of Hutchins, 829 S.W.2d 295, 299 (Tex. App.—Corpus Christi 1992, writ denied) (concluding it unnecessary to establish adult status by another means after already established by age).

232. PROB. § 88(b)(1).

233. *See In re* Neville, 67 S.W.3d 522, 524 (Tex. App.—Texarkana 2002, no pet.) (recognizing Texas courts define "sound mind" as testamentary capacity); Bracewell v. Bracewell, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citations omitted) (acknowledging the terms testamentary capacity and sound mind are synonymous in Texas courts).

234. Lindley v. Lindley, 384 S.W.2d 676, 678 n.1 (Tex. 1964); *see* Prather v. McClelland, 76 Tex. 574, 13 S.W. 543, 546 (1890) (outlining the requisite elements for a state of sound mind); *Neville*, 67 S.W.3d at 524 (echoing the elements of testamentary capacity as outlined in *Prather*); Tieken v. Midwestern State Univ., 912 S.W.2d 878, 882 (Tex. App.—Fort Worth 1995, no writ) (explaining the aspects of testamentary capacity); Stephen v. Coleman, 533 S.W.2d 444, 446 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (reiterating the standards outlined in *Prather*). *But see* TEX. PATTERN JURY CHARGE 230.2A (2012) (providing the pattern jury charge definition of testamentary capacity before a will is admitted to probate:

> A decedent has testamentary capacity if, at the time the decedent signs a will, the decedent has—1. Sufficient mental ability to understand that *he* is making a will; and 2. Sufficient mental ability to understand the effect of *his* act in making the will; and 3. Sufficient mental ability to understand the general nature and extent of *his* property; and 4. Sufficient mental ability to know *his* next of kin and natural objects of *his* bounty; and 5. Sufficient memory to collect in *his* mind the elements of the business to be transacted and to be able to hold the elements long

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b. No Presumption of Testamentary Capacity

Testamentary capacity is never presumed due to the statutory requirement that sound mind be proved.[235] A self-proving will with proper affidavits supplies some evidence of testamentary capacity and, if not otherwise objected to, the proponent may admit the will to probate without further evidence on this issue.[236] Similarly, even the direct testimony of the attesting witnesses to the will that the testator was of sound mind when he or she executed the will is not conclusive, and the jury may elect not to believe this testimony.[237]

c. Contractual Capacity for *Inter Vivos* Trust Distinguished

The mental capacity required to establish an *inter vivos* trust is that needed to execute a contract, and is considered by some courts as a more stringent standard of capacity than that required to make a will.[238]

Unlike testamentary capacity, courts presume a person possesses sufficient mental capacity to enter into a contract, or to execute an *inter*

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enough to perceive their obvious relation to each other and to form a reasonable judgment as to these elements).

"Although the Texas Pattern Jury Charges are a guide and not binding on the court, well-settled pattern jury charges should not be embellished with addendum." H.E. Butt Grocery Co. v. Bilotto, 928 S.W.2d 197, 201 (Tex. App.—San Antonio 1996) *aff'd*, 985 S.W.2d 22 (Tex. 1998.).

235. *See In re* Estate of Price, 375 S.W.2d 900, 903 (Tex. 1964) (indicating sound mind must be proven before a will is admitted to probate), *superseded by statute on other grounds as stated in* Stiles v. Resolution Trust Corp., 867 S.W.2d 24 (Tex. 1993).

236. PROB. § 59(c) (West Supp. 2012); *id.* § 88(b)(1) (West 2003); *see* Guthrie v. Suiter, 934 S.W.2d 820, 827 (Tex. App.—Houston [1st Dist.] 1996, no writ) (stating that a self-proving will, absent evidence to the contrary, needs no other proof of testamentary capacity to be admitted); *Estate of Hutchins*, 829 S.W.2d at 299 ("Testamentary capacity when the will is not self-proving, will not be presumed."). The affidavit may, of course, be rebutted by other evidence of lack of capacity. *See* Croucher v. Croucher, 660 S.W.2d 55, 57 (Tex. 1983) (citations omitted) (establishing the general rule that evidence of incompetence at other times may help establish incompetency on the date of execution).

237. *Estate of Price*, 375 S.W.2d at 903; *see* Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968) (holding direct testimony about the testator's mental capacity, from the witnesses to the wills execution, could be disbelieved by the jury and could be rebutted by lay opinion testimony to the contrary based on witnesses' observations of conduct either before or after the date of execution).

238. *See* Hamill v. Brashear, 513 S.W.2d 602, 607 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.) (citations omitted) (stating the general rule that lower mental capacity is needed for a will than a contract); Rudersdorf v. Bowers, 112 S.W.2d 784, 789 (Tex. Civ. App.—Galveston 1937, writ dism'd w.o.j.) (recognizing the general rule that an individual does not need as much mental capacity to execute a will as is needed to enter into a contract); *see also* TEX. PROP. CODE ANN. § 112.007 (West 2007) ("A person has the same capacity to create a trust by declaration, *inter vivos* or testamentary transfer, or appointment that the person has to transfer, will, or appoint free of trust.").

vivos trust.[239] A person has sufficient mental capacity to contract under Texas law if, at the time of contracting, he or she "appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting."[240] Contractual mental capacity, or a lack thereof, may be established using circumstantial evidence "that would show (1) a person's outward conduct, manifesting an inward and causing condition; (2) pre-existing external circumstances tending to produce a special mental condition; and (3) prior or subsequent existence of a mental condition from which its existence at the time in question may be inferred."[241]

Contestants should be aware of some prior Texas decisions before attempting to litigate competency. For example, an important difference to keep in mind is that "[u]nlike minors, elderly persons are not presumptively incompetent."[242] Furthermore, evidence of anger and erratic behavior alone will not overcome the presumption of contractual capacity,[243] and "[a] person may be incompetent at one time but competent at another time."[244] Generally, the question of whether a person knows or understands the nature and consequences of their actions is a question of fact for the jury.[245]

Also of note is the well-drafted 2011 opinion of *In re Estate of Lynch*.[246] The matter on appeal arose after a jury found that the testator executed his

239. *See* Dubree v. Blackwell, 67 S.W.3d 286, 289 (Tex. App.—Amarillo 2001, no pet.) (citations omitted) ("Absent proof and determination of mental incapacity, a person who signs a document is presumed to have read and understood the document."); Bradshaw v. Naumann, 528 S.W.2d 869, 873 (Tex. Civ. App.—Austin 1975, writ dism'd) (noting that the law presumes a grantor possessed sufficient mental capacity to understand his or her rights at the time of the execution of a deed).

240. Mandell & Wright v. Thomas, 441 S.W.2d 841, 845 (Tex. 1969) (citations omitted); *see* Bach v. Hudson, 596 S.W.2d 673, 675–76 (Tex. Civ. App.—Corpus Christi 1980, no writ) (citing *Mandell* in stating the legal standard for mental capacity to contract); Bd. of Regents of the Univ. of Tex. v. Yarbrough, 470 S.W.2d 86, 90 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.) (defining mental capacity as possessing "sufficient mind and memory to understand the nature and effect of the act in which he is engaged and the business which he is transacting").

241. *Bach*, 596 S.W.2d at 676.

242. Edward D. Jones & Co. v. Fletcher, 975 S.W.2d 539, 545 (Tex. 1998).

243. *See* Estate of Galland v. Rosenberg, 630 S.W.2d 294, 298 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (determining claims of anger or inconsistent behavior, without elaboration, do not automatically raise mental incompetency issues).

244. *Dubree*, 67 S.W.3d at 289 (citing Hefley v. State, 480 S.W.2d 810 (Tex. Civ. App—Fort Worth 1972, no writ)).

245. *See* Fox v. Lewis, 344 S.W.2d 731, 739 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.) (stating knowledge and understanding of the consequences of entering into a contract is a question of fact).

246. In re Estate of Lynch, 350 S.W.3d 130 (Tex. App.—San Antonio 2011, pet. denied).

will lacking testamentary capacity and that he was simultaneously unduly influenced.[247] The argument followed that this created an irreconcilable difference: can one be subject to undue influence if they do not have testamentary capacity?[248] The San Antonio Court of Appeals stated, "[W]e conclude that testamentary incapacity and undue influence are not necessarily mutually exclusive; in fact, one (incapacity) may be a factor in the existence of the other (undue influence)."[249] The courts resolution now accords practitioners with the finding that "[courts] are unwilling to hold that in all cases a person cannot both lack testamentary capacity and be unduly influenced."[250]

d. Relevant Time Frame

Whether dealing with a will or trust, the requisite mental capacity must exist during the execution of the instrument.[251] However, execution of a codicil that reaffirms a prior will, or an amendment ratifying a trust, may salvage an earlier-questioned document if the testator's mental capacity is not in question at the time the codicil or amendment is executed.[252] Direct testimony or other evidence at the precise moment the document is signed is not the only method of proving mental capacity.[253] Evidence of incompetency at another time may be used to demonstrate incompetency on the day of execution if the evidence shows "the condition persists and has some probability of being the same condition" that existed at the time the document was executed.[254]

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247. *Id.* at 134.

248. *Id.*

249. *Id.* at 135.

250. *Id.*

251. *See* Horton v. Horton, 965 S.W.2d 78, 85 (Tex. App.—Fort Worth 1998, no pet.) (requiring testamentary capacity at the time the will is executed); Bradshaw v. Naumann, 528 S.W.2d 869, 873 (Tex. Civ. App.—Austin 1975, writ dism'd) (placing the burden on the person challenging a deed to show grantor's incapacity when deed was made).

252. *See, e.g.*, Campbell v. Barrera, 32 S.W. 724, 725 (Tex. Civ. App.—San Antonio 1895, no writ) (asserting lack of undue influence at the time of execution of a codicil validates a prior will that was otherwise invalid on the basis of undue influence).

253. *See* Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968) (establishing the use of evidence of mental incompetency at other times to suggest mental incompetency at the time of the document's execution).

254. Croucher v. Croucher, 660 S.W.2d 55, 57 (Tex. 1983) (internal quotation marks omitted) (quoting *Lee*, 424 S.W. at 611); *see In re* Estate of Flores, 76 S.W.3d 624, 630 (Tex. App.—Corpus Christi 2002, no pet.) (citations omitted) (acknowledging the ability to challenge mental capacity at the time of the execution of documents using evidence of mental capacity at other times); *In re* Neville, 67 S.W.3d 522, 524–25 (Tex. App.—Texarkana 2002, no pet.) (stating evidence of incapacity before and after the will was signed is admissible even if there is direct evidence of the testator's mental condition on the exact date the will was signed); Rodriguez v. Garcia, 519 S.W.2d 908, 911

e. Factors Considered

i. Physical Conditions with Corresponding Mental Repercussions. Evidence of a testator's physical incapacity may be probative of lack of testamentary capacity if the illness is consistent with mental incapacity.[255] In *Croucher v. Croucher*,[256] the testator's sons from his first marriage contested the devise of their father's entire estate to his second wife by offering evidence that their father suffered from arterial occlusion with a corresponding decrease in mental ability.[257] The Supreme Court of Texas concluded this was some evidence of lack of mental capacity and held the second wife, as the proponent, failed to establish the testator possessed the requisite testamentary capacity when he executed the will.[258]

ii. Age. Old age alone is not per se evidence of lack of testamentary capacity, although it may be, and often is, a factor that courts consider.[259]

iii. Prior Mental Problems. In *Guthrie v. Suiter*,[260] evidence the testatrix was committed to a mental hospital where she underwent a frontal lobotomy in the 1950s with resulting seizures and other physical manifestations, coupled with additional evidence that she suffered from diminished capacity during the time she executed the will, created a fact question on testamentary capacity sufficient to defeat the executor's motion for summary judgment.[261]

iv. Prior Adjudication of Incompetency. Adjudication of unsound mind prior to a will's execution is not dispositive on the question of lack of testamentary capacity, but courts may consider it as evidence of

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(Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (recognizing the validity of evidence prior or subsequent to the execution of a deed when determining mental capacity).

255. *See Croucher*, 660 S.W.2d at 57 (reviewing physical evidence when evaluating mental capacity).

256. Croucher v. Croucher, 660 S.W.2d 55 (Tex. 1983).

257. *Id.* at 57.

258. *Id.* at 57–58; *see Neville*, 67 S.W.3d at 526 (evaluating doctor's testimony that testatrix had a brain tumor that adversely affected her mental soundness and was getting progressively worse before the will in question was executed).

259. *Compare Lee*, 424 S.W.2d at 611–12 (introducing evidence of old age to support allegations of lack of testamentary capacity), *with* Brewer v. Foreman, 362 S.W.2d 350, 356 (Tex. Civ. App.—Houston 1962, no writ) ("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." (citing McCannon v. McCannon, 2 S.W.2d 942, 949–50 (Tex. Civ. App—Galveston 1927, writ dism'd w.o.j.))), *and* Cruz v. Prado, 239 S.W.2d 650, 651 (Tex. Civ. App.—San Antonio 1951, no writ) (finding an elderly testator to have sufficient testamentary capacity to execute valid will).

260. Guthrie v. Suiter, 934 S.W.2d 820 (Tex. App.—Houston [1st Dist.] 1996, no writ).

261. *Id.* at 830–31.

incompetence.[262] An adjudication of unsound mind after the will's execution is not admissible on the question of testamentary capacity.[263]

v. Previous Alcohol or Substance Abuse. In *Gum v. Gum*,[264] evidence that testator, a long-time alcoholic, routinely drank a gallon of scotch every four days, suffered from hallucinations, and was admitted to the hospital in an intoxicated condition within one to two hours of executing the offered will supported contestants' argument that testator lacked testamentary capacity.[265]

vi. Medications. In *Kenney v. Estate of Kenney*,[266] the testatrix's illness requiring regular doses of morphine resulting in drowsiness and hallucinations during the two weeks before her death supported an inference that these conditions persisted and prevented the testatrix from having testamentary capacity when she signed her will.[267]

vii. Education and Experience or Lack Thereof. The testator's illiteracy does not alone establish lack of testamentary capacity, but may be a factor in whether he or she truly understood the effect of the instrument signed.[268]

viii. Unnatural Disposition. A court may consider an unnatural disposition of the testator's property as some evidence of lack of testamentary capacity.[269]

ix. Erroneous Statements of Facts by Testator. Evidence that the testator made statements that, although appearing rational on their face,

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262. *See* Clement v. Rainey, 50 S.W.2d 359, 359 (Tex. Civ. App.—Texarkana 1932, writ ref'd) (identifying that adjudication of mental unsoundness is not conclusive of incompetency to make a will).

263. *See* Carr v. Radkey, 393 S.W.2d 806, 815 (Tex. 1965) (citations omitted) (declaring subsequent adjudication of unsound mind of a testator is inadmissible in Texas).

264. Gum v. Gum, No. 09-94-157-CV, 1996 WL 112155 (Tex. App.—Beaumont, March 14, 1996, writ denied) (not designated for publication).

265. *Id.* at *3–4; *see Brewer*, 362 S.W.2d at 356–57 (deciding evidence of testatrix's use of alcohol, while prejudicial, was admissible on the questions of testamentary capacity and undue influence).

266. Kenney v. Estate of Kenney, 829 S.W.2d 888 (Tex. App.—Dallas 1992, no writ).

267. *Id.* at 892–93; *see* Beadle v. McCrabb, 199 S.W. 355, 363 (Tex. Civ. App.—Galveston 1917, writ ref'd) (concluding the trial court could reasonably find that the testator, who was suffering from cancer, lacked testamentary capacity due to her odd behavior and reaction to the medication).

268. *See* Cruz v. Prado, 239 S.W.2d 650, 650–51 (Tex. Civ. App.—San Antonio 1951, no writ) (determining actions and conduct typical of "an infirm, illiterate and feeble-minded old man" were insufficient, standing alone, to sustain a finding of testamentary incapacity).

269. *See* Dominguez v. Duran, 540 S.W.2d 567, 571 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (recognizing that it is a reasonable possibility that a jury could find lack of testamentary capacity when testator inexplicably excluded young son from will); Craycroft v. Crawford, 285 S.W. 275, 278 (Tex. Comm'n App. 1926, holding approved) (suggesting a will with no devise to testator's children may demonstrate lack of testamentary capacity).

are shown to be untrue or irrational by extrinsic evidence can support a finding of lack of testamentary capacity.[270]

x. Document Problems. Inaccurate statements, logical inconsistencies, or gaps in the will or other documents written by the testator may raise questions as to the testator's mental ability.[271]

D. *Insane Delusion*

1. Equally Applicable to Wills or Trusts

A claim of "insane delusion" resembles a claim of lack of testamentary capacity and courts sometimes consider it a sub-category of testamentary capacity.[272] An insane delusion is (1) "the belief of a state of supposed facts that do not exist"; and (2) "which no rational person would believe."[273] Proof of the second element requires evidence of an organic brain defect or "functional disorder of the mind."[274] A contestant seeking to set aside a will based on a testator's

270. *See, e.g.*, Lowery v. Saunders, 666 S.W.2d 226, 235 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (concluding declarations of such a "disordered, unreasonable and abnormal character would be unlikely to be prompted by a sound mind" and "are admissible to prove want of testamentary capacity" (citing McIntosh v. Moore, 53 S.W. 611 (Tex. Civ. App. 1899, no writ))). In *Lowery*, the testatrix's erroneous declaration to her doctor at or about the time her will was executed that she owned certain property when she did not was competent evidence of lack of testamentary capacity. *Id.* at 235–36. *See* Sebesta v. Stavinoha, 590 S.W.2d 714, 716 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (citation omitted) (deciding that a testatrix's omission of a certificate of deposit in a food stamp application was competent evidence she did not grasp the nature or extent of her property immediately before the will execution); McNaley v. Sealy, 122 S.W.2d 330, 332 (Tex. Civ. App.—Austin 1938, writ dism'd w.o.j.) (holding when testator filed application for old age pension stating he had no realty or personalty, despite evidence indicating he had over $4,000 in the bank, such evidence was admissible to prove lack of testamentary capacity). *But see In re* Estate of Flores, 76 S.W.3d 624, 630–31 (Tex. App.—Corpus Christi 2002, no pet.) (noting the testator's mistaken statement in his will that he had no deceased children was not relevant to the essence of the will contest, namely his desire to disinherit his other son).

271. *See* Long v. Long, 133 Tex. 96, 125 S.W.2d 1034, 1037–38 (1939) (concluding a will containing a bequest that amounted to nothing was evidence tending to show that testatrix did not understand the will); Bogel v. White, 168 S.W.2d 309, 312–13 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.) (holding nonsensical letters of testator were admissible to prove lack of testamentary capacity); Knott v. Jensen, 27 S.W.2d 624, 625 (Tex. Civ. App.—Amarillo 1930, writ dism'd w.o.j.) (deciding evidence that the testatrix had no money or property to satisfy the bequest in the will was admissible on the question of testamentary capacity).

272. *See* Knight v. Edwards, 153 Tex. 170, 264 S.W.2d 692, 693–96 (1954) (reviewing evidence of an insane delusion as a possible reason to find a lack of testamentary capacity).

273. *Id.* at 695 (quoting Lanham v. Lanham, 146 S.W. 635, 640 (Tex. Civ. App.—Texarkana 1910, no writ)).

274. *See* Lindley v. Lindley, 384 S.W.2d 676, 679–80 (Tex. 1964) (holding testatrix's conviction that one or both of her disinherited children were responsible for deceased son's death entitled contestants to jury instruction on insane delusion because the belief would not be entertained by a rational person).

insane delusions must also show that the delusions caused the testator to "dispose of his property in a way which he would not have disposed of it but for the insane delusion."[275] A testator's conviction, however illogical, is not an insane delusion if arrived at through a process of reasoning based upon existing facts.[276]

2. What Is Not an Insane Delusion

(a) A religious or spiritual belief.[277]

(b) A mistaken belief of facts unaccompanied by fraud or undue influence.[278]

(c) A rational subjective opinion or belief.[279]

E. *Non-Revocation*

Section 88(b)(3) of the Texas Probate Code requires proof that the will was not revoked by the testator.[280] Section 63 provides that a revocation must meet certain criteria to be valid.

"No will in writing, and no clause thereof or devise therein, shall be revoked, except by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by the testator destroying or canceling the same, or causing it to be done in his presence."[281]

The requirement that the revoking instrument be executed with like formalities means only that the revoking instrument be in accordance with the legal requirements applicable to that type of document.[282] Thus, a valid holographic will can revoke an earlier typewritten, attested will and

275. Oechsner v. Ameritrust Tex., N.A., 840 S.W.2d 131, 134 (Tex. App.—El Paso 1992, writ denied).

276. *Knight*, 264 S.W.2d at 696 (citing Navarro v. Rodriguez, 235 S.W.2d 665, 668 (Tex. Civ. App.—San Antonio 1950, no writ)).

277. *See* Burchill v. Hermsmeyer, 230 S.W. 809, 811 (Tex. Civ. App.—Fort Worth 1921, writ dism'd w.o.j.) (illustrating a spiritual belief does not render one incompetent to form a contract).

278. *See* Spillman v. Estate of Spillman, 587 S.W.2d 170, 173 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (determining a simple mistaken belief regarding testator's children was not enough to constitute an insane delusion).

279. *See* Bauer v. Estate of Bauer, 687 S.W.2d 410, 412 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (warning subjective concepts like family love are ill-suited for a legal system that is oriented towards factual proof).

280. *See In re* Estate of McGrew, 906 S.W.2d 53, 56 (Tex. App.—Tyler 1995, writ denied) (indicating the proponent bears the burden of proving non-revocation of a will); Goode v. Estate of Hoover, 828 S.W.2d 558, 559 (Tex. App.—El Paso 1992, writ denied) (placing burden of proof on proponent of will to establish that it was not revoked by the testator).

281. TEX. PROB. CODE ANN. § 63 (West 2003).

282. *See In re* Estate of Brown, 507 S.W.2d 801, 805–06 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (explaining revoking instruments need only comply with legal requirements for that type of document, rather than those required by the original instrument).

vice versa.[283] To revoke a will, the testator must have testamentary capacity.[284] While the standard way to revoke a will is by executing a later will expressly stating, "[A]ll prior wills are hereby revoked," a will may be revoked by an intentional, unequivocal act of destruction.[285] A later will may also revoke a prior one by implication, in whole or in part, simply by making a disposition of the testator's property inconsistent with that of the first instrument.[286]

There are several presumptions that may affect the question of revocation.[287] For instance, section 69 statutorily revokes any testamentary provisions in favor of a divorced ex-spouse.[288] In addition, section 58B voids devises and bequests to a non-relative attorney who "prepares or supervises the preparation of the will," including any devise or bequest to an heir or employee of the attorney.[289] In disputed cases, the question of revocation is for the fact finder.[290]

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283. *See* Brackenridge v. Roberts, 114 Tex. 418, 267 S.W. 244, 247 (1924) (finding a written declaration, if properly executed, may revoke a will); Cason v. Taylor, 51 S.W.3d 397, 410 (Tex. App.—Waco 2001, no pet.) (citations omitted) (recognizing the power of attested or holographic wills to revoke each other if the revoking instrument complies with legal requirements); *Estate of Brown*, 507 S.W.2d at 805–06 (affirming a subsequent codicil can be less formal than the prior will it revokes).

284. Lowery v. Saunders, 666 S.W.2d 226, 238 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

285. *See* Morris v. Morris, 642 S.W.2d 448, 450 (Tex. 1982) (finding it necessary to possess the intent to destroy the will and must actually destroy the will in order for testator to effectively revoke the will).

286. *See* Lisby v. Estate of Richardson, 623 S.W.2d 448, 449–50 (Tex. App.—Texarkana 1981, no writ) (concluding a will was revoked by a subsequent will that provided for a different distribution of assets); Baptist Found. of Tex. v. Buchanan, 291 S.W.2d 464, 472 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.) (citations omitted) (suggesting a contrary disposition in a subsequent will may revoke by implication the previous will).

287. *See In re* Estate of Glover, 744 S.W.2d 939, 940 (Tex. 1988) (per curiam) (affirming a presumption of revocation exists when a will could not be located and was last seen in testator's possession); Morgan v. Morgan, 519 S.W.2d 276, 278 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e) (stating that a presumption against revocation exists upon establishment of a duly executed will); Simpson v. Neely, 221 S.W.2d 303, 312 (Tex. Civ. App.—Waco 1949, writ ref'd) (presuming a will as revoked when it was found in a cancelled condition in a place only accessible to the testator).

288. *See* TEX. PROB. CODE ANN. § 69 (West Supp. 2012) (explaining that an ex-spouse is deemed to have not survived the testator, unless otherwise expressly provided in the will).

289. *See, e.g.*, Olson v. Estate of Watson, 52 S.W.3d 865, 869 n.11 (Tex. App.—El Paso 2001, no pet.) (noting the Texas Probate Code section 58B effectively implements Rule 1.08(b) of the Texas Rules of Professional Conduct, which bans bequests to a preparing attorney for all wills executed after September 1, 1997).

290. *See* Cason v. Taylor, 51 S.W.3d 397, 411 (Tex. App.—Waco 2001, no pet.) (reviewing the evidence on revocation of a prior will to determine if the fact finder possessed factually sufficient evidence to support its finding).

F. *Non-Statutory Grounds: Undue Influence*

1. General Rule

Under Texas law, a claim of undue influence is broad enough to encompass fraud, deceit, or duress and may be alleged in the alternative with a claim based on lack of testamentary capacity.[291] As previously noted however, the San Antonio Court of Appeals recently held, "[W]e conclude that testamentary incapacity and undue influence are not *necessarily* mutually exclusive; in fact, one (incapacity) may be a factor in the existence of the other (undue influence)."[292] The burden of proving undue influence always rests with the contestant.[293]

2. Classic Definition

To set aside a will on the basis of a classic claim of undue influence, the contestant must prove (1) "the existence and exercise of an influence" upon the testator, (2) that operated to subvert or overpower the testator's mind at the time the will was executed, and (3) such that the execution would not have occurred but for the undue influence.[294] An early Texas Supreme Court opinion defined the ultimate question as whether "the testator's free agency was destroyed, and [whether] his will was overcome by excessive importunity, imposition, or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the persons exercising the influence."[295]

To understand better a claim of undue influence, recall the testator's intent is an underlying concern in probate litigation. Thus, many of these cases show how the final will no longer represents the true intent of the testators, as they have succumbed to the undue influence. "The exercise of undue influence may be accomplished in many different ways—directly

291. *See* Guthrie v. Suiter, 934 S.W.2d 820, 833 (Tex. App.—Houston [1st Dist.] 1996, no writ) (citing Holcomb v. Holcomb, 803 S.W.2d 411, 414 (Tex. App.—Dallas 1991, writ denied) (expressing the view of Texas courts that undue influence and fraudulent inducement are similar types of fraud)).

292. In re Estate of Lynch, 350 S.W.3d 130, 135 (Tex. App.—San Antonio 2011, pet. denied) (emphasis added). *But see* Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963) (proclaiming testamentary capacity is implied with undue influence); Long v. Long, 133 Tex. 96, 125 S.W.2d 1034, 1036 (1939) (stating sufficient mental capacity is necessarily implied by an undue influence claim).

293. *See* Cravens v. Chick, 524 S.W.2d 425, 428 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.) (indicating the burden of proof rests with the contestant in undue influence cases).

294. *Rothermel*, 369 S.W.2d at 922; *In re* Estate of Murphy, 694 S.W.2d 10, 12 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

295. Trezevant v. Rains, 19 S.W. 567, 570 (Tex. 1892) (quoting Mackall v. Mackall, 135 U.S. 167, 172 (1890), *rev'd on other grounds*, 85 Tex. 329, 23 S.W. 890 (Tex. 1892)).

and forcibly, as at the point of a gun; but also by fraud, deceit, artifice and indirection; by subtle and devious, but none-the-less forcible and effective means."[296] Undue influence "may be exercised through threats or fraud or the silent power of a strong mind over a weak one."[297] Indeed, "The cases dealing with the question of undue influence have [consistently] recognized the difficulty, if not the absolute impossibility, of laying down a hard and fast rule or definition that would embrace all forms of undue influence."[298] "It is not possible to frame a definition of undue influence which embraces all forms and phases of the term."[299] If a general rule exists with respect to undue influence cases, "[I]t is that each case [is unique and] must stand on its own bottom as to the legal sufficiency of the facts proven."[300]

3. Fraud in the Inducement

Fraud in the inducement occurs when an individual intentionally misrepresents a fact outside of the document to the testator and, without such misrepresentation, he or she would not have executed the will.[301] In Texas, "[F]raud in the inducement of a dispositive instrument and undue influence are treated as one."[302] Fraud in the inducement can include promissory misrepresentation, as well as misrepresentation of an existing fact.[303]

4. Fraud or Mistake in the Factum

Fraud in the factum occurs when a testator is "misled as to the nature or

296. *In re* Estate of Olsson, 344 S.W.2d 171, 173–74 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.).

297. Curry v. Curry, 153 Tex. 421, 270 S.W.2d 208, 214 (1954) (quoting Smith v. Mann, 296 S.W. 613, 615 (Tex. Civ. App.—San Antonio 1927, writ ref'd)).

298. *Estate of Olsson*, 344 S.W.2d at 173.

299. Long v. Long, 133 Tex. 96, 125 S.W.2d 1034, 1035 (1939).

300. *See Estate of Olsson*, 344 S.W.2d at 173 (emphasis omitted) (noting that each case will contain varying facts (citing *Long*, 125 S.W.2d at 1035; Firestone v. Sims, 174 S.W.2d 279, 281 (Tex. Civ. App.—Fort Worth 1943, writ ref'd))).

300. *See Curry*, 270 S.W.2d at 214 (identifying how the issue of fraud in the inducement is raised) (quoting *Smith*, 296 S.W. at 615).

301. *See id.* (identifying how a contestant may raise the issue of fraud in the inducement).

302. *See* Smith v. Smith, 389 S.W.2d 498, 504 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.) (explaining how undue influence must be supported by fraud (citing *Curry*, 270 S.W.2d at 214)); *see also* Gallagher v. Neilon, 121 S.W. 564, 568 (Tex. Civ. App.—1909, writ ref'd) ("Undue influence is a species of fraud, and the word 'fraud,' wherever it appears in the court's charge, seems to have been used synonymously with the phrase 'undue influence . . . .'").

303. *See* Holcomb v. Holcomb, 803 S.W.2d 411, 415 (Tex. App.—Dallas 1991, writ denied) (explaining that intent to not fulfill a promise can constitute fraud in the inducement).

content of the instrument [being] executed."[304] To defeat the will's admission to probate, a mistake of fact or law must be accompanied by evidence of fraud or undue influence.[305] The mistake of fact must also go to the crux of the will contest, not simply to a collateral issue.[306]

5. Proof by Direct or Circumstantial Evidence

A will contestant must prove every element of undue influence with either direct or circumstantial evidence.[307]

Courts recognize that most cases of undue influence are based primarily on circumstantial evidence because the person controlling the testator, or otherwise exerting the undue influence, is not likely to publicize this fact:

> The existence of undue influence is a question of fact, and from its very nature, like all fraudulent and vicious schemes, hides its features behind masks and operates in dark and secret places and in covert ways, and proof of it must usually be by circumstantial rather than by direct testimony.[308]

Each case presents a different and unique set of facts and circumstances so judicial precedent will, at best, establish only a very basic framework. As the Supreme Court of Texas noted in *Long v. Long*:[309]

> It is impossible to lay down any hard and fast rule, or rules, which will accurately govern the question as to whether a given record contains affirmative probative evidence of undue influence. All that we can do is to announce certain general rules of law, and then in this case, as in all cases, apply such rules to the facts in the record. Law is not an exact mathematical science. No two cases are alike. Each case must stand on its own bottom as to the legal sufficiency of the facts proven . . . .[310]

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304. *See, e.g.*, Guthrie v. Suiter, 934 S.W.2d 820, 833 (Tex. App.—Houston [1st Dist.] 1996, no writ) (indicating that a record devoid of evidence concerning a misled testatrix fails to raise the issue of fraud in the factum).

305. *See* Carpenter v. Tinney, 420 S.W.2d 241, 244–45 (Tex. Civ. App.—Austin 1967, no writ) (holding a mere mistake of fact will not sustain a finding of undue influence); *see also Holcomb*, 803 S.W.2d at 415 ("[A] mistake of fact or law alone will not defeat the probate of a will even though the testator would have made a different will but for the mistake inducing the making of the will.").

306. *See In re* Estate of Flores, 76 S.W.3d 624, 631 (Tex. App.—Corpus Christi 2002, no pet.) (noting mistake of fact must be relevant to the intent of the deceased).

307. *See* Long v. Long, 133 Tex. 96, 125 S.W.2d 1034, 1036 (1939) (acknowledging the inherent difficulty in proving undue influence by direct testimony because "[u]ndue influence is usually a subtle thing, and by its very nature usually involves an extended course of dealings and circumstances"); *see also* Lowery v. Saunders, 666 S.W.2d 226, 234 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (finding "evidence of all relevant matters occur[ring] within a reasonable time before or after the execution of the will" are admissible on the issue of undue influence).

308. Truelove v. Truelove, 266 S.W.2d 491, 497 (Tex. Civ. App.—Amarillo 1953, writ ref'd).

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

310. *Id.* at 1035.

This lack of precision, coupled with obvious judicial disfavor of undue influence claims and confusion over the use of circumstantial evidence, leaves participants in undue influence cases with inconsistent court opinions and little guidance in determining when circumstantial evidence will be sufficient to support a finding of undue influence.[311]

6. Inferences As Part of Circumstantial Evidence

a. Inferences Defined

According to the instruction suggested in the recently promulgated Texas Pattern Jury Charge, "[A] fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved."[312] Although it seems simple, the role of inferences in determining whether there is some evidence of undue influence is the source of confusion in undue influence will contest cases.

Unlike a presumption, which in law is a logical conclusion that *will* flow from certain basic facts; an inference is a logical conclusion that *may* flow from certain basic facts. Courts have defined inference as "a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts already proved."[313]

Thus, for a jury to infer a fact, it need only be able to deduce the fact as a logical consequence from other proven facts.[314] "By its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern."[315] Facts must

311. *See In re* Estate of Olsson, 344 S.W.2d 171, 178 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (finding circumstantial evidence sufficient to raise more than a mere suspicion of undue influence, and overruling the contention that circumstantial evidence is no evidence with regard to undue influence). *But see In re* Estate of Davis, 920 S.W.2d 463, 467 (Tex. App.—Amarillo 1996, writ denied) (holding that when circumstantial evidence equally indicates both proper and improper execution, through undue influence, such evidence is no evidence (citing Smallwood v. Jones, 794 S.W.2d 114, 118 (Tex. App.—San Antonio 1990, no writ))); *In re* Estate of Montgomery, 881 S.W.2d 750, 754 (Tex. App.—Tyler 1994, writ denied) (remarking that a finding of undue influence cannot be maintained when circumstantial evidence is "equally consistent with the absence of undue influence").

312. *See* TEX. PATTERN JURY CHARGE 100.8 (2010) (defining the boundaries of when circumstantial evidence can give rise to fact).

313. *See* Marshall Field's Store, Inc. v. Gardiner, 859 S.W.2d 391, 400 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.) (quoting BLACK'S LAW DICTIONARY 700 (5th ed. 1979)).

314. *See* Joske v. Irvine, 91 Tex. 574, 44 S.W. 1059, 1064 (1898) (explaining that an inference is merely a deduction from proven facts).

315. Browning–Ferris, Inc. v. Reyna, 865 S.W.2d 925, 927 (Tex. 1993).

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underlie each inference because the law is clear that an inference cannot be drawn from another inference.[316]

Inferences are simply one part of the circumstantial evidence package.[317] Black's Law Dictionary defines circumstantial evidence as "[e]vidence based on inference[s] and not on personal knowledge or observation" and "[a]ll evidence that is not given by eyewitness testimony."[318]

An example of how an inference drawn from circumstantial facts may become evidence of an ultimate fact occurs in situations where a party fails to rebut negative evidence or to explain his failure to do so:

> When the proof tends to establish a fact and at the same time discloses that it is within the power and to the interest of the opposing party to disprove it, if false, the silence of the opposing party not only strengthens the probative force of the affirmative proof *but of itself is clothed with a certain probative force.*[319]

b. The Equal Inference Rule

The problem with inferences in undue influence cases is twofold. First, what may be a fair and reasonable inference to the jury may not seem fair and reasonable to the trial judge or appellate court. Second, some courts have difficulty applying the traditional direct evidence standards of review to circumstantial evidence cases. Thus, although the judges assert that in determining "no evidence" issues they will review the evidence in the light

316. *See* Ice Bros., Inc. v. Bannowsky, 840 S.W.2d 57, 61 (Tex. App.—El Paso 1992, no writ) (citing Rounsaville v. Bullard, 154 Tex. 260, 276 S.W.2d 791, 794 (1955) (limiting the ways in which a deduction may be reached).

317. *See id.* ("An inference does not constitute evidence in support of a proposition unless the inference is based upon facts established by direct evidence." (citing Roberts v. U.S. Home Corp., 694 S.W.2d 129, 135 (Tex. Civ. App.—San Antonio 1985, no writ))).

318. BLACK'S LAW DICTIONARY 576 (7th ed. 1999); *accord* Felker v. Petrolon, 929 S.W.2d 460, 463 (Tex. App.—Houston [1st Dist.] 1996, writ denied) ("Circumstantial evidence is the proof of collateral facts and circumstances from which the mind arrives at the conclusion that the main facts sought to be established in fact existed." (quoting Glover v. Davis, 360 S.W.2d 924, 928 (Tex. Civ. App.—Amarillo 1962, writ denied))).

319. Sullivan v. Fant, 160 S.W. 612, 616 (Tex. Civ. App.—San Antonio 1913, writ ref'd) (emphasis added) (quoting Pullman Palace Car Co. v. Nelson, 54 S.W. 624, 626 (Tex. Civ. App.—Tyler 1899, writ denied)); *see* Craycroft v. Crawford, 285 S.W. 275, 282 (Tex. Comm'n App. 1926, holding approved) ("Silence, under the conditions disclosed, in our opinion, had some probative force as pointing to undue influence for a source of the will . . . and as strengthening the unfavorable inferences which the jury may have drawn from the other facts and circumstances."); *accord* Boyer v. Pool, 280 S.W.2d 564, 576–77 (Tex. 1955) (holding the circumstantial fact of silence gives rise to an inference that the truth is adverse to the silent party and this inference is some evidence to support a finding of undue influence).

most favorable to the contestant and disregard "all evidence and inferences to the contrary," this standard of review quickly gets lost in the shuffle. This can occur when judges disagree with the inference drawn by the jury in favor of undue influence, or find that the facts were equally consistent with another contrary inference of no undue influence.[320] If the court finds that a set of facts gives rise to two inferences, one that reasonably supports a finding of an element of undue influence and one that does not, the reaction of the court is often to rule that the two inferences are equal and conclude there is no evidence to support a finding of undue influence.[321] As clarified by the Texas Supreme Court in *Lozano v. Lozano*,[322] this is both a misconstruction and a misuse of the "equal inference rule."[323]

In *Lozano*, Chief Justice Phillips stated in his concurring opinion—joined on this issue by the majority of the justices—that the reviewing court should not apply the equal inference rule element by element on a piecemeal basis, but instead the court must apply the rule with due regard for the jury's right to decide which inference is more reasonable.[324] In support, Chief Justice Phillips stated:

> The equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence "which could give rise to any number of inferences, none more probable than another." Thus, in cases with only slight circumstantial evidence, something else must be found in the record to corroborate the probability of the fact's existence or non-existence.
>
> . . . The applicable rule was succinctly stated in *Litton* as follows: "When circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred."
>
> . . . .
>
> Properly applied, the equal inference rule is but a species of the no

320. *See* Estate of Davis v. Cook, 9 S.W.3d 288, 293 (Tex. App.—San Antonio 1999, no pet.) (involving a no-evidence motion for summary judgment); *see also* Smallwood v. Jones, 794 S.W.2d 114, 119 (Tex. App.—San Antonio 1990, no writ) (involving a judgment notwithstanding the verdict); *In re* Estate of Davis, 920 S.W.2d 463, 467 (Tex. App.—Amarillo 1996, writ denied) (reversing a jury verdict in favor of contestants on appeal); Stewart v. Miller, 271 S.W. 311, 316 (Tex. Civ. App.—Waco 1925, writ ref'd) (affirming a directed verdict for defendant).

321. *See, e.g.*, *Cook*, 9 S.W.3d at 295 (holding the inferences proffered as evidence failed to meet the burden of proof).

322. Lozano v. Lozano, 52 S.W.3d 141 (Tex. 2001) (per curiam).

323. *Id.* at 149.

324. *See id.* (explaining the right of a jury to decide which evidence is the most believable (citing Benoit v. Wilson, 150 Tex. 273, 239 S.W.2d 792, 797 (1951))).

> evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.
>
> Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. And this choice in turn may be influenced by the fact finder's views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.[325]

Under the "element by element" approach taken by several courts of appeals in undue influence will contests, it is not surprising that the undue influence claims rarely survive judicial scrutiny.[326] Following *Lozano*, Texas courts will hopefully return to the basics and recognize that circumstantial evidence under the correct standards of review may indeed be sufficient to support a finding of undue influence.

7. Circumstances Should Be Considered "As a Whole"

When courts rely upon circumstantial evidence to prove undue influence—or any other claim—the facts and inferences drawn from those facts, should not be viewed in isolation.[327] Rather, the fact finder must consider all of the circumstances as a whole before reaching a decision:

> In the absence of direct evidence[,] all of the circumstances shown or established by the evidence should be considered; and even though none of the circumstances standing alone would be sufficient to show the elements of undue influence, if when considered together they produce a reasonable belief that an influence was exerted that subverted or overpowered the mind of the testator and resulted in the execution of the testament in controversy, the evidence is sufficient to sustain such conclusion.[328]

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325. *Lozano*, 52 S.W.3d at 148–49 (emphasis added) (internal citations omitted).

326. *See id.* at 152 (describing how some courts view undue influence, instead of taking the totality of circumstances approach).

327. *See* Felker v. Petrolon, Inc., 929 S.W.2d 460, 464 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (remarking the fact finder must view circumstantial evidence under the totality of the circumstances).

328. *See* Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963) (averring that evidence standing in isolation may not be sufficient; however, when viewed with all other evidence, there is adequate evidence to uphold a jury's decision); *accord* Truelove v. Truelove, 266 S.W.2d 491, 497 (Tex. Civ. App.—Amarillo 1953, writ ref'd); *Lozano*, 52 S.W.3d at 149 (Phillips, C.J., concurring); *see also Felker*, 929 S.W.2d at 464 ("In reviewing circumstantial evidence, we must look at the *totality* of

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In *Pullen v. Russ*,[329] the Seventh Court of Appeals articulated the rule requiring the court consider circumstantial evidence of undue influence in a will contest as a whole:

> It has been held that the opportunity to exert such influence, the age of the testator, his physical condition, the fact he preferred one child over another, and the original testamentary intentions of the deceased are circumstances which, if taken alone, would not necessarily be evidence of undue influence. However, *when taken in the same case and when the devise is either unnatural or, to say the least, contrary to the testator's previously announced intentions, such combined facts and circumstances are sufficient to [submit] the issue of undue influence to the jury.*[330]

8. Proof is by a Preponderance of the Evidence

Several appellate courts suggest that circumstantial evidence in an undue influence case must be "strong and convincing."[331] Contrary to these assertions, the level of proof required in these cases has never been anything other than a preponderance of the evidence.[332] The "strong and convincing" phrase appears to be a corruption of what was actually stated by the Texas Supreme Court in *Rothermel v. Duncan*,[333] that "the circumstances relied on as establishing the elements of undue influence must be of a reasonably satisfactory and convincing character."[334]

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the known circumstances rather than reviewing each piece of evidence in isolation.").

329. Pullen v. Russ, 209 S.W.2d 630 (Tex. Civ. App.—Amarillo 1941, writ ref'd n.r.e.).

330. *Id.* at 634–35 (emphasis added) (citation omitted).

331. *See* Estate of Davis v. Cook, 9 S.W.3d 288, 293 (Tex. App.—San Antonio 1999, no pet.) (clarifying the undue influence must be "of such probative force as to lead a well-guarded mind to a reasonable conclusion . . . that it controlled the will power of the testator at the precise time the will was executed" (citing Green v. Earnest, 840 S.W.2d 119, 121 (Tex. App.—El Paso 1992, writ denied))); *see also* Mackie v. McKenzie, 900 S.W.2d 445, 449–50 (Tex. App.—Texarkana 1995, writ denied) (describing the nature of the evidence that must be shown to prove undue influence); Garza v. Garza, 390 S.W.2d 45, 47 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.) (asserting that evidence of mere opportunity to exert undue influence is not strong enough to support a finding of undue influence).

332. *See, e.g.*, *In re* Estate of Woods, 542 S.W.2d 845, 846 (Tex. 1976) ("When undue influence is alleged as a grounds for setting aside the probate of a will, the burden is upon the contestant to prove the allegation by a preponderance of the evidence.").

333. Rothermel v. Duncan, 369 S.W.2d 917 (Tex. 1963).

334. *See id.* at 922 (remarking that to prove undue influence, the evidence must be of a satisfactory and convincing character (citing Stewart v. Miller, 271 S.W. 311, 316 (Tex. Civ. App.—Waco 1925, writ ref'd))); *see also* Ellis Cnty. State Bank v. Keever, 888 S.W.2d 790, 792–93 (Tex. 1994) (reaffirming that, in civil cases "no doctrine is more firmly established than that issues of fact are resolved from a preponderance of the evidence[,]" the Supreme Court of Texas noted that "the occasional suggestion that facts must be established by 'clear and convincing' evidence as 'but an admonition to the judge to exercise great caution in weighing the evidence'" does not supplant the usual standard of proof by a preponderance of the evidence, but rather is "merely another method of

Because the burden of proof for undue influence is by a preponderance of the evidence, after considering all of the circumstantial evidence relied on by the contestant, if the evidence proving the ultimate fact also equally supports the non-existence of that fact, then the contestant failed to carry his or her burden of proof on the issue.[335] Unfortunately, some appellate courts latched on to the "equally consistent" phrase of *Rothermel* and mistakenly applied it element by element, and inference by inference, rather than to the facts, inferences, and circumstances as a whole. This is precisely the type of appellate review condemned by the majority of the court in *Lozano*.[336]

9. The *Rothermel* Approach

The Supreme Court of Texas in *Rothermel* establishes an approach for the analysis of circumstantial evidence in undue influence cases that avoids the confusion in past case law:

(a) Each element of the undue influence claim must be supported by satisfactorily proven circumstantial facts from which at least one inference in support of undue influence can be reasonably drawn. It need not be the only reasonable inference that could be drawn from the facts;

(b) If each element has some supporting circumstantial evidence support (facts plus inferences), then there is some evidence to submit the claim to a jury where all of the facts and inferences on each of the elements can be considered together as a whole; and

(c) If the combined evidence, taken as a whole, supports a reasonable inference of undue influence by a preponderance of the evidence, then it is sufficient to support a jury finding in favor of the claim.[337]

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stating that a cause of action must be supported by factually sufficient evidence" (quoting Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206, 209 (1950))).

335. *See Rothermel*, 369 S.W.2d at 922 ("[T]he circumstances relied on as establishing the elements of undue influence . . . must not be equally consistent with the absence of the exercise of [undue] influence."); *see also In re* Estate of Montgomery, 881 S.W.2d 751, 756 (Tex. App.—Tyler 1994, writ denied) (viewing only facts and inferences favorable to contestant, the court concluded the jury's verdict in favor of undue influence was based on some evidence, thereby rejecting the no-evidence argument; but, upon review of all of the evidence, the court found the evidence was insufficient and remanded for new trial).

336. *See* Lozano v. Lozano, 52 S.W.3d 141, 152 (Tex. 2001) (per curiam) (looking at the totality of the circumstances when seeking to determine the evidentiary sufficiency of undue influence). *But see Cook*, 9 S.W.3d at 293 (requiring the assertion of specific facts as to the claim of undue influence, and weighing those independent of other evidence that might support the cause of action).

337. *Rothermel*, 369 S.W.2d at 922 (citations omitted).

10. What Qualifies As Undue Influence

Not every influence is undue. Influence is not undue unless the testator's free agency is destroyed, and the resulting will actually expresses the wishes of the one exerting the undue influence rather than the testator's intent.[338] Requests, importunities, and entreaties to execute a favorable disposition do not taint a will's validity unless shown by the contestant to be so excessive "as to subvert the will of the maker."[339] It is equally true, however, that physical duress or direct arm-twisting is not required to prove undue influence, and undue influence can compel a testator to act against his will simply because of his or her desire for peace.[340]

11. Factors to Consider When Analyzing Undue Influence Claims

a. Beneficiary's Involvement

One of the key factors in any undue influence claim is the beneficiary's involvement in drafting the will and securing the testator's signature thereon.[341] In *Taylor v. Taylor*,[342] the court held that where the will proponent takes an active part in the will execution, coupled with "other indicia of imposition or undue influence[,]" then a "presumption [of undue influence] arises in favor of the contestant."[343] Evidence of the favored beneficiary leaning over the shoulder of the testator when the will is signed is undoubtedly helpful to the contestant, but the beneficiary's physical presence at the actual signing of the will is not required to find undue influence. If other evidence supports a conclusion that the beneficiary had

338. In re Estate of Johnson, 340 S.W.3d 769, 776 (Tex. App.—San Antonio 2011, pet. denied) ("Not every influence exerted by a person on the will of another is undue."); *see Rothermel*, 369 S.W.2d at 922 (noting that free agency must be destroyed before a claim of undue influence will be successful (citing Long v. Long, 133 Tex. 96, 125 S.W. 2d 1034, 1035 (1939))).

339. *See id.* (explaining the influence must rise to the level of changing the testator's wishes to the point that those wishes are no longer reflected in the instrument (citing Curry v. Curry, 153 Tex. 421, 270 S.W.2d 208, 211–12 (1954))); *see also* Trezevant v. Rains, 85 Tex. 329, 19 S.W. 567, 570 (1892) (citations omitted) (cautioning that "mere persuasion" or "acts of kindness" do not create undue influence when the "testator has the requisite mental capacity").

340. *See* Furr v. Furr, 403 S.W.2d 866, 871 (Tex. Civ. App.—Fort Worth 1966, no writ) (noting testator's desire for peace and to avoid conflict was sufficient to show undue influence); *see also Long*, 125 S.W.2d at 1035 (holding undue influence can take the form of behavior that influences the testator's desire for peace, creating a scenario where the final will no longer reflects the decedent's wishes).

341. *See, e.g.*, Taylor v. Taylor, 248 S.W.2d 820, 823–24 (Tex. Civ. App.—Dallas 1952, no writ) (summarizing how heightened scrutiny is created).

342. *Id.* at 820 (quoting 44 TEX. JUR. *Wills* § 56 (1936)).

343. *Id.* at 823–24.

sufficient control over the testator to exert his or her influence from a distance, then the lack of physical presence will not preclude undue influence.[344]

b. Existence of a Fiduciary Relationship

The existence of a fiduciary or confidential relationship between the testator and the favored beneficiary is not alone sufficient to invalidate a will.[345] Nevertheless, the existence of a fiduciary relationship may shift the burden of going forward with evidence to establish the fairness of the transaction to the benefitted fiduciary.[346] An exception to the fiduciary rule exists where the benefitted recipient is an otherwise unrelated attorney for the testator because such devises are void, by statute.[347]

c. Non-Exhaustive List of Other Factors to Consider

Undue influence hinges on whether the testator's own desires were subverted by that of a person substituting his or her own wishes in the will. Not surprisingly, the court looks at a broad range of circumstances

344. *See* Pearce v. Cross, 414 S.W.2d 457, 460–61 (Tex. 1966) (clarifying the presence of a beneficiary in the immediate vicinity is sufficient to establish undue influence); *see also In re* Estate of Olsson, 344 S.W.2d 171, 178–79 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (recognizing the evidence supported a finding of undue influence even though the beneficiary was not physically present in the room while testatrix signed her will, especially noting that "when she came out each time he was there, and he left with the testatrix on each of these occasions"); Besteiro v. Besteiro, 65 S.W.2d 759, 761 (Tex. Comm'n App. 1933) (stating that prior acts or words unduly operated on the grantor's mind at the document's execution). *But see* Broach v. Bradley, 800 S.W.2d 677, 681 (Tex. App.—Eastland 1990, writ denied) (concluding that the presence of a beneficiary at a will signing does not automatically constitute undue influence).

345. *See, e.g.*, Longaker v. Evans, 32 S.W.3d 725, 733–37 (Tex. App.—San Antonio 2000, pet. withdrawn) (considering the circumstances surrounding the fiduciary relationship and finding that the existence of such relationship is not enough to establish undue influence without other evidence).

346. *See* Collins v. Smith, 53 S.W.3d 832, 840–41 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("Texas courts have applied a presumption of unfairness to transactions between a fiduciary and a party to whom he owes a duty of disclosure, thus casting upon the profiting fiduciary the burden of showing the fairness of the transactions."); *see also* Spillman v. Estate of Spillman, 587 S.W.2d 170, 172 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (arguing the purpose of the presumption of undue influence in a fiduciary relationship is to "establish the burden of producing evidence"); Price v. Taliaferro, 254 S.W.2d 157, 163 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.) (recognizing the burden rests on devisee, who had the fiduciary duty, to show there was no undue influence); Rounds v. Coleman, 189 S.W. 1086, 1089 (Tex. Civ. App.—Amarillo 1916, no writ) (reasoning that the burden of proving undue influence rests on the party who had the fiduciary duty).

347. *See* TEX. PROB. CODE ANN. § 58b (West Supp. 2012) (outlining when a "devise or bequest of property in a will is void"); *see also* Shields v. Tex. Scottish Rite Hosp. for Crippled Children, 11 S.W.3d 457, 458–60 (Tex. App.—Eastland 2000, pet. denied) (holding a bequest to attorney was void under state disciplinary rules even though the will was executed before section 58b's effective date).

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when evaluating such claims. For example, factors relevant to an undue influence claim include the following:

> [C]ircumstances [surrounding the] execution of the instrument; the relationship existing between the maker and the beneficiaries and others who might be expected to be recipients of [the maker's] bounty; the motive, character, and conduct of those benefitted by the instrument, participation by the beneficiary in preparation or execution of the instrument; the words and acts of all attending parties; the physical and mental condition of the maker at the time of the execution of the instrument; his age, weakness, infirmity, and dependency on or subjection to the control of the beneficiary; and the improvidence of the transaction by reason of unjust, unreasonable, or unnatural disposition.[348]

12. Basic Proof Outline for Undue Influence Claims

In *Rothermel*, the Supreme Court of Texas provides a clear guide to the type of evidence that will normally be introduced in support of an undue influence claim, although the proof and facts will vary from case to case:

> Generally, *the establishment of the existence of an influence that was undue* is based upon an inquiry as to the nature and type of relationship existing between the testator, the contestants[,] and the party accused of exerting such influence.
>
> *The establishment of the exertion of such influence* is generally predicated upon an inquiry as to the opportunities existing for the exertion of the type of influence or deception possessed or employed, the circumstances surrounding the drafting and execution of the testament, the existence of a fraudulent motive, and whether there has been an habitual subjection of the testator to the control of another.
>
> Where there is competent evidence of the existence and exercise of such influence, *the issue as to whether it was effectually exercised* necessarily turns the inquiry and directs it to the state of the testator's mind at the time of the execution of the testament, since the question as to whether free agency is overcome by its very nature comprehends such an investigation.
>
> *The establishment of the subversion or overpowering of the will of the testator* is generally

348. Lowery v. Saunders, 666 S.W.2d 226, 234 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (quoting 61 TEX. JUR. 2d *Wills* § 76 (1964)); *see In re* Estate of Graham, 69 S.W.3d 598, 609 (Tex. App.—Corpus Christi 2001, no pet.) (echoing the principle that evidence of the circumstances surrounding the execution of the will may be admitted to determine the existence of undue influence); *see also* Click v. Sutton, 438 S.W.2d 610, 613 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.) (suggesting courts should look at surrounding circumstances to determine undue influence).

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> based upon an inquiry as to the testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted. Words and acts of the testator may bear upon his mental state. Likewise, weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in establishing this element of undue influence. Finally, *the establishment of the fact that the testament executed would not have been executed but for such influence* is generally predicated upon a consideration of whether the testament executed is unnatural in its terms of disposition of property.[349]

G. *Texas Probate Code Section 85: Proof of Lost Will*

If the original of the will to which the proponent seeks to admit in probate cannot be located, then he or she must not only establish the basic requisites for a valid will, such as the presence of a signature, testamentary intent, testamentary capacity, due execution, and non-revocation, but a proponent must also:

1. Establish the cause of the will's non-production (to overcome any presumption of revocation by destruction), including proof that the will "cannot by any reasonable diligence be produced"; and
2. Offer substantial proof of its contents.[350]

A proponent must explain the reason for non-production of the original document. Section 85 of the Texas Probate Code applies even if a photocopy of the lost will is available.[351] To prove the contents of the lost will, a credible witness who previously read the will must testify.[352] Again, this proof is necessary even if a photocopy is available because a credible witness must testify that the photocopy is a "true and correct copy" of the original.[353] In Texas, if there is no photocopy, it is not necessary to establish all of the contents of the lost will verbatim.[354] In

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349. Rothermel v. Duncan, 369 S.W.2d 917, 923 (Tex. 1963) (emphasis and spacing added) (internal citations omitted).

350. PROB. § 85 (West 2003) (providing requirements of proof for written wills not produced in court).

351. *See* Bracewell v. Bracewell, 20 S.W.3d 14, 26 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (recognizing that photocopies of the original will must be proved in the same matter as an attested or holographic will as provided in PROB. § 84 (West 2003)).

352. *See* PROB. § 85 (requiring that the cause of non-production be explained by a credible witness who either read the will or heard it read).

353. *Id.*; *see* TEX. R. EVID. 901(a)–(b)(1) (establishing the need for authentication or identification of evidence and witness testimony as sufficient to meet these requirements); *id.* R. 1002 (requiring the original document).

354. *See* Garton v. Rockett, 190 S.W.3d 139, 145 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("While it is not necessary to establish all of the contents of an alleged lost will literally or

such cases, it is required to provide proof that establishes the essential terms with some degree of certainty, so there is no confusion about the provisions.[355] Importantly, the proof required under section 85 is necessary only if the proponent offers the lost will for probate.[356] If the lost will is offered simply to raise a fact issue as to revocation of an earlier will, section 85 is not applicable.[357]

IV. JURISDICTION

A. *Probate Code Jurisdiction*

1. General Rules

The basic jurisdictional scheme for probate matters is set forth in sections 4C, 4F, and 4H of the Texas Probate Code.[358] Since a will contest is obviously a matter "appertaining or incident to the estate" of the deceased testator, subject matter jurisdiction of the contest usually lies (at least initially) in whichever court the application to probate the will is filed.[359] Once jurisdiction attaches in a particular court, that court will

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verbatim, it is necessary to establish its material contents with some degree of certainty . . . ." (quoting Cason v. Taylor, 51 S.W.3d 397, 409 (Tex. App.—Waco 2001, no pet.))).

355. *See Cason*, 51 S.W.3d at 409 ("[S]tatutory requirements for substantial proof of the contents of an alleged lost will have not been satisfied so long as the court is left in confusion about the real provisions of the will . . . ." (quoting Harris v. Robbins, 302 S.W.2d 225, 229 (Tex. Civ. App.—Amarillo 1957, no writ))); Howard Hughes Medical Inst. v. Neff, 640 S.W.2d 942, 952 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (remarking that contents of lost will must be proved by credible witness (citing *Harris*, 302 S.W.2d at 229)).

356. *See* PROB. § 85 (prescribing the methods that may be used in proving up a will that cannot be produced in court as the same as those for an attested will or holographic will); *see also* Lisby v. Estate of Richardson, 623 S.W.2d 448, 450–51 (Tex. Civ. App.—Texarkana 1981, no writ) (noting that the method for establishing a will outside of probate is different than the requirements laid out in sections 84 and 85 of the Texas Probate Code).

357. *See Lisby*, 623 S.W.2d at 450–51 (distinguishing methods required for lost wills and "revoking [an] instrument which is not admitted to probate"); *see also In re* Estate of Page, 544 S.W.2d 757, 761 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (explaining that there is a distinction between proving the existence of a subsequent will and showing revocation of an earlier will).

358. *See* PROB. § 4C (West Supp. 2012) (proclaiming county courts have original jurisdiction in the absence of a statutory probate court and county court at law, and when there is a county court and county court at law but no statutory probate court, the courts exercise concurrent jurisdiction); *see also id.* § 4D (describing jurisdictional scheme for contested matters where county court exercises original probate jurisdiction); *id.* § 4E (establishing procedure for contested probate matters in county where there is no statutory probate court); *id.* § 4F (stating statutory probate courts have exclusive jurisdiction); *id.* § 4H (providing the instances in which district courts exercise concurrent jurisdiction with the statutory probate court).

359. *See id.* § 4A (asserting that a "court exercising original probate jurisdiction also has jurisdiction of all matters related to the probate proceeding" as specified for that court); *see also id.* § 4B (describing actions that are "related to a probate proceeding"); Palmer v. Coble Wall Trust Co.,

retain dominant jurisdiction for all matters related to the estate to the exclusion of other coordinate courts.[360] Any orders entered by the wrong court—one without dominant jurisdiction—are void and subject to either direct or collateral attack.[361] Parties may not waive lack of subject matter jurisdiction and cannot raise the issue for the first time on appeal.[362] Once a trial court determines that it lacks subject matter jurisdiction, it has no discretion and must dismiss the case as a ministerial act.[363] Local or special legislation for the county courts in the county where the application to probate is filed should be checked before the contest is filed.[364] If jurisdiction appears at all questionable, a litigant should file a plea in abatement at the earliest opportunity.[365]

2. Contested Probate Jurisdiction

In small or rural counties—where there is no statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court—will contestants have the option of transferring to a district court for resolution.[366] In these counties, major revisions to section 5 of the Probate Code during 1997 and 1999 now give parties to contested probate proceedings the option of requesting the appointment of a statutory probate court judge to hear the contested matters.[367] The

851 S.W.2d 178, 182 (Tex. 1992) (interpreting repealed section 5A(b) as stating that all incidents and matters related to the estate are within the jurisdiction of the court exercising original probate jurisdiction).

360. *See* Carlisle v. Bennett, 801 S.W.2d 589, 592 (Tex. App.—Corpus Christi 1990, no writ) (noting that where courts have concurrent subject matter jurisdiction, the first court to acquire jurisdiction has dominant jurisdiction).

361. *See, e.g.*, Miller v. Woods, 872 S.W.2d 343, 346 (Tex. App.—Beaumont 1994, no writ) (stating that the district court did not have subject matter jurisdiction to determine a will contest where a statutory county court was granted such jurisdiction); Crawford v. Williams, 797 S.W.2d 184, 185–86 (Tex. App.—Corpus Christi 1990, writ denied) (holding that the district court did not have jurisdiction over will contest proceeding where the county court acquired and exercised jurisdiction).

362. *See* Tex. Ass'n of Bus. v. Air Control Bd., 852 S.W.2d 440, 443–45 (Tex. 1993) ("Subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties.").

363. *See, e.g.*, Qwest Microwave Inc. v. Bedard, 756 S.W.2d 426, 440 (Tex. App.—Dallas 1988, no writ) (averring that the court must dismiss claims over which it has no subject matter jurisdiction).

364. *See* TEX. GOV'T. CODE ANN. § 25.0001 (West 2004) (acknowledging when the general provisions for statutory county courts conflict with specific provisions, the specific provisions control).

365. *See* Wyatt v. Shaw Plumbing Co., 760 S.W.2d 245, 248 (Tex. 1988) (describing the use of a plea in abatement in regards to venue); *see also* 1A TEX. JUR. 3d *Actions* § 134 (2012) (promoting the idea that a plea in abatement is used to stay venue when more than one action is commenced).

366. *See, e.g.*, TEX. PROB. CODE ANN. § 4D(a)(2) (West Supp. 2012) (providing that a judge may "transfer the contested matter to the district court").

367. *See id.* § 4D(a)(2) (allowing counties with no statutory probate court or county court at law

parties make this request by filing a motion that a county court judge is obligated to grant unless a court already transferred the matter to a district court.[368] Once a statutory probate judge is assigned to a contested probate matter, the judge has the full range of jurisdiction and authority given to statutory probate judges.[369] In complex cases involving estate plans with trusts and family partnerships, this expanded jurisdiction can be crucial to avoiding piecemeal litigation.[370] Statutory probate courts and district courts, unlike county courts at law or constitutional county courts, may also impose a constructive trust.[371] Section 25.0022 of the Texas Government Code outlines the appropriate measures for seeking recusal or disqualification of a statutory probate judge.[372]

B. *Trust Code Jurisdiction*

A district court has original jurisdiction over all proceedings concerning trusts, including questions related to construction and validity.[373] Under section 115.001(d) of the Texas Property Code, the jurisdiction of the district court is exclusive except for the concurrent jurisdiction otherwise conferred by law on statutory probate courts under section 4H of the Texas Probate Code,[374] or the statutory jurisdiction granted to a court

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to request the appointment of a statutory probate judge to hear the contested matter); *see also* GOV'T § 25.0022 (West Supp. 2012) (establishing the administration of statutory probate courts).

368. *See, e.g.*, PROB. § 4D(b) (mandating that if a party to a probate proceeding requests a statutory probate court judge to hear contested matters in the proceedings before the county court transfers the matter to the district court, then the county judge must grant the motion and not transfer to the district court).

369. *See, e.g.*, GOV'T. § 25.0022(i) (maintaining that a judge assigned to hear statutory probate matters under a special provision has the same "jurisdiction, powers, and duties given . . . to statutory probate court judges by general law").

370. *See, e.g.*, PROB. § 4G (granting statutory probate courts jurisdiction over trusts and actions related to trusts).

371. *See* Green v. Watson, 860 S.W.2d 238, 244 (Tex. App.—Austin 1993, no writ) (clarifying that "[t]he mere request for a constructive trust will not, of itself, guarantee a district court's exercise of its jurisdiction to oust the dominant jurisdiction of a statutory county court sitting in probate" (citing Thomas v. Tollon, 609 S.W.2d 859, 860–61 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.))).

372. *See* GOV'T § 25.00255 ("A party in a hearing or trial in a statutory probate court may file with the clerk of the court a motion stating grounds for the recusal or disqualification of the judge."); *see also In re* Living Centers of Am., Inc., 10 S.W.3d 1, 5 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding), *mand. denied*, 35 S.W.3d 596 (Tex. 2000) ("[W]e do not believe the Legislature intended section 25.00261 to apply to the assignment of judges in the probate courts.").

373. *See, e.g.*, TEX. PROP. CODE. ANN. § 115.001(a), (b) (West 2007) ("[A] district court has original and exclusive jurisdiction over all proceedings concerning trusts . . . [and] may exercise the powers of a court of equity in matters pertaining to trusts.").

374. *See id.* § 115.001(d) (noting that the district court's exclusive jurisdiction over proceedings concerning trusts is limited when jurisdiction is "conferred by law on a statutory probate court"); *see*

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creating a management trust pursuant to section 867 of the Texas Probate Code.[375]

V. VENUE

A. *Probate Actions*

Section 6 of the Texas Probate Code fixes venue for the probate of a will in the county of the decedent's domicile or "fixed place of residence."[376] On the other hand, if the deceased had no domicile or residence in Texas, then other proper venues include: the county in which the testator's principal property was located at the time of his or her death; the county where the testator died; the county where his or her next of kin resided; or the "county where his [or her] principal estate was situated."[377]

The essential elements of domicile are residence in fact and intent to make the county his or her permanent, fixed place of residence.[378] In many instances, the testator states in the will that he or she is a resident of a certain county. Absent proof that the testator changed his or her residence subsequent to the execution of the will, this type of recital of residence is usually accepted.[379] Only voluntary changes in residence are effective for venue purposes under section 6(a).[380]

If venue is proper in two or more counties, the proceedings in the second county are stayed until the judge of the court that received the first

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also PROB. § 4H (West Supp. 2012) (granting district courts concurrent jurisdiction over certain matters).

375. *See* PROB. § 867 (West 2003) (listing provisions regarding the creation of a management trust); *see also id.* § 869C ("A court that creates a trust under Section 867 . . . has the same jurisdiction to hear matters relating to the trust as the court has with respect to guardianship . . . .").

376. *See, e.g., id.* § 6(1) (declaring that venue for probate proceedings shall be in the county where the deceased lived or maintained a permanent residence within Texas).

377. *See generally id.* § 6 (listing possible venue options).

378. *See In re* Estate of Steed, 152 S.W.3d 797, 804–05 (Tex. App.—Texarkana 2004, pet. denied) (holding that even though testator spent most of his time in county where he worked, venue was proper in county where his wife lived); *see also* Maddox v. Surber, 677 S.W.2d 226, 228 (Tex. App.—Houston [1st Dist.] 1984, no writ) (reciting the essential elements of domicile (citing Texas v. Florida, 306 U.S. 398, 424 (1939))); Slay v. Dubose, 144 S.W.2d 594, 596 (Tex. Civ. App.—Fort Worth 1940, writ ref'd) (finding that "fixed place of residence" is equated with "domicile").

379. *See, e.g.*, Estate of McKinney v. Hair, 434 S.W.2d 217, 218 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) ("Recitals and declarations 'in the will as to the testator's residence ordinarily carry great weight, and will be accepted in the absence of a showing of a change of residence before death.'" (quoting 95 C.J.S. *Wills* § 418)).

380. *See, e.g.*, Thomas v. Price, 534 S.W.2d 730, 732–33 (Tex. Civ. App.—Waco 1976, no writ) (recognizing that because the testator died in a state hospital after being adjudicated insane, domicile for venue purposes was the county of his residence at the time of this adjudication).

application determines the venue question.[381] Section 8 also states that probate proceedings initiated in multiple counties are to be stayed except in the county where first initiated, until venue is determined.[382] If a probate proceeding is initiated in a county that did not have priority of venue, that court has the authority to transfer the proceeding to the proper court any time before the final decree.[383] Once a proceeding is transferred to another court, that proceeding resumes and all orders from the first court are presumed valid.[384] Every court has full jurisdiction to determine venue and venue orders are not subject to collateral attack.[385] Interlocutory appeals are also not permitted.[386] If a party does not raise the issue of priority of venue before the final decree, there is no error.[387]

There is no right to a jury trial on venue matters; venue is determined based on pleadings and affidavits.[388] The provisions of section 6 apply only to proceedings to probate a will or grant letters testamentary or letters of administration; otherwise, the general venue rules of sections 115.001 and 115.002 of the Property Code apply.[389]

B. *Trust Actions*

In 1999, the Texas Legislature substantially revised the venue rules for

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381. *See, e.g.*, PROB. § 8(b) (West Supp. 2012) (stating that when two or more courts have concurrent jurisdiction, the one who first obtains jurisdiction retains it until it resolves the question of where venue is proper).

382. *See, e.g., id.* ("If the proper venue is finally determined to be in another county, the clerk, after making and retaining a true copy of the entire file in the case, shall transmit the original file to the proper county, and the proceeding shall . . . [continue] as if the proceeding had originally been instituted therein.").

383. *See, e.g., id.* § 8A(a) (allowing transfer of the proceedings at any stage upon a showing of improper venue or for the convenience of the estate).

384. *See, e.g., id.* § 8(b).

385. *See, e.g., id.* § 8A(c) (protecting venue determinations from collateral attack).

386. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a) (West 2002) (holding that venue determinations are not eligible for interlocutory appeal).

387. *See In re* Estate of Izer, 693 S.W.2d 481, 484 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) ("[I]f the question as to priority of venue is not raised before final decree in the proceedings is announced, the finality of such decree shall not be affected by any error in venue." (quoting what is now PROB. § 8A(a) (West Supp. 2012))).

388. *See* CIV. PRAC. & REM. § 15.064 ("The court shall determine venue questions from the pleadings and affidavits."); *see also* Maddox v. Surber, 677 S.W.2d 226, 228 (Tex. App.—Houston [1st Dist.] 1984, no writ) ("[T]here is no right to a jury under the probate code for venue . . . .").

389. *See* TEX. PROP. CODE ANN. § 115.001 (West 2007); *see also* Boyd v. Ratliff, 541 S.W.2d 223, 225–26 (Tex. Civ. App.—Dallas 1976, writ dism'd) (holding that a "suit for declaratory judgment by an independent executrix" does not fall within sections 6, 7, or 8 of the Texas Probate Code).

trust actions.[390] As a result, venue cases decided before the effective date of these amendments (September 1, 1999), may not be useful in deciding current venue questions. Fortunately, the 1999 venue rules set forth in the Texas Property Code are easy to follow, and provide three guiding principles:

1. Single Trustee

> If there is a single, noncorporate trustee, the action shall be brought in the county in which: (1) the trustee resides or has resided at any time during the four-year period preceding the date the action is filed[,] or (2) the situs of the administration at any time during the four-year period preceding the date the action is filed.[391]

2. Multiple or Corporate Trustees

> If there are multiple trustees or a corporate trustee, an action shall be brought in the county in which the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed, provided that an action against a corporate trustee . . . may be brought in the county in which [it] maintains its principal office in [Texas].[392]

3. Convenience

> For just and reasonable cause, including the location of the records and the convenience of the parties and witnesses, the court may transfer an action from a county of proper venue . . . to another county of proper venue: (1) on motion of a defendant or joined party, . . . or (2) on motion of an intervening party, filed not later than the 20th day after the court signs the order allowing the intervention.[393]

Finally, note that each of the key definitions—corporate trustee, principal office, and situs of administration—is defined in section 115.002(f) of the Texas Property Code.[394]

390. Act of May 26, 1999, 76th Leg., R.S., ch. 933, 1999 TEX. GEN. LAWS 3668, 3668–69 (amended 1999) (current version at PROP. § 115.002 (West 2007)).

391. PROP. § 115.002(b)(1)–(2).

392. *Id.*

393. *Id.*

394. *Id.* § 115.002(f).

VI. PLEADING CHECKLIST

A. *Probate Code Pleading Requirements*

The Texas Rules of Civil Procedure are generally applicable to probate proceedings. However, the Texas Probate Code has several specialized rules of procedure applicable to will contests, and in the event of any conflict, those provisions control over the rules of procedure.[395]

Any time a question of pleading arises in a will contest, a practitioner should check the following sections of the Probate Code:

Section 6—Venue: Probate of Wills and Granting of Letters Testamentary and of Administration[396]
Section 8—Concurrent Venue in Probate Proceeding[397]
Section 8A—Transfer of Venue in Probate Proceeding[398]
Section 9—Defects in Pleading[399]
Section 10—Persons Entitled to Contest Proceedings[400]
Section 10A—Necessary Party[401]
Section 21—Trial by Jury[402]
Section 79—Waiver of Right to Serve[403]
Section 81—Contents of Application for Letters Testamentary (includes offers of a "written will" or a "nuncupative will")[404]
Section 82—Contents of Application for Letters of Administration[405]
Section 83—Procedure Pertaining to a Second Application[406]
Section 89A—Contents of Application for Probate of Will as Muniment of Title[407]

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395. *See* TEX. R. CIV. P. 2 (declaring that specialized probate provisions control over general rules in the event of conflict); *see also In re* Estate of Crenshaw, 982 S.W.2d 568, 571 (Tex. Civ. App.—Amarillo 1998, no pet.) ("Rule 2 delineates the scope of [the rules] application to include all actions of a civil nature . . . subject to limited exceptions not applicable here."); Drake v. Muse, Currie & Kohen, 532 S.W.2d 369, 372 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (holding that appeals from probate proceedings were governed in part by the Texas Probate Code, and that "when a rule of civil procedure promulgated by the supreme court conflicts with a legislative enactment, the rule must yield").

396. TEX. PROB. CODE ANN. § 6 (West Supp. 2012).
397. *Id.* § 8.
398. *Id.* § 8A.
399. *Id.* § 9 (West 2003).
400. *Id.* § 10.
401. *Id.* § 10A.
402. *Id.* § 21.
403. *Id.* § 79.
404. *Id.* § 81.
405. *Id.* § 82.
406. *Id.* § 83.
407. *Id.* § 89A (West Supp. 2012).

Section 95—Probate of Foreign Will Accomplished by Filing and Recording[408]

B. *Probate Citation and Notice Rules*

1. General Rules: Texas Probate Code Sections 33 and 34

The general notice and service rules applicable to probate matters are found in section 33 of the Probate Code—Issuance, Contents, Service, and Return of Citation, Notices, and Writs in Probate Matters.[409] Section 33 expressly provides clarification regarding the following: (a) when citation or notice is necessary; (b) when the county clerk will issue necessary citations in probate matters; (c) what must be included in the contents of probate citations, writs, and notices; (d) that the Texas Rules of Civil Procedure may be followed when no specific method of notice is prescribed by the Probate Code, or where the provisions of the Probate Code are "insufficient or inadequate"; (e) the rules for service upon personal representatives; (f) the various methods of serving citations and providing notice, such as personal service, posting, publication, and mailing; (g) the return of citations and notices; (h) the rules for returns of citation when notice is by posting; (i) the rules for proof of service; and (j) that "any person interested in the estate" can file a request for notice even though that person has not entered an appearance as a party to any specific proceeding.[410]

Section 34, Service on Attorney, also provides that, unless the Code expressly requires personal service,[411] "[A]ll citations and notices required to be served on the party . . . shall be served on the attorney" either "by registered or certified mail or by delivery to the attorney in person" once the attorney enters an appearance of record for a party in a probate proceeding.[412]

2. Application to Probate: Texas Probate Code Section 128

Additional specialized notice provisions apply to applications for probate and, thus, contests.[413] Section 128(a) of the Texas Probate Code provides for citation by posting if the application is for "probate of a

408. *Id.* § 95.
409. *Id.* § 33.
410. *Id.*
411. *See, e.g., id.* § 149C (discussing the removal of an independent executor).
412. *Id.* § 34.
413. *Id.* § 128.

written will produced in court."[414] Service by posting under section 128 satisfies due process requirements under the United States Constitution.[415] Section 128(b) requires personal service on the resident heirs if the application is for a lost will.[416] Section 128A also requires written notice by registered or certified mail within sixty days after the will is admitted to probate to certain beneficiaries and entities named as devisees in the will, including the state, governmental agencies of the state, or charitable organizations.[417] A careful review of section 128A is imperative to ensure all appropriate parties are given the proper notice.

For any will offered for probate under section 73(a), more than four years after the testator's death, section 128B(a) requires "notice by service of process to each of the testator's heirs whose address can be ascertained by the applicant with reasonable diligence" before the hearing.[418] This requirement may be avoided as to any heir who files an affidavit of non-objection in compliance with section 128B(b).[419] Section 128B(e) provides that if a will has already been admitted to probate, then the notice by service of process must be given to each "beneficiary of the testator's probated will" instead of the testator's heirs.[420]

C. *Contesting Statutory Validity Issues*

1. Texas Probate Code Section 10: Opposition

The only requirement specified by section 10 of the Probate Code for an opposition filed prior to the time the will is admitted to probate is that it be in writing.[421] Courts will liberally construe this requirement in favor of the contestant.[422] Because a will proponent must already prove the

414. *Id.* § 128(a).

415. *See In re* Estate of Ross, 672 S.W.2d 315, 318 (Tex. App.—Eastland 1984, writ ref'd n.r.e.) (concluding that posting notice sufficiently complies with federal due process requirements when a will is produced in court).

416. PROB. § 128(b) (West Supp. 2012).

417. *See id.* § 128A(d)(2) (stating that beneficiaries who receive less than $2,000 in aggregate gifts under a will do not have to be provided notice); *see* TEX. PROP. CODE ANN. § 123.003 (West 2003) (requiring notice to the Texas Attorney General if a charitable trust is involved at least twenty-five days before any hearing in the proceeding).

418. PROB. § 128B(a).

419. *Id.* § 128B(b).

420. *Id.* § 128B(e).

421. *See, e.g., id.* § 10 ("Any person interested in an estate may, at any time before any issue in any proceeding is decided upon by the court, file opposition thereto in writing and shall be entitled to process for witnesses and evidence, and to be heard upon such opposition, as in other suits.").

422. *See In re* Estate of Merrick, 630 S.W.2d 500, 502 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.) (finding sufficient pleading in opposition under section 10 in an application maintaining that

will's validity under sections 59[423] and 88[424], the mere filing of an opposition does no more than notify the proponent that he or she may need more than a self-proving affidavit to meet his or her previously existing burden of proof and is, in many ways, similar to the filing of a general denial.[425]

Courts consistently reject attempts to impose additional requirements with regard to pleadings under the Texas Rules of Civil Procedure.[426] In *Hogan v. Stoepler*,[427] the court refused to apply the verified pleading requirement of Texas Rule of Civil Procedure 93(7)[428] and stated that it does not apply to will contests because:

> An application to probate a will is not in any proper sense a pleading founded in whole or in part upon an instrument in writing. The proceeding is one in rem, the very purpose of which is to establish the genuineness, the validity, and the execution under the essential formalities of law of the instrument as the last will and testament of the testator.[429]

Thus, a pleading that states, "Jane Doe hereby opposes the application to admit the document dated January 1, 2001 to probate as the last will and testament of John Doe," places at issue every fact essential to prove the statutory validity of the offered will under sections 59 and 88, including legal adult status, testamentary capacity, signature (with knowledge of contents and with testamentary intent), proper witnessing, and non-revocation.[430]

"deceased left no valid will" to contest proponent's application to probate an alleged will); *see also* PROB. § 9 (West 2003) ("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.").

423. *See* PROB. § 59 (West Supp. 2012) (describing requirements for a valid will).

424. *See id.* § 88 (West 2003) (requiring applicant to offer general and additional proofs to the court for probate of a will regardless of whether the will is contested).

425. *See, e.g., id.* § 59(c) (West Supp. 2012) (providing an interested party may contest a self-proved will because the court will subject it to the same treatment as a will that is not self-proved).

426. *See Estate of Merrick*, 630 S.W.2d at 502 (relying on section 10 of the Probate Code to find that contesting a will requires "less strictness" in pleading than other matters).

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

428. *See* TEX. R. CIV. P. 93 (listing matters requiring verification, including denial of writings "charged to have been executed by a person then deceased").

429. *Hogan*, 82 S.W.2d at 1001; *accord In re* Estate of Rosborough, 542 S.W.2d 685, 687 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) (clarifying the only statutory requirement under Texas Probate Code section 10 is that the opposition be in writing; there is no requirement that it be verified or otherwise comply with Texas Rule of Civil Procedure 93(7)).

430. *See* PROB. § 59 (West Supp. 2012) (explaining the requirements of a will); *see also id.* § 88 (West 2003) (listing general and additional requirements the applicant must prove to satisfy the probate court).

2. Texas Probate Code Section 93: Contest

If the contestant files the contest after the will is admitted to probate, the pleading should comply with Texas Rule of Civil Procedure 45 and give fair notice as to each of the grounds, such as lack of testamentary capacity or improper execution, on which the contest is based.[431]

3. Undue Influence and Fraud

The contestant must always affirmatively plead any affirmative challenge to the will on which he or she has the burden of proof such as undue influence, fraud, or mistake.[432]

D. *Standing*

1. The Contestant's Standing

Under either Sections 10 or 93 of the Probate Code, the contestant must plead sufficient facts to demonstrate his or her standing as a person interested in whether the court admits the will to probate.[433]

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431. *See* TEX. R. CIV. P. 45 (stating requirements for proper pleadings).

432. *See id.* ("Pleadings . . . shall . . . consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegation as a whole."); *see also* Long v. Long, 196 S.W.3d 460, 466 (Tex. App.—Dallas 2006, no pet.) ("When a party with the burden of proof challenges an adverse finding, he must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue." (citing Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001))).

433. *See* Logan v. Thomason, 202 S.W.2d 212, 215 (Tex. 1947) (asserting that a contestant has the burden of alleging and, if necessary, of proving a personal financial interest involved in the probate proceedings). In *Logan*, the court provides insight regarding who qualifies as an interested person:

> The term 'person interested' has a well-defined but restricted meaning. The interest referred to must be a pecuniary one, held by the party either as an individual or in a representative capacity, which will be affected by the probate or defeat of the will. An interest resting on sentiment or sympathy or any other basis other than gain or loss of money or its equivalent, is insufficient.

Id.; *accord* Abrams v. Estate of Ross, 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923, holding approved) (noting that a party contesting a will has the burden to prove a legal interest in the estate). *See generally* In re Estate of Redus, 321 S.W.3d 160, 162 (Tex. App.—Eastland 2010, no pet.) (asserting that named beneficiaries of a first will have the request standing to contest a later will).

2. Attacking Standing of Other Party

Either party to a will contest may attack the standing of the other party. The nature of the standing defect will usually dictate which method a challenging party will use.[434]

a. Pleading Deficiency: Special Exceptions. If the pleading fails to allege any facts that demonstrate standing, the court should give the contestant an opportunity to cure this pleading defect.[435]

b. Undisputed Standing Facts: Motion for Dismissal or for Partial Summary Judgment. If undisputed facts that are insufficient for standing as a matter of law form the basis of the opposition's pleading, plaintiff's counsel may file a motion for partial summary judgment or a motion to dismiss the contest for lack of jurisdiction.[436] From a practical viewpoint, this makes sense. The following scenario illustrates this point: a testator and his wife are in love, and he generously provides for his wife and step-daughter in his will. Unfortunately, the couple divorces, yet the testator fails to change his will, and he dies years later. Should his ex-wife and step-daughter receive the devise? No. In fact, the Texas Legislature amended section 69 in 2007 to clarify scenarios like this.[437] Prior to the amendment, the statute only listed ex-spouses.[438] To ensure that step-children and in-laws could not benefit from such will provisions, the legislature added the following language: "[I]f the former spouse and *each relative of the former spouse who is not a relative of the testator.*"[439] Thus, ex-spouses may not benefit, nor can step-children and in-laws.[440]

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434. *See* PROB. § 9 (West 2003) (requiring timely objection to the court before defects in any pleading may invalidate the pleadings); *see also* Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996) (defining standing as being "personally aggrieved").

435. PROB. § 9. *Contra* Seyffert v. Briggs, 727 S.W.2d 624, 628 (Tex. App.—Texarkana 1987, writ ref'd n.r.e.) (stating if pleadings cannot be cured by any amendment, the court should enter an order dismissing the contest rather than an order striking the pleadings).

436. For example, section 69 revokes certain provisions as a matter of law: "If after making a will, the testator's marriage is dissolved, . . . all provisions in the will . . . shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator." PROB. § 69. An additional example of a contestant without standing as a matter of law occurs when a devisee who disclaimed interest in the estate of decedent then files contest. *See id.* § 37A(c) (noting the effect of a disclaimer).

437. *See* 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 34.4 (3d ed. 2012) (illustrating problems faced by courts before the amendment).

438. *Id.*

439. *See* PROB. § 69 (West Supp. 2012) (emphasis added); *see also* 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 34.4 (3d ed. 2012) (explaining the effect of the amendment).

440. PROB. § 69; 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 34.4 (3d ed. 2012).

c. Evidentiary Questions: Motion in Limine/Plea in Abatement/Plea to Jurisdiction/Motion to Dismiss for Lack of Subject Matter Jurisdiction/Motion to Dismiss for Lack of Standing. Notwithstanding the motion's title, if the facts related to standing are not apparent from the pleading or are otherwise in dispute, the question of standing will require a motion and an evidentiary hearing.[441] Consistent with other instances where the court must determine whether it has jurisdiction, the court must resolve disputed fact questions related to standing without a jury.[442] Once the facts are resolved, the party's standing becomes a question of law to be resolved by the court.[443]

E. *Lack of Legal Capacity to Sue*

The question of capacity refers to the legal authority of one person to act, usually for someone other than him or herself.[444] A person may contest a will in a representative capacity, but only if he or she has a pecuniary interest in the outcome of the proceeding in that capacity.[445] If lack of capacity is the issue, a verified denial under Texas Rule of Civil Procedure 93 will be required.[446] Although parties cannot waive standing, a party waives the issue of capacity when it fails to specifically plead and timely bring a complaint regarding capacity to the trial court's attention.[447]

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441. *See In re* Estate of McDaniel, 935 S.W.2d 827, 829–30 (Tex. App.—Texarkana 1996, writ denied) (affirming order sustaining plea in abatement and dismissing the contest of the will based on test for estoppel); *see also* Sheffield v. Scott, 620 S.W.2d 691, 693–94 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (explaining lack of standing issues based on estoppel should be tried separately by motion in limine before trial).

442. *See Sheffield*, 620 S.W.2d at 693 ("The Texas Courts have established that the proper procedure to follow on the issue of interest of a contestant is to try the issue separately in an in limine proceeding and in advance of a trial of the issues affecting the validity of the will." (citing Womble v. Atkins, 160 Tex. 363, 331 S.W.2d 294 (1960))); *see also In re* Estate of Hill, 761 S.W.2d 527, 528–29 (Tex. App.—Amarillo 1988, no writ) (explaining that standing issues are tried without a jury).

443. *See* Caprock Inv. Corp. v. F.D.I.C., 17 S.W.3d 707, 713 (Tex. App.—Eastland 2000, pet. denied) (identifying the issue of standing as a question of law).

444. *See* Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996) (defining capacity as having "the legal authority to act, regardless of whether there is a justiciable interest in the controversy").

445. *See* Logan v. Thomason, 146 Tex. 37, 202 S.W.2d 212, 215 (1947) (defining interested persons as those with a "legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefited, or in some manner materially affected, by the probate of the will").

446. *See* TEX. R. CIV. P. 93 (noting that either the plaintiff or the defendant's lack of capacity must be verified by an affidavit unless verification appears in the record).

447. *See Nootsie*, 925 S.W.2d at 662 ("Unlike standing, an argument that an opposing party does not have the capacity to participate in a suit can be waived."); *see also* Cont'l Supply Co. v. Hoffman,

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F. *Jurisdiction and Venue*

Since the contestant usually files after the original application to probate, if he or she agrees with the jurisdiction and venue as pleaded the contestant only need state in the pleading that "jurisdiction and venue are proper in this court as set forth in the application."[448] If there is a pleading defect on these issues, but no real dispute that jurisdiction and venue are proper, the contestant should assert the requisite jurisdiction and venue facts.

To contest venue, the party should file a motion to transfer venue in compliance with Texas Rule of Civil Procedure 86.[449] While the better practice, in keeping with the general rules applicable to venue motions, is to file the motion to transfer venue before any other pleading, this is not always essential in a will contest. Section 8A(a) provides that the court shall transfer the proceeding to a proper county "on the application of any interested person" filed "at any time before the final decree" and upon a showing "that the proceeding was commenced in a court which did not have priority of venue over such proceeding."[450] Section 8A(b) gives the court discretion, so that it "may order the proceeding transferred to the proper court in any other county in this State" at any time before the matter is concluded if the court determines the transfer "would be in the best interest of the estate."[451] If a court transfers venue under section 8A, the action does not start over, rather the second court recognizes and expressly presumes that all proceedings and orders entered by the first court are valid.[452]

G. *Discovery Level*

Although the requirement of Texas Rule of Civil Procedure 190.1 states that the "plaintiff must allege in the first numbered paragraph of the original petition," this is still open to question in applications to probate a will—or any opposition or contest—there is no reason this language could not be included.[453] Attorneys should also check local rules for any special requirements on docket control orders.

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144 S.W.2d 253, 255 (Tex. 1940) (concluding that defendant waived capacity arguments by not raising the issue).

448. *See generally* TEX. R. CIV. P. 87(3)(a) ("All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party.").

449. *See id.* R. 86 (describing the requirements for filing an objection to venue).

450. TEX. PROB. CODE ANN. § 8A(a) (West Supp. 2012).

451. *See id.* § 8A(b) (summarizing the provision relating to "Transfer for Convenience").

452. *Id.* § 8B.

453. *See* TEX. R. CIV. P. 190.1 (mandating a discovery control plan).

H. *Jury Demand*

The parties may demand a jury in the initial contest or in a separately filed pleading, as long as the demand is filed before any deadline specified in the court's local rules, or at least thirty days prior to the time the case is set for trial on the non-jury docket.[454] Failure to pay the requisite jury fee may render the request ineffective.[455]

I. *Counter-Applications*

The contestant who is also seeking to admit a will to probate must file a "counter-application."[456] If the contestant does not wish to offer a competing will, and the opposition is filed before the will is admitted to probate, the contestant's pleading might also contain, or be accompanied by, an application for the appointment of a temporary administrator.[457]

J. *Attorney's Fees*

1. Will Contests

Section 243 of the Probate Code provides the following:

> When any person designated as executor in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings. When any person designated as a devisee, legatee, or beneficiary in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he may be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings.[458]

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454. *See id.* 216(a) (requiring the filing of a written request to receive a jury trial).

455. *See* PROB. § 21 (West 2003) (explaining that parties are entitled to jury trials for contested probate proceedings); *see also* TEX. R. CIV. P. 216 (describing the necessity for payment of the required fee to secure a jury trial).

456. *See* PROB. § 81 (providing a list of information that must be included in every application to probate a will). Note that section 81 requires that a written will "if within the control of the applicant," is to "be filed with the application" for probate. *Id.*

457. *See* PROB. § 131A(b) (West Supp. 2012) (establishing the requirements of "a written application for the appointment of a temporary administrator"); *see also id.* § 132(a) (permitting the appointment of a temporary administrator during a will contest).

458. *Id.* § 243.

Texas courts strictly construe section 243. Thus, the courts decline to authorize attorney's fees to a contestant who does not offer a competing will for probate.[459] Section 243 is also not applicable to an administrator "not seeking to have a will admitted to probate" or "defending a will already admitted" to probate.[460]

Furthermore, attorney's fees in will contests cannot be recovered from the opposing party, nor can they be charged against the contestant's share of the estate.[461] Instead, attorney's fees paid from the estate under section 243 are considered a general expense of administration to be allocated as provided by the terms of the will or by section 322B.[462]

The term "designated executor" means the person specifically named as the executor in the will.[463] The term "designated beneficiary" includes those persons specifically named as the beneficiaries in the will.[464] Persons offering or defending the will need not be successful in the action; however, if they do not prevail, they must obtain a finding of good faith and just cause from the court or the jury as a prerequisite to an award of fees under section 243.[465] This finding of good faith may not be required

459. *See* Zapalac v. Cain, 39 S.W.3d 414, 419 (Tex. App.—Houston [1st Dist.] 2001, no pet.) ("Under Texas law, a party who seeks *only* to contest a will may not obtain statutory reimbursement for attorney's fees under Section 243.").

460. *See* Drake v. Muse, Currie & Kohen, 532 S.W.2d 369, 374–75 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (observing section 243 is inapplicable because no one was trying to admit a will to probate or "defending a will already admitted").

461. *See Zapalac*, 39 S.W.3d at 420 (refusing "[t]o judicially engraft the words 'out of the *unsuccessful party's portion* of the estate'" onto section 243 because it "would contravene the explicit wording of the Section 243" that allows fees only from the estate as a whole).

462. *See* PROB. § 322B (West Supp. 2012) (classifying priority of claims against the estate and explicitly indicating that any will provisions are controlling over the statutory priority); *see also* Salmon v. Salmon, 395 S.W.2d 29, 33 (Tex. 1965) (ducking the issue of allocating will contest fees to parties who benefitted from the executor's successful defense of a will and applying the general rule for payment of these fees out of the residuary estate); *Zapalac*, 39 S.W.3d at 420 (declining to charge attorney's fees solely against the contestant's share of the estate).

463. Schulte v. Marik, 700 S.W.2d 685, 686–87 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

464. *See In re* Estate of Huff, 15 S.W.3d 301, 306 (Tex. App.—Texarkana 2000, no writ) (identifying the issue of whether a "beneficiary must be specifically named" in the will to recover attorney's fees as "an issue of first impression," but refusing to address the issue given the facts of the case); *see also* Harkins v. Crews, 907 S.W.2d 51, 62 (Tex. App—San Antonio 1995, writ denied) (interpreting the 1987 amendment to PROB. § 243, permitting beneficiaries to recover attorney's fees when "defending a will in good faith"); Travis v. Robertson, 597 S.W.2d 496, 498 (Tex. Civ. App.—Dallas 1980, no writ) (awarding attorney's fees to executrix who was "found by the court to have acted in good faith and with just cause").

465. Huff v. Huff, 132 Tex. 540, 124 S.W.2d 327, 330 (Tex. 1939); Aldridge v. Spell, 774 S.W.2d 707, 711 (Tex. App.—Texarkana 1989, no writ); *see* Ray v. McFarland, 97 S.W.3d 728, 730–31 (Tex. App—Fort Worth 2003, no pet.) (overturning the trial court's judgment notwithstanding verdict and restoring jury finding—will contestant had not proceeded in good faith and with just

for designated executors because, absent evidence to the contrary, they are presumed to be acting in good faith.[466] The finding of good faith is also not required for successful proponents.[467] The problem is that the proponents never know whether they will be successful until the jury comes back or a court grants a summary judgment motion. Therefore, the only safe route is to always request and obtain a factual finding of good faith from the fact finder.

The general rule requiring the segregation of attorney's fees between claims where fees are allowed by statute and claims where fees are not allowed is applicable in probate actions subject to the recognized exception involving facts that are inextricably "intertwined to the point of being inseparable."[468] The award may include fees incurred before the contestant offered the will for probate if the attorney provides evidence that such legal work was directed to oppose contestant's offering of an alternate will.[469]

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cause); Collins v. Smith, 53 S.W.3d 832, 843 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (upholding jury's finding that contestants of a will were not entitled to attorney's fees and expenses because they "did not proceed in good faith and with just cause").

466. *See Salmon*, 395 S.W.2d at 33 (discussing the circumstances under which an executor "is deemed to be acting for the benefit of the estate"); *see also In re Estate of Lynch*, 04-11-00731-CV, 2012 WL 4900859 (Tex. App.—San Antonio Oct. 17, 2012, no. pet. h.) (reiterating the rule that an executor must defend a will contest in good faith or face reimbursing the estate for attorney's fees incurred).

467. *See* Miller v. Anderson, 651 S.W.2d 726, 728 (Tex. 1983) (distinguishing the presumed benefit to the estate for an attorney who successfully admitted a will to probate from the good faith and just cause requirements for contestants to wills already in probate); *see also In re* Estate of Davis v. Cook, 9 S.W.3d 288, 295 (Tex. App.—San Antonio 1999, no pet.) (affirming the trial court's award of attorney's fees to the proponents of a will because the "contestants failed to produce specific evidence of undue influence or bad faith" related to the proponents' actions).

468. *See* Hartmann v. Solbrig, 12 S.W.3d 587, 593–94 (Tex. App.—San Antonio 2000, pet. denied) (holding that litigation commenced by and against executrix provided "several statutory bases for awarding attorney fees" and that executrix was not required to segregate attorney's fees between settling and non-settling defendants); *see also* McLendon v. McLendon, 862 S.W.2d 662, 673–74 (Tex. App.—Dallas 1993, writ denied) (determining that the intertwined legal theories involved in challenging executor's estate management satisfied the exception to the general rule that requires segregation of attorney's fees); Ephran v. Frazier, 840 S.W.2d 81, 88 (Tex. App.—Corpus Christi 1992, no writ) (denying prayer for attorney's fees because the claim included fees related to estate management that were unrelated to the instant suit). *See generally* Tony Gullo Motors v. Chapa, 212 S.W.3d 299, 310–14 (Tex. 2006) (expounding on the general rule to disallow attorney's fees unless authorized by statute or contract and the exception to the general rule for "discrete legal services [that] advance both a recoverable and unrecoverable claim that . . . are so intertwined that they need not be segregated").

469. *See* Zapalac v. Cain, 39 S.W.3d 414, 418–19 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (awarding attorney's fees under section 243 on the basis "that a party affirmatively seeking to have a will admitted to probate" is also entitled to attorney's fees for the "portion of its litigation strategy that contests a rival will").

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Courts use a "sufficiency of evidence" standard to review an award of attorney's fees under section 243, and the party seeking recovery bears the burden of proof.[470] Under section 243, an award of contingency fees does not fall under the rubric of reasonable fees.[471] The request for fees under section 243 must be brought in the original will contest and not in a subsequent suit.[472] The trial court is authorized to allow a trial amendment seeking attorney's fees and expenses after the case is decided, subject to a review for abuse of discretion.[473]

2. Trust Actions

Section 114.064 of the Texas Property Code—the Texas Trust Code—permits recovery of "reasonable and necessary attorney's fees as may seem equitable and just."[474] The award of attorney's fees under the Texas Trust Code is within the "discretion of the trial court" and will not be disturbed on appeal absent an abuse of discretion.[475] An action to declare the validity of a trust agreement or the rights of parties under a trust may also be brought under the Texas Declaratory Judgments Act.[476] At least one court held that the two statutes are not interchangeable and that section

470. *Hartmann*, 12 S.W.3d at 594 (citing Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 11 (Tex. 1991)).

471. *See Salmon*, 395 S.W.2d at 33 ("[Section 243] does not authorize the allowance of an amount that might be reasonable for a fee contingent upon successful prosecution of the litigation."). *But cf. id.* at 32 ("[The court is] not to be understood as holding here that the estate may never be required to pay a reasonable contingent fee under the terms of [section 243].").

472. Huff v. Huff, 132 Tex. 540, 124 S.W.2d 327, 329–30 (1939); *see* Russell v. Moeling, 526 S.W.2d 533, 536 (Tex. 1975) (refining the court's ruling in *Huff*, which denied an executor the right to seek attorney's fees in a subsequent proceeding, to align with the Texas rule of res judicata barring litigation of a related issue which was tried in an earlier suit). *But see Miller*, 651 S.W.2d at 728 (finding an attorney who filed a claim for fees with the court, after receiving approval from the bank acting as alternate independent executor, in compliance with section 243).

473. *See* TEX. R. CIV. P. 270 (providing a universal rule permitting the introduction of new evidence, if such new evidence is not deemed controversial); *see also id.* R. 306a (outlining the time frame in which a court retains plenary power); *id.* R. 329b (describing the requirements for filing motions to amend judgments); *cf.* Candelier v. Ringstaff, 786 S.W.2d 41, 43 (Tex. App.—Beaumont 1990, writ denied) (discussing the application of the Texas Rules of Civil Procedure to a motion for an award of attorney's fees and expenses filed after the court's announcement of its decision).

474. TEX. PROP. CODE ANN. § 114.064 (West 2007); *see* Charles Epps Ipock, *A Judicial and Economic Analysis of Attorney's Fees in Trust Litigation and the Resulting Inequitable Treatment of Trust Beneficiaries*, 43 St. Mary's L.J. 855 (2012) (providing a thorough analysis of potential inequities of awarding attorney's fees to negligent trustees).

475. *See* Lyco Acquisition 1984 Ltd. P'ship v. First Nat'l Bank of Amarillo, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied) (illustrating the court's abuse of discretion in failing to award attorney's fees under section 114.064 of the Texas Property Code).

476. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.005 (West 2008) (establishing that an interested party may use the Declaratory Judgments Act to have a declaration of their rights and legal relations determined with regard to a trust or an estate).

114.064 of the Property Code applies only to proceedings brought under the express provisions of the Trust Code.[477] Thus, a defendant may rely on section 114.064 to recover fees in an action brought under the Declaratory Judgment Act.[478] The "lodestar method" is often used to determine the reasonableness of fees in trust actions.[479] Under this approach, the court first determines the lodestar by multiplying the number of hours reasonably expended by the prevailing hourly rate in the community, and then adjusts the figure up or down depending on a variety of factors.[480]

K. *Third-Party Pleadings: Will Contests*

An action to probate a will, and any opposition or contest filed in connection therewith, is a proceeding in rem.[481] Such proceedings are, therefore, binding on all persons interested in the estate of the decedent whether or not they have actual notice of the proceeding and even though they are not formally joined as parties to the action.[482] One of the justifications for this rule is that a person who is close enough to the testator to have a pecuniary interest in the outcome of the will contest should also be close enough to know when the testator dies.[483] Therefore, it is not unduly harsh to impose a rule whereby this person is also presumed to know when a probate proceeding is opened.

1. Texas Probate Code Section 10A: Necessary Party

While this is still the rule for most interested persons, the legislature

477. *See* Conte v. Conte, 56 S.W.3d 830, 834 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (denying attorney's fees because the suit was brought under the Declaratory Judgments Act rather than section 114.064 of the Property Code).

478. *See, e.g.*, CIV. PRAC. & REM. § 37.009 (West 2008) (awarding "necessary attorney's fees as are equitable and just").

479. *See, e.g.*, Texarkana Nat'l Bank v. Brown, 920 F. Supp. 706, 708 (E.D. Tex. 1996) (discussing applicability of lodestar method to declaratory action seeking construction of trust created by a will).

480. *See, e.g., id.* at 708–09 (outlining the steps in the lodestar method).

481. *See* Ladehoff v. Ladehoff, 436 S.W.2d 334, 336 (Tex. 1968) (stating that "[a]n application for probate is a proceeding in rem," and clarifying that "[a]n in rem judgment, . . . is binding upon the whole world and specifically upon persons who have rights or interest in the subject matter").

482. *See id.* at 336–37 (emphasizing that an application to probate, as an in rem proceeding, is specifically binding "upon persons who have rights or interests in the subject matter," regardless of whether they were personally served with notice); *see also* Neill v. Yett, 746 S.W.2d 32, 36 (Tex. App.—Austin 1988, writ denied) (reiterating probate actions "bind all persons unless set aside in the manner provided by law").

483. *See, e.g., Neill*, 746 S.W.2d at 36 (holding a beneficiary was charged with constructive notice of testator's death and execution of his will; therefore, court was unwilling to waive the two-year statute of limitations to bring "suit for fraud and tortious interference").

added a statutory exception to the Probate Code in 1989 to protect certain distributees who could not reasonably be expected to know when a will they might have an interest in was being offered for probate.[484] Under section 10A of the Probate Code, the only necessary parties to a will contest in Texas are: "An institution of higher education[,] . . . a private institution of higher education, or a charitable organization" named as a distributee in the will being contested.[485] The Attorney General of the State of Texas must also be notified at least twenty-five days prior to any hearing in any will contest in which a devise or bequest to a charitable organization may be affected by the outcome.[486]

2. Joinder of Other Named Legatees and Devisees

At least one court indicated that all persons named as legatees or devisees in contested will proceedings should be joined as parties.[487] While the failure to join a person interested in the estate will probably not affect the finality or validity of the judgment,[488] the risk of not joining all interested parties is that no truly final settlement can be reached unless all potential takers are present. An incomplete settlement agreement will bind all parties who do sign the agreement, but it cannot bind the non-signing beneficiaries or affect their interests.[489]

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484. *See, e.g.*, PROB. § 10A(b) (West 2003) (finding that institutions of higher education and charitable organizations are entitled to notice and service in the manner provided by this Code).

485. *See id.* § 10A(a) (noting that institutions of higher education and charitable organizations are necessary parties).

486. *See* TEX. PROP. CODE ANN. §§ 115.011(c), 123.003 (West 2007) (illustrating the requirement that the attorney general receive notice of the proceeding from "[a]ny party initiating a proceeding involving a charitable trust").

487. *See* TEX. R. CIV. P. 39–40 (regarding joinder of parties); *see also* Jennings v. Srp, 521 S.W.2d 326, 328–30 (Tex. Civ. App.—Corpus Christi 1975, no writ) (reconciling the requirements of section 93 of the Texas Probate Code with Rule 39 of the Texas Rules of Civil Procedure to determine that "[l]egatees and/or devisees and heirs at law whose interest in property will be affected by a construction of the will are indispensable parties to an action to construe the will and must be made parties to the action in accordance with Rule 39, TEX. R. CIV. P."). *But see* Wojcik v. Wesolick, 97 S.W.2d 335, 337–38 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (emphasizing that the Texas Rules of Civil Procedure are inapplicable to probate actions because the unambiguous language of the Texas Probate Code states that it is unnecessary to join any person to a probate proceeding unless the Probate Code expressly requires joinder).

488. *See* Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981) (reiterating probate actions are in rem actions that bind all persons; therefore, all "[p]ersons interested in an estate . . . are charged with notice of the contents of the probate records").

489. *See* Fore v. McFadden, 276 S.W. 327, 329 (Tex. Civ. App.—Texarkana 1925, writ dism'd w.o.j.) (finding that married women who were not signatories to a family settlement agreement were not bound by its provisions).

3. Minors and Incompetents

The major concern with respect to unjoined interested persons is always whether there are minors, incompetents, unknown heirs, or even unborn heirs who might appear years later to undo the settlement or file a contest under section 93 of the Probate Code, which expressly tolls the two-year statute of limitations until two years after the removal of any legal disability.[490] If this is a concern, the better practice is to seek the appointment of a guardian *ad litem*, or even an attorney *ad litem*, to represent these interested persons.[491]

4. Necessary Parties: Trust Proceedings

In trust proceedings, section 115.011(b) of the Property Code specifies that the only necessary parties (in addition to the trustee) are the following persons:

(1) a beneficiary on whose act or obligation the action is predicated;
(2) a beneficiary designated by name in the instrument creating the trust;
(3) a person who is actually receiving distributions from the trust estate at the time the action is filed; and
(4) the trustee, if a trustee is serving at the time the action is filed.[492]

Section 115.013(c)(3) provides that "a parent may represent his minor child as a guardian *ad litem* or as a next friend," as long as "there is no conflict of interest."[493] Section 115.013(c)(4) also recognizes that the doctrine of virtual representation may obviate any need for the appointment of *ad litems* if the interests of the "unborn or unascertained person who is not otherwise represented . . . [are] adequately represented by another party having a substantially identical interest in the proceeding."[494] Finally, section 115.0014 authorizes the appointment of a guardian *ad litem* for minor, incapacitated, or unborn beneficiaries "at any

490. *See* PROB. § 93 (West 2003) (denoting that the statute of limitations for contesting probate is tolled for incapacitated persons until the "removal of their disabilities," at which point the two-year limitations period beings to run).

491. *See id.* § 34A (West 2003) (illustrating the general attorney *ad litem* provision); *see also id.* § 53(b) (West Supp. 2012) (describing the special provision for the appointment of a guardian *ad litem* or attorney *ad litem* for unknown or incapacitated heirs "in a proceeding to declare heirship" if the court finds "the appointment is necessary to protect" their interests); TEX. R. CIV. P. 173 (showing the general guardian *ad litem* provision).

492. PROP. § 115.011(b) (West 2007).

493. *Id.* § 115.013(c)(3).

494. *See id.* § 115.013(c)(4); *accord id.* § 114.032 (c)–(e) (making settlement agreements binding on minor beneficiaries and unborn or unascertained beneficiaries in no conflict virtual representation cases unless the trust is to be modified or terminated).

point in a proceeding" if the court determines that representation of that person's interest would otherwise be inadequate.[495]

L. *Motion for Continuance on Application Hearing*

Most counties will remove the matter from the uncontested docket once the opposition is filed; however, if the application to probate is set for hearing on the probate court's docket, be sure that the judge's clerk is advised that an opposition was filed before the time set for the hearing.[496] If there is any doubt, appear at the hearing with a copy of the file-stamped opposition. A practitioner should check the local rules to determine whether filing the opposition is sufficient to postpone any hearing that may already be set on the application or whether a formal motion for continuance is required.

VII. SPECIAL DISCOVERY TOOLS

The Texas Probate Code provides some special discovery tools that are often crucial to the preparation of both sides of a will contest.

A. *Demand for Delivery of Will*

In many cases, the potential contestant or proponent of a will has information indicating that the decedent may have executed one or more alternate wills, but is unable to obtain a copy of the document. Section 75 of the Texas Probate Code sets forth a procedure whereby the custodian of the original of any will allegedly executed by the decedent can be compelled to deliver the original will to the clerk of the court that has jurisdiction over the estate.[497] A will delivered under section 75 need not be offered for probate.[498] Section 75 further imposes an affirmative obligation on any person or corporate entity having possession or custody of an alleged will to come promptly forward with the document.[499] Failure to come forward with the document after citation and notice may result in arrest and incarceration until the document is delivered, and

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495. *Id.* § 115.0014 (West Supp. 2012).

496. *See In re* Estate of Morris, 577 S.W.2d 748, 752 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e) (describing a will contest as a "direct attack upon a decree admitting a will to probate"); *see also* PROB. § 93 (West 2003) (defining the types of challenges that may be made, who may bring those challenges, and the statute of limitations on such challenges).

497. PROB. § 75 (West 2003).

498. *See id.* (requiring that good cause be shown as to why the will is not delivered). *But cf. id.* § 88(b) (requiring proof that the will was executed with the "formalities and solemnities and under the circumstances required by law to make it a valid will").

499. *Id.* § 75.

damages may be assessed if "sustained as a result of such refusal."[500]

A contestant can facilitate this process by sending a formal written "Demand for Delivery of Wills" to anyone he or she believes may have custody of a will.[501] Potential recipients include the decedent's surviving spouse, any living ex-spouse, children and other relatives, any attorney who performed legal services for the decedent during his or her life, a bookkeeper, a broker or other investment advisors, a secretary or business associates, insurance agents, and any bank or other financial institution where the decedent maintained his or her accounts.

The demand should meet the following requirements: (1) be sent by certified mail; (2) identify the decedent by his or her full name and any aliases; (3) state the date and county of the decedent's death; (4) give the style and cause number and court in which the estate is pending (if the estate is opened); (5) identify the "clerk of the court" by name, title, and address; and (6) specify a reasonable time frame for the delivery of the will to the clerk—two weeks should be sufficient in most cases.[502] The name, mailing address, e-mail address, telephone number, and fax number of a contact person for the sender, usually the sender's attorney, should also be included because many of the recipients may have information regarding the decedent even if they do not have one or more of his or her wills. A copy of the demand may be filed in the probate proceeding or attached to a later motion to compel delivery.[503]

The initial purpose of section 75 was to assist potential contestants by discouraging parties from suppressing wills that were unfavorable to them.[504] The proponent of a will can use section 75 to show lack of revocation and due diligence in attempts to locate a document in any case where the original of the offered will is lost or destroyed.[505] Another

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500. *Id.*

501. *See id.* (providing basic authority to demand delivery of a will from its custodian); *see also* 12 Aloysius Leopold & Gerry Beyer, *West's Texas Forms: Admin. Decedent Est. & Guard.* § 11:2 (3d ed. 2011) (providing the basic form for "Complaint for delivery of will" as baseline for submission to court).

502. *See* 25 AM. JUR. PLEADING & PRAC. FORMS WILLS § 45 (West 2012) (providing detailed guidance for litigants seeking to compel production of a will).

503. *Cf.* Plummer v. Roberson, 666 S.W.2d 656, 657–58 (Tex. App.—Austin 1984, writ ref'd n.r.e.) (discussing section 75 of the Texas Probate Code and its application where two separate wills were filed in two separate courts and then the two applications were consolidated to determine which instrument was proper).

504. *See id.* (describing executor's obligation to turn over competing wills to probate court).

505. *See* PROB. § 85 (West 2003) (outlining the standard of proof for "[a] written will which cannot be produced in court"); In re Estate of Perez, 324 S.W.3d 257, 261 (Tex. App.—El Paso 2010, no pet.) ("The will proponent must establish the will's nonrevocation by a preponderance of the evidence.").

strategic use of section 75 forces the early production of a will in any case where a potential contestant is hinting about another will or making subtle threats to file a contest in the future. Once the will is delivered to the clerk, the requesting party can examine the document for possible forgery or other fraud; to identify and locate the subscribing witnesses, the drafting attorney, or both; and to elect to take advantage of Texas Rule of Civil Procedure 202[506] by formally deposing the witnesses even though no contest is filed. A more prompt and fair resolution of the matter may result once the potential contestant realizes that he or she lost much of the leverage of uncertainty otherwise created by the two-year limitation period for filing contests under section 93,[507] a more prompt and fair resolution of the matter will result.

B. *Waiver of Decedent's Medical Records Privilege*

Section 10B of the Texas Probate Code allows parties in a will contest to compel the production of the decedent's medical information from any health care provider with a subpoena accompanied by a copy of the petition in the contested proceeding.[508] Section 10B was originally designed to dispense with the necessity of obtaining a court order or a written authorization for release of the decedent's medical records from the personal representative of his or her estate.[509] The statute imposing confidentiality on a patient's medical records has also been amended to recognize an exception for cases in which the deceased patient's mental capacity to execute a will is an issue.[510]

C. *Entry into Safety Deposit Box*

Sections 36B,[511] 36C,[512] 36D,[513] 36E,[514] and 36F[515] of the Texas

506. *See* TEX. R. CIV. P. 202 (permitting petition for court order authorizing deposition "to investigate a potential claim or suit").

507. PROB. § 93 (West 2003).

508. *Id.* § 10B (West 2003); *see* TEX. R. CIV. P. 205 (allowing access to decedent's records where a party is relying on decedent's capacity as part of its claim or defense); TEX. R. EVID. 902(10) (prescribing the notice requirements and the proper form of an affidavit for proof of medical records under the business records hearsay exception).

509. Act of Sept. 1, 1997, 75th Leg., R.S., ch 1302, 1997 TEX. SESS. LAW SERV. (amended 1999) (current version at PROB. § 10B (West 2003)).

510. *See, e.g.*, TEX. OCC. CODE ANN. § 159.003(a)(8) (West 2012) (noting that an "exception to the privilege of confidentiality in a court or administrative proceeding exists . . . if the patient's physical or mental condition is relevant to the execution of a will").

511. *See* PROB. § 36B (permitting examination of documents or safe deposit box with a court order).

512. *See id.* § 36C (allowing the judge issuing a court order for entry into a safe deposit box to take possession of the contents and issue a receipt).

Probate Code set forth procedures whereby access to the testator's safe deposit box to locate a will or other documents can be accomplished.

D. *Pre-Death Filing of Wills*

Section 71 establishes a procedure to deposit a will with the clerk of the county where the testator resides, which is sealed for privacy.[516] During the testator's lifetime, only the testator, or a person authorized by him or her can obtain the will.[517] After the testator's death, the clerk should deliver the will in the following order to:

1. A recipient named by the testator;
2. an executor named in the will; or
3. devisees named in the will.[518]

VIII. EVIDENCE

A. *The Self-Proving Affidavit*

Unless the self-proving affidavit is being used to supply missing signatures on a will pursuant to section 59(b) of the Texas Probate Code (the "Anti-Boren" amendment),[519] the affidavit is not part of the will—it is merely one method of providing evidence that the will was validly executed.[520] Once admitted into evidence, a properly executed and facially valid self-proving affidavit, in substantial compliance with the form

513. *See id.* § 36D (listing the people that the individual in control of the decedent's safe deposit may share its contents with).

514. *See id.* § 36E (providing additional direction for the actions of an individual in control of the decedent's safe deposit box).

515. *See id.* § 36F (forbidding removal of items from the decedent's safe deposit box except under certain circumstances).

516. *See id.* § 71 (West Supp. 2012) (outlining the procedures for the deposit of a will).

517. *Id.*

518. *Id.*

519. *Id.* § 59(b). Prior to the passage of section 59(b) of the Texas Probate Code, the Texas Supreme Court refused to admit a will that bore no witness signatures into probate merely by attaching a self-proving affidavit. *See* Boren v. Boren, 402 S.W.2d 728, 729–30 (Tex. 1966) (finding a will lacking signatures of witnesses was not admissible to probate by self-proving affidavit stating that each witness signed the will).

520. *See* Croucher v. Croucher, 660 S.W.2d 55, 57 (Tex. 1983) (concluding a self-proved will is some evidence of testamentary capacity to execute a will, but it does not shift the burden of proof); *In re* Estate of Price, 375 S.W.2d 900, 903 (Tex. 1964) ("[S]elf-proving provisions have only the effect of authorizing the substitution of affidavits in lieu of testimony offered before the court"), *superseded by statute on other grounds as stated in* Stiles v. Resolution Trust Corp., 867 S.W.2d 24 (Tex. 1993). Note that if the self-proving affidavit is utilized for signatures "the will may not be considered a self-proved will." PROB. § 59(b) (West Supp. 2012).

set forth in section 59(a),[521] is some evidence that the will was properly executed, as required by section 59. The self-proving affidavit also shows that the testator was of legal age (or otherwise considered a legal adult) and had testamentary capacity at the time the will was executed as required by section 88(b).[522] Although both section 88(b)(1) and section 59(a) use the term "sound mind," Texas courts consistently "defined the term 'sound mind' to mean 'testamentary capacity.'"[523] A self-proving affidavit admitted by the court is also sufficient evidence of the facts contained therein to preclude the entry of a directed verdict against the proponent.[524]

However, a self-proving affidavit is subject to objection, both on grounds apparent from the face of the affidavit and on grounds that may be dependent on the introduction of extrinsic evidence.[525] Other potential grounds for objection to the admission of the self-proving affidavit should be explored during the discovery process. For example, if discovery reveals that a subscribing witness never met the testator before the will was signed, there may be a valid objection on the grounds that the subscribing witness was not competent to testify that the testator was over eighteen or of sound mind due to the witness's lack of personal knowledge.[526] A contestant may make another objection based on the lack of opportunity to form sufficient perceptions of the testator to

521. *See* PROB. § 59(a) (providing a form outlining the contents of a self-proving affidavit).

522. *See id.* § 88(b) (stating that a "will is not self-proved" unless the testator "was at least eighteen years of age," lawfully married, or "a member of the armed forces" and of sound mind).

523. Bracewell v. Bracewell, 20 S.W.3d 14, 26 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see* Chambers v. Chambers, 542 S.W.2d 901, 906 (Tex. Civ. App—Dallas 1976, no writ) (recognizing the requirement that the applicant show the testator possessed testamentary capacity "or was of sound mind to probate a will"); Garcia v. Galindo, 189 S.W.2d 12, 12 (Tex. Civ. App.—San Antonio 1945, writ ref'd w.o.m.) (recognizing Texas defines "sound mind" to mean "testamentary capacity").

524. *See Bracewell*, 20 S.W.3d at 26 (upholding trial court's decision to grant an application to probate a will where a proponent entered a self-proved will into evidence).

525. *See* PROB. § 59(c) (clarifying that a court may admit a self-proved will subject to limitations); *see* Broach v. Bradley, 800 S.W.2d 677, 678 (Tex. App.—Eastland 1990, writ denied) (discussing the objection "that the self-proving affidavit was invalid" because witnesses were not properly sworn); Cutler v. Ament, 726 S.W.2d 605, 607 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (agreeing with the appellant's "claim that the wording of the jurat makes the self-proving affidavit defective" in determining the validity of a will). *But see In re* Estate of Graham, 69 S.W.3d 598, 604 (Tex. App.—Corpus Christi 2001, no pet.) (concluding that because the "will was subscribed and acknowledged by the testator and subscribed and sworn to by the witnesses, it is in substantial compliance with the affidavit form provided in [P]robate [C]ode section 59(a)").

526. *See* TEX. R. EVID. 602 (requiring evidence be introduced to prove a witness has personal knowledge before testifying to a matter).

support the opinion.[527] Nevertheless, even if admitted into evidence, the self-proving affidavit is not conclusive on the facts it purports to cover, and may be rebutted by competent evidence.[528] In addition, a valid self-proving affidavit is also insufficient to override a finding by the court that the will was invalid for other reasons.[529]

B. *The Attestation Clause*

The attestation clause of the will is where the witnesses sign immediately after the testator stating words to the following effect:

> The above instrument was here and now published as his last will and signed by the said John Doe, the testator, in our presence and we, at his request, in his presence and in the presence of each other, subscribed our names hereto as attesting witnesses.[530]

Although attestation clauses without self-proving affidavits are hearsay, Texas courts occasionally accept them as evidence of proper execution in cases where there is no other proof, such as when the witnesses are dead or incompetent, or where the witnesses later contradict what happened.[531]

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527. *See id.* R. 701 (proposing testimony of lay witnesses must be "rationally based on the perception of the witness").

528. *See* Croucher v. Croucher, 660 S.W.2d 55, 56–57 (Tex. 1983) (deciding that a trial court's judgment to deny probate of a self-proved will based on a finding that testator lacked testamentary capacity should be affirmed where there was evidence to contradict testamentary capacity); Morris v. Estate of West, 602 S.W.2d 122, 123–24 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (finding that live testimony of subscribing witnesses contradicting attestation clause and self-proving affidavit created a fact issue precluding summary judgment on behalf of the proponent of the will); *see also* Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968) (upholding verdict of lack of testamentary capacity where jury "chose not to believe the testimony of the attesting witnesses" to a self-proved will).

529. *See, e.g.*, Mahan v. Dovers, 730 S.W.2d 467, 468 (Tex. App.—Fort Worth 1987, no writ) (affirming trial court's order denying probate of self-proved will where evidence showed testator frequently changed his will and the court "had no way of knowing whether the will offered for probate was the same will properly executed" on a prior date).

530. This is based on sample language found in section 59 of the Probate Code. *See* PROB. § 59(a) (West Supp. 2012) ("The undersigned, . . . declare to the testator and to the undersigned authority that the testator declared to us that this instrument is the testator's will and that the testator requested us to act as witnesses to the testator's will and signature. The testator then signed this will in our presence, all of us being present at the same time.").

531. *See* Wilson v. Paulus, 15 S.W.2d 571, 573 (Tex. Comm'n App. 1929) (acknowledging that "declarations of the attesting witness as contained in the attestation clause, constitute presumptive evidence of the proper execution of the will"); *see also* Hopf v. State, 72 Tex. 281, 10 S.W. 589, 589–90 (1888) (stating that "when all the subscribing witnesses are dead" other evidence may be sufficient to probate the will); Reese v. Franzheim, 381 S.W.2d 329, 330 (Tex. Civ. App.—Houston 1964, writ refused n.r.e.) (concluding that a "presumption of law arises that the will has been properly executed" where "the signatures of the testatrix and the attesting witnesses hav[e] been proven without controversy").

In *Hopf v. State*,[532] the Texas Supreme Court stated:

> If from defect of memory, or from corrupt purpose, subscribing witnesses should be unable or unwilling to testify to the facts bearing on the due execution of a will, this ought not to be permitted to defeat the will, if other evidence, admissible under the ordinary rules of law to establish facts, be introduced sufficient to satisfy the court 'that the testator executed the will with the formalities and solemnities and under the circumstances required by law to make a valid will.' Cases have arisen in which wills were admitted to probate when the positive testimony of the subscribing witnesses would have defeated this.[533]

A subsequent court interpreted *Hopf* as creating the following rule:

> A full attestation clause reciting compliance with all formalities of execution and signed by the witness is prima facie evidence of the validity of the will, although the witness' memory is faulty, or he contradicts the facts stated in the clause, or where he is dead. The statements of the attestation clause may, however, be rebutted by proper evidence.[534]

As with the self-proving affidavit, the evidence provided by an attestation clause will initially depend on its facial validity and overall consistency with the rest of the document. If the clause passes this threshold test, then if necessary due to lack of other proof, the court may consider it evidence sufficient to preclude a summary judgment or a directed verdict against the proponent of the will on the proper execution issues.[535]

C. *Presumptions in Will Contests*

In addition to the self-proving affidavit and the attestation clause, Texas courts have adopted certain presumptions in will contest cases that will aid the proponent of a will in meeting his or her burden.

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532. Hopf v. State, 72 Tex. 281, 10 S.W. 589 (1888).

533. *Id.* at 592.

534. *Wilson*, 15 S.W.2d at 573; *see* Morris v. Estate of West, 602 S.W.2d 122, 123 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (quoting *Wilson*, 15 S.W.2d at 573); Jones v. Whiteley, 533 S.W.2d 881, 884 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (quoting *Wilson*, 15 S.W.2d at 573); Seydler v. Baumgarten, 294 S.W.2d 467, 473 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.) (quoting *Wilson*, 15 S.W.2d at 573).

535. *See Morris*, 602 S.W.2d at 123 (deciding that probate of a will was improperly denied where a will was properly attested to and self-proved); *Jones*, 533 S.W.2d at 884–85 (making the determination in a will contest case that the burden of proof shifted to the contestant after the proponent "established prima facie that the will was properly executed" through a full attestation clause); Allen v. Nesmith, 525 S.W.2d 943, 948 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (supporting the idea that an attestation clause, together with a self-proving affidavit, can serve as prima facie evidence of the validity of a will despite controverting evidence).

A presumption is not a rule of substantive law.[536] It is simply a factual conclusion that is drawn or inferred from another fact or set of facts legally recognized to occur so consistently, or with such a high degree of probability, that the law is willing to dispense with the need for additional evidence to prove its validity.[537] Presumptions dispense with the need for producing evidence to prove what history and experience teach us probably occurred. Thus, if A + B = C, lawyers and judges are usually willing to presume that A + B will equal C, unless there is some evidence to the contrary.

The key to any presumption is the underlying fact or set of facts upon which it is predicated. In order for a presumption to arise in the first instance, the underlying fact or set of facts must be undisputed and free from doubt or contradiction.[538] In the context of proving up a will, this means that the document must appear regular on its face.[539] However, will contest presumptions are not conclusive, and can be rebutted by contradicting evidence or mitigating facts and circumstances.[540]

1. Testamentary Intent

The presumption that the testator knew and understood the contents of his or her will—this presumption arises from proof that the testator signed the will, since every competent person is presumed to have read and understood each document he or she signs.[541] However, this presumption can be

536. *Cf.* Hunter v. Palmer, 988 S.W.2d 471, 473 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("A legal presumption is a rule of law, statutory or judicial, by which the finding of a basic fact gives rise to the existence of the presumed fact, until the presumption is rebutted.").

537. *See* Greer v. United States, 245 U.S. 559, 561 (1918) (explaining that because a presumption is a factual conclusion that occurs consistently, it "shows the fact to be so generally true that courts may notice the truth"). *Cf.* Madrid v. State, 595 S.W.2d 106, 109 (Tex. Crim. App. 1979) (suggesting that because a presumption shifts the burden of proof to the other party, there is no need for additional evidence).

538. *Cf.* Joplin v. Borusheski, 244 S.W.3d 607, 611 (Tex. App.—Dallas 2008, no pet.) (proposing indirectly that a presumption does not arise that requires "the fact finder to reach a particular conclusion" if there is evidence to the contrary).

539. *Cf.* Reese v. Franzheim, 381 S.W.2d 329, 330 (Tex. Civ. App.—Houston [1st Dist.] 1964, writ ref'd n.r.e.) (acknowledging a lack of suspicious circumstances surrounding the will's execution leads to a presumption of proper execution and validity).

540. *See In re* Estate of Turner, 265 S.W.3d 709, 714 (Tex. App.—Eastland 2008, no pet.) (showing that although presumption arises, it is not conclusive and can be rebutted by contradicting evidence); *see also In re* Estate of Wilson, 252 S.W.3d 708, 713 (Tex. App.—Texarkana 2008, no pet.) (demonstrating that a presumption may be overcome by "proof and circumstances contrary to the presumption").

541. *See* Gilkey v. Allen, 617 S.W.2d 308, 311 (Tex. Civ. App.—Tyler 1981, no writ) (stating that it is "well established that if a testator, who is of sound mind and able to read and write, executes a will and has it witnessed as required by statute, the testator is presumed to know the contents of the

rebutted if suspicious circumstances exist that cast a doubt on the issue[542] and it may not apply if the testator and beneficiary are in a confidential or fiduciary relationship.[543]

A variation of this presumption may also work against a proponent if the will has facial conflicts or inconsistencies because the court will presume that parties read the will before signing it.[544] Moreover, the testator's execution of a logically inconsistent document may call the testator's testamentary capacity into question.[545]

2. Revocation

Additionally, there are presumptions both for and against a finding of revocation:

(i) The presumption of continuity—that the will has not been revoked—arises when the will is found after the testator's death and it can be presumed that the will was not revoked.[546] The evidence to show revocation must be substantial to overcome the presumption of continuity.[547]

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testamentary instrument which he has signed"); James v. Haupt, 573 S.W.2d 285, 289 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (confirming the presumption that a testator knows the contents of his or her will); Boyd v. Frost Nat'l. Bank, 145 Tex. 203, 196 S.W.2d 497, 507 (1946) (acknowledging the presumption that "every such man examines and knows the contents of every instrument he executes").

542. *See* Kelly v. Settegast, 68 Tex. 13, 2 S.W. 870, 872–73 (1887) (reinforcing the idea that, absent proof of suspicious circumstances, the court will assume a testator has full knowledge of the contents of his or her will).

543. *See* Miller v. Miller, 700 S.W.2d 941, 949 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (stating the rule "that a party is presumed to know what he signs" is not strictly applied when a confidential relationship exists).

544. *See* Wich v. Fleming, 652 S.W.2d 353, 355 (Tex. 1983) (stating the court could not "assume the parties signing the affidavit . . . did not read and were unaware of the language of the affidavit and its import"); Hopkins v. Hopkins, 708 S.W.2d 31, 33 (Tex. App.—Dallas, 1986, writ ref'd n.r.e.) ("Extrinsic evidence that the witnesses did not read what they signed cannot abrogate the requirements of the [Texas Probate] Code.").

545. *Cf.* Lowery v. Saunders, 666 S.W.2d 226, 235 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (declaring statements made in the execution of a will that are "unlikely to be prompted by a sound mind are admissible to prove want of mental capacity").

546. *See* Turk v. Robles, 810 S.W.2d 755, 758 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (allowing a rebuttable presumption of continuity to apply if the proponent can show the will's authenticity is not in question); Morgan v. Morgan, 519 S.W.2d 276, 278 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) ("When a will is established as having been duly executed by a testator, unattended by any circumstances which cast suspicion upon it, the presumption of continuity of status applies and makes a prima facie case . . . against revocation.").

547. *See In re* Estate of McGrew, 906 S.W.2d 53, 56 (Tex. App.—Tyler 1995, writ denied) (acknowledging the evidence of revocation must be substantial to rebut the presumption of continuity). *But see* Lisby v. Estate of Richardson, 623 S.W.2d 448, 451 (Tex. Civ. App.—Texarkana 1981, no writ) (holding that proof of revocation by execution of subsequent testamentary instrument

(ii) A presumption that the testator destroyed the will with the intent to revoke it arises if the will was last seen in the testator's possession and cannot be located with reasonable diligence after death,[548] or if it is found in a mutilated condition.[549] However, the presumption of destruction is rebutted if there is evidence that the will was last seen in the possession of someone with a motive to destroy it.[550]

D. *Lay Witness Opinions*

Lay witnesses are allowed to express their opinions if the requirements of Texas Rule of Evidence 602 (personal knowledge) and 701 (opinions by lay witnesses) are satisfied. The most critical component of Rule 701 is that it requires a showing that the opinion is "rationally based on the perception of the witness" before the lay witness offers any testimony regarding either the basis of the opinion or the method by which the opinion is reached.[551]

Even before the adoption of the Texas Rules of Evidence, lay witnesses in will contest actions were allowed to express their opinions of the testator's mental condition, but only after showing sufficient personal contacts.[552] However, no witness—whether characterized as lay or expert—can testify that the testator had testamentary capacity because it is a question of law.[553] Instead, a practitioner should ask the lay witness

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was based solely on the testimony of the testator's estate planning attorney because the second revoking will was lost).

548. *See In re* Estate of Glover, 744 S.W.2d 939, 940 (Tex. 1988) ("[A] presumption of revocation arises when a will is not produced in court, and the will was last seen in the possession of the testatrix or in a place to which she had ready access.").

549. *See* Simpson v. Neely, 221 S.W.2d 303, 312–13 (Tex. Civ. App.—Waco 1949, writ ref'd) (affirming that a presumption of revocation arises when the will was last seen in the testator's possession, but it cannot be found after the testator's death, or is found in a cancelled condition).

550. *Cf. In re* Estate of Caples, 683 S.W.2d 741, 743 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (noting presumption of revocation may be rebutted with evidence showing the will was "surreptitiously withdrawn from the possession of the testator").

551. *See* Fairon v. State, 943 S.W.2d 895, 898–99 (Tex. Crim. App. 1997) (stating that the "initial requirement that an opinion be rationally based on the perceptions of the witness is itself composed of two parts[,]" which includes establishing that the witness has personal knowledge and that the opinion is based on that knowledge).

552. *See* Kenney v. Estate of Kenney, 829 S.W.2d 888, 890 (Tex. App.—Dallas 1992, no writ) (stating that "evidence of incompetency may include lay opinion testimony of a witnesses' observations" in determining testamentary capacity to execute a will); Reynolds v. Park, 485 S.W.2d 807, 811 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (determining that where a lay witness has sufficient personal contacts with the testator, he or she may give testimony based on his or her personal opinion of the testator's mental abilities); Santos v. Morgan, 195 S.W.2d 927, 930 (Tex. Civ. App.—Austin 1946, writ ref'd n.r.e.) (expressing the rule that where sufficient personal contacts are shown, a lay witness is qualified to testify about the testator's mental state).

553. *See* Lindley v. Lindley, 384 S.W.2d 676, 682 (Tex. 1964) (deciding that no witness is

whether, in his or her opinion, the testator had sufficient mental ability to satisfy each of the five requirements of testamentary capacity based on his or her knowledge of the testator.[554]

E. *Expert Witness Opinions*

In the 1993 decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[555] the United States Supreme Court completely altered the analysis federal courts use to determine the admissibility of expert witness testimony. The *Daubert* Court, concerned by what it perceived as a rising tide of "junk science" in the courtroom, abandoned the old test of "general acceptance in the scientific community" in favor of more specific and stringent tests for reliability, relevance, and, ultimately, admissibility.[556] In the wake of *Daubert*, several Texas Supreme Court decisions made it clear that Texas courts must now apply the more stringent post-*Daubert* tests to determine admissibility of expert testimony.[557]

1. Statutory Rules: The Texas Rules of Evidence

a. Rule 602—Lack of Personal Knowledge: Expert witnesses are expressly excluded from the requirement that a witness may not testify to a matter unless he or she has personal knowledge of the matter as required by Rule 602.[558]

b. Rule 702—Testimony by Experts: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."[559]

c. Rule 703—Bases of Opinion Testimony by Experts: This rule acts

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allowed to "state his opinion as to the legal capacity of a person to make a will, because the determination of the existence of testamentary capacity involves the application of a legal definition to the facts").

554. *See* Carr v. Radkey, 393 S.W.2d 806, 810 (Tex. 1965) (determining that a lay witness may testify to a testator's mental ability, not mental capacity).

555. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

556. *See id.* at 588–89 ("Nothing in the text of [Rule of Evidence 702] establishes 'general acceptance' as an absolute prerequisite to admissibility.").

557. *See, e.g.*, E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 572 (Tex. 1995) (holding a proponent of expert testimony must show that the testimony is relevant and based on a reliable foundation to be permitted in court); Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 721 (Tex. 1998) (noting the requirement that expert testimony must be both relevant and reliable).

558. TEX. R. EVID. 602.

559. *Id.* R. 702.

as an expert witness exception to the hearsay rule.

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[560]

d. Rule 704—Opinion on Ultimate Issue: "Testimony [from an expert witness] in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[561]

e. Rule 705—Disclosure of Facts or Data Underlying Expert Opinion: This rule provides the following:

> (a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
>
> (b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered . . . in a civil case may[] be permitted to conduct [voir dire] examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.
>
> (c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.
>
> (d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible

560. *Id.* R. 703. The following subsections of Texas Rule of Evidence 803, concerning hearsay exceptions, frequently come into play in connection with expert witnesses in probate and trust litigation (e.g., doctors, accountants, handwriting experts, and economists): 803(4) (Statements for Purposes of Medical Diagnosis or Treatment); 803(5) (Recorded Recollection); 803(6) (Records of Regularly Conducted Activity); 803(7) (Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6)); 803(8) (Public Records and Reports); 803(9) (Records of Vital Statistics); 803(10) (Absence of Public Record or Entry); 803(14) (Records of Documents Affecting an Interest in Property); 803(15) (Statements in Documents Affecting an Interest in Property); 803(17) (Market Reports, Commercial Publications); and 803(18) (Learned Treatises). *Id.* R. 803.

561. TEX. R. EVID. 704.

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facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.[562]

f. Rule 403—Exclusion of Relevant Evidence on Special Grounds: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[563]

2. "Eight Gates" for Expert Witnesses: New Judicial Tests for Expert Opinion Testimony

Judge Harvey Brown provides a helpful guide to the admissibility of expert witness testimony after *Daubert* in *Eight Gates for Expert Witnesses.*[564] In this article, Brown discusses the following eight gates that experts must pass to allow the use of their testimony in Texas proceedings.[565]

The First Gate: Helpfulness—Pursuant to Rule 702, the testimony must "assist the trier of fact."[566] As such, Texas courts held that mere superfluous testimony that fails to meet this helpfulness requirement is inadmissible.[567] By examining case law in this area, Judge Brown concludes, "Rule 702's helpfulness standard is liberally applied."[568]

The Second Gate: Qualifications—The expert must be qualified on a case-specific, opinion-by-opinion basis.[569] Importantly, Judge

562. *Id.* R. 705. As a practical matter, counsel often asks experts to discuss the basis for their opinion. *See, e.g.*, Alice Leasing Corp. v. Castillo, 53 S.W.3d 433, 446 (Tex. App.—San Antonio 2001, pet. denied) (permitting counsel to ask an expert to narrate a videotaped demonstration that showed the underlying basis for his opinion). However, an important distinction is that the proponent is not required to do so during direct examination. *See, e.g.*, Liquid Energy Corp. v. Trans-Pan Gathering, 758 S.W.2d 627, 637 (Tex. App.—Amarillo 1988), *vacated*, 762 S.W.2d 759 (Tex. App.—Amarillo 1988, no writ) (allowing an expert to testify even though the "predicative data" was not initially disclosed, but also clarifying that such data must be disclosed to the opponent on cross examination).

563. TEX. R. EVID. 403.

564. Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743 (1999).

565. *See id.* (analyzing the admissibility of testimony by expert witnesses in Texas following the *Daubert* decision); *see also* Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 1133, 1153–58 (1999) (exploring procedural issues surrounding expert witness testimony and its admissibility in Texas).

566. TEX. R. EVID. 702.

567. *See, e.g.*, K-Mart v. Honeycutt, 24 S.W.3d 357, 360 (Tex. 2000) (concluding it was not error to exclude the testimony of an expert who did not assist the jurors). "When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony." *Id.*

568. *See* Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 751–57 (1999) (commenting on the discretion given to courts and evaluating how expert testimony is viewed based upon Rule 702).

569. *Id.* at 757–73.

Brown rejects the "notion that an expert must be a highly educated, sophisticated 'authority.'"[570] For example, a repairman may not have any formal education, but he may be qualified to testify regarding how freezing water impacts swimming pool decks based on multiple years of on-the-job training.[571]

The Third Gate: Relevancy—The expert testimony "must be 'sufficiently tied to the facts of the case so that it will aid the jury in resolving a factual dispute.'"[572]

The Fourth Gate: Methodological Reliability—The methodology applied by the expert must be reliable.[573]

The Fifth Gate: Connective Reliability—The expert's reasoning in applying the methodology must be sound for the expert's opinion to be admissible.[574]

The Sixth Gate: Foundational Reliability—"The opinion of an expert must be supported by an adequate foundation of relevant facts, data, or opinions. Absence of such a foundation requires the striking of the expert's opinion as based upon conjecture and speculation."[575]

The Seventh Gate: Reliance upon Inadmissible Evidence Used by Other Experts—"If the sole basis of an expert's is inadmissible evidence that does not satisfy Rule 703, the opinion is inadmissible."[576]

The Eighth Gate: Rule 403—Expert opinion testimony that passes the seven gates, may still be inadmissible if it is unfairly prejudicial pursuant to the standards of Rule 403.[577]

3. When Expert Opinion Testimony Is Not Allowed

a. Questions of Law

Although an expert can pass Rule 702 standards, certain testimony is per se inadmissible, and expert testimony may not be used to instruct the jury as to the law or the application of the law to the specific facts of the case. In Texas, "[A] witness may not give legal conclusions or interpret

570. *Id.* at 759 (citing Petrolia Ins. Co. v. Everett, 719 S.W.2d 639, 641 (Tex. App.—El Paso 1986, no writ).

571. *Id.*

572. *Id.* at 773 (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993)) (citation omitted).

573. *Id.* at 778–804.

574. *Id.* at 804–11.

575. *Id.* at 811–12 (quoting MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 702.1 (4th ed. 1996)).

576. *Id.* at 875.

577. TEX. R. EVID. 403; Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 880 (1999).

the law to the jury."[578] Because the "trial [court] is presumed to have specialized competency in all aspects of the law" and is a legal expert itself "capable of applying the law to the facts and reaching a conclusion without the benefit of expert testimony from another attorney[,]" legal conclusions are almost never admissible.[579] The following are examples of when courts found expert opinions on questions of law inadmissible:

i. Testimony concerning domestic law.[580]

ii. Testimony as to whether a party actually owed a duty.[581]

iii. Testimony as to the existence and extent of a trustee's duty.[582]

iv. Testimony that a fiduciary duty exists, to what extent it actually exists, and the applicable standard of care.[583]

v. Testimony as to whether fraud was committed.[584]

vi. Testimony concerning whether certain statements were disparaging in a business disparagement case.[585]

vii. Testimony as to whether fiduciary duties were actually breached.[586]

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578. United Way of San Antonio v. Helping Hands Lifeline Found., Inc., 949 S.W.2d 707, 713 (Tex. App.—San Antonio 1997, writ denied).

579. *See* Holden v. Weindenfeller, 929 S.W.2d 124, 133–34 (Tex. App.—San Antonio 1996, writ denied) (proclaiming the lower court was correct in excluding testimony on the basis that an expert witness may not testify to matters that are questions of law).

580. *See id.* at 133–34 (affirming the lower court's ruling that an expert witness may not testify as to his opinion of whether the facts of the particular case are enough to establish the elements needed for "an implied easement, an easement by estoppel, and a public dedication").

581. *See, e.g.*, Puente v. A.S.I. Signs, 821 S.W.2d 400, 402 (Tex. App.—Corpus Christi 1991, writ denied) (explaining that opinions regarding the existence of a duty with no underlying factual basis for support, act as legal conclusions, which may only be decided by the court).

582. *See* Harrison v. Wells Fargo Bank Tex., N.A., No. 14-97-00951-CV, 1999 WL 130176, at *6 (Tex. App.—Houston [14th Dist.] March 11, 1999, no pet.) (not designated for publication) (asserting because "the existence and extent of a trustee's duties" are questions of law, testimony based only on opinion are inadmissible regardless of the witness's qualifications).

583. *See* Brown v. McCleskey, No. 07-99-0027-CV, 1999 WL 795478, at *5 (Tex. App.—Amarillo Oct. 6, 1999, pet. denied) (not designated for publication) (stating a witness's affidavit expressing that an implied attorney-client relationship existed between the parties, which created the same fiduciary duties as an express relationship, was "not competent summary judgment evidence" to be considered by the court).

584. *See* Connell v. Connell, 889 S.W.2d 543, 544–45 (Tex. App.—San Antonio 1994, writ denied) (concluding it was not error for the trial court to exclude testimony from an expert witness who only testified to the issue of his opinion on whether fraud was committed by a party to the case).

585. *See, e.g.*, United Way of San Antonio v. Helping Hands Lifeline Found., Inc., 949 S.W.2d 707, 712–13 (Tex. App.—San Antonio 1997, writ denied) (finding testimony that included an opinion of whether or not a party to the case made previous defamatory statements constituted an impermissible legal conclusion).

586. *See* Askanase v. Fatjo, 130 F.3d 657, 673 (5th Cir. 1998) (affirming the exclusion of expert testimony on the basis that it was an impermissible legal opinion where the witness testified regarding whether a party to the case breached a fiduciary duty).

4. "No Help" Cases

Courts will also exclude expert testimony when the witness is no more capable than the jury of drawing a conclusion or where the testimony will intrude upon the role of the court. For example, courts exclude expert opinion testimony in the following circumstances:

a. Testimony as to the type of punishment a defendant should receive.[587]

b. Testimony that a witness was lying or telling the truth.[588]

c. Testimony as to the truth and veracity of a bank officer's conduct.[589]

d. Testimony as to whether the plaintiff's alleged emotional distress was severe in an emotional distress case.[590]

5. Expert Testimony Is Not Conclusive on Testamentary Capacity

The testimony of an expert witness is not conclusive and does no more than create a fact issue, unless the subject matter is one that the trier of fact can only be guided by the opinion testimony of experts:

> '[O]pinion testimony does not establish any material fact as a matter of law . . . .' [T]his statement means . . . that the mere qualification of a witness as an expert does not cut off the fact finder from exercising considerable judgment of his own about how far his opinions are to be relied on, it being no less so where the expert is an employee of the party for whom he testifies.
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> . . . .
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> . . . [J]uries in weighing opinion testimony and reaching their verdicts, when all or most of the evidence on the particular issue is of such character, may, and, as [j]ustice to weigh, and argue against, opinion effect to give effect to the testimony by applying to it, and considering it in the light of, their own general knowledge and experience in the subject of inquiry.'

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587. *See* Sattiewhite v. State, 786 S.W.2d 271, 290–91 (Tex. Crim. App. 1989) (holding testimony by a witness as to the type of punishment a criminal defendant should receive does not aid the trier of fact and was properly excluded by the trial court).

588. *See* Schutz v. State, 957 S.W.2d 52, 68–71 (Tex. Crim. App. 1997) (discussing the exclusion of testimony regarding the truthfulness of a child witness because such testimony was not grounded on specialized knowledge and could not assist the trier of fact in determining the witness's reliability).

589. *See* First United Fin. Corp. v. U.S. Fid. & Guar. Co., 96 F.3d 135, 136 (5th Cir. 1996) (concluding that the lower court's exclusion of testimony was proper because the witness's opinion regarding the honesty of a bank officer's conduct did not assist the fact finder and went beyond the capacity of expertise).

590. *See* Schauer v. Memorial Care Sys., 856 S.W.2d 437, 451 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding that party's reliance on expert testimony to establish the element of severe emotional distress was misplaced because such testimony cannot be used to answer legal questions).

> . . . .
> . . . [T]he opinion testimony of experts is not conclusive on the trier of facts unless the subject is one for experts or skilled witnesses alone where the jury or the court cannot properly be assumed to have, or be able to form, correct opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry.[591]

In Texas, the proponent establishes whether the testator's mental ability satisfies the required elements of testamentary capacity through both lay witnesses and experts.[592] Therefore, even if expert testimony passes muster under the new tests, it will not conclusively establish either the existence of, or the lack of, the testator's testamentary capacity.[593]

F. *The Attorney–Client Privilege*

The attorney–client privilege survives the client's death,[594] and a deceased's relative may assert it on the client's behalf.[595] A will contest frequently involves questions as to a deceased's intent or state of mind at the time the will was executed; thus, communications with one's estate planning attorney are often of critical importance. One of the first tasks faced by will contest attorneys for both parties is to determine if any privileged information exists and, if so, whether an exception to Rule 503 will allow its discovery and use.

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591. Broussard v. Moon, 431 S.W.2d 534, 537 (Tex. 1968) (internal citations omitted); *accord* Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 829 (Tex. 1970) (stating that expert opinion testimony may not establish a "fact as [a] matter of law").

592. *See e.g.*, Reynolds v. Park, 485 S.W.2d 807, 811 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.) (explaining if a lay witness has sufficient "opportunity through personal contacts, conversations, association with[,] and observation of the person in question to reasonably form an intelligent opinion as to such person's sanity[,] . . . he is qualified to express such opinion").

593. For examples of the use of experts in will contest cases, *see* Carr v. Radkey, 393 S.W.2d 806, 808–10, 813 (Tex. 1965) (proclaiming physician's testimony on issues of insane delusions should be allowed even though he never met the decedent); Lindley v. Lindley, 384 S.W.2d 676, 682 (Tex. 1964) (explaining a doctor was not allowed to testify that the testator was suffering from insane delusions because there was a insufficient predicate showing that his definition of the term was the correct legal definition); Oechsner v. Ameritrust Tex., N.A., 840 S.W.2d 131, 136 (Tex. App.—El Paso 1992, writ denied) (determining a medical expert who had not met the testator was still allowed to testify regarding the testator's mental capacity); Estate of Jernigan, 793 S.W.2d 88, 90 (Tex. App.—Texarkana 1998, no writ) (recognizing a handwriting expert witness testified on a question of forgery).

594. *See generally* Swindler & Berlin v. United States, 524 U.S. 399, 405, 407, 410 (1999) (deciding notes taken by an attorney during an interview with a client, prior to the client's death, could not be used in a criminal investigation because the notes were protected by the attorney-client privilege).

595. *See* TEX. R. EVID. 503(c) (stating the attorney-client privilege "may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the

1. Does the "Communication" Fit Rule 503?

Texas Rule of Evidence 503 provides that:

> A client has a privilege to refuse to disclose . . . confidential communications made for the purpose of facilitating the rendition of professional legal services to the client; (A) between the client or the client's representative and the client's lawyer or a representative of the lawyer; (B) between the lawyer and the lawyer's representative; (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; (D) between representatives of the client or between the client and a representative of the client; or (E) among lawyers and their representatives representing the same client.[596]

Nevertheless, not all communications between a client and his or her attorney will meet this test. A communication is privileged only if it was intended to be confidential, made for the purpose of providing legal services for the client, and made to authorized persons listed in Rule 503.[597]

2. Does the Communication Fall Within an Exception to Rule 503?

If the communication is privileged, one of the exceptions to the privilege set forth in Rule 503(d) may nevertheless allow discovery and use.

a. Rule 503(d)(2): Claimants Through Same Deceased Client

An important exception in will contest actions is found in Rule 503(d)(2), which provides that there is no privilege "[a]s to a communication relevant to an issue between parties who claim through

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successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence").

596. *Id.* R. 503(b)(1)(A–E).

597. *See In re* Tex. Farmers Ins. Exch., 990 S.W.2d 337, 341 (Tex. App.—Texarkana 1999, orig. proceeding [mand. denied]) (concluding the trial court did not err when it determined that an attorney who obtained witness statements for an insurance company acted as an investigator and was not protected by the attorney-client privilege); *In re* Monsanto Co., 998 S.W.2d 917, 931 (Tex. App.—Waco 1999, no pet.) (recognizing attorney correspondence with recipients who were not the client's representatives or agents was not privileged); Cigna Corp. v. Spears, 838 S.W.2d 561, 566–67 (Tex. App.—San Antonio 1992, no writ) (establishing letters from an attorney were not privileged because the recipients were not employees or representatives of the client); Ledisco Fin. Servs., Inc. v. Viracola, 533 S.W.2d 951, 959 (Tex. Civ. App.—Texarkana 1976, no writ) (pointing out that the attorney–client privilege does not apply to communications made in the presence of third persons); Clayton v. Canida, 223 S.W.2d 264, 266 (Tex. Civ. App.—Texarkana 1949, no writ) (refuting claim that attorney's advice regarding tax services to deceased fell under the attorney–client privilege).

the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions."[598] This exception allows both sides in a will contest to discover communications from the deceased's attorney regarding any facts that may affect the will's contents or execution.[599]

b. Rule 503(d)(4): Documents Attested by a Lawyer

Rule 503(d)(4) also provides that there is no privilege "as to a communication relevant to an issue concerning an attested document to which a lawyer is an attesting witness."[600] The rationale for this exception is that the attorney is not acting as an attorney when serving as a witness. No Texas cases specifically discuss this exception to the attorney–client privilege, but it is commonly recognized by other jurisdictions.[601]

c. Rule 503(d)(1): Crime–Fraud Exception

Rule 503(d)(1) provides that no privilege exists "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan

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598. TEX. R. EVID. 503(d)(2).

599. *See In re* Tex. A & M–Corpus Christi Found., Inc., 84 S.W.3d 358, 361 (Tex. App.—Corpus Christi 2002, orig. proceeding [mand. denied]) (applying the "plain meaning of the rule[,]" the court held that discovery from two of the donor's estate planning attorneys regarding her mental capacity prior to and at the time of the challenged *inter vivos* gift would be allowed under Texas Rule of Evidence 503(d)(2); however, this particular exception only applies when both parties are claiming "through the same deceased client" and does not apply when one party's interest is adverse to the decedent's estate); Estate of Jernigan, 793 S.W.2d 88, 89 (Tex. App.—Texarkana 1998, no writ) (affirming the attorney who drafted the will was allowed to testify as to the testator's statements that reflected his state of mind); Lisby v. Estate of Richardson, 623 S.W.2d 448, 450–51 (Tex. Civ. App.—Texarkana 1981, no writ) (determining the testimony of the decedent's attorney stating that the subsequent will was properly executed and expressly revoked prior to the will being offered for probate was sufficient evidence to prove revocation by subsequent testamentary instrument); Krumb v. Porter, 152 S.W.2d 495, 497 (Tex. Civ. App.—San Antonio 1941, writ ref'd) (ruling that an attorney's testimony concerning a will's content or execution and on issues of testamentary capacity at the time the will was executed may be allowed); Pierce v. Farrar, 126 S.W. 932, 933 (Tex. Civ. App.—Dallas 1910, no writ) (declaring the lower court erred when it did not allow an attorney to testify about the testator's statements concerning the reasons for the disposition of his property); *cf.* Emerson v. Scott, 87 S.W. 369, 369–70 (Tex. Civ. App.—Texarkana 1905, no writ) (illustrating the attorney may be prevented from testifying regarding the testator's statements at the time of the will's execution because the party seeking to cancel a deed given to him by the testator was asserting a claim adverse to the estate, despite the exception "that as between litigants who claim under the testator, . . . the attorney who wrote the will may testify as to the statements made to him by the testator").

600. TEX. R. EVID. 503(d)(4).

601. *Cf.* HERASIMCHUK, TEXAS RULES OF EVIDENCE HANDBOOK 416 (4th ed. 2001) (discussing the rule regarding documents attested to by lawyers, yet no Texas cases are cited related to this area of law).

to commit what the client knew or reasonably should have known to be a crime or fraud."[602] This exception might come into play in a will contest if there is a claim of fraudulent inducement or forgery of the will. The client in this instance would be the beneficiary accused of committing the fraud, not the testator. The fraud encompassed by the exception is held to be much broader than common law or criminal fraud and includes "commission or attempted commission of fraud" on a court or third person.[603] For this exception to apply, a party must make a prima facie showing of contemplated fraud, and "there must be a relationship between the document" or the information that invokes this privilege and what is offered as prima facie proof.[604] The intent or motive of the client to commit a fraud is what controls—not the intent of the attorney.

d. Rule 503(d)(5): Joint Client Exception

A husband and wife who contemporaneously seek estate planning advice from the same attorney may be considered "joint clients" of that attorney.[605] This raises the possibility that the joint client exception found in Rule 503(d)(5) may render all otherwise privileged communications between the estate planning attorney and the surviving spouse discoverable—especially when coupled with the deceased client exception of Rule 503(d)(2), or the crime–fraud exception of Rule 503(d)(1).

e. Waiver by Voluntary Disclosure or by "Offensive Use"

A party may waive attorney–client privilege by voluntary disclosure of "any significant part of the privileged matter."[606] Additionally, if the party asserting the privilege attempts to use the privilege offensively as a sword, rather than a shield, courts will find the attorney–client privilege involuntarily waived.[607] Under the guidelines set forth by the Texas

602. TEX. R. EVID. 503(d)(1).

603. Volcanic Gardens Mgmt. Co., Inc. v. Paxson, 847 S.W.2d 343, 347–48 (Tex. App.—El Paso 1993, no writ).

604. *See* Granada Corp. v. First Court of Appeals, 844 S.W.2d 223, 227 (Tex. 1992) ("The crime–fraud exception applies only if a prima facie case is made of contemplated fraud. Additionally, there must be a relationship between the document for which the privilege is challenged and the prima facie proof offered.").

605. *See, e.g.*, Estate of Arlitt v. Paterson, 995 S.W.2d 713, 721–22 (Tex. App.—San Antonio 1999, pet. denied) (showing a couple that seeks the advice of a single attorney may both be considered clients of such attorney and are therefore eligible to claim the same privileges of an attorney-client relationship).

606. TEX. R. EVID. 511(1).

607. *See, e.g.*, Westheimer v. Tennant, 831 S.W.2d 880, 883–84 (Tex. App.—Houston [14th Dist.] 1992, no writ) (stating the principle of fairness precludes a client from using the attorney-client

Supreme Court, the following criteria must be met to support a finding of waiver of a privilege under a claim of offensive use:

1. "[T]he party asserting the privilege must seek affirmative relief";
2. the privileged information must be outcome-determinative evidence; and
3. disclosure of the privileged material must be the only way by which the other party may obtain this evidence.[608]

G. *Exception to Husband–Wife Privilege*

A communication between spouses may "be confidential if it is made privately[,]" during the marriage "and it is not intended for disclosure to any other person."[609] However, there is an exception to this privilege in proceedings "between spouses in civil cases" and specifically, in "a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction."[610] While there are no reported cases interpreting this particular exception to the rule, it will likely share the same broad application in will contest proceedings, given the similarity between the language of the deceased client exception and the attorney–client privilege.[611] This exception means that the surviving spouse may not be able to refuse to provide information regarding any marital communications with the deceased spouse during discovery, but it does not necessarily mean that such conversations will be admissible in evidence.[612]

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privilege as an offensive instrument in litigation).

608. *See* Republic Ins. Co. v. Davis, 856 S.W.2d 158, 163 (Tex. 1983) (noting that an offensive use waiver "should not lightly be found" and providing an outline of the elements needed to invoke such a waiver).

609. TEX. R. EVID. 504 (a)(1).

610. *Id.* R. 504(a)(4)(B).

611. *Compare id.* R. 503(d)(2) ("There is no privilege . . . [a]s to communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions."), *with id.* R. 504(a)(4)(B) ("There is no confidential communication privilege . . . [i]n (A) a proceeding brought or on behalf of one spouse against the other spouse, or (B) a proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by *inter vivos* transaction.").

612. *See id.* R. 601(b) (espousing the Dead Man's Rule in stating that "[i]n civil 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 oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party").

H. *Dead Man's Rule*

For many years, the Dead Man's statute, a rule excluding certain transactions with the decedent, was one of the most confusing rules of evidence in a will contest action.[613] Fortunately, when the legislature adopted Texas Rule of Evidence 601(b), the exclusionary scope of the rule was both limited and simplified. The rule now provides:

> In civil 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 oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial 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* based in whole or in part on such oral statement .... The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.[614]

Now, the only evidence barred under the Dead Man's Rule is the uncorroborated testimony of an interested party witness (e.g., executor, administrators, guardians, heirs, or legal representatives of the deceased) as to an oral statement by the deceased. In other words, a proponent may not admit into evidence an oral conversation between the interested witness and the deceased if it occurred in private and was not otherwise referred to in a written document.

The prohibition of the rule is further limited because providing corroboration under the Dead Man's Rule is now relatively simple. Corroborating evidence is sufficient if it "tend[s] to confirm and strengthen the testimony of the witness and show the probability of its truth."[615] Corroboration may come orally from other competent and

613. *See* Lewis v. Foster, 621 S.W.2d 400, 402–03 (Tex. 1981) (discussing the history and criticisms of the Dead Man's Statute as it applied prior to its subsequent modification and defining its purpose as "(1) to put the parties on an equal footing at trial, (2) to prevent one, to the detriment of the other, from taking advantage of the fact that the lips of the deceased have been sealed, and (3) to render incompetent testimony as to conversations and transactions with a deceased in a suit in which the deceased might deny the conversation").

614. TEX. R. EVID. 601(b) (emphasis added).

615. *See* Escamilla v. Estate of Escamilla, 921 S.W.2d 723, 726–27 (Tex. App.—Corpus Christi 1996, writ denied) (citing Quitta v. Fossati, 808 S.W.2d 636, 641–42 (Tex. App.—Corpus Christi 1991, writ denied) (commenting on the sufficiency of evidence as it relates to compliance with the corroboration requirement of the Dead Man's Rule)).

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disinterested witnesses or in written form from other sources, including letters and other written estate planning documents.[616] The corroboration evidence cannot, however, be simply additional oral testimony of the interested witness.[617]

For all practical purposes, the Dead Man's Rule has now become one dictating the order of proof. A proponent should offer and admit all corroborating testimony and documentary evidence before calling the interested witness to the stand to testify about any oral conversations with the decedent.

I. *Hearsay Exceptions*

Almost every exception to hearsay listed in Texas Rule of Evidence 803 is likely to be invoked during the trial of a will contest.[618] Among the more frequently encountered are:

803(3), Then Existing Mental, Emotional or Physical Condition
803(4), Statements for Purposes of Medical Diagnose or Treatment
803(6), Records of Regularly Conducted Activity
803(7), Presence or Absence of Entry in Records
803(8), Public Records and Reports
803(9), Records of Vital Statistics
803(12), Marriage, Baptismal, and Similar Certificates
803(16), Ancient Documents
803(19), Reputation Concerning Personal or Family History
803(23), Judgment as to Personal, Family, or General History or Boundaries

J. *Statements of the Testator*

The most frequently encountered hearsay issues in will contest litigation

616. *See Quitta*, 808 S.W.2d at 641 (citing Powers v. McDaniel, 785 S.W.2d 915, 920 (Tex. App.—San Antonio 1988, writ denied) (stating that "evidence must tend to support some of the material allegations or issues which are raised by the pleadings and testified to by the witness whose evidence is sought to be corroborated" and "may come from any other competent witness or other legal sources, including documentary evidence")); *see also Powers*, 785 S.W.2d at 920 (holding that a will, written after decedent's oral promise to "will back" his one-half interest to his mother, was adequate corroboration); Donaldson v. Taylor, 713 S.W.2d 716, 717 (Tex. App.—Beaumont 1986, no writ) (concluding that newspaper advertisements corroborated claim of oral promise of "a lifetime guarantee on the lime slurry process").

617. *See* Parham v. Wilbon, 746 S.W.2d 347, 350 (Tex. App.—Fort Worth 1988, no writ) ("[T]he testimony offered by [testator's daughter] that she would inherit half of the estate was not corroborated by any other evidence and therefore was properly excluded under rule 601(b).").

618. *See* TEX. R. EVID. 803 (listing hearsay exceptions that may be invoked); *see also id.* R. 804(b)(3) (excepting "statements of personal or family history" from the hearsay rule).

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involve the admissibility of statements of the testator.[619] Assuming the exclusionary bar of the Dead Man's Rule does not apply, statements of the testator are most often admitted under the "state of mind" hearsay exception.[620] The Supreme Court of Texas recognized the limited admissibility of these statements in undue influence cases long before the codification of the Texas Rules of Evidence. In *Scott v. Townsend*,[621] the court laid down the rule that statements of the testator "whether made contemporaneously with the execution of the will or within a reasonable time before or after its execution, are admissible" as to his or her mental state or the "question of his [or her] free agency" in executing the document, but are not admissible to prove that undue influence was in fact exerted.[622] A party may also admit the testator's statements under the state of mind exception to show feelings toward a beneficiary or a contestant on the question of whether a disposition was unnatural.[623]

K. *Ancient Documents*

Statements in an ancient document, or "a document in existence twenty years or more[,] the authenticity of which is established," are exceptions to the hearsay rule under Texas Rule of Evidence 803(16).[624] Texas Rule of Evidence 901(b)(8) further provides that a document in any form will be authenticated if it: "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it

619. *See In re* Estate of Steed, 152 S.W.3d 797, 808 (Tex. App.—Texarkana, 2004 pet. denied) (discussing the admissibility of certain statements made by testator and pointing to several cases cited by the Texas Supreme Court regarding this issue); Lindley v. Lindley, 384 S.W.2d 676, 682 (Tex. 1964) (analyzing the probative value of statements made by testator in determining her physical and mental condition); Scott v. Townsend, 106 Tex. 322, 166 S.W. 1138, 1142 (1914) (stating that the principle question presented in the case was the admissibility of certain statements made by the testator). *See generally* TEX. R. EVID. 601(b) (prohibiting oral statements by the testator unless introduced in accordance with the rule).

620. *See* TEX. R. EVID. 803(3) (establishing that "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition" is not excluded).

621. Scott v. Townsend, 106 Tex. 322, 166 S.W. 1138 (1914).

622. *See id.* at 1142–44 (reviewing established Texas case law to determine the admissibility and probative value of testimony regarding the testator's state of mind at the execution of his will).

623. *See id.* at 1146–48 (declaring the law "permits the use of declarations of a testator, as evidence of his state of mind, where they serve to indicate a mental condition" and that "[t]he testator's declarations indicative of his feelings toward his daughter were clearly admissible"); *see also In re* Burns' Estate, 52 S.W. 98, 99 (Tex. Civ. App.—El Paso 1899, writ ref'd) (holding the testator's statements that demonstrated intent to leave property to his family were admissible to establish whether the testator's mind was influenced by his attorney, but were not admissible to prove that the will in favor of the testator's attorney was induced by fraud).

624. TEX. R. EVID. 803(16).

is offered."[625] This rule recognizes the difficulty in authenticating documents of this nature because of the unavailability of witnesses to prove up documents of this age and is based on the belief that their age, proper custody, and unsuspicious appearance support their authenticity.[626] Ancient documents are usually encountered in will contests on the issues of family history, corroboration of oral statements of the deceased[627] and prior expressions of testamentary intent.[628]

IX. PRE-TRIAL EVIDENCE RULINGS

The scope of discovery under the Texas Rules of Civil Procedure is much broader than the scope of admissibility under the Texas Rules of Evidence.[629] Uncomfortable details about the decedent's past and many disquieting facts about the decedent's family members, both living and dead may be uncovered during discovery. While these family secrets may make for a more entertaining trial, some of this information is not relevant to the issues under Texas Rule of Evidence 401 or, even if relevant, it may be so inflammatory or prejudicial as to warrant exclusion under Texas Rule of Evidence 403. In these instances, counsel will want to obtain a ruling from the trial court on the admissibility of the evidence prior to the beginning of trial either to prepare for an unsatisfactory outcome, or to notify clients that certain topics will potentially be off limits.

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625. *Id.* 901(b)(8); *see* Zobel v. Slim, 576 S.W.2d 362, 365 (Tex. 1978) (applying the common law rule used to determine whether an ancient document was authentic and therefore admissible under the ancient document hearsay exception); Emery v. Bailey, 111 Tex. 337, 234 S.W. 660, 662 (1921) ("[A]n original deed is admissible in evidence as an ancient instrument . . . when it comes from the proper custody[,] . . . when it is free from suspicion[,] and . . . when it is shown to have been in existence more than 30 years."); Sherrill v. Estate of Plumley, 514 S.W.2d 286, 291 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (identifying three characteristics of a trustworthy document and determining that "the ancient document exception to the hearsay rule" did not apply to the newspaper article in question).

626. *See* CATHLEEN C. HERASIMCHUK, TEXAS RULES OF EVIDENCE HANDBOOK 816 (4th ed. 2001) (noting although Texas Rule of Evidence 803(16) provides a definition for ancient document, Texas Rule of Evidence 901(b)(8) provides for authentication of ancient documents); *see also* TEX. R. EVID. 803(16) (defining what qualifies as an ancient document); TEX. R. EVID. 901(b)(8) (providing an example of authentication that conforms with the rules of evidence for admissibility).

627. *Cf.* TEX. R. EVID. 601(b) (stating that in certain circumstances "neither party shall be allowed to testify against the others as to any oral statement by the testator . . . unless that testimony to the oral statement is corroborated").

628. *See, e.g.*, Guthrie v. Suiter, 934 S.W.2d 820, 825 (Tex. Civ. App.—Houston [1st Dist.] 1996, no writ) (enforcing the lower court's decision to exclude letters attesting to the decedent's mental state after a lobotomy because the letters were hearsay and did not satisfy the ancient document requirements set forth in the Texas Rules of Evidence).

629. *See, e.g.*, TEX. R. CIV. P. 192.3(a) ("It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to

A. *Motion in Limine*

Although the Texas Legislature did not codify filing a motion in limine as a Rule of Civil Procedure, the procedure is the traditional method in Texas for obtaining pre-trial rulings by the court to exclude specified evidence.[630] Counsel for either party should not offer evidence excluded pursuant to a motion in limine during the course of the trial, unless counsel first approaches the bench or otherwise makes the offer outside the presence of the jury. Counsel may proceed with the offer with express permission from the court; however, if the court sustains the objection to exclude the evidence, the offeror must create a formal record of what the excluded evidence would have been by dictating a bill of review into the record outside of the presence of the jury.[631] This somewhat cumbersome procedure is necessary if the party who wishes to offer the evidence wants to preserve the exclusion for appeal. A ruling on a motion in limine is not sufficient to preserve the objection to the trial court's ruling for appellate purposes.[632]

B. *Pre-trial Conference Order*

Texas Rule of Civil Procedure 166 provides that the trial court may hold a pre-trial conference to streamline issues for trial and make rulings on evidence.[633] At least one court of appeals held that, unlike an order on a motion in limine, a pre-trial order excluding evidence entered during a Rule 166 pre-trial conference will be sufficient to preserve the issue for appeal and that no further offer or objection at trial is required.[634]

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the discovery of admissible evidence.").

630. *See* Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963) (surmising that "the purpose of a motion in limine is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of a jury"); *cf.* TEX. R. EVID. 103(c) (omitting reference to motion in limine, but establishing that inadmissible evidence shall not reach the jury); *Id.* R. 104 (authorizing the court to make determinations on the admissibility of evidence).

631. *See, e.g.*, Johnson v. Garza, 884 S.W.2d 831, 834 (Tex. App.—Austin 1994, writ denied) (discounting the alleged error raised by the appellant over the exclusion of evidence because the evidence at issue was not preserved in a bill of exception).

632. *See* Acord v. Gen. Motors Corp., 669 S.W.2d 111, 116 (Tex. 1984) (noting the lower court's refusal to bar references to plaintiff's rejection of certain medical treatments did not preserve error for appellate review); *see also McCardell*, 369 S.W.2d at 335 ("If a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were *in fact* asked or offered.").

633. *See* TEX. R. CIV P. 166 (listing what the court may allow parties to consider in a conference "to assist in the deposition of the case without undue expense or burden").

634. *See* Huckaby v. A.G. Perry & Son, Inc., 20 S.W.3d 194, 205–06 (Tex. App.—Texarkana 2000, pet. denied) (concluding the issue was preserved for appeal where pretrial objections and rulings were recorded).

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X. MOTIONS FOR SUMMARY JUDGMENT

A. *Keep Summary Judgment in Perspective*

Motions for summary judgment steadily gained acceptance with trial and appellate courts in Texas over the last two decades. With the advent of the new no-evidence motion for summary judgment under Texas Rule of Civil Procedure 166a(i), it is now fairly unusual to not have at least one motion for summary judgment filed in a will contest action.[635] Motions for summary judgment, whether under the provisions of Rule 166a(a)–(c), or under the no-evidence provisions of Rule 166a(i), may increase judicial efficiency and economy in will contest litigation. However, the desire for economy and efficiency, admittedly intense in this era of overcrowded probate court dockets, should not override the basic right of every litigant to a jury trial—instead of a judge—based on all admissible evidence, rather than just affidavits.

The following rules may help keep the role of summary judgment proceedings in will contest litigation, in the proper perspective:

1. Summary judgment is proper "only when there is no disputed fact issue."[636]

2. "The summary judgment is to be applied with caution and will not be granted where there is doubt as to the facts. Although the prompt disposal of judicial business is greatly to be desired, that is not the main objective."[637]

3. Issues of fact are raised "[w]here the facts are controverted, or are such that different inferences may be reasonably drawn" and where "discarding all adverse evidence, . . . and indulging every legitimate conclusion favorable to the plaintiff which might have been drawn from the facts proved, a jury might have found in favor of the plaintiff."[638] On the other hand, if the "evidence is harmonious and consistent" and permits only one conclusion, then the question is one of law that the court must determine.[639]

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635. *See* TEX. R. CIV. P. 166a(i) (outlining the timing and basis for a no-evidence motion for summary judgment and the requisite information that must be included in the motion).

636. Gulbenkian v. Penn, 151 Tex. 412, 252 S.W.2d 929, 931 (1952) (citing King v. Rubinsky, 241 S.W.2d 220 (Tex. Civ. App.—1951, no writ)); *see In re* Estate of Price, 375 S.W.2d 900, 904 (Tex. 1964) (declaring that summary judgment is inappropriate where material fact issues are present), *superseded by statute on other grounds as stated in* Stiles v. Resolution Trust Corp., 867 S.W.2d 24 (Tex. 1993).

637. *Estate of Price*, 375 S.W.2d at 904 (citing *Gulbenkian*, 252 S.W.2d at 931).

638. Olds v. Traylor, 180 S.W.2d 511, 514 (Tex. Civ. App.—Waco 1944, writ ref'd) (quoting Wininger v. Ft. Worth & D. C. R. Co., 105 Tex. 56, 143 S.W. 1150 (1912)).

639. *Id.*

4. "The duty of the court hearing the motion for summary judgment is to determine if there are any issues of fact to be tried . . . ."[640] The trial court is not authorized to "weigh the evidence or to determine its credibility and, thus try the case on affidavits."[641]

5. The purpose of Rule 166a was the elimination of "patently unmeritorious claims, or untenable defenses and to avoid delays of trial where there is no genuine issue of fact."[642] It was not "intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact."[643] This underlying purpose has not been abandoned or altered by the adoption of the no-evidence motion for summary judgment.[644]

6. If a motion for summary judgment "involves the credibility of affiants or deponents, or the weight of the showings or, . . . a mere ground of inference, the motion will not be granted."[645]

7. Texas Rule of Civil Procedure 166a(c) allows summary judgment based on uncontroverted testimony of an interested witness, as long as the testimony is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."[646] The last requirement needs clarification. Evidence that "could have been readily controverted" within the meaning of Rule 166a(c) does not simply mean that the proof could easily and conveniently be rebutted. To the contrary:

> [I]t means that testimony at issue is of a nature which can be effectively countered by opposing evidence. If the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate. On the other hand, if the non-movant must, in

640. *Gulbenkian*, 252 S.W.2d at 931 (citing King v. Rubinsky, 241 S.W.2d 220 (Tex. Civ. App.—Waco, 1951, no writ)).

641. *Id.*; *see* Huckabee, 19 S.W.3d at 422 (citing *Gulbenkian*, 252 S.W.2d at 931) (reaffirming that summary judgment determinations do not involve the weighing of evidence).

642. *Estate of Price*, 375 S.W.2d at 904.

643. *Id.*; *see* City of Hous. v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979) (rejecting the notion that failure to respond to a motion for summary judgment results in an automatic default judgment for the moving party); Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989) (citing *Clear Creek Basin Auth.*, 589 S.W.2d at 678 n.5) (affirming the judicial economy basis for summary judgments in Texas).

644. *See* Tempay, Inc. v. TNT Concrete & Const., Inc., 37 S.W.3d 517, 521 (Tex. App.—Austin 2001, pet. denied) (determining the addition of the no-evidence rule still permits the non-movant to demonstrate that a fact issue exists).

645. *Gulbenkian*, 252 S.W.2d at 932 (citing Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 628 (1944)); *accord Casso*, 776 S.W.2d at 558 ("If credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate.").

646. TEX. R. CIV. P. 166a(c).

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> all likelihood, come forth with independent evidence to prevail, then summary judgment may well be proper in the absence of such controverting proof.[647]

8. "No evidence" exists when any of the following occurs:

> (1) [A] complete absence of evidence of a vital fact;
> (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact;
> (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or
> (4) the evidence establishes conclusively the opposite of a vital fact.[648]

9. A no-evidence motion for summary judgment should *not* be granted if the non-movant presents more than a "scintilla" of probative evidence.[649]

10. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions."[650]

11. "There is some evidence when the proof supplies a reasonable basis on which reasonable minds may reach different conclusions about the existence of the vital fact."[651]

12. The standards for granting or reviewing a traditional claimant's motion for summary judgment under Rule 166a(a) are as follows:

> [a.] The movant for summary judgment . . . has the burden of showing that there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law.
> [b.] In deciding whether . . . there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

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647. *Casso*, 776 S.W.2d at 558.

648. Horton v. Horton, 965 S.W.2d 78, 85 (Tex. App.—Fort Worth 1998, no pet.) (citing Juliette Fowler Home, Inc. v. Welch Assocs., Inc., 793 S.W.2d 660, 666 n.9 (Tex. 1990)).

649. *See* Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 70–71 (Tex. App.—Austin 1998, no pet.) (citing TEX. R. CIV. P. 166a(i); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) (providing a definition for "scintilla" of evidence in the context of a summary judgment ruling)).

650. *See Jackson*, 979 S.W.2d at 70–71; Gen. Mills Rests. Inc. v. Tex. Wings, 12 S.W.3d 827, 832–33 (Tex. App.—Dallas 2000, no pet.) (discussing what must occur to conclusively establish a matter when a no-evidence summary judgment is sought).

651. *See Horton*, 965 S.W.2d at 85; Orozco v. Sander, 824 S.W.2d 555, 556 (Tex. 1992) (citing Kindred v. Con/Chem., Inc., 650 SW.2d 61, 63 (Tex. 1983) (affirming that a court will find the existence of some evidence where the proof gives a reasonable basis for those with reasonable minds to reach different conclusions)).

[c.] Every reasonable inference must be indulged in favor of the non-movants and any doubts resolved in their favor.[652]

13. To prevail on summary judgment under Rule 166a(b), a defendant must either "disprove at least one element" of each of the plaintiff's theories of recovery, or "plead and conclusively establish each essential element of an affirmative defense thereby, rebutting the plaintiff's cause of action."[653] A court will find a matter conclusively established if ordinary minds could not differ on the "conclusion to be drawn from [the evidence.]"[654]

Once the defendant establishes a right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence that raises a genuine issue of material fact.[655]

14. No-evidence motions for summary judgment under Rule 166a(i) are determined and reviewed under similar standards; however, only evidence presented by the non-movant may be considered. Therefore, the court should accept evidence favorable to the non-movant as true, indulge every reasonable inference, and resolve all doubts in favor of the non-movant.[656]

However, if viewed under judgment *non obstante veredicto* (JNOV) or directed verdict standards, the court should "consider all the evidence in the light most favorable to the party against whom the no-evidence

652. Wilcox v. St. Mary's Univ. of San Antonio, 531 S.W.2d 589, 592–93 (Tex. 1975) (citations omitted); Montgomery v. Kennedy, 669 S.W.2d 309, 310–11 (Tex. 1984) (citing City of Hous. v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); *see* Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 546, 548–49 (Tex. 1985) (proclaiming the well-established standards for reviewing a motion for summary judgment); Hudnall v. Tyler Bank & Trust Co., 458 S.W.2d 183, 185 (Tex. 1970); *Clear Creek Basin Auth.*, 589 S.W.2d at 674–76 (stating the history of the summary judgment rule and its application); Cowden v. Bell, 157 Tex. 44, 300 S.W.2d 286, 287 (1957).

653. *See* Int'l Union United Auto. Aerospace & Agric. Implement Workers of Am. Local 119 v. Johnson Controls, Inc., 813 S.W.2d 558, 563 (Tex. App.—Dallas 1991, writ denied) (delineating how a defendant may prevail on a motion for summary judgment).

654. Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc., 644 S.W.2d 443, 446 (Tex. 1982).

655. *See Clear Creek Basin Auth.*, 589 S.W.2d at 678–79 (asking not to be understood as shifting the burden of proof in summary judgment proceedings because a defendant must first establish his or her right to a summary judgment before a non-movant must respond); Muckelroy v. Richardson Indep. Sch. Dist., 884 S.W.2d 825, 828 (Tex. App.—Dallas 1994, writ denied) (pointing to the instances in which the burden of proof shifts from the movant to the non-movant).

656. *See* Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 425 (Tex. 1997) (stating the rules that must be followed when looking at the validity of a summary judgment motion, which includes viewing evidence that is favorable to the non-movant as true); Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 619 (Tex. App.—Eastland 2000, no pet.) (holding when reviewing a no-evidence summary judgment motion, the court does not consider evidence from the movant, but instead, considers the evidence in the non-movant's favor).

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summary judgment was rendered, and disregard all contrary evidence and inferences."[657]

15. For those claims that may be proved by circumstantial as well as direct evidence (e.g., fraud, undue influence), as long as an inference may be reasonably drawn from the underlying facts that there is some evidence of the claim, this is sufficient to preclude the entry of a no-evidence motion for summary judgment. This is true even though the court may personally disagree with the inference asserted or believe that, once the jury weighs the evidence at trial, it might conclude that the inference asserted is unreasonable or that the contestants did not prove the claim by a preponderance of the evidence.[658]

B. *Traditional Motion: Rule 166a (a) and (b)*

There is no shortage of cases in Texas jurisprudence regarding traditional summary judgments.[659] The cited cases illustrate the variety of

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657. *See* Gen. Mills Rests., Inc. v. Tex. Wings, 12 S.W.3d 827, 832–34 (Tex. App.—Dallas 2000, no pet.) (discussing application of the same legal sufficiency parameters in reviewing both no-evidence summary judgments and directed verdicts); *accord* Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997) (proclaiming that all the "evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered").

658. *See Hight*, 22 S.W.3d at 619 (providing that when a court responds to a no-evidence motion, the court must indulge "every reasonable inference and resolve all doubts in favor of the non-movant"); *Gen. Mills Rests.*, 12 S.W.3d at 833 (stating that on a no-evidence motion, the court must disregard "all contrary evidence and inferences"); *see also* Lozano v. Lozano, 52 S.W.3d 141, 148 (Tex. 2001) (reiterating that "circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn" and that "it is for the jury to decide which is more reasonable" when circumstantial evidence supports various reasonable inferences); *cf.* Huckabee v. Time Warner Ent., 19 S.W.3d 414, 422 (Tex. 2000) (affirming that a court is not allowed to weigh the evidence on a motion for summary judgment, but may determine whether "a material question of fact exists").

659. *See generally* Estate of Graham, 69 S.W.3d 598, 609–10 (Tex. App.—Corpus Christi 2001, no pet.) (examining the elements of fraud and undue influence in will contest litigation); Neill v. Yett, 746 S.W.2d 32, 34–35 (Tex. App.—Austin 1988, writ denied) (providing guidelines for dealing with fraud when carrying out a will); *In re* Estate of Thompson, 873 S.W.2d 113, 114 (Tex. App.—Tyler 1994, no writ) (refusing to grant summary judgment motion in a case contesting the validity of the testator's will where there were genuine issues of fact); Green v. Earnest, 840 S.W.2d 119, 121 (Tex. App.—El Paso 1992, writ denied) (examining when provisions in wills may be set aside due to undue influence); Hammer v. Powers, 819 S.W.2d 669, 671 (Tex. App.—Fort Worth 1991, no writ) (stating that court will affirm a grant of summary judgment "only if the record establishes that the appellees have conclusively proved all of the essential elements of their cause of action or defense as a matter of law"); *In re* Estate of Price, 375 S.W.2d 900, 904 (Tex. 1964) (indicating the purpose of summary judgment is eliminating patently unmeritorious claims and untenable defenses), *superseded by statute on other grounds as stated in* Stiles v. Resolution Trust Corp., 867 S.W.2d 24 (Tex. 1993). For illustration only, see Olson v. Estate of Watson, 52 S.W.3d 865, 868 (Tex. App.—El Paso 2001, no pet.) (discussing attorney-client relationship in the drafting of a will); *In re* Estate of Williams, No.

issues raised in these pre-trial proceedings, but the underlying goal remains the same—elimination of patently unmeritorious claims and untenable defenses.

C. *"No-Evidence" Motion: Rule 166a(i)*

The Texas Legislature amended summary judgment practice rules in 1997 to allow for the entry of a "no-evidence" summary judgment under certain limited circumstances. Texas Rule of Civil Procedure 166a(i) provides that "after adequate time for discovery," any party "without presenting summary judgment evidence," may move for summary judgment as to any claim or defense on which the adverse party has the burden of proof at trial, on the grounds that there is no evidence to support one or more specified essential elements of the claim or defense.[660] Once a proper 166a(i) motion is filed, the responding party must come forward with some competent evidence on each disputed element to avoid an adverse judgment.[661] The Texas Supreme Court included official comments when Rule 166a(i) was adopted clarifying the fairly narrow scope of the no-evidence summary judgment motion and reaffirming that traditional motions under Rule 166a(a) or (c) are required in all other instances.[662]

The short history of Rule 166a(i) indicates that the trial courts may experience some confusion about the use of this new rule;[663] however, appellate courts are fairly united in requiring strict compliance with the narrow limits of the rule so that the purpose of disposing of only patently unmeritorious claims and defenses on this basis will be fulfilled.[664]

07-00-0449-CV, 2001 WL 1218440, at *8–9 (Tex. App.—Amarillo Dec. 3, 2001, pet. denied) (not designated for publication) (finding pleadings insufficient to support summary judgment).

660. TEX. R. CIV. P 166a(i).

661. *See id.* (delineating the requirements for a no-evidence motion for summary judgment).

662. *Misc. Docket No. 97-9139, Final Approval of Revisions to Texas Rules of Civil Procedure*, 60 TEX. B.J. 872, 873 (1997); TEX. R. CIV. P 166a.

663. *See* Estate of Davis v. Cook, 9 S.W.3d 288, 298 (Tex. App.—San Antonio 1999, no pet.) (affirming trial court's grant of beneficiaries' no-evidence motion for summary judgment against contestant's claim of undue influence); *see also In re* Estate of Hall, No. 05-98-01929-CV, 2001 WL 753795, at *3 (Tex. App.—Dallas July 5, 2001, no pet.) (not designed for publication) (reversing a no-evidence summary judgment against will contestant on undue influence claim because the proponent's motion was not specific enough to put contestant on notice of which "elements" were being challenged). *But see* Estate of Cooper, No. 09-01-041-CV, 2001 WL 995405, at *4 (Tex. App.—Beaumont, August 30, 2001, no pet.) (upholding no-evidence motion for summary judgment on undue influence because no evidence of second *Rothermel* element, i.e., that improper influence was exerted at time will was made).

664. *See* Tempay, Inc. v. TNT Concrete & Constr., Inc., 37 S.W.3d 517, 521 (Tex. App.—Austin 2001, pet. denied) (stating strict compliance with summary judgment motions in order to

The examples of a no-evidence motion for summary judgment in a will contest action located to date reflect that the courts are willing to apply Rule 166a(i) in spite of the usually fact-intensive inquiries associated with claims of undue influence or lack of testamentary capacity.[665] It also appears, however, that the use of circumstantial evidence by the non-movant in undue influence cases may continue to confuse some judges.[666]

1. Adequate Time for Discovery

Adequate time for discovery under Rule 166a(i) is to be determined on a case-by-case basis with due regard for the complexity of the issues, whether the issues are fact intensive or questions of law, whether the discovery deadlines are vague, and whether the party seeking the entry of the no-evidence motion is guilty of delaying or preventing discovery by the opposing party.[667]

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eliminate "patently unmeritorious claims and untenable defenses" (quoting City of Hous. v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979))).

665. *See generally* Estate of Graham, 69 S.W.3d 598, 605 (Tex. App.—Corpus Christi 2001, no pet.) (stating requirements necessary in drafting legitimate will); *In re* Estate of Thompson, 873 S.W.2d 113, 114 (Tex. App.—Tyler 1994, no writ) (showing summary judgment as a "stern measure used to eliminate issues that can be determined as a matter of law"); Green v. Earnest, 840 S.W.2d 119, 121 (Tex. App.—El Paso 1992, writ denied) (examining what a contestant must prove in order to successfully set aside a will under a claim of undue influence); Hammer v. Powers, 819 S.W.2d 669, 671 (Tex. App.—Fort Worth 1991, no writ) (stating courts will affirm a grant of summary judgment if "the record establishes that the appellees have conclusively proved all of the essential elements of their cause of action or defense as a matter of law"); *In re* Estate of Price, 375 S.W.2d 900, 904 (Tex. 1964) (detailing examples of when motion for summary judgment states specific grounds relied upon therefore), *superseded by statute on other grounds as stated in* Stiles v. Resolution Trust Corp., 867 S.W.2d 24 (Tex. 1993).

666. *See, e.g.*, *Cook*, 9 S.W.3d at 298 (granting a no-evidence motion for summary judgment based on claim of undue influence). In *Cook*, a case decided before the Texas Supreme Court's decision in *Lozano v. Lozano*, 52 S.W.3d 141 (Tex. 2001), involving the "equal inference" rule, the court appears to impermissibly: (a) consider evidence and inferences presented by and in favor of the movants; (b) weigh the evidence; and (c) ignore the rule that inferences are part of the permissible circumstantial evidence that is not to be considered in isolation, but rather as part of a complete picture. *Lozano*, 52 S.W.3d at 148–49; *see Estate of Hall*, 2001 WL 753795, at *3 (clarifying that a mere statement of the cause of action will not satisfy notice); *Estate of Cooper*, 2001 WL 995405, at *4 (upholding a no-evidence motion for summary judgment based on undue influence because there was no evidence of the second *Rothermel* element, i.e., that improper influence was exerted at time will was executed).

667. *See* In re Watson, 259 S.W.3d 390, 393 (Tex. App.—Eastland 2008, no pet.) ("[T]he trial court has broad discretion to limit discovery requests by time, place, and subject matter . . . [t]hose restrictions must, however, be reasonable."; *Tempay*, 37 S.W.3d at 521–22 (stating that the rule contemplates both adequate time and adequate opportunity for discovery); Specialty Retailer's Inc. v. Fugua, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (noting how adequate time for discovery must be determined, which requires consideration of the nature of the action and the evidence controverting the no-evidence motion).

A respondent claiming that the no-evidence motion was prematurely filed should file a verified motion for continuance or motion to extend time to obtain summary judgment proof under Texas Rule of Civil Procedure 166a.[668]

2. Elements Must Be "Specified"

Rule 166a(i) requires the movant to specify each element "as to which there is no evidence."[669] This is a more stringent standard than the fair notice requirement of specifically stated grounds in a traditional 166a(c) motion. Under a traditional motion, the opposing party only needs adequate information to respond to the motion and to define the issues.[670] Conversely, in a 166a(i) no-evidence motion, the burden of coming forward with evidence, often at considerable effort and expense, is shifted to the respondent. Therefore, fair notice in this situation requires more precision.[671]

3. No Evidence from the Movant Considered

If the movant offers any evidence or summary judgment proof in connection with a no-evidence motion for summary judgment, such evidence or proof must be disregarded by the court.[672]

4. Motion Improper If Movant has Burden of Proof

Rule 166a(i) means precisely what it says; thus, a no-evidence motion for summary judgment is not allowed as to any claim or defense on which the movant "will have the burden of proof at trial."[673] If a movant

668. *See e.g.*, *Tempay*, 37 S.W.3d at 521 (citing Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 647 (Tex. 1996) (reaffirming that a party contending that it did not have an adequate opportunity for discovery must file an affidavit or verified motion for continuance)).

669. TEX. R. CIV. P 166a(i); Macias v. Fiesta Mart, Inc., 988 S.W.2d 316, 316–17 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (asserting that "the movant must specifically state the elements as to which there is no evidence" for the burden to shift to the non-movant).

670. *See* Roth v. FFP Operating Partners, L.P., 994 S.W.2d 190, 194 (Tex. App.—Amarillo 1999, pet. denied) (discussing the requirement of specificity in a motion for summary judgment and comparing the standards for specificity under different sections of Rule 166a).

671. *See, e.g.*, *Estate of Hall*, 2001 WL 753795, at *1 (emphasizing that a motion was defective because it simply stated there was "no evidence of undue influence" without referencing any element of that claim); *Macias*, 988 S.W.2d at 316–17 (discussing the burden that shifts to the respondent "to bring forth evidence that raises a fact issue on the challenged elements").

672. *See* Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 618–19 (Tex. App.—Eastland 2000, pet. denied) (stating the rule that evidence offered in motion for summary judgment should not be considered in the determination of a no-evidence motion for summary judgment).

673. *See* Battin v. Samaniego, 23 S.W.3d 183, 185 (Tex. App.—El Paso 2000, pet. denied) (stating that Rule 166a(i), regarding summary judgment, is only available under certain

improperly files a Rule 166a(i) motion on an issue, this defect should be brought to the attention of the trial court by special exception or specific objection in the response. If the issue is one on which the movant will have the burden of proof at trial, the court should strike the motion or disregard it as to any such issue.[674]

5. What to Do with a Defective or Improper No-Evidence Motion

Some attorneys view a no-evidence motion for summary judgment as another discovery tool that affords them a "free peek" at their opponent's case prior to trial. Unfortunately, for the party responding to a no-evidence summary judgment motion, there is rarely anything "free" about it. These motions can be incredibly time consuming and expensive to respond to.[675] While some appellate courts suggest that the court could just proceed to consider the improperly filed no-evidence motion under the traditional summary judgment standards of Rule 166a(a) or (c),[676] this practice would only seem to encourage potential misuse. If the respondent objects to the no-evidence motion because it was improperly filed on an issue where the movant has the burden of proof, he or she should not have to go through the time and expense of preparing a response to a "traditional" motion that has not even been filed. He or she should be able to stand on this objection and file no further response until the court rules on the exception. Similarly, the movant may prefer to withdraw the motion rather than submit it under traditional standards. Therefore, if this objection (or special exception) to the motion is sustained, the better practice would be for the court to give both parties an opportunity to revise the motion and the response, if desired, to fit the traditional summary judgment requirements rather than to proceed immediately to grant or deny the motion as originally filed.[677]

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circumstances); Harrill v. A.J.'s Wrecker Serv., 27 S.W.3d 191, 193–94 (Tex. App.—Dallas 2000, pet. dism'd w.o.j.) (proclaiming when it is appropriate for trial courts to grant a movant's motion for summary judgment).

674. *See generally Battin*, 23 S.W.3d at 185–86 (holding the trial court's summary judgment determination was error because it was based on a supplemental motion and burden of proof was on the defendant); *Harrill*, 27 S.W.3d at 194 (discussing upon whom the burden is placed and what evidence is admitted in regards to summary judgment motions); Grant v. Sw. Elec. Power Co., 20 S.W.3d 764, 768 n.1 (Tex. App.—Texarkana 2000), *aff'd in part, rev'd in part*, Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211 (Tex. 2002) (stating that general contentions in a summary judgment motion will fail to meet the requirement of Rule 166(a)(i), that specific elements lacking evidence be stated).

675. *See generally* David F. Johnson, *The No-Evidence Motion for Summary Judgments in Texas*, 52 BAYLOR L. REV. 929, 947–50 (2000) (observing that the requirement for adequate time for discovery is not well-defined, which may result in delay and expense).

676. TEX. R. CIV. P 166a(a) & (c).

677. *See generally id.* R. 166a (delineating the traditional summary judgment requirements).

The 1997 comments to Rule 166a(i) expressly note that trial courts are authorized to assess sanctions in connection with no-evidence motions.[678] If the law is clear that the movant has the burden of proof on an issue, and the movant has nonetheless presented in a Rule 166a(i) motion, a court should seriously consider granting a request for sanctions to cover the fees incurred by the non-movant in responding to the motion.[679]

D. *Proponent's Use of No-Evidence Motion*

A no-evidence motion for summary judgment may be a very efficient and effective tool for the proponent of a will. Depending on when the contestant filed the proceeding, all or part of the case may be a proper subject for this type of summary judgment motion.

1. Texas Probate Code Section 10: Opposition

In a will contest proceeding filed before the will is admitted to probate, a no-evidence motion for summary judgment by the proponent would be proper only as to claims of undue influence or fraud.[680] The proponent has the burden of proof at trial as to all other issues concerning the validity of the will (i.e., testamentary capacity, proper execution, non-revocation) precluding a Rule 166a(i) motion on these issues. The fact that the will may be self-proved does not shift this burden of proof to the contestant of an unprobated will.[681]

2. Texas Probate Code Section 93: Contest

If the contestant files a contest after admitting the will to probate, then he or she has the burden of proof at trial as to all issues and therefore a no-evidence motion would be authorized as to all or part of the case.[682]

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678. *Misc. Docket No. 97-9139, Final Approval of Revisions to Texas Rules of Civil Procedure*, 60 TEX. B.J. 872, 873 (1997); TEX. R. CIV. P 166a(i).

679. *See Misc. Docket No. 97-9139, Final Approval of Revisions to Texas Rules of Civil Procedure*, 60 TEX. B.J. 872, 873 (1997) (advising that sanctions be imposed through attorney's fees where a motion filed had no reasonable basis). *See generally* Jackson v. Fiesta Mart Inc., 979 S.W.2d 68, 70–71 (Tex. App.—Austin 1998, no pet.) (discussing what constitutes more than a scintilla of evidence).

680. *See generally* TEX. PROB. CODE ANN. § 10 (West 2003) (listing the persons who are entitled to contest estate proceedings).

681. Croucher v. Croucher, 660 S.W.2d 55, 57 (Tex. 1983) (citing Reynolds v. Park, 485 S.W.2d 807 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.)).

682. *Cf. In re* Estate of Davidson, 153 S.W.3d 301, 303 (Tex. App.—Beaumont 2004, pet. denied) ("In a proceeding attacking an order admitting a will to probate, the burden is on the contestant to prove grounds for the contest."). *See generally* PROB. § 93 (West 2003) (detailing necessary parties for a will contest).

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3. Undue Influence

Because the contestant has the burden of proof for any undue influence claim, including claims of fraud or deceit, a no-evidence motion for summary judgment would be authorized on this issue. In fact, for a contestant, this may be the toughest type of no-evidence motion to defeat, unless the court abides by the summary judgment rules against weighing the evidence, considering evidence, or forming inferences to the contrary when undue influence is asserted.[683]

XI. PROPONENT'S COUNTER-ATTACKS

A will contest can be a very expensive and time-consuming proceeding, often involving numerous medical experts, accounting experts, and fact witness depositions. In many instances, the administration of the estate may also be complicated and made more expensive by the appointment of a dependent administrator pending the resolution of the contest under section 132 of the Probate Code.[684]

For many years, there was nothing a disgruntled proponent could do to recoup his or her attorneys' fees and costs from the contestant, even if the basis of the contest was highly suspect. Courts simply considered the fees and costs of defending even wrongful litigation part of the price to insure that the courts would be open to everyone. Over 120 years ago, in the case of *Salado College v. Davis* the Supreme Court of Texas adopted the "American Rule" that requires each party in a lawsuit to pay their own fees.[685] There, the court rejected the defendant's claim that he should recover his attorneys fees in successfully defending the suit from the plaintiff because the suit "was unjust, . . . vexing and harassing," with the following comment:

> To bring an action, though there be no good ground, is not actionable.
>
> An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.

683. *See, e.g.*, Estate of Davis v. Cook, 9 S.W.3d 288, 292–93 (Tex. App.—San Antonio 1999, no pet.) (proclaiming the contestant's burden for summary judgment motions dealing with undue influence).

684. PROB. § 132 (West 2003).

685. *See* Salado Coll. v. Davis, 47 Tex. 131, 135–36 (1887) (discussing the American Rule followed by Texas in cases regarding the recoupment of funds).

> In ordinary cases, where no further wrongful act is complained of than the institution of a groundless suit, though done knowingly and with intent to harass, the award of costs is, in contemplation of law, full compensation for the unjust vexation.
>
> In such cases, the defendant recovers his costs "but no allowance is made for his time, indirect loss, annoyance, or counsel fees . . . ." "Every defendant against whom an action is 'unnecessarily' brought, experiences some injury or inconvenience beyond what the costs will compensate him for." This injury or inconvenience results from a resort to the legally-constituted tribunals; and it seems to be the policy of the law to content itself with meting out something less than our ideas of natural justice would demand, rather than to increase the risks attending and discouraging such a resort, and at the same time add to the difficulties and intricacies of ordinary litigation.[686]

Roughly forty years later, the American Rule was followed in *Pye v. Cardwell*,[687] where the Texas Supreme Court rejected a claim alleging a malicious prosecution conspiracy with the following observations: "If it is not an actionable wrong for one person to bring an unfounded suit, to harass a defendant and extort money from him, it cannot be actionable for two or more to join in the same sort of suit."[688]

In fact, in spite of tort reform and the legislative adoption of sanctions for unfounded litigation, the "[p]ublic policy [which] disfavors actions that burden or discourage persons from pursuing and resolving their disputes in court" is still recognized as part of Texas law.[689]

The Texas Legislature abandoned the American Rule in certain cases by statutorily authorizing the recovery of attorneys' fees and expenses from an unsuccessful litigant in specific types of actions.[690] This has not occurred to date in the will contest context. The only statutory basis for the recovery of attorneys' fees and expenses incurred in a will contest is section 243 of the Probate Code.[691] This section allows the payment of

686. *Id.* (internal citations omitted).

687. Pye v. Cardwell, 110 Tex. 572, 222 S.W. 153 (1920).

688. *Id.* at 153.

689. *See* Luce v. Interstate Adjusters, Inc., 26 S.W.3d 561, 565 (Tex. App.—Dallas 2000, no pet.) (illustrating that malicious prosecution causes of action are traditionally disfavored).

690. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2002) (listing claims for which attorney's fees are recoverable).

691. *See* TEX. PROB. CODE ANN. § 243 (West 2003) (stating that an executor, devisee, legatee, or beneficiary of a will is entitled to recover attorney's fees from the estate when defending the will for the purpose of admitting it to probate). *See generally* Tex. R. Civ. P. 167.4 (codifying the narrow "loser-pays" statute passed in the 2011 legislative session). The full scope of the law is yet to be seen, having been codified so recently, but the intent of the statute is to incentivize parties to reach

fees and expenses from the estate to any person designated as an executor, devisee, legatee, or beneficiary who defends the will "in good faith, and with just cause," whether such defense is successful or not.[692] Of course, the right to receive payment from an estate that you are otherwise entitled to receive anyway is not a very satisfactory remedy for the successful proponent of a will.

Despite the legislative reluctance to authorize the recovery of fees and expenses from the unsuccessful will contestant (or perhaps because of it), proponents in will contest cases are increasingly aggressive in mounting counter-attacks to fill the gap left by section 243.[693] While some of these methods are clearly appropriate in certain instances, others may be as questionable, and possibly as wrongful as the pleadings they attack.

A. *Sanctions*

A party to any form of litigation in Texas can now recover sanctions for the filing of groundless pleadings an opponent brings in bad faith or solely for the purpose of harassment under Chapters 9 and 10 of the Texas Civil Practice & Remedies Code and Texas Rule of Civil Procedure 13.[694]

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reasonable settlements or face the imposition of fees if a judgment is significantly less favorable than the settlement offer. *See id.*

692. *See* PROB. § 243 (allowing recovery of attorney's fees from an estate when said fees are incurred by the executor in defending a will).

693. *See id.* (describing the possibility of allotting "necessary expenses and disbursements" for defending or prosecuting a proceeding in good faith "whether successful or not"). *Compare* Estate of Davis v. Cook, 9 S.W.3d 288, 295–98 (Tex. App.—San Antonio 1999, no pet.) (rejecting a claim for sanctions based solely on the filing of a will contest), *with* Hawkins v. Estate of Volkmann, 898 S.W.2d 334, 338 (Tex. App.—San Antonio 1995, writ denied) (granting a request for sanctions for filings designed to delay probate proceedings).

694. Chapter 9 of the Texas Civil Practice & Remedies Code discusses frivolous pleadings and claims. Specifically, section 9.011 provides that a person that signs a pleading guarantee that it is not groundless, nor is it brought in bad faith, for the purpose of harassment, or for any improper purpose. TEX. CIV. PRAC. & REM. CODE ANN. § 9.011 (West 2002). Section 9.012 mandates that a court consider different factors when determining whether the pleading is groundless, and outlines provisions relating to sanctions. *Id.* § 9.012. Chapter 10 of the Texas Civil Practice & Remedies Code authorizes sanctions for frivolous pleadings and motions. *See generally id.* §§ 10.001–10.006. Section 10.001 contains a list of what courts may consider frivolous. *Id.* § 10.001. For example, pleadings with the sole purpose "to harass or to cause unnecessary delay," or asserting claims and defenses not supported by existing law or by a nonfrivolous argument. *Id.* Courts have discretion to "enter an order describing the specific conduct" that appears frivolous and "direct the alleged violator to show cause," explaining how their conduct is not in violation of section 10.001. *Id.* § 10.002(a), (b). Moreover, if a party files a motion pursuant to Chapter 10 and prevails, the court may award "the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." *Id.* § 10.002(c). Additionally, Texas Rule of Civil Procedure 13 also describes sanctions for attorneys or parties who bring fictitious suits or pleadings. TEX. R. CIV. P. 13. Buck v. Estate of Buck, 291 S.W.3d 46 (Tex. App.—Corpus Christi 2009, no pet.) (providing a thorough appellate

Pleadings in a will contest are subject to the same sanction rules as pleadings in any other type of litigation. In *Hawkins v. Estate of Volkmann*,[695] the Fourth Court of Appeals affirmed the imposition of sanctions under Rule 13 against the will contestant's attorney for what it termed "harassment" pleadings that "could never have led to a legal goal."[696] The facts in *Hawkins* were egregious enough for the trial court to enter the following findings:

> Hawkins initiated a course of conduct and trial strategy [including filing 'numerous contests, objections, pleadings and other documents'] designed to unnecessarily confuse the issues, delay the probate proceedings and[,] unduly prolong the dependent administration . . . in order to procure a sizeable settlement for . . . [his client] and himself; and that Hawkins took these actions intentionally, willfully, and maliciously, having no "just cause or excuse," and consciously disregarding the rights of the estate's beneficiaries, causing "substantial monetary damage and harm to the [e]state.[697]

After two appeals, the court ultimately dismissed Hawkins's client from the litigation for lack of standing.[698] In the order granting sanctions against the attorney, the trial court assessed almost all of the legal fees, costs, and expenses incurred by the temporary administrator for the estate (approximately $148,000).[699] The court of appeals affirmed the imposition of sanctions, but reversed the amount of the award on the grounds that it was excessive because it included fees and expenses that were part of the "normal incidents of defending a will contest."[700] On remand, the trial court received an instruction to limit the sanctions to expenses related solely to the "harassment" behavior, and sanctions should not include fees and expenses incurred as the result of the "normal and reasonable legal behavior of a will contestant."[701]

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review of a trial court's decision to impose the "death penalty" sanction against an abusive litigant).

695. Hawkins v. Estate of Volkmann, 898 S.W.2d 334 (Tex. App.—San Antonio 1995, writ denied).

696. *See id.* at 337 (allowing the imposition of sanctions for harassing pleadings in a will contest).

697. *Id.* at 338.

698. *See id.* at 336–37 (describing the procedural history of the underlying case, including whether Hawkins's client was an "interested party").

699. *See id.* at 337–39 (listing the costs and fees that were included in the trial court's assessment of sanctions).

700. *See id.* (stressing that the trial court "abused its discretion in basing sanctions on amounts incurred not as a result of the sanctionable behavior," and should not have included the "costs of temporary administration").

701. *See id.* ("In assessing sanctions, the trial court should have limited the sanctions to the 'harassment' behavior and not the normal and reasonable legal behavior of a will contestant.").

Moreover, the court refused to punish Hawkins for simply filing an unsuccessful will contest, and made it clear that Rule 13 should not be used as a "corrective amendment" to section 243. "We agree with appellant that a party has a right to contest a will and be heard on the merits. Litigation, conducted in good faith (as well as bad faith), is expensive. Just because one party is causing another party to expend money in defending itself is not objectionable."[702]

The question of sanctions, this time predicated solely on the filing of a will contest, arose again in *Estate of Davis v. Cook*.[703] In this case, the testatrix's nieces and nephews contested their aunt's will—leaving most of her estate to charity—on the basis of undue influence.[704] The trial court first granted no-evidence motions for summary judgment on the undue influence claim filed by the named will beneficiaries and the Attorney General.[705] The court later amended the judgment to add an award of sanctions in excess of $88,000 against the contestants because "the will contest was groundless and brought for harassment purposes."[706] The court of appeals affirmed the no-evidence summary judgment, but reversed the award of sanctions, holding that the trial court abused its discretion.[707] In essence, the court reasoned the claim of undue influence was not wholly without factual support at the time of filing; nor was there evidence that the contestant brought the claim in bad faith for purposes of harassment.[708] The appellate court expressly reaffirmed its statement in *Hawkins* that "a party has the right to contest a will" and distinguished *Davis* from *Hawkins* on the basis that the repeated challenges to the administrator's actions, repetitious pleadings, contests and objections, continuous jury trial filings, and several applications to probate the will in *Hawkins* supported a different conclusion in that case.[709]

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702. *Id.* at 337.

703. *See* Estate of Davis v. Cook, 9 S.W.3d 288, 297–98 (Tex. App.—San Antonio 1999, no pet.) (reiterating that costs associated with defending a normal will contest cannot be recovered from the contestants' attorneys).

704. *See id.* at 291 (outlining the grounds of the will contest).

705. *See id.* at 291–92 ("Finding no evidence of undue influence, the court entered an order . . . granting summary judgment in favor of the will beneficiaries and ruling that the beneficiaries recover their necessary expenses and reasonable attorney's fees out of the estate.").

706. *Id.* at 296.

707. *Id.* at 298.

708. *See id.* at 297–98 (establishing that sanctions for bringing a will contest, even when pleadings are groundless, are not proper absent a showing of bad faith or harassment).

709. *See id.* (clarifying that while a claim for sanctions may be allowed in a will contest for frivolous filings; sanctions will not be imposed for the mere filing of a contest itself); *see also* Pool v. Diana, 03-08-00363-CV, 2010 WL 1170234 (Tex. App.—Austin Mar. 24, 2010, pet. denied) (citing

Thus, while sanctions are certainly available in an appropriate will contest case, these decisions indicate that it may take something more than just the filing of the contest pleading to satisfy the statutory tests of groundless, bad faith, or improper purpose.[710]

B. *Malicious Prosecution*

Another possible counter-attack is a claim by the proponent for "malicious prosecution" predicated on the contestant's filing of the will contest.

> To prevail in a suit alleging malicious prosecution of a civil claim, the plaintiff must establish: (1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages.[711]

A court will not terminate a proceeding for malicious prosecution purposes "until the final disposition of the appeal and any further proceedings that it may entail."[712] Thus, a malicious prosecution claim cannot be brought as a counterclaim or a third party action in the will contest proceeding.[713] At best, the proponent will have to wait until his or her judgment is final.

Further, and in keeping with what has been the Texas law since *Salado College* was decided in 1887, the mere filing of a civil lawsuit, without more,

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Estate of Davis v. Cook in affirming the jury courts finding of sanctionable behavior and ordering sanctions over $100,000).

710. *See In re* Estate of Snider, No. 04-98-00771-CV, 2000 WL 35883, at *3 (Tex. App.—San Antonio Jan. 19, 2000, pet. denied) (not designated for publication) (trial court sanctioned attorneys in probate litigation for filing pleadings containing "claims, defenses, and other legal contentions unwarranted by existing law" and without evidentiary support). The judge addressed the parties, and cautioned that their behavior was deeply troubling: "[E]ssentially what you and your client did was sue the plaintiff and the plaintiff's lawyer under a theory of law [not recognized in Texas] . . . and then in another allegation failed to put on any evidence when you were challenged to do so by [s]ummary [j]udgment." *Id.*

711. Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203, 207 (Tex. 1996).

712. *See id.* at 208 (noting an action for malicious prosecution may not be filed until the underlying proceeding is disposed of on appeal, and any other proceedings are finalized).

713. *See* Oak Crest Civic Club v. Lowe, 678 S.W.2d 93, 94 (Tex. App.—Houston [14th Dist.] 1984, writ denied) (reiterating that one of the critical elements of a malicious prosecution claim hinges on whether the party can plead and prove that "*the original proceeding terminated in favor of the party who later brought the malicious prosecution action*"); Delaporte v. Preston Square, Inc., 680 S.W.2d 561, 564 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (asserting that a third-party action for malicious prosecution cannot be filed until the underlying suit terminates, as this would make it impossible to satisfy one of the requirements for malicious prosecution claims).

is not actionable, and the plaintiff can recover only if he or she suffered a "special injury:"

> A plaintiff must suffer a special injury before recovering for malicious prosecution of a civil case. It is insufficient that a party has suffered the ordinary losses incident to defending a civil suit, such as inconvenience, embarrassment, discovery costs, and attorney's fees. *The mere filing of a lawsuit cannot satisfy the special injury requirement.* There must be some physical interference with a party's person or property in the form of an arrest, attachment, injunction, or sequestration. While this rule may leave a party without a remedy for indirect losses, the countervailing policies supporting this heightened threshold in malicious prosecution cases are compelling and well-established in Texas law. As the Corpus Christ Court of Appeals has noted, "The special damage requirement assures good faith litigants access to the judicial system without fear of intimidation by a countersuit for malicious prosecution. The special damage requirement also prevents successful defendants in the initial proceeding from using their favorable judgment as a reason to institute a new suit based on malicious prosecution, resulting in needless and endless vexatious lawsuits."[714]

C. *Tortious Interference with Inheritance Rights*

Texas first recognized tortious interference as a cause of action to protect inheritance rights in the case of *King v. Acker*.[715] In this case, the testator's widow transferred stock to herself using a forged power of attorney and filed an application to probate a forged will.[716] The testator's children successfully contested the will.[717] They then sued the widow, her attorney, and the witnesses to the forged will, seeking to recover damages for all fees and costs incurred by them as the result of the wrongful offer of the forged will for probate.[718] The court of appeals, stating that "equity will not suffer a right to be without a remedy," judicially recognized that a cause of action for tortious interference with inheritance rights, based on section 774B of the Second Restatement of

714. *Green*, 921 S.W.2d at 208–09 (emphasis added) (internal citations omitted) (quoting Martin v. Trevino, 578 S.W.2d 763, 768 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)).

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

716. *See id.* at 752 (describing the testator's widow's acts that constituted tortious interference with inheritance rights).

717. *See id.* at 751–52 (stating that the jury found the will was not signed by the testator, and thus, the testator's children were appointed as co-independent administrators).

718. *See id.* at 754 (outlining each of the individual parties and the complaint).

Torts, was needed as part of Texas law.[719] Section 774B of the Second Restatement of Torts provides:

> One who by fraud, duress[,] or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.[720]

The commentary to this section provides in part: "[T]he rule stated here applies when a testator has been induced by tortious means to make his or her first will or not to make it; and it applies also when he has been induced to change or remake it. It applies also when a *will is forged*, altered[,] or suppressed."[721]

The *King* court allowed the children to recover actual damages consisting of the commission paid to a temporary administrator for the illegitimate stock transfer, and punitive damages equal to their attorney's fees to contest the forged will.[722] There are very few reported cases in Texas addressing tortious interference with inheritance rights since *King* was decided,[723] and none of them involved a claim against a will

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719. RESTATEMENT (SECOND) OF TORTS § 774B (1979); *see King*, 725 S.W.2d at 754 (citing Chandler v. Welborn, 294 S.W.2d 801, 807 (Tex. 1956) (detailing the basis for identifying a cause of action for tortious interference with inheritance rights in Texas)).

720. *See King*, 725 S.W.2d at 754 (citing RESTATEMENT (SECOND) OF TORTS § 774B (1979)).

721. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 774B (1979)).

722. *See id.* at 754–55 ("The appellant is liable for both the actual and exemplary damages for the consequential losses for which her tortious interference caused.").

723. *See* Urbanczyk v. Urbanczyk, 278 S.W.3d 829, 835 n.6 (Tex. App.—Amarillo 2009, no pet.) ("Disposition of this appeal does not require us to consider whether such a cause of action [for tortious interference of inheritance rights] exists in Texas, and we do not consider that question."); *In re* Estate of Russell, 311 S.W.3d 528, 535 (Tex. App.—El Paso 2009, no pet.) (agreeing with appellees that there was sufficient evidence to show tortious interference with an intended inheritance); *In re* Estate of Kuykendall, 206 S.W.3d 766, 771 (Tex. App.—Texarkana 2006, no pet.) ("We find only one case in Texas recognizing a tort of tortious interference with inheritance rights." (citing *King*, 725 S.W.2d at 750)); *In re* Estate of Arndt, 187 S.W.3d 84, 88 (Tex. App.—Beaumont 2005, no pet.) (evaluating whether the trial court erred in admitting evidence in support of a claim for tortious interference with inheritance rights); Brandes v. Rice Trust, Inc., 966 S.W.2d 144, 146–50 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (assessing the propriety of granting summary judgment on a claim of tortious interference with inheritance rights); Harkins v. Crews, 907 S.W.2d 51, 61 (Tex. App.—San Antonio 1995, writ denied) (determining that a party seeking actual damages in the form of temporary administrator expenses in a tortious interference of inheritance rights claim must specifically plead those damages); Neill v. Yett, 746 S.W.2d 32, 35–36 (Tex. App.—Austin 1988, writ denied) (deciding a claim for tortious interference with an "inheritance expectancy" was time-barred by a two-year statute of limitations). *See generally* Jennifer Knauth, Steve McConnico & Robyn Hargrove, *Legal Malpractice for Litigators: An Update on Recent Developments in Texas Legal Malpractice and Ethics Law*, THE ADVOC. (Tex.), Spring 2008, at 1, 14–15, *available at* http://www.litigationsection.com/downloads/42_Best_Of_Part_II.pdf (surveying Texas courts' recognition of a cause of action for tortious interference with inheritance rights).

contestant who did not also offer a competing will for probate.[724]

XII. MAKING THE MOST OF THE DOCUMENT EXECUTION PROCESS

Finally, after weeks of discussions, research, writing, rewriting, fine tuning, editing and revising—your client's estate planning documents are finished and as close to perfect as you can make them. All the client needs to do is sign them. Your work is complete. It is time to take off for a well-deserved round of golf. Your long-time secretary is a notary; she has experienced hundreds of document executions and can ensure the testator signs the documents properly. Or, better yet, comply with your client's requests and send the originals to his or her office with a red tab indicating each place to sign. The client will take care of it and even send you copies for your file.

This scenario is every probate litigator's dream, and every estate planner's potential nightmare.

While this situation may seem unlikely, it can and does happen. When an attorney's legal antennae should be most tuned in to the possibility that someone, eventually, may try to undo all of his or her beautiful legal work, too many estate planning attorneys let their guards down and treat the execution of the documents with minimal importance. This practice seems particularly true when the estate planning document is a trust agreement, a partnership, or some other document that does not by law require the formal execution ceremony that is typically associated with a will.[725]

It is a mistake—a big one—but one that can be easily avoided with just a little bit of extra time and attention. The key is to think ahead. Consider which possible attacks on the documents are most likely in light of your client's desires, and any adverse reactions that may be expected from

724. *See, e.g.*, *Urbanczyk*, 278 S.W.3d at 831 (stating the contestant of a 2003 will sought to admit a 2000 will into probate); *Estate of Russell*, 311 S.W.3d at 534–35 ("Appellees point out that the prior wills established their grandmother's intent that they share in her estate."); *Estate of Kuykendall*, 206 S.W.3d at 769 (explaining that the plaintiffs petitioned the court to set aside a 1983 will and enforce a 1954 will); *Estate of Arndt*, 187 S.W.3d at 86 (stating that after one party contested an application for probate of a 2003 will and offered a competing 1995 will, the other parties amended their pleadings to include a tortious interference with inheritance rights claim); *Brandes*, 966 S.W.2d at 146 (involving no offers of a competing will, nor any claims against the will contestant); *Harkins*, 907 S.W.2d at 54 (stating that after appellants offered a will for probate, appellees brought forth a competing will and sought actual and punitive damages for tortious interference with inheritance rights); *Neill*, 746 S.W.2d at 33–34 (concerning a claim for tortious interference with inheritance rights filed by the will contestant).

725. *Compare* TEX. PROP. CODE. ANN. § 112.004 (West 2003) (requirements of a trust), *with* TEX. PROB. CODE ANN. § 59 (West 2003) (listing requisites of a will).

family members or other intended beneficiaries.[726] Never assume that these individuals will be grateful that your client elected to dictate what should happen with his or her property after death or incapacity rather than just giving it to them outright (even if you did save them a substantial amount in taxes). Never fool yourself into believing that they will simply take your word for it that this is what their loved one wanted. Never take the signing of any estate planning document as anything less than what it is—a very important occasion that may well be analyzed, discussed, and dissected, piece by piece, in a courtroom full of non-lawyers. Protect your client, and yourself, by doing your best to safeguard the execution of every estate planning document you draft when those documents are signed. Then, when and if litigation becomes a reality, you will have the best witness possible and all that will be left to do is prepare these witnesses before they are deposed or called upon to testify.

A. *Anticipate Common Attacks*

1. Mental Capacity

The client's mental capacity at the time of the estate planning document execution is always a potential issue for litigation. If a contestant can show the client lacked the requisite mental capacity at the time the document was executed, the document will be unenforceable.[727] Thus, the first step when anticipating potential attacks is to determine which type of mental capacity could be an issue—either testamentary capacity or contractual capacity. This is especially relevant because different legal tests exist for each type of capacity, each discussed in the following section.

726. *See, e.g.*, *In re* Estate of Johnson, 340 S.W.3d 769, 773 (Tex. App.—San Antonio 2011, pet. denied) (appealing a jury's finding that certain wills and trusts were executed because of undue influence); *Estate of Kuykendall*, 206 S.W.3d at 769 (embroiling several heirs who sought to set aside the decedent's will and to recover damages for tortious interference with inheritance rights); *In re* Estate of Robinson, 140 S.W.3d 782, 786 (Tex. App.—Corpus Christi 2004, pet. denied) (affirming the decision to set aside a will and related estate planning documents because the testator lacked the requisite testamentary capacity).

727. *See Estate of Robinson*, 140 S.W.3d at 799 (pertaining to the invalidity of a will and other estate planning documents because the testator lacked the requisite mental capacity when the documents were executed); Bracewell v. Bracewell, 20 S.W.3d 14, 16 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (affirming the decision to grant a probate application for an earlier will because a jury found the testator lacked the requisite mental capacity to execute a more recent will).

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a. Testamentary Capacity

Section 88(b)(1) of the Texas Probate Code requires that a person be of sound mind in order to execute a valid will.[728] Texas courts equate the "of sound mind" requirement with "testamentary capacity,"[729] defining it as:

> [S]ufficient mental ability[,] at the time of [the] execution of the will[,] (1) *to understand* the business in which the testatrix is engaged, the effect of making the will, and the general nature and extent of her property; (2) *to know* the testatrix's next of kin and the natural objects of her bounty; and (3) to have sufficient memory to assimilate the elements of the business to be transacted, to hold those elements long enough *to perceive* their obvious relation to each other, and to form a reasonable judgment as to them.[730]

Proving each element of this test is essential; there is no presumption that a person has testamentary capacity.[731]

b. Contractual Mental Capacity

Section 112.007 of the Texas Property Code provides: "A person has the same capacity to create a trust by declaration, *inter vivos* or testamentary transfer, or appointment that the person has to transfer, will, or appoint free of trust."[732] This test follows judicial precedent holding that the mental capacity required for the valid execution of an *inter vivos* trust is the same as that required to execute a contract.[733]

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728. *See* PROB. § 88(b)(1) (outlining proof requirements for probate of a will); *see also* Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968) (emphasizing that a will is only enforceable if the testator is found to be "of sound mind" at the time of execution).

729. *See Bracewell*, 20 S.W.3d at 19 (citations omitted) ("Courts in Texas have defined the term 'sound mind' to mean 'testamentary capacity.'"); Chambers v. Chambers, 542 S.W.2d 901, 906 (Tex. Civ. App.—Dallas 1976, no writ) ("As used in the probate code, the term 'of sound mind' means 'having testamentary capacity.'" (citing Nass v. Nass, 224 S.W.2d 280, 283 (Tex. Civ. App.—Galveston 1949), *aff'd on other grounds*, 149 Tex. 41, 228 S.W.2d 130 (1950); Garcia v. Galindo, 189 S.W.2d 12 (Tex. Civ. App.—San Antonio 1945, writ ref'd w.o.m.))).

730. *See In re* Estate of Grimm, 180 S.W.3d 602, 605 (Tex. App—Eastland 2005, no pet.) (emphasis added) (citing Guthrie v. Suiter, 934 S.W.2d 820, 829 (Tex. App.—Houston [1st Dist.] 1996, no writ) (defining "testamentary capacity").

731. *See* Croucher v. Croucher, 660 S.W.2d 55, 57 (Tex. 1983) (noting that the proponent of the will carries the burden of proving testamentary capacity); *In re* Estate of Graham, 69 S.W.3d 598, 605–06 (Tex. App.—Corpus Christi 2001, no pet.) (analyzing the burden of proof in regard to testamentary capacity before and after admitting a will to probate); Trouppy v. De Bus, 311 S.W.2d 431, 437 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.) ("Unless the presence of testamentary capacity is made to prima facie appear, the proponent is not entitled to have the will admitted to probate.").

732. TEX. PROP. CODE ANN. § 112.007 (West 2003).

733. *See* Bach v. Hudson, 596 S.W.2d 673, 675–76 (Tex. Civ. App.—Corpus Christi 1980, no writ) ("The legal standards for determining the existence of mental capacity for the purposes of

> In Texas, a person has "mental capacity" to contract if, at the time of contracting, he [or she] "appreciated the effect of what [he or she] was doing and understood the nature and consequences of [the] acts and the business [he or she] was transacting." Mental capacity, or a lack thereof, may be shown by circumstantial evidence, including: (1) a person's outward conduct "manifesting an inward and causing condition"; (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred.[734]

Again, proof of each element is required, but unlike testamentary capacity, courts presume contractual mental capacity absent an adjudication of incapacity.[735]

c. Red Flags

Every attorney in Texas has an ethical obligation, both before and during the rendition of legal services to determine if the client is mentally competent to attend to the legal tasks at hand and, if not, to seek protection for the client, including a formal guardianship if necessary.[736] Unfortunately, knowing that your client is competent and proving it are two different things. What are the possible warning signs that a claim of mental incapacity may become an issue? Advanced age is the most common factor in claims of mental incapacity.[737] Even though many

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executing a will or deed are substantially the same as the mental capacity for executing a contract . . . ." (citing Mandell & Wright v. Thomas, 441 S.W.2d 841, 845 (Tex. 1969))). *Compare Mandell & Wright v. Thomas*, 441 S.W.2d at 841 (involving a will), *with* Pollard v. El Paso Nat'l Bank, 343 S.W.2d 909, 910 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (involving a deed).

734. Lerer v. Lerer, No. 05–99–00474–CV, 2000 WL 567020, at *2 (Tex. App.—Dallas May 3, 2000, pet. denied) (not designated for publication) (citations omitted).

735. *See* McKeehan v. McKeehan, 355 S.W.3d 282, 295 (Tex. App.—Austin 2011, pet. filed) (citations omitted) ("Texas has long presumed that a party to a contract has the mental capacity to enter into the contract."); *In re* Estate of Vackar, 345 S.W.3d 588, 597 (Tex. App.—San Antonio 2011, no pet.) (indicating that a party must prove lack of mental capacity to abrogate a power of attorney).

736. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2003) (Tex. State Bar R. art. X, § 9) ("A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, . . . a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.").

737. *See, e.g.*, *Estate of Graham*, 69 S.W.3d at 602, 606–07 (describing an attack on the testamentary capacity of a man who executed his will at age 81 despite overwhelming evidence of his mental soundness and no evidence presented to the contrary); Burk v. Mata, 529 S.W.2d 591, 594 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (stating that "appellant also implies that because of [the testator's] advanced age she could not have testamentary capacity"); Brewer v. Foreman, 362 S.W.2d 350, 353 (Tex. Civ. App.—Houston 1962, no writ) ("There was testimony from which the

elderly clients retain their full mental clarity, it is almost a habit of the young and middle-aged to assume that advancing age automatically signals diminished mental capacity.[738] Physical health, at any age, may also be an important factor, particularly if a physical illness or impairment is associated with mental decline or otherwise impacts the client's ability to read and understand the documents.[739] Various medications may also contribute to diminished mental functioning.[740] Finally, any prior history of mental problems or substance abuse will increase the odds that a mental capacity claim may arise.[741]

The estate planning attorney should not hesitate to question his or her client about all of these issues and should make a written memo of the discussion and the information obtained. If the discussion raises more questions, or if the possibility of a contest is sufficiently great to warrant defensive planning, suggest that your client obtain a medical opinion from someone who: (1) knows the applicable legal definitions (do not take a

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jury could conclude that Mrs. Culpepper suffered from weaknesses of the mind and body caused by old age . . . ."); Salinas v. Garcia, 135 S.W. 588, 590–91 (Tex. Civ. App. 1911, writ ref'd) (addressing an argument that the testatrix lacked the mental capacity to make a will because, among other reasons, she was 90 years old).

738. *See Salinas*, 135 S.W. at 590 (cautioning that persons who "may be old and infirm, weakened in energy, and impaired in the senses," may still have a sound mind). Specifically, the court noted:

> [T]here can be no age limit prescribed at which it can be decreed that 'a sound and disposing memory' has been lost because the mind of the man of 80, or 90, or even 100 years of age, may be bright, active, and brilliant, while the man of 50 or 60 may have entered the pitiable state of garrulous senility or brutal imbecility. Mental and physical decay do not keep step with each other, and, after a man has become impaired in all the five senses, he may retain intelligence sufficient to enable him to understand and prepare for the testamentary disposition of property.

Id. (citations omitted).

739. *See* Bracewell v. Bracewell, 20 S.W.3d 14, 17 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (describing testatrix's physical ailments in terms of proffered evidence of her mental incapacity); Mills v. Kellahin, 91 S.W.2d 1097, 1098 (Tex. Civ. App.—El Paso 1936, writ dism'd) (expounding that the testator "was a very aged man at the time he executed his will and for a long time previous thereto had been in feeble health, ravaged by disease").

740. *See Bracewell*, 20 S.W.3d at 17 (considering a history of prescription drug abuse in determining whether the testator lacked testamentary capacity); Horton v. Horton, 965 S.W.2d 78, 86 (Tex. App.—Fort Worth 1998, no pet.) ("The fact that a testator consumed pain medication on the day he executed the will in question is likewise insufficient to prove a lack of testamentary capacity, without some evidence that the medication rendered the testator incapable of knowing his family, his estate, or understanding the effect of his actions.").

741. *See* Carr v. Radkey, 393 S.W.2d 806, 812–15 (Tex. 1965) (exploring the mental capacity of a testator who was diagnosed with manic depression); Daily v. Wheat, 681 S.W.2d 747, 753 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("Although the evidence suggests that [the testator] may have indulged in alcohol, there was ample evidence to show that she had no drinking problem at the time the will and codicil under attack were executed.").

chance on this—provide your client with the appropriate test in writing and insist they give it to the doctor);[742] and (2) is competent either through education or experience to give an opinion on mental capacity (find out in advance which doctors are involved and check their credentials).[743]

2. Undue Influence

a. General Test

Another common attack on estate planning documents is a generalized claim of undue influence. The issue is whether the client executed the document voluntarily, "as his free act and deed," or whether he or she signed it because of undue influence.[744] Not every influence is undue or sufficient to set aside an otherwise validly executed document:

> In order to set aside a will on the basis of undue influence, the contestant must prove: 1) the existence and exercise 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 will; and 3) the execution of a will which the maker thereof would not have executed but for such influence. Factors to be considered include evidence of infirmity of mind produced by age; ill health; circumstances attending the execution of the instrument;

742. *See In re* Estate of Grimm, 180 S.W.3d 602, 605 (Tex. App.—Eastland 2005, no pet.) ("'Testamentary capacity' means possession of sufficient mental ability at the time of execution of the will (1) to understand the business in which the testatrix is engaged, the effect of making the will, and the general nature and extent of her property; (2) to know the testatrix's next of kin and the natural objects of her bounty; and (3) to have sufficient memory to assimilate the elements of the business to be transacted, to hold those elements long enough to perceive their obvious relation to each other, and to form a reasonable judgment as to them." (citing Guthrie v. Suiter, 934 S.W.2d 820, 829 (Tex. App.—Houston [1st Dist.] 1996, no writ))); *Lerer*, 2000 WL 567020, at *2 ("In Texas, a person has 'mental capacity' to contract if, at the time of contracting, he 'appreciated the effect of what [he] was doing and understood the nature and consequences of [his] acts and the business [he] was transacting.'" (quoting Mandell & Wright v. Thomas, 441 S.W.2d 841, 845 (Tex. 1969))).

743. *See* Melady v. Coulter, 504 S.W.2d 524, 525 (Tex. Civ. App.—Texarkana 1973, no writ) (mentioning that a doctor's testimony during a will probate proceeding was later read into evidence before the jury in a district court trial); Bell v. Bell, 237 S.W.2d 688, 692–93 (Tex. Civ. App.—Amarillo 1951, no writ) (providing a portion of a doctor's testimony as to the testator's mental capacity).

744. *See* TEX. PROB. CODE ANN. § 59(a) (West 2003) (providing an affidavit form, to be signed by a testator and witnesses, that declares the will was executed "as his free act and deed"); Pearce v. Cross, 414 S.W.2d 457, 461 (Tex. 1966) (declaring that in order to affirm a finding of undue influence, the evidence must "support a reasonable inference that the influence was such as to destroy the free agency of the testatrix and produce a will which she would not otherwise have made"); Long v. Long, 196 S.W.3d 460, 466–67 (Tex. App.—Dallas 2006, no pet.) ("While testamentary incapacity implies the want of intelligent mental power, undue influence implies the existence of a testamentary capacity subjected to and controlled by a dominant influence or power.").

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> opportunity for the exercise of influence that would destroy the exercise of free agency[;] and an unnatural or unjust disposition by the instrument.[745]

b. Fraud/Mistake/Alterations

Although courts presume that a person knows and understands the contents of any document he or she signs, this presumption is rebuttable if there is evidence to the contrary.[746] In some cases, internal inconsistencies throughout an estate planning document may be sufficient to raise the question of whether the client understood all of its contents.[747] If other documents, letters, memos, etc., indicate that the testator did not know or understand what he or she signed, a fraudulent inducement claim is certainly possible.[748] Other suspicious circumstances, such as the testator's inability to read, his or her lack of education, or the rush of the signing process, may call the testator's knowledge or understanding of the contents into question.[749] Unfortunately, there are no fast and easy ways to avoid claims of fraud or mistake. Under Texas law, courts consider these claims a subspecies of undue influence and can run the gamut from outright fraudulent inducement, to questions of

745. *In re* Estate of Murphy, 694 S.W.2d 10, 12 (Tex. App.—Corpus Christi 1984, no writ) (internal citations omitted); *accord* Guthrie v. Sulter, 934 S.W.2d 820, 831 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (listing the requirements to prove undue influence).

746. *See* Boyd v. Frost Nat'l Bank, 196 S.W.2d 497, 507 (Tex. 1946) ("[T]he will ought to be admitted to probate without further proof that the testator knew the contents of the paper, unless suspicion in some way be thrown upon it; for it is to be presumed that every such man examines and knows the contents of every instrument he executes." (quoting Kelly v. Settegast, 2 S.W. 870, 872 (Tex. 1887))); *In re* Estate of Flores, 76 S.W.3d 624, 630 (Tex. App.—Corpus Christi 2002, no pet.) ("A competent testator is presumed to know and understand the contents of the testamentary instrument he has signed, unless circumstances exist that cast suspicion on the issue." (citing *Boyd*, 196 S.W.2d at 507)).

747. *See* McQueen v. Stevens, 100 S.W.2d 1053, 1058 (Tex. App.—Houston [14th Dist.] 1984, no writ) (analyzing apparent inconsistencies in the disposition of a will); *In re* Estate of Gaudynski, 175 N.W.2d 272, 274 (Wis. 1970) (arguing that the complexities of the testator's will indicated that the testator lacked the capacity to understand the dispositions in his will).

748. *See In re* Estate of Coleman, 360 S.W.3d 606, 611–12 (Tex. App.—El Paso 2011, no pet.) (indicating fraudulent inducement may be a valid claim to set aside a will); *In re* Estate of Robinson, 140 S.W.3d 782, 786 (Tex. App.—Corpus Christi 2004, pet. denied) (finding testator without the capacity to execute will or numerous other estate planning documents).

749. *See* Guthrie v. Sulter, 934 S.W.2d 820, 830–31 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (assessing the testamentary capacity of a woman who had undergone a frontal lobotomy, which rendered her susceptible to influence); Gilkey v. Allen, 617 S.W.2d 308, 311–12 (Tex. App.—Tyler 1981, no writ) (indicating that a showing of suspicious circumstances may be able to raise an issue regarding the testator's understanding of the document).

substituted pages, to issues of simple mistakes.[750] The best preventive defense against these claims is a clear and concise document, executed free of internal inconsistencies, under the supervision and control of a competent attorney.[751]

c. Forgery

A person's signature can vary from one document to the next due to age, physical infirmities, or because he or she was rushed during the signing process.[752] A party can defeat a claim of forgery by presenting other evidence of the client's handwriting or signature at the relevant time under the same or similar circumstances.[753] If at all possible, the estate planning attorney should obtain other examples of the client's handwriting (e.g., a signed fee agreement, letters regarding the will, or copies of payment checks) from around the time the estate planning documents are executed, and keep these exemplars with the finally executed estate planning documents.

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750. *See Estate of Flores*, 76 S.W.3d at 628 (examining the number of staple holes in individual pages of the will to evaluate claims of undue influence and whether the will itself was complete and accurate).

751. Attorneys could benefit by implementing the following practical tips:

(1) Do not leave large "gaps" or blank spaces in the typed document, particularly between the "body" and the signature line. Either reset the margins or page breaks, or manually adjust them to fit.

(2) Ensure that your client initials each page including the signature pages and self-proving affidavit. Make sure all pages are initialed before the testator and the witnesses leave the table. Consider having the witnesses initial the pages as well as the testator. Consider having the witness physically check the document to verify that each page is initialed.

(3) Use cream colored or off-white bond paper.

(4) Use blue ink—not black—for the signatures.

(5) Avoid stapling and unstapling the original document. If you staple the original, use a "blue-back" will holder, with at least two top staples. If your probate clerk's office does not restrict access to the original documents (or does not control who can check out the document) include a description of the condition of the original will (e.g., "blue back with two staples at top and no other staple holes") in your application to probate and ask the filing clerk to verify the condition of the document when it was filed by initialing that portion of the application.

(6) Clearly stamp or mark each page of any copy with the word "copy."

Id. at 628–30 (rejecting the inconsistent number of staple holes, on individual pages of a will, as providing evidence of forgery).

752. *See, e.g.*, Brown v. Traylor, 210 S.W.3d 648, 668 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (finding that signatures appeared different due to lack of several fingers).

753. *See id.* (admitting testimony which explained undeniable signature discrepancies); Phillips v. Najar, 901 S.W.2d 561, 562 (Tex. App.—El Paso 1995, no writ) (deciding that name affixed with rubberstamp by third party is sufficient to meet signature requirement when supplemented by evidence); Zaruba v. Schumaker, 178 S.W.2d 542, 543 (Tex. Civ. App.—Galveston 1944, no writ) (ruling that a will written and signed with a typewriter was sufficient since intent was evidenced).

d. Red Flags

Some red flags to look for in undue influence cases include: an overly domineering spouse, friend, or caretaker;[754] a fiduciary relationship between the testator and the favored beneficiary;[755] a mentally or physically fragile client;[756] or a potential will beneficiary who insists on injecting him or herself into the estate planning process, the execution of the will, or both.[757]

The best defense for the estate planning attorney is direct one-on-one communication with the client and actual physical distance separating the potential influencing beneficiary from all stages of the process from discussion to drafting, and most importantly, document execution.[758] This is particularly true when dealing with estate planning for second spouses.[759] Even if a lawyer holds joint preliminary discussions with both spouses, the supervising attorney must be sure to handle the execution of each will as a distinct, separate event—preferably on different days—without the other spouse present.

B. *The Best Defense: Select Good Witnesses*

Not all witnesses are created equal. Some are more intelligent, articulate, honest-looking, or simply willing to show up if needed to testify. Attorneys rarely get to hand pick witnesses in advance, but this unique opportunity is presented each time an estate planning document is signed. Thus, it is nothing short of remarkable that so few estate planning

754. *See, e.g.*, *In re* Estate of Butts, 102 S.W.3d 801, 805 (Tex. App.—Beaumont 2003, no pet.) (analyzing the opportunity to find undue influence between a testator and her caretaker).

755. *See, e.g.*, Dailey v. Wheat, 681 S.W.2d 747, 754–55 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (analyzing undue influence in the context of a fiduciary relationship between testatrix and attorney).

756. *See, e.g.*, Moore v. Horne, 136 S.W.2d 638, 639 (Tex. Civ. App.—Austin 1940, writ dism'd) (recognizing a person "who by reason of age, physical weakness, and infirmities of body and mind is more susceptible to control by the will of another").

757. *See, e.g.*, *Estate of Flores*, 76 S.W.3d at 630–31 (recognizing that potential benefit is a requirement of undue influence).

758. *See In re* Estate of Olsson, 344 S.W.2d 171, 174 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (listing circumstances surrounding the execution of a will as one of the factors which is used to determine whether there was undue influence); RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.3, cmt. h (2003) (noting that a factor to be considered against an individual, who is alleged to have unduly influenced a testator, is the extent of their participation in the preparation of a will or its substitute).

759. *See* Mason v. Mason, 369 S.W.2d 829, 832 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.) (involving a will contest with testator's second wife who was present during the drafting and execution of testator's will); *Estate of Olsson*, 344 S.W.2d at 178–79 (showing undue influence exerted by second husband over testatrix, whose health was impaired, when second husband accompanied testatrix to her attorney's office during her will drafting discussions).

attorneys avail themselves of this golden opportunity to improve their clients' overall chances of success in potential future litigation.

1. Do You Always Want a Witness?

Many estate planning documents such as trusts and partnership agreements do not require a witness to the client's signature for validity.[760] In those cases, the question is whether a witness should get involved. A good rule of thumb is, if in doubt about whether a relative or friend may file a contest, get a witness. Having a witness present during the execution process signals that the client feels the document is important. This indication of significance is more apparent to a layperson than to lawyers who deal with legal documents on a daily basis. On both a conscious and sub-conscious level, it may make an important difference in the outcome of the contest.[761]

2. The "Best" Witness

Once you determine that an attesting witness is either required or advantageous, the next task is selecting the best witness available. Determining who would make the best witness will vary on a case-by-case basis; you must consider several distinct characteristics as minimum requirements for any potential attesting witness.[762]

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760. *See* TEX. PROB. CODE ANN. § 439(a)(4) (West 2003) (showing financial form documents that do not require a witnessing signature); *id.* § 439(a)(5) (providing an example of a non-testamentary transfer form); *id.* § 490(a) (outlining a durable power of attorney form that does not require an attesting witness signature).

761. *See* Boyd v. Boyd, 680 S.W.2d 462, 465 (Tenn. 1984) (illustrating that laypeople may attach significance to the witnessing of a document (a will in this case) even when a witness is not required).

762. Providing a list of minimum requirements:

(1) Lack of pecuniary interest—direct or indirect—in the transaction at hand.
(2) Good observation skills.
(3) A good memory.
(4) The ability to follow instructions.
(5) The ability to read and write the language used in the document being signed.
(6) The ability to articulate his or her thoughts in the language most likely to be used in the courtroom.
(7) A willingness to show up and testify if needed.
(8) A "normal" physical appearance.
(9) No criminal convictions.

See Triestman v. Kilgore, 838 S.W.2d 547, 547 (Tex. 1992) ("A competent witness to a will is one who received no pecuniary benefit under its terms."); *In re* Estate of Teal, 135 S.W.3d 87, 92 (Tex. App.—Corpus Christi 2002, no pet.) (reasoning that a witness was credible because she received no pecuniary benefit); 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 18.48 (3d ed. 2002) (outlining certain qualities to look for when selecting a witness, including witnesses that permanently reside in the same area where the testator lives, persons younger than the testator who may be

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3. The Attorney As a Witness

Some attorneys apparently feel they make a good witness and will act in such a capacity or as a Notary Public on wills and other estate planning documents they draft. This is not a wise decision. Unfortunately, no matter how charming or articulate a given lawyer may be, lawyers are not high on the trust and honesty list of most potential jurors.[763] Moreover, if the lawyer acts as an attesting witness, there is no attorney–client privilege with respect to any communication related to that document.[764] Although this may not bother a deceased client whose will is contested, it can be extremely irritating to a living client, or his or her guardian, when an *inter vivos* trust or partnership agreement is challenged. Finally, in many cases the drafting attorney may be a litigation witness regardless of whether the attorney signed the document as an attesting witness.[765] By acting as an attesting witness, the attorney may preclude another witness from testifying on the client's behalf.[766]

4. Stranger or Friend?

If mental capacity—whether testamentary or contractual—is likely to be an issue, the best witnesses to your client's estate planning documents are long-term friends or acquaintances. Close friends are likely to have had ample opportunities over time to observe your client, and will be able to make an informed judgment as to mental capacity on the date the document is signed.[767] Conversely, when undue influence is a potential

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available to testify, if needed, and someone who can speak to the testator's physical and mental health); Stephen C. Simpson, *Avoiding A Will Contest: Estate Planning and A Legislative Solution*, HOUS. LAW., Aug. 1999, 36, 38 ("The practitioner should choose witnesses wisely. They should be disinterested witnesses who would make good witnesses if a trial ensues. Ideally, the witnesses should be well acquainted with the testator and the family history.").

763. *See* Alex Vorro, *37% of People Say Lawyers Have Very Low Ethical Standards*, INSIDE COUNSEL (Dec. 12, 2011), http://www.insidecounsel.com/2011/12/12/37-of-people-say-lawyers-have-very-low-ethical-sta (highlighting the results of a Gallup Poll that reports "lawyers are perceived as only slightly more honest and ethical than car salesmen, stockbrokers, and telemarketers").

764. TEX. R. EVID. 503(d)(4) (indicating that the attorney–client privilege is extinguished when a lawyer serves as an attesting witness).

765. *See In re* Estate of Leach, 772 N.Y.S.2d 100, 102 (App. Div. 2004) (referencing that the drafting attorney and his secretary were deposed); Moeling v. Russell, 483 S.W.2d 21, 22–23 (Tex. Civ. App.—Tyler 1972, no writ) (detailing the testimony given at trial by the drafting attorney).

766. *See* Cottonwood Estates, Inc. v. Paradise Builders, Inc., 624 P.2d 296, 300 (Ariz. 1981) (expressing that mixing the role of a witness with that of an attorney diminishes the adversarial system's effectiveness); *In re* Pitt's Estate, 55 N.W. 149, 150 (Wis. 1893) (explaining that a relationship existed between testatrix and witnesses whose testimony was most valuable).

767. Among the more effective "friend" witnesses: (1) the decedent's long-term hairdresser (or barber), (2) bridge playing partners, (3) fellow garden club members (or other co-workers at charitable/volunteer groups), (4) close next-door neighbors, and (5) church associates. *See* 1

claim, the closeness of the relationship between the witness and the signing client may become an issue. Yet even in these cases, unless the witness stands to gain directly or indirectly from the document in question, jurors tend to give more credence to a witness who knew the person signing the document as opposed to one who simply met the testator at the time the document was signed.[768] If possible, try to have at least one witness who does not work at your law office.

5. Arm the Witness with Knowledge

a. Mental Capacity

Every person who is asked to witness a signature on any estate planning document should receive a written definition of the type of mental capacity required to execute that particular document, and should be encouraged to ask questions that they feel are necessary to enable them to testify on the issue.[769] Be sure to warn the client in advance that these questions may be asked and why the questions are important.

b. Unusual Disposition Issues

An attesting witness is not required to know the contents of the document being signed.[770] However, from a strategy standpoint, the client may benefit from disclosing relevant information. If a future contest to the document is a distinct possibility due to an unusual or unnatural disposition, the lawyer should bring that fact to the witness's attention,

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THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENTS' ESTATES § 74, at 352 (2d ed. 1953) ("[I]t is advisable to choose the attesting witnesses from among the testator's closest acquaintances."); Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & CMTY. PROP. L.J. 1, 39 (2011) (noting that when a will contest is expected "personal friends, co-workers, and business associates" are prudent choices as witnesses).

768. Recommended "business associate" witnesses include: (1) certified public accountant or tax preparer, (2) the church pastor, and (3) personal bank officer or trust officer.

769. *See* Storey v. Hayes, 448 S.W.2d 179, 182 (Tex. Civ. App.—San Antonio 1969, writ dism'd) (noting that sufficient personal contact between a witness and a testator may allow a witness to testify as to whether the testator possessed sufficient capacity to execute a will without giving expert opinion). *But see* Strahl v. Turner, 310 S.W.2d 833, 835, 837 (Mo. 1958) (holding that attesting reading magazine during execution of will did not make witness incompetent); 1 RONALD R. CRESSWELL ET. AL., TEXAS PRACTICE GUIDE: WILLS, TRUSTS AND ESTATE PLANNING § 4:58 (2002) (suggesting that all witnesses speak with the testator in order to credibly testify as to the capacity of the testator at trial if it should become necessary).

770. *See* Brown v. Traylor, 210 S.W.3d 648, 666 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (noting that witnesses are not required to know the actual contents of the will); Davis v. Davis, 45 S.W.2d 240, 241 (Tex. Civ. App.—Beaumont 1931, no writ) (stating that it is not essential for witnesses to read over a will or know its contents for the will to be valid).

allowing the testator to explain clearly the reasons for the unnatural disposition.[771] For example, if a testator cuts a child out of the will, be sure that the client states that fact to the witnesses and provides a brief explanation for the exclusion. As a cautionary note, attorneys should refrain from doing most of the talking. Suppose that a witness is asked to testify as to why the children were removed from the will. The witness will be much more persuasive if they had an actual conversation with the client, rather than testifying the lawyer passed down all the information. Finally, take proactive measures to ensure that the potential witness also feels comfortable with the client's decision. In essence, take steps to avoid using a surly witness whose discomfort could have negative implications for the client's case.

c. Other Important Issues

Any other issues of particular concern to the client should be brought up and discussed with the witness (e.g., a desire to save estate taxes, selection of a corporate fiduciary, a decision to leave some bequests in trust and some outright). The more the witness knows about the client's wishes and the document he or she is witnessing, the more likely it is that the witness will recall the events and discussions when called upon to testify.[772]

6. Ways to Easily Locate Witnesses in the Future

We live in an extremely mobile society. The most convenient way to track down a witness, particularly since the advent of the Internet, is to have the following: (1) his or her full legal name; (2) a copy of their driver's license, or at least the number and state of issuance; and (3) if possible, a Social Security Number.[773] Adding a few extra lines to the signature page

771. *See* Rothermel v. Duncan, 369 S.W.2d 917, 924 (Tex. 1963) (stating that possible undue influence issues only arise in a will contest where there is no reasonable explanation for an unnatural disposition); Franklin v. Martin, 73 S.W.2d 919, 919 (Tex. Civ. App.—San Antonio 1934, writ ref'd) (showing testator clearly expressed his testamentary desires and intent to the witnesses by reading such provisions aloud in their presence).

772. *See In re* Estate of Collins, 458 N.E.2d 797, 800 (N.Y. 1983) ("[A witness's] failure to recollect the event may be significant in determining whether the formalities of execution were followed."); Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & CMTY. PROP. L.J. 1, 16 (2011) ("It is important to impress the identity of the testator on the witnesses so that the witness will be able to remember the ceremony should their testimony later be needed.").

773. *See* Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & CMTY. PROP. L.J. 1, 40 (2011) (noting that an attorney may want to obtain the social security numbers of witnesses in order to more easily track them down in the future); 9 Gerry W. Beyer, *Texas Practice Series: Texas*

of the document provides an efficient, convenient point of reference so that you may easily find the witness in the future. Alternatively, an attorney can place this information on a letter the witness signs regarding the testator's mental capacity.

C. *Follow the Language of the Self-Proving Affidavit*

1. Approved Form

Section 59(a) of the Texas Probate Code provides that the following language is sufficient for a self-proving affidavit:

Law of Wills §§ 18.53, 43 (3d ed. Supp. 2012) (stating that including the witnesses' address on the will with their signatures makes locating the witnesses easier in the future).

THE STATE OF TEXAS
COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in the respective capacities, and, all of said persons being by me duly sworn, the said _____, 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 the same as witnesses in the presence of the said testator and at his request; that he was at that 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

_____
Witness

Subscribed and sworn to before me by the said _____, testator, and by the said _____ and _____, witnesses, this _____ day of _____ A.D. _____.

(SEAL)

(Signed) _____

(Official Capacity of Officer)

While the Code does not require this exact language,[774] it makes little sense to stray from the statutory form.

774. *See* TEX. PROB. CODE ANN. § 59(b) (West Supp. 2012) (noting that substantial compliance with the form is sufficient).

2. Let the Notaries Do Their Job

The self-proving affidavit serves as a substitute for in-court testimony that an attorney would otherwise need to prove up the will.[775] Unfortunately, many attorneys take over the will execution process—even to the point of summarizing or short-handing the text of the self-proving affidavit.[776] As a result, the best that many witnesses can do is to identify their own signatures when questioned later. They may have little or no recollection of ever being placed under oath, answering specific questions, or swearing to anything. The contestant may force the notary to admit that, contrary to what the self-proving affidavit states, he or she never placed anyone under oath.[777] Whether this invalidates the affidavit is open to question.[778] In any case, it does not sell well to a jury. Fortunately, the fix is simple: treat the self-proving affidavit as though the testator and witness are in a courtroom. Specifically, the notary should place the witnesses and testator under oath and elicit affirmative verbal responses to the affidavit questions. They should also ensure that the witnesses fully comprehend that they are swearing to the truth of their statements.

XIII. CONCLUSION

"Any lawyer who is not aware of the pitfalls in probate practice has been leading a Rip Van Winkle existence for the last twenty years."[779] Admittedly, this area of practice is a melting pot of presumptions, exceptions, threshold hurdles, capacity qualms, evidentiary issues, strategic

775. *See id.* § 59(a) (stating that the use of a properly executed statutory form self-proves a will and removes the need for court testimony from witnesses when probating the will); Wich v. Fleming, 652 S.W.2d 353, 354 (Tex. 1983) ("[T]he only purpose of the self-proving affidavit is to eliminate the necessity for the testimony of the subscribing witnesses when the will is offered for probate.").

776. *See* Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & CMTY. PROP. L.J. 1, 17–20 (2011) (setting forth the procedure for the execution ceremony and the roles of both the attorney and the Notary Public in executing the self-proving affidavit).

777. *See* TEX. PENAL CODE ANN. § 37.02(a)(1) (West 2011) (warning that a criminal penalty exists if a notary falsely states a document was executed under oath); 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 18.53 (3d ed. Supp. 2012) (identifying the steps in the will execution process that provides for the notary to place the witnesses and testator under oath).

778. *See* TEX. GOV'T CODE ANN. § 312.011(1) (West 2005) (reporting the necessary requirements for an affidavit, including that it be sworn to before an authorized officer). *See generally* Brittain v. Monsur, 195 S.W. 911, 917 (Tex. Civ. App.—Beaumont 1917, writ dism'd) (suggesting notary's liability for false certificate of acknowledgment).

779. Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death"—Common Non-Tax Errors and How to Prevent Them*, 1 EST. PLAN. & CMTY. PROP. L.J. 61, 64 (2009) (citing Robert E. Dahl, *An Ounce of Prevention—Knowing the Effect of Legal Malpractice in the Preparation and Probate of Wills*, Docket Call 9, 9 (Summer 1981)).

clauses, and countless other headache-inducing legal issues—yet attorneys must diligently juggle all of them while also maintaining their clients' confidence and trust. By addressing a gamut of probate concerns, this Article aims to enable practitioners to overcome successfully these issues. The suggestions within this Article are designed to provide practical steps that attorneys can implement in their daily practice. As previously discussed, preparation is key. This Article highlights the ever-changing, broad scope of probate quandaries, but as evidenced herein, practitioners can stay ahead of the game by using effective and efficient strategies.