

[This article was prepared for a group of probate judges from all over the United States. It was intended to give those judges a feel for some of the unusual aspects of Texas probate law. It was presented with Judge Russell Austin a Probate Judge in Houston.]

NATIONAL COLLEGE OF PROBATE JUDGES Spring 2003 Conference

MYTHS AND FACTS: TEXAS PROBATE

**Galveston, Texas
May 8, 2003**

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- "“HE’S DEAD?” Real Estate in a Decedent’s Estate,” Advanced Real Estate Drafting Course 2002
- "“COMMUNITY PROPERTY FOR ACCOUNTANTS,” Travis County CPAs Annual Conference. 1999.
- "“TEXAS LEGISLATIVE REPORT” 2003, 2001, 1999, 1997 State Bar of Texas, Annual Advanced Estate Planning and Probate Course.
- "“What’s Hot: GRATS, GRUTS, PRTS, QPRTS & FLPS,” ANNUAL TAX CONFERENCE, Travis County CPA Association. 1995.
- "The 706 for Country Lawyers and Other Simple People," Travis County Probate and Trust Law Section, 1994.
- "DEATH AND TAXES: An Introduction To Taxes Concerning A Probate Attorney," prepared for the University of Texas Legal Assistant Program--1993.
- "Estate Planning for PWAs (Persons With AIDS)," State Bar of Texas, 16th Annual Advanced Estate Planning and Probate Course 1992.
- "Divorce: Effect Upon Life Insurance and Non Probate Assets," 1988, Probate & Property, magazine of the Real Property, Probate and Trust Section, American Bar Association.
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PUBLICATIONS AND SPEECHES

- **A Potpourri Of Guardianship Issues From The Bench Or Common Mistakes**, 2003, Elder Law Conference, Houston
- ***Evicting Heirs, Devisees & Legatees – Where Does Jurisdiction Lie And Forcing The Sale Of A Beneficiary’s Interest In Non Exempt Real Property For Non Payment Of Ad Valorem Taxes***, 2002, Lawyers In Tax & Probate, Co-Author Jason B. Ostrom, J.D., Houston
- ***Guardianship Alternatives and Settling Contested Guardianships***, 2002, Wills & Probate Institute, Co-Author Darlene Payne Smith, J.D., Houston
- ***Planning For Incapacity***, 2002, Houston Bar Association, Co-Author Sharon Stodghill, J.D., C.P.A.
- ***Characterization and Tracing of Assets***, 2002, Wills & Probate Institute, Co-Author Paula A. Miller, P.A. Miller Consulting, Inc.
- ***Creditor Claims Procedures In Decedent’s Estates and Guardianship Proceedings***, 2002, Houston Bar Association, Co-Author Gus G. Tamborello, J.D.
- ***“Appertaining To And Incident To”***, 2001, 12th Annual Advanced Medical Malpractice Conference, Houston, Texas
- ***Preserving Error In The Admission And Exclusion Of Evidence: Objections, Motions and Offers of Proof***, 2000, Lorman Education Services, Houston, Texas
- ***Evidentiary Issues***, 2000, 24th Annual Advanced Estate Planning and Probate Course, Co-Author James Benson, Ph.D., J.D., Fort Worth, Texas
- ***Avoiding Embarrassment At Trial***, 1999, 10th Annual Advanced Medical Malpractice Conference, Houston, Texas
- ***Use and Misuse of Powers of Attorney***, 1999, Intermediate Estate Planning, Guardianship and Elder Law Conference, Co-Author James Benson, Ph.D., J.D., University of Texas, Galveston, Texas
- ***Constitutional and Statutory County Court Probate Jurisdiction***, 1999, Co-Author Prof. Helen Jenkins, South Texas County Judge’s and Commissioner’s Conference, Galveston, Texas

- **What Lawyers Want To Know About Probate Court Jurisdiction**, 1999, State Bar of Texas, 23rd Annual Advanced Estate Planning and Probate Course, San Antonio, Texas
- **Putative Spouses In The Probate Process**, 1999, co-author Darlene Payne Smith, J.D., Texas College of Probate Judges, S. Padre Island, Texas
- **Real Property Resolutions In The Probate Process**, 1999, Disability and Elder Law Attorney's Association, Houston, Texas
- **Claims In The Probate Process**, 1999, Texas College of Probate Judges, Austin, Texas
- **Appraisals In The Probate Process**, 1998, co-author James Benson, Ph.D., J.D., American Society of Appraisers Newsletter
- **Special Proceedings In Probate**, 2002, 1999, Texas College of Probate Judges, Houston, Texas
- **Limiting A Guardian's Authority To Alter A Ward's Estate Plan**, 1998, co-author James Benson, Ph.D., J.D., Disability and Elder Law Attorneys Assoc., Houston, Texas; 22nd Annual Advanced Estate Planning & Probate Course, 1998, Austin, Texas
- **Guardianship Law**, 1998, West Texas County Judges & Commissioners Conference, Odessa, Texas
- **Probate Jurisdiction**, December 1997, The Texas Lawyer
- **Real Estate In The Probate System**, 1997, Advanced Estate Planning and Probate Law Seminar, Texas Bar Association, Houston, Texas
- **Guardianship Alternatives**, 1998, Planning Strategies For Persons With Disabilities, State Bar of Texas; 1997, Wills and Probate Institute, Houston Bar Association.
- **Independent Administration From The Perspective Of The Bench**, 1998, Texas College of Probate Judges, Corpus Christi; 1997, Galveston, Texas
- **No Reason To Fear Texas Probate**, June 1997, The Texas Lawyer
- **Dependent Administration and Heirship From The Perspective of The Bench**, 2000, Texas College of Probate Judges, San Antonio; 1998, El Paso; 1997, San Antonio, Texas
- **Guardianship - A Safety Net For The Incapacitated**, co-author Nicholas J. Lykos Family Violence, Sexual Assault and Child Abuse, 1997, College of Advanced Judicial Studies, Houston, Texas
- **The Impact of Advance Medical Directives on Distribution of Estate Assets Under the Simultaneous Death Act**, 1997, co-author James Benson, Ph.D., J.D., Elder Law Journal
- **Guardianship Law From The Perspective of The Bench**, 1996, Far West Texas County Judges and Commissioners Conference, Lajitas, Texas
- **Independent Administration Under § 145, T.P.C.**, 1996, Pocket Parts, Houston Young Lawyers Association
- **Estate Planning To Maintain Assets**, 1996, Elder Law Institute Republication Speech, Dallas, Texas
- **What You Are Dying To Know About Probate**, 1996, Houston Legal Assistants Association News
- **Alternatives To Formal Probate**, 2002, 2001, 2000, 1999, Wills and Probate Institute, Houston Bar Association, Houston, Texas; 1998, 1997, 1996, 1995, H.B.A. Institute
- **The Role of The Attorney Ad Litem in Guardianships**, 1995, H.B.A., Houston, Texas
- Editor, **Comprehensive Planning Document for Nassau Bay, Texas, Volume I**, 1979

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**MYTHS AND FACTS: TEXAS PROBATE
Galveston, Texas
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MYTHS AND FACTS: TEXAS PROBATE

1. Myth or Fact: Texas Has the Easiest Probate System.
 - a. Three Pieces of Paper. It is possible to probate a will, through a muniment of title using only three pieces of paper (four if you count the one prepared by the clerk). A will can be probated as a muniment of title under Sections 89A, 89B and 89C of the Texas Probate Code (hereafter Section refers to the Texas Probate Code unless otherwise indicated).
 - i. All that is needed is
 - (1) Application to probate the will;
 - (2) Proof of death and other facts; and,
 - (3) Order admitting the will to probate as a muniment of title.
 - ii. With a muniment of title, there is no personal representative. There is no requirement for an inventory.
 - iii. It is available only if there are no unpaid debts of the decedent other than those secured by real estate. Section 89A(b)(7).
 - iv. This procedure is used most commonly
 - (1) When the only beneficiary is the surviving spouse,
 - (2) When a will is being probated more than four years after the date of death, or
 - (3) When there is no executor named in the will or none that can qualify.
 - v. It is also used in estate's where
 - (1) There are no debts,
 - (2) The assets are easily divided among the beneficiaries, and
 - (3) There is no need for a personal representative.
 - vi. There is no requirement for notice to creditors and there is no requirement to file an inventory.
 - vii. Section 89C(d) requires the applicant to file an affidavit stating that the terms of the will have been fulfilled. However, even this piece of paper can be waived.
 - b. Even in complex estates, it is possible to probate a will with only seven pieces of paper
 - i. The application to probate the will;
 - ii. Proof of death and other facts;
 - iii. Representative's oath;
 - iv. The order admitting the will to probate as a muniment of title;
 - v. Notice to Creditors published in the newspaper;
 - vi. Inventory; and,
 - vii. Order approving inventory.

2. Myth or Fact: Texas Has The Best Probate Alternatives.

The probate alternatives are

- a. An independent administration may be established by will, Section 145(b).
- b. If there is no will or the will does not establish an independent administration, or none of the designated executors can qualify, all of the distributees of the estate may agree upon an independent administration including the waiver of bond.
- c. A dependent administration may be had. The court may appoint a dependent administrator when there is no will or even when there is one which does not provide for an independent administration. In fact the court can appoint a dependent administrator even if the will provides for an independent administration. Section 156(r) says that a court may appoint as a dependent administrator a person who has refused to serve as independent executor.
- d. A will may be probated simply as a muniment of title without an administration under, Sections 89A et seq., as discussed above.
- e. An estate may be settled using a small estate affidavit under Section 137.
 - i. This affidavit, if approved by the court, may be used to collect the estate of the decedent.
 - ii. It is only available if there is no will and the estate, other than exempt property and homestead, does not exceed \$50,000.
- f. If there is no will the court can determine the heirs under Sections 48 et seq. This is generally a pre-requisite to the appointment of an administrator.
- g. When there is no will, Section 52A provides a statutory affidavit of heirship. This statute was passed in 1999 at the behest of the title companies. It is a very common practice in Texas for title companies to accept affidavits of heirship in lieu of a probate proceeding to establish succession to title.
- h. When a spouse dies and there is no administration, the surviving spouse may sell, mortgage or lease property for purposes of paying community debts, Section 160(a). Surprisingly title companies have accepted this procedure and permitted a surviving spouse to sell real estate.
- i. Alternatively, when a spouse dies, the survivor may be appointed “community administrator. Sections 161 et seq.
 - i. To qualify
 - (1) The community estate must pass to someone other than the surviving spouse and
 - (2) There is no one named in a will who is willing or able to serve; or the decedent died intestate.
 - ii. After qualifying and filing an inventory, the surviving spouse acts free of any further action of the court. Section 167
 - iii. A bond is required. Section 165.
 - iv. The community administrator, after paying the community debts, shall “carry on as statutory trustee for the owners of the community

estate...”

- j. Finding of No Necessity for Administration. Finally, Section 180 allows a court to declare that there is no need for the administration of an estate. Such an order is sufficient legal authority for third persons to deal directly with the heirs.
3. Myth or Fact: Texas’s Probate System Is Too Easy (Notice)
- a. A will can be probated (or an administration taken out) in Texas with only posting at the courthouse door.
 - b. It is not necessary to give actual notice to beneficiaries, to a surviving spouse, to the children or other next of kin.
 - c. It is even possible, through a muniment of title, to probate a will without any notice to the named executor.
4. Myth or Fact: Texas Has the Greatest Probate Courts.
- a. Depending on the county, Texas has three different courts of original probate jurisdiction.
 - i. Constitutional County Courts. In the smaller counties the constitutional serves as the probate court of original jurisdiction.. The judges of these courts are also the chief administrative officer of the county and oversees the county’s commissioner’s courts. It is not required that the judge be a lawyer.

The county courts’ jurisdiction is fairly restricted

“The county court shall have the general jurisdiction of a probate court. It shall probate wills, grant letters testamentary and of administration, settle accounts of personal representatives, and transact all business appertaining to the estates subject to administration, including the settlement, partition and distribution of such estates.” (Underlining added) (Section 4)

If there is a contested probate matter in the county court, the judge may on his own motion (and shall on the motion of any party) transfer to the district court or assign to a statutory probate court. Section 5(b)
 - ii. County Courts at Law. In most of Texan’s 154 counties there are county courts at law. In Texas the trial courts are the district courts and county courts at law. The district courts are regarding as courts

of general jurisdiction. The county courts at law handle the smaller civil matters (controversies involving less than \$100,000, Texas Government Code Section 25.0003) and misdemeanors. Many, but not all, also handle family law, juvenile and probate.

If a county has a county court at law, but not a statutory probate court, the county court at law has original probate court jurisdiction. Section 5(c).

Section 5A(a) outlines the jurisdiction for county courts at law as all matters “appertaining to” or incident to an estate” to “include, but are not limited to “

1. “all claims by or against an estate;”
2. “all actions for trial of title to land incident to an estate and for the enforcement of liens thereon;”
3. “all actions for trial of the right of property incident to an estate,”
4. “actions to construe wills, and”
5. “generally all matters relating to the settlement, partition, and distribution of estates of deceased persons.”

iii. Statutory Probate Courts (SPC). In the more populous counties (the counties in which the following cities are located: Dallas, Houston, Galveston Austin, San Antonio, Ft. Worth, Plano, Denton and McAllen), there are statutory probate courts. These courts vary tremendously from the previously discussed courts.

Their jurisdiction is broad. They have all of the original probate jurisdiction set out above; plus in Section 5A(b)

1. Interpretation and administration of testamentary trusts;
2. applying of constructive trusts;
3. all suits by or against a personal representative; including estates administered by an independent executor.

Section 5A(c) also gives them concurrent jurisdiction with the district court in all actions:

- “1. by or against an estate’s personal representative;
2. involving an inter vivos trust;
3. involving a charitable trust; and,
4. involving a testamentary trust.”

And, Section 5A(d) also gives them pendent and ancillary jurisdiction “to promote judicial efficiency and economy.”

Finally, the Texas Trust Code (Texas Property Code) Section 115.001(d)) acknowledges their concurrent jurisdiction with the district court in matters involving testamentary and inter vivos trusts.

Transfer Power. But that's not all. Statutory probate courts also have a unique transfer power. Section 5B says a statutory probate court may transfer to its court, from a district court or statutory court, a cause of action incident to or appertaining to an estate or "in which a personal representative of an estate is a party."

Personal Representative Confers Jurisdiction. The statutes as currently written resolve several old jurisdictional problems. For years, cases were tried only to learn that it had been tried in the wrong court. That because it was "appertaining to" or "Incident to" an estate the district court did not have jurisdiction. Or because it was not "appertaining to" or "incident to" an estate the probate court did not have jurisdiction. Now the test is simple: Is the personal representative a party? If yes, the SPC has jurisdiction.

There Are Anomalies. Section 5A(b) says where the jurisdiction of the statutory probate court and the district court are concurrent, "any cause of action appertaining to estate or incident an estate shall be brought in the statutory probate court rather than in the district court" (emphasis added). Some believe this phrase negates all probate jurisdiction in the district courts. The problem was touched on but not resolved in In Re Azle Manor, Inc. 83 S.W.3d 410 (Ft. Worth 2002, _____). There is legislation pending before the Texas Legislature that will, hopefully, solve this problem.

Transfer vs. Venue. In 1995 the Texas Legislature passed Texas Civil Practice and Remedies Code Section 15.007. This section says that it controls venue in cases involving personal injury, death or property damage and not the Texas Probate Code. Two cases, which upheld a statutory probate court's authority to transfer, have held that Section 5B is a transfer statute, not a venue statute, In re J7S Inc., J7S Cattle Co., Ltd. 979 S.W.2d 374 (Tex. App.-Houston 14th, 1998 original proceeding) and In re Houston Northwest Partners, Ltd. 98 S.W.3d 777 (Austin, 2003, _____).

But a third case held that Section 5B is a venue statute and is overridden by the Civil Practice and Remedies Code Section 15.007, Reliant Energy Incorporated v. Gonzalez, _____ S.W.3d _____ (2002 WL 31051573 (Tex.App.-Houston 1st, 2002, application for rehearing pending).

Staffing. Statutory probate courts are required to have:

- (A) a court coordinator, Texas Government Code Section 25.0024
- (B) an administrative assistant, id.
- (C) an auditor, id and
- (D) a court investigator, Texas Government Code Section 25.0025

Masters. In addition, with local authorization, a statutory probate court may also have a master (Texas Government Code Section 54.601).

5. Myth or Fact. Texas Has The Most Flexible Systems of Wills.

- a. Texas has self proved wills, attested wills, holographic wills and nuncupative wills.
- b. An attested will is a written will signed by the testator and two witnesses above the age of 14. Section 59(a)
- c. A self proved will is a written will complying with the requirements of Section 59 and has attached to it an affidavit substantially in the form of the affidavit set out in Section 59(a). An uncontested will with a self proving affidavit attached may be probated without any testimony from the witnesses. Section 59(c). The affidavit is deemed sufficient.
- d. A holographic will, signed just by the testator and wholly in his handwriting, is admissible to probate in Texas. Section 60. This will may even be made self proved. A holographic will does not require any witnesses. And it of course can provide for an independent executor and can waive the requirement of a bond.
- e. It is even possible in Texas to have an oral (nuncupative) will for personal property.
 - i. These nuncupative wills are permitted if
 - (1) The declarations are made within 10 days of the date of death;
 - (2) It is made at the testator's home or where he has resided for at least 10 days, except if he becomes ill while away from home and dies before returning; and
 - (3) Nuncupative wills are only valid for personal property.
 - (4) The value may not exceed \$30 unless there are three credible witnesses that the testator "called on a person to take notice or

bear testimony that such is his will.”

- ii. Section 86 sets out the requirements for probating a nuncupative will.
 - (1) The will cannot be probated for 14 days or until those who would have inherited but for the will have been given notice.
 - (2) If the will is not probated within six months, the will has to be reduced to writing within six days of the making of the will.
 - (3) If the value of the estate exceeds \$30, there must be three credible witnesses.

6. Myth of Fact. Jury Trials Are Available to Probate Litigants in Texas.

Section 21 says

“In all contested probate and mental health proceedings..., the parties shall be entitled to trial by jury as in other civil actions.”

In Texas juries resolve issues of fact in equitable proceedings. This was explained in Casa El Sol-Acapulco, S.A. v. Fontenot, 919 S.W.2d 709, 715 (Tex.App.–Houston [14th Dist.] 1996, writ dism'd by agreement).

“There is no common-law right to a jury trial in equity. Trapnell v. Sysco Food Services, Inc., 850 S.W.2d 529, 543 (Tex.App.–Corpus Christi 1992), *aff'd*, 890 S.W.2d 796 (Tex.1994). However, two provisions of the constitution insure the right to a jury trial in Texas. The first is contained in the Texas Bill of Rights. See Tex. Const. art. I, § 15. This provision guarantees “the right to a jury in all actions where that right existed at the time the Constitution was adopted.” State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 291 (Tex.1975). Because the English chancery were judges of both fact and law at the time our constitution was enacted, this provision does not alter the common law tradition eschewing juries in equity actions.

“Because of Texans' familiarity with Spanish law and procedure, they adopted a second constitutional provision insuring the right to a jury trial in all causes. This provision is found in the Judiciary Article. See Tex. Const. art. V, § 10. Thus, in Texas, the “traditional distinctions between actions at law and suits in equity have never carried the procedural significance accorded to them in other states of the Union.” The law in Texas is that the right to a jury trial extends to disputed issues of fact in equitable as well as legal proceedings. Jeter v. Associated Rack Corp., 607 S.W.2d 272, 277-78 (Tex.Civ.App.–Texarkana 1980, writ *ref'd n.r.e.*), cert. denied, *716 454 U.S. 965, 102 S.Ct. 507, 70 L.Ed.2d 381 (1981). The jury, however, should not determine the expediency, necessity, or propriety of equitable relief. State v. Texas Pet Foods, Inc., 591 S.W.2d 800, 803 (Tex.1979).”

It is clear in Texas that the right to a jury trial extends to questions of fact even in equitable proceedings. Arce v. Burrow, 958 S.W.2d 239 (Tex. App.-- Houston [14th Dist.] 1997)

A jury cannot apply those facts to the law. Thus the jury does not decide if an executor should be removed, only if breaches have occurred. See Caballero v. Central Power of Light Company, 858 S.W.2d 359 (Tex. 1993). In Arce, supra, the court held (at 250),

“...it is equally clear that a jury may not determine the expediency, necessary or propriety of equitable relief... So while the parties are entitled to have the jury determine whether there has been a breach of fiduciary duty, they are not entitled to have the jury determine the amount, if any, of any fee forfeiture because fee forfeiture is not an issue of fact, it is a remedy. As stated by the supreme court in [Caballereto, supra] “We hold that when properly requested jury trials are appropriate for finding the ultimate issues of fact...but not for fashioning appropriate equitable relief.” In light of this longstanding tradition, we are compelled to hold that the trial court is to determine the amount of forfeiture, if any, and in making this decisions, is to consider the factors held by this court to be relevant to that determination.”

The above discussion on juries deciding facts in equitable proceedings was borrowed liberally from Frank Ikard’s forthcoming article “Trust Litigation in Texas” which will be presented at the Ft. Worth Fiduciary Litigation Seminar in the fall of this year.

7. Myth or Fact. In Texas Judges Can Be The Settlers of Trusts.

- a. Section 142.005 of the Texas Property Code was enacted in 1984. This statute permits a court to create a trust to hold settlement or judgment proceeds for a minor or incapacitated person who is not subject to a guardianship. The trustee has to be a corporation.

The court shall provide the “terms, conditions and limitation of the trust” provided that they do not conflict with “the following mandatory provisions:” (Texas Property Code Section 142.005(b)

- “(1) the minor or incapacitated person is the sole beneficiary of the trust;
- (2) the trustee may disburse amounts of the trust's principal, income, or both as the trustee in his sole discretion determines to be reasonably necessary for the health, education, support, or maintenance of the beneficiary;

- (3) the income of the trust not disbursed under Subdivision (2) is added to the principal of the trust;
- (4) if the beneficiary is a minor, the trust terminates on the death of the beneficiary, on the beneficiary's attaining an age stated in the trust, or on the 25th birthday of the beneficiary, whichever occurs first, or if the beneficiary is an incapacitated person, the trust terminates on the death of the beneficiary or when the beneficiary regains capacity;
- (5) the trustee serves without bond; and
- (6) the trustee receives reasonable compensation paid from trust's income, principal, or both on application to and approval of the court."

The court which creates the trust may amend, modify or revoke the trust at any time. Texas Property Code Section 142.005(d).

In Texas State Bank v. Amaro, 87 S.W.3d 538 (Tex.,2002) the court held that all proceedings concerned that trust must be brought in the court which created it.

- b. In 1993 the Texas Legislature created Sections 867-870 of the Texas Probate Code allowing probate courts to create similar trusts when there is a guardianship. Under these guardianship trusts an individual may be appointed if the size of the trust is less than \$50,000. An individual may also be appointed if the amount is greater than \$50,000 and no corporate trustee is willing to serve. Unlike a corporate trustee, an individual trustee will have to post a bond.

8. Myth or Fact. A Texas Probate Proceeding Has Many Appeals.

- a. What represents a final, appealable judgment has bedeviled Texas probate lawyers for years.
- b. In 1995 some guidance was provided in Crowson v. Wakeham, 897 S.W.2d 779 (Tex. 1995). The Texas Supreme Court said a probate order was final and appealable if there was an express statute, declaring that phase to be final and appealable, if the order adjudicated a substantial right or if the matter was severed.
- c. Since then cases have been decided holding that the following orders are appealable (this list is taken from Professor Stanley Johanson's Annotated Texas Probate Code):

- i. Order denying application to set aside probate of a will, Kongs v. Harmon, 1998 WL 394177 (Tex.App.–Corpus Christi 1998, no writ).
- ii. Order appointing executor. Estate of Crenshaw, 982 S.W.2d 568 (Tex.App.–Amarillo 1998, no writ).
- iii. Order denying appointment of named executor on ground of unsuitability. Estate of Vigen, 970 S.W.2d 597 (Tex.App.–Corpus Christi 1998, no writ).
- iv. Order that party was disqualified to serve as personal representative. Spies v. Milner, 928 S.W.2d 317 (Tex. Ft. Worth 1996, no writ).
- v. Order that party lacked standing to bring action to remove executor. A & W Industries, Inc. v. Day, 977 S.W.2d 738 (Tex.App.–Fort Worth 1998, no writ).
- vi. Order appointing temporary guardian. Woollett v. Matyastik, 23 S.W.3d 48 (Tex.App.–Austin 2000, writ denied).
- vii. Order continuing attorney ad litem’s appointment. Coleson v. Bethan, 931 S.W.2d 706 (Tex.App.–Fort Worth 1996, no writ).
- viii. Summary judgment. Sanders v. Capitol Area Council, 930 S.W.2d 905 (Tex.App.–Austin 1996, no writ)
- ix. Summary judgment order in § 54 heirship proceeding in which, the Court of Appeals severed the proceeding Estate of Loveless, 64 S.W.3d 564 (Tex. App.–Texarkana 2001, no writ).
- x. Order for partition of property. Estate of Mitchell, 20 S.W.3d 160 (Tex.App.–Texarkana 2000, no writ).
- xi. Order finding that proposed ward had capacity to contract for legal services. Logan v. McDaniel, 21 S.W.3d 683 (Tex.App.–Austin 2000, writ denied).
- xii. Order authorizing guardian to file for divorce. Stubbs v. Ortego, 977 S.W.2d 718 (Tex.App.–Fort Worth 1998, writ denied).

The following orders have been ruled to be interlocutory and thus not appealable:

- xiii. Order transferring guardianship to another county. Guardianship of Murphy, 1 S.W.3d 171 (Tex.App.–Fort Worth 1999, no writ).
- xiv. Order setting bond of independent administrator. Navar v. Fitzgerald, 14 S.W.3d 378 (Tex.App.–El Paso 2000, no writ).
- xv. Order transferring lawsuit over fee contract from district court to statutory probate court. Forlano v. Joiner, 906 S.W.2d 118 (Tex. App.–Houston [1st Dist.] 1995, no writ).
- xvi. Order barring authenticated claim against estate. Columbia Rio Grande Regional Hospital v. Stover, 17 S.W.3d 387 (Tex.App.–Corpus Christi 2000, no writ) (independent administration; order barring claim was res judicata).

9. Myth or Fact. Texas Lawyers Are Not Liable for Negligent Drafting of Wills.

In Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996), the Texas Supreme Court held that a Texas attorney is not liable for negligent drafting of a will or trust. Actually, they said the attorney was not liable to the persons who would have benefitted from a properly written will.

To date only two exceptions have been grafted onto this rule. In Arlitt v. Paterson, 995 S.W.2d 73, (Tex.App.–San Antonio 1999, writ denied), the court held that when there were two clients (husband and wife) Barcelo did not bar the survivor’s actions.

In Arlitt and in McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1998) the courts recognized a claim based on negligent misrepresentation.

10. Myth or Fact. Texas Probate Judges Do Not Have Full Judicial Immunity.

a. Section 36(a) of the Texas Probate Code says probate judges are liable,

“...should damage or loss result to estates through the gross neglect of the judge to use reasonable diligence in the performance of his duty, he shall be liable on his bond to those damaged by such neglect.”

a. In Heyn v. Massachusetts Bonding & Ins. Co., 110 S.W.2d 1937 (Tex.Civ.App.–Dallas 1937, writ dismissed w.o.j.) the bond of the County Judge of Dallas County was found to be liable. In that matter the judge did not set an adequate bond, he did not compel the filing of annual accounts, and he did not examine the ward’s affairs.

b. The court said these “...mandatory duties are imposed upon court judges by reason of the inability [of the wards] to take care of their own interests.” (page 265).

c. Not only must a complainant show gross negligence, he must also show that it was the proximate cause of the loss.

d. Further, the wording of the statute makes unclear if the judge is liable or only his bond.

11. Myth or Fact. Corporate Trustees Can Be Exculpated From All Liability.

- a. This year the Texas Supreme Court issued an opinion in Texas Commerce Bank, N.A. v. Grizzle, 96 S.W.2d 240 (Tex. 2003). A district court in Dallas County established a court created trust under Chapter 142 of the Texas Property Code to hold property received from a lawsuit settlement.
- a. The trust included an exculpatory clause which stated,

“This instrument shall always be construed in favor of the validity of any act or omission by the Trustee, and a Trustee shall not be liable for any act or omission except in the case of gross negligence, bad faith or fraud.” (page 243)
- b. The original trustee, Frost, and Texas Commerce Bank entered into a bank swap. As a result TCB wound up with the Grizzle trust. That transfer of the trust required TCB to liquidate Grizzle’s interest in the Frost stock and income funds. TCB made the liquidation and while reinvesting 5 days later, the trust lost \$5,500.
- c. The beneficiary’s mother brought a class action against TCB. TCB’s motion for summary judgment was granted.
- d. The court of appeals held that the exculpatory clause could not, as a matter of public policy, vitiate claims for self dealing, 38 S.W.3d 271. That court said self dealing included misapplication of funds, mishandling of funds and failing to promptly reinvest.
- e. The Texas Supreme Court, reversing the court of appeals, held
 - i. That a judge in creating a trust with a corporate trustee under Chapter 142 could include an exculpatory clause. (page 248)
 - ii. That an exculpatory clause can relieve a corporate trustee from self dealing defined as misapplication, mishandling or delay in promptly reinvesting.
 - iii. That the only restrictions on a corporate trustee are those set out in Trust Code Sections 113.052 and 113.053 prohibiting lending to itself and buying or selling trust property. (page 248).
 - iv. That the public policy limiting exculpatory clauses is determined by the Texas Legislature in the statutes it passes.
- f. Those who are critical of this opinion say the opinion leaves open the possibility of eliminating all duties of a trustee including the duty to account. That a settlor could now exonerate a trustee from profits made from a breach of trust, despite the language in Section 222 of the Restatement (Second) of

Trusts.

- g. While this trust excepted out bad faith, fraud or gross negligence now it is unclear if those too could be exonerated.

12. Myth or Fact. Texas Has The Most Generous Exempt Property Provisions.

- a. In Texas the following assets are exempt from forced sale or claims of creditors. These protections are set out in the statutes but they are also constitutional, see Texas Constitution Article XVI, Section 49 (personal property) and Section 50 (homestead).

- b. Up to \$60,000 of personal assets for a person who is a member of a family (Texas Property Code Sections 42.001 *et seq*) including the following which are set out in Section 42.002 of the Texas Property Code

“(1) home furnishings, including family heirlooms;
(2) provisions for consumption;
(3) farming or ranching vehicles and implements;
(4) tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;
(5) wearing apparel;

(6) jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a);

(7) two firearms;

(8) athletic and sporting equipment, including bicycles;

(9) a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;

(10) the following animals and forage on hand for their consumption:

(A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each;

(B) 12 head of cattle;

(C) 60 head of other types of livestock; and

(D) 120 fowl; and

(11) household pets.”

A single person, who is not a member of a family, is limited to \$30,000 of the above.

The provisions set out above are the only Texas exemption statutes that have a monetary limitation.

- c. In addition, and not limited by the dollar amount above, current wages, prescribed health aids and alimony and support are exempt, Section 42.001(b) Texas Property Code.
- d. In addition, all of a Texan's retirement benefits are protected under Section 42.0021 of the Texas Property Code.
- e. In addition, without any limitations as to amount, all of a Texan's life insurance and annuities are exempt. Texas Insurance Code Section 1108.001 et seq. The only exceptions, Section 1108.053 are premium payments made in fraud of a creditor and debt secured by a pledge of an insurance policy.
- f. In addition, investments in Texas's 529 plans are protected. See Texas Education Code, Section 54.639 ("Texan Guaranteed Tuition Plan" formerly known as the Texas Tomorrow Plan), and Section 54.709(e) ("Tomorrow's College Investment Plan,")
- g. And finally, Texas has its homestead protection. The extent of the protection depends upon the urban or rural nature of the homestead.
 - i. If the homestead is urban, Texas Property Code Section 41.002(a) limits it to 10 contiguous acres. There is no dollar limitation. It may be not only a home but also a "place to exercise a calling or business..."
 - ii. If the homestead is rural Section 41.002(b) allows up to 200 acres and if in more than one tract they do not have to be contiguous. If the person is single the homestead is limited to 100 acres. Again there is no dollar restriction.
 - iii. Section 41.002(c) says a homestead is urban if, at the time th designation is made, the homestead
 - (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
 - (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:
 - (A) electric;
 - (B) natural gas;
 - (C) sewer;
 - (D) storm sewer; and

(E) water.

13. Myth or Fact. The Beneficiaries or Heirs Can Rewrite a Will.

Texas law favors resolution of disputes. As a result family settlement agreements are encouraged, Shepard v. Ledfferd, 962 S.W.2d (Tex. 1998). In addition to encouraging settlements, the courts say the agreements are valid because of Section 37. Section 37 says a decedent's estate vests in the beneficiaries or heirs immediately upon death. The courts indicate that a family settlement agreement is an alternate means of administration. That the settlement agreement can even be used as a means to avoid settlement.

Because an estate vests at death, beneficiaries to have to be careful of the tax consequences of any settlement. While the settlement may be valid under Texas law, there may be tax issues. As long as it is a bona fide settlement there are no income tax consequences (Lyeth v. Hoey, 305 U.S. 188 (1938) and there are no gift tax consequences (PLR 8902045). Because of the tax savings the problem generally comes up regarding claimed marital deductions (Estate of Thomas W. Tebb, 27 T.C. 671, Dec. 22,212, 1967) or charitable deductions (Rev.Rul. 145, 1953-2 Cum Bull. 273) claimed as a result of a settlement.

The consideration also has to be adequate to avoid gift tax issues, see PLR 8902045).

14. Myth or Fact. The Beneficiaries and Heirs Can Enter Into a Family Settlement Agreement Over the Objection of the Executor.

In In Re Estate of Hodges, 725 S.W.2d 625 (Tex.App.–Amarillo 1986, writ ref'd n.r.e.) the testatrix left one of her daughters out of the will. She instructed the executor and the beneficiaries to oppose any efforts by that daughter to contest the will and she included a no contest clause. The daughter filed a will contest. After two years of extensive preparation, the beneficiaries entered into a settlement agreement with her.

The man named as executor in the will opposed the agreement. The trial court held that he had no standing and approved the settlement agreement.

That ruling was sustained on appeal. The court held that when an executor has no pecuniary interest, it has no standing to object to a settlement. The executor said the fee set out in the will was his pecuniary interest. The court rejected this argument as well.

15. Myth or Fact. A Texan May Be Sued For Tortious Interference With Inheritance Rights For Filing A Will For Probate Or For Contesting The Probate Of A Will.

In King v. Aker, 725 S.W.2d 750 (Tex.App.–Houston [1st Dist.] 1987, no writ), the decedent's widow before death used a power of attorney to transfer stock and after death offered a will for probate. The children contested and a temporary administrator was appointed. A jury found that the power of attorney and will were not signed by the decedent. The jury found that the widow had tortiously interfered with the inheritance rights of the children with malice. Further they assessed actual damages of \$28,275. The children contended that a temporary administration would not have been necessary except for the conduct of the widow and that the temporary administration caused \$28,275 in unnecessary expenses. Further, the jury awarded \$76,096.82 in exemplary damages, equally the fees of the lawyer representing the children.

In upholding the trial court, the court of appeals cited Restatement (Second) of Torts, Section 774B,

“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.”

\$8,275 of the \$28,275 award was for a handwriting expert. The court held that was a litigation cost and set it aside. The other \$20,000 was the temporary administrator's fee

Lawyers are now frequently pleading tortious interference in will contests.

One lawyer, who is also a legislator, was on the short end of such a case; in 2001 he proposed a statutory solution by adding Section 10C to the Texas Probate Code.

“Sec. 10C. EFFECT OF FILING OR CONTESTING PLEADING. The filing or contesting in probate court of any pleading relating to a decedent's estate does not constitute tortious interference with inheritance of the estate.

While that bill failed in 2001 it is expected to reappear in the current legislative session.