

# **TRYING A WILL CONTEST**

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I. WILL CONTESTS AND RELATED MATTERS.

A. TESTAMENTARY CAPACITY.

1. Elements. The Texas Probate Code provides that a person of sound mind may execute a will. TEX. PROB. CODE ANN. § 57 (Vernon 1980). As used in the Probate Code, the term "of sound mind" means "having testamentary capacity." *Chambers v. Chambers*, 542 S.W.2d 901 (Tex. Civ. App.--Dallas 1976, no writ). Testamentary capacity requires that at the time of the execution of the will the decedent must have had sufficient mental ability to:

- a. understand the business in which the decedent was engaged (the making of a will);
- b. understand the effect of his act in making the will;
- c. understand the general nature and extent of his property;
- d. know his next of kin and natural objects of his bounty; and
- e. collect in his mind the elements of the business to be transacted, and hold them long enough to perceive at least their obvious relation to each other, and to be able to form a reasonable judgment as to them. *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. 1964); *Kenney v. Estate of Kenney*, 829 S.W.2d 888 (Tex. App.--Dallas 1992, no writ).

2. Texas cases involving the elements of testamentary capacity.

a. Testator affected by dementia. In *Jones v. LaFargue*, 758 S.W.2d 320 (Tex. App.--Houston [14th Dist.] 1988, error denied), the finding that the testator did not have testamentary capacity on the day the will was executed was supported by the testimony of friends, relatives, and physicians that the testator had developed dementia years before the will was executed. No testimony was offered to prove that the testator lacked capacity on the day the will was executed. However, the record reflected specific incidents of the testator's irrational conduct prior and subsequent to the will's execution. The record showed that there were instances when the testator could not understand the extent of his property and where he failed to recognize members of his family. The evidence also showed that the testator became reclusive, uncharacteristically rude and curt, and unkempt. The testator refused to seek medical treatment when he injured his leg, and his leg had to be amputated. Furthermore, the evidence showed that five doctors concluded the testator had dementia, a progressive disease which can impair memory, judgment, and abstract reasoning and result in changes in personality. One of the doctors, a neurosurgeon, testified that, within a reasonable medical probability, the testator's obvious chronic dementia had begun several years prior to his death, had progressed to such a state that the testator was demented prior to the time he executed his will, and that by the date the testator executed his will he would not have know the natural objects of his bounty, the nature and extent of his property, or the nature of his act in executing his will. While the testator was not examined by doctors until four months after he executed his will, the testimony of the

doctors was held by the court of appeals to still be valid based upon a prior Texas Supreme Court ruling. In *Lindley v. Lindley*, 384 S.W.2d 676, 682 (Tex. 1964), the Texas Supreme Court held that the examination of a testatrix five months after she executed her will was not so remote in time as to preclude an opinion, based upon reasonable medical probability, of the condition of the testatrix on the date of execution.

b. Testator affected by old age or poor physical health. In *Broach v. Bradley*, 800 S.W.2d 677 (Tex. App.--Eastland 1990, writ denied), the testatrix was elderly and suffered some physical problems, but the evidence reflected that the testatrix knew what she was doing and was of sound mind when she signed the will and that she knew and understood her business.

c. Testamentary capacity affected by testator's ability to communicate, read, and remain lucid. In *Kenney v. Estate of Kenney*, 829 S.W.2d 888 (Tex. App.--Dallas 1992, no writ), the trial court found that the testatrix lacked testamentary capacity. The record presented conflicting evidence concerning the testatrix' mental and physical health on the day she executed her will. Part of the record showed that the testatrix hallucinated and was unable to speak, to see clearly, to read, or to remain awake as a result of cancer and medication before, on, and after the day she signed the will which was one week prior to her death. Despite the evidence in support of a finding of testamentary capacity, the court of appeals affirmed the trial court's holding.

The testatrix' first will, executed six weeks before her death, left her entire estate to her children. The testatrix' second will, executed only one week before her death, left her estate to her husband with her children as contingent beneficiaries. The testatrix' children offered the first will for probate, and the testatrix' husband sought to have this will set aside and the second will admitted to probate. The testatrix' husband testified that on the day his wife executed her final will her mental condition was good, she was able to recognize people at the house, and she was alert. While the nurse's notes for that day showed that the testatrix often went to sleep mid-sentence, the husband testified that he did not notice such behavior. The notary and a witness to the final will testified that the testatrix was alert and conscious. The notary felt that the testatrix knew what she was doing when she signed the will, and the witness assumed as much. A woman who gave the testatrix her last rites twelve days before her death testified that the testatrix was alert, prayed with her from memory, and received communion with no problem. Furthermore, the testatrix' daughter-in-law testified that the testatrix was able to talk and recognize her the day before she executed her final will.

The testatrix' children testified that the testatrix was taking several different types of pain killers, including liquid morphine, several times per day during the last two weeks of her life. The testatrix' son testified that he visited the testatrix on the morning of the day she executed her final will. At the time of his visit, the testatrix could neither talk much nor maintain consciousness. There was testimony by the testatrix' daughters that a couple of days before the signing of the final will and after the signing, the testatrix could not talk, read, or remain alert. Thus, the court of appeals found that there was sufficient evidence to support the trial court's finding of lack of testamentary capacity.

3. Proof.

a. Burden of proof. Proponents of a will have the burden of proving that the decedent had testamentary capacity. *Seigler v. Seigler*, 391 S.W.2d 403 (Tex. 1965); *Croucher v. Croucher*, 660 S.W.2d 55 (Tex. 1983); *Lowery v. Saunders*, 666 S.W.2d 226 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). This burden may be satisfied by admitting into evidence a self-proved will in conformity with Section 59 of the Probate Code. Once a self-proved will is admitted into evidence, the proponent makes out a prima facie case that the will has been properly executed, and any will contestant must go forward with the evidence to overcome the prima facie case. TEX. PROB. CODE ANN. § 59 (Vernon Supp. 1995); *James v. Haupt*, 573 S.W.2d 285 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.). Where a will contest is filed before a will is admitted to probate, the fact that a will is self-proved does not shift the burden of proof from the proponent of the will. The proponent must still conclusively prove that the testator had testamentary capacity. TEX. PROB. CODE ANN. § 88(b)(1,2) (Vernon 1980); *Croucher v. Croucher*, 660 S.W.2d 55 (Tex. 1983); *Kenney v. Estate of Kenney*, 829 S.W.2d 888 (Tex. App.--Dallas 1992, no writ); *In re Estate of Hutchins*, 829 S.W.2d 295 (Tex. App.--Corpus Christi 1992), writ denied per curiam, *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992).

b. Discovery.

(i) Requests seeking admissions that the decedent was of sound mind are proper. In *Hoffman v. Texas Commerce Bank*, 846 S.W.2d 336 (Tex. App.--Houston [14th Dist.] 1992, writ denied), the appellants cited *Boyter v. MCR Constr. Co.*, 673 S.W.2d 938, 941 (Tex. App.--Dallas 1984, writ ref'd n.r.e.), and *Taylor v. Lewis*, 553 S.W.2d 153, 161 (Tex. Civ. App.--Amarillo 1977, writ ref'd n.r.e.), for the proposition that requests for admissions regarding another party's state of mind seek inadmissible opinions and cannot be deemed admitted. Appellees countered that *Boyter* and *Taylor* were not controlling because 1984 amendments made to Texas Rule of Civil Procedure 169 authorized requests that sought to elicit opinion by allowing "statements or opinions of fact ...." See TEX. R. CIV. P. ANN. 169(1). While the *Taylor* holding preceded the amendments to Rule 169, *Boyter* was decided a few months after the amendments became effective. Furthermore, the court in *Boyter* did not mention these amendments and supported its decisions by citing to *Taylor*. See *Boyter*, 673 S.W.2d at 941. The *Hoffman* court declined to hold that the 1984 amendments to Rule 169 rendered the *Boyter* and *Taylor* holdings of no precedential value. Rather, the court rejected the holdings of *Boyter* and *Taylor* insofar as they related to the specific facts of this case and held that the trial court did not err in deeming admitted those requests regarding testamentary capacity.

c. Testimony. Testamentary capacity may be proved by lay testimony. *Soto v. Ledezma*, 529 S.W.2d 847 (Tex. Civ. App.--Corpus Christi 1975, no writ); TEX. R. CIV. EVID. 701. Testamentary capacity may also be proved by expert testimony. TEX. R. CIV. EVID. 704.

(i) Attorney testimony.

(a) Where an attorney had already testified to the underlying facts forming the definition of testamentary capacity, his subsequent expression that the testatrix had such capacity was properly admitted both as his expert opinion and as a shorthand rendition of the facts. *Faulkner v. Thrapp*, 616 S.W.2d 344 (Tex. Civ. App.--Texarkana 1981, writ ref'd n.r.e.).

(b) Finding that the testator had capacity was supported by the testimony of the attorney that he met with the testator after drafting the will and discussed the terms of it with him paragraph by paragraph, and that two witnesses talked with the testator before he signed the will, and that it appeared that he knew what he was doing. *Estate of Jernigan*, 793 S.W.2d 88 (Tex. App.--Texarkana 1990, no writ).

d. Capacity at the time of the will's execution. The testator's mental capacity on the day the will is executed is controlling in determining the existence of testamentary capacity. *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968); *Kenney v. Estate of Kenney*, 829 S.W.2d 888 (Tex. App.--Dallas 1992, no writ). The moment the testator executed the will is the only moment which is relevant to the determination of the validity of the will and its admission to probate. TEX. R. CIV. EVID. 401. However, declarations expressive of a testator's mental state, be it intent or feeling, may be admissible if they are close in time to the execution of the will. TEX. R. CIV. EVID. 803(3) (permits "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition ... including a statement of memory or belief ... as it relates to the execution, revocation, identification, or terms of the declarant's will"); *Douglas v. Winkle*, 623 S.W.2d 764 (Tex. App.--Texarkana 1981, no writ). Furthermore, evidence of incompetency at times aside from the day the will was executed can be used to establish incompetency if the evidence demonstrates that the condition persists and has some probability of being the testator's condition at the time of the will's making. *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983) citing *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968); *Kenney v. Estate of Kenney*, 829 S.W.2d 888 (Tex. App.--Dallas 1992, no writ). Evidence of incompetency may include lay opinion testimony of witnesses' observations of the testator's conduct, either prior or subsequent to the execution of the will. *Kenney v. Estate of Kenney*, 829 S.W.2d 888 (Tex. App.--Dallas 1992, no writ); TEX. R. CIV. EVID. 701, 704 (Rule 704 provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue [i.e. testamentary capacity] to be decided by the trier of fact.").

(i) Remoteness in time. The Supreme Court held the examination of a testatrix five months after she executed her will was not so remote in time as to preclude an opinion, based upon reasonable medical probability, of the condition of the testatrix on the date the will was executed. *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. 1964).

(ii) Capacity at moment of execution is relevant. In *Campbell v. Groves*, 774 S.W.2d 717 (Tex. App.--El Paso 1989, writ denied), the testator's grandson filed an affidavit stating that the testator referred to various instances of someone persecuting him which did not happen and that he had hallucinated events that were not real. The court held that the statements could be considered to the extent that they were what the grandson based his perception on in determining that the testator was not of sound mind. See TEX. R. CIV. EVID. 701. However, the court held that direct testimonial evidence established that the testator had testamentary capacity on the day the will was executed even though he may have displayed conduct or expressed words from time to time that induced his grandson to believe he was of unsound mind.

(iii) Declarations expressive of a mental state may be admissible if close in time to the execution of the will. What constitutes a reasonable proximity and forms the basis for rulings on admissions of evidence expressive of the testatrix' intent should be left to the sound discretion of the trial judge. *Douglas v. Winkle*, 623 S.W.2d 764 (Tex. App.--Texarkana 1981, no writ). In *Douglas*, the testatrix told her sisters that she did not wish her stepdaughter to receive her property and that she wanted her brothers and sisters to have her property when she was gone. The testatrix executed her will in 1974, expressed her wishes to one sister in 1978, and expressed her wishes to her second sister at a time that could not be determined. The court held that the trial court did not abuse its discretion in excluding evidence of the testatrix' declarations because they could be deemed too far removed from the execution of the will.

## B. INSANE DELUSION.

1. Elements. In a will contest, evidence with respect to insane delusion is only admissible on the question of testamentary capacity. *Galindo v. Garcia*, 199 S.W.2d 499 (Tex. 1947). When the evidence raises the issue of insane delusion, the definition of insane delusion must be added to the definition of lack of testamentary capacity. Additionally, it must be shown that the will was the product of or was influenced by the insane delusion. *In re Lockhart's Estate*, 258 S.W.2d 877 (Tex. Civ. App.--Amarillo 1953, *rev'd on other grounds*, *Knight v. Edwards*, 264 S.W.2d 692 (Tex. 1954)). The finding of insane delusion is conditioned on the testator's belief in the state of supposed facts. A conviction which the testator arrives at by reasoning, however illogical, from existing facts is not such an "insane delusion" as would affect his capacity to make a will. *Knight v. Edwards*, 264 S.W.2d 692 (Tex. 1954). No mere mistake, or prejudice, or ill-founded conclusion can ever be the basis of setting aside a will on the grounds of insane delusion. *Bauer v. Estate of Bauer*, 687 S.W.2d 410 (Tex. App.--Houston [14th Dist.] 1985, writ *ref'd n.r.e.*). However, when the testator's false belief amounts in law to an insane delusion which influences the terms of his will, testamentary capacity is lacking even though the testator might know the nature and extent of his property, the effect of his will, and the natural objects of his bounty and might be able to handle complex business matters. *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. 1964).

### 2. Texas cases involving the elements of insane delusion.

a. Insane delusion conditioned on testator's belief in the state of supposed facts. The testator's belief that family love was missing from his life was not an insane delusion which justified upsetting his will. Facts, which can be proved true or false, are actionable. *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 79 (Tex. App.--Fort Worth 1982, writ ref'd n.r.e.). However, the term "family love" refers to an intangible sensation, a feeling which cannot exist independent of a positive belief in its existence. Hence, the court held that a belief in "lack of family love" did not fall within the class of beliefs about which a judgment as to insane delusion could reasonably be made. *Bauer v. Estate of Bauer*, 687 S.W.2d 410 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.).

b. Insane delusion is based on irrational belief. In *Oechsner v. Ameritrust Texas, N.A.*, 840 S.W.2d 131 (Tex. App.--El Paso 1992, writ denied), the jury found that the testator possessed testamentary capacity despite the contention that the testator was operating under an insane delusion at the time he executed his will and codicil disinheriting his children.

In *Oechsner*, a husband and wife executed similar wills leaving their property to each other upon the death of either of them and to their children, upon the death of the surviving spouse. The wife subsequently changed her will without her husband's knowledge, completely disinherited her husband, and left everything to the children. The wife then died, and the husband learned of his wife's disinheritance. The husband was upset about the disposition of his wife's property and the fact that he had not previously been told of the change. Moreover, the husband became very upset by his children's attempt to inventory the house soon after his wife's death. Shortly thereafter, the husband changed his will, leaving his entire estate to Scottish Rite Hospital For Crippled Children. No provision was made for the children. The husband then executed a codicil which left his home to the housekeeper. Both documents were executed when the husband was ninety-three years old. Several years later, the husband died and his children instituted an action to contest the will and codicil of their father. The children alleged that their father lacked testamentary capacity when he executed the will because he was suffering under some form of insane delusion, laboring under the misconception that his children had "taken property from him or had caused his wife to have left the children the property in her Will."

The record showed testimony by a psychologist that the testator suffered from dementia and possessed paranoid delusions of mistrust. Evidence further established that the psychologist's conclusions were based largely on interviews with and materials provided by the children who were interested in an outcome favoring lack of capacity, and that the psychologist never had the opportunity to meet the testator. On the other hand, there was extensive testimony that the testator did not appear "out of it" or "disoriented" during the execution of his will and codicil. Further, the record established that the testator's attitude toward his two children changed dramatically only after the death of his wife, and that he was upset because he felt his children had instigated his wife's disinheritance of him. Additionally, there was evidence to indicate that the two children attempted to obtain title to their father's home despite his homestead rights. The record also established curious events surrounding the execution of the wife's will. The evidence showed that the children and a grandson were involved in the changing

of the wife's will and that it had been changed without the husband's knowledge. The court of appeals concluded that, based on the evidence, a jury could have found that the husband's belief that his children were attempting to take property from him and had influenced the wife to disinherit him was rational.

c. Insane delusion is not based on logical conviction. In *Rich v. Rich*, 615 S.W.2d 795 (Tex. Civ. App.--Houston [1st Dist.] 1980, no writ), evidence revealed that the testatrix named her son in her holographic will, set forth what he was to get, and explained that he was not receiving more because she did not desire to reward him for his ungrateful conduct. The court held that the testatrix knew exactly what she wanted to do with her possessions and that her actions demonstrated that she was not suffering from an insane delusion when she executed her will.

### 3. Proof.

a. Must prove actual influence affecting production of the will. Where no general insanity is shown, but only some specific insane delusion or monomania (pathological obsession with one idea), the will is valid unless the terms of it appear to have been directly influenced by infirmity, and mental error must have been an actual operative in the production of the instrument. *Rich v. Rich*, 615 S.W.2d 795 (Tex. Civ. App.--Houston [1st Dist.] 1980, no writ).

b. Testimony and evidence regarding mental condition. The jury in a will contest should be given all relevant and competent testimony with regard to the mental condition of the testator and competent evidence about his mental condition and mental ability or lack thereof which does not involve legal definitions, legal tests, or pure questions of law. *Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965).

(i) Declarations evidence of mental condition. Declarations which are not likely to be uttered by a person of reasonable and normal character are admissible to prove want of mental capacity. Also, declarations rational on their face are admitted along with proof that they are, in fact, untrue to show the decedent's mental shortcomings. *Lowery v. Saunders*, 666 S.W.2d 226 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). In *Lowery*, the testimony of a doctor, who drew his conclusions from interviews with the testatrix up until the will was executed, indicated that the testatrix' declarations appeared to be rational on their face, but in fact, had no basis. The doctor's testimony furnished support for the conclusion that the testatrix' condition persisted up to the date she executed her last will.

## C. TESTAMENTARY INTENT.

1. Elements. An instrument is not a will unless it is executed with testamentary intent. The maker need not realize that he is making a will or designate the instrument as a will, but he must intend to create a revocable disposition of property to take effect after death.

*Hinson v. Hinson*, 280 S.W.2d 731 (Tex. 1955); *Trim v. Daniels*, 862 S.W.2d 8 (Tex. App.--Houston [1st Dist.] 1992, writ denied).

a. In *Trim v. Daniels*, 862 S.W.2d 8 (Tex. App.--Houston [1st Dist.] 1992, writ denied), the appellee received a greeting card in the mail. At the bottom of the front side of the greeting card, the testator had signed his full name. Underneath his signature, the testator had written "(on back)". The back of the greeting card read:

Last Will:

I leave everything to Vernice Daniels.

BHD.

Note: Handle pursuant to the incomplete will that Doris has.

Only a few weeks after the appellee received the card, the testator was killed in an automobile accident. Several months after the testator's death, the appellee probated the will of the testator. Approximately, one month after the will was admitted to probate, the appellant contested the validity of the will. Both the appellant and the appellee claimed to be the common-law wife of the decedent. Summary judgment was granted the appellee with the court holding that a writing on the back of a greeting card constituted a valid holographic will. The appellant appealed, but did not challenge the authenticity of the handwriting, but stated that there were fact issues as to whether the decedent intended the writing to be a holographic will. The appellant alleged that (1) the writing did not identify the name of the testator as it merely said "Last Will;" (2) because of the use of "I," the testator was incapable of being determined; (3) the initials at the end of the statement did not properly identify the testator; and (4) the statement "Note: Handle pursuant to the incomplete will that Doris has," indicted the writing was not the decedent's will.

The court of appeals noted that since the decedent was a practicing attorney at the time he executed his will, one could assume that he had knowledge of the form and wording of a will. See *Bergin v. Bergin*, 315 S.W.2d 943, 947 (Tex. 1958). Paying deference to the decedent's knowledge, the court of appeals concluded that the only rational interpretation of the instrument was that "BHD" intended to bequeath his entire estate to the appellee upon his death. The language of the instrument was clear, direct, and unambiguous. The front side of the card directed the reader to the backside of the card so that the information would not be overlooked. The appellant asserted that the statement following the decedent's initials, "Note: Handle pursuant to the incomplete will that Doris has," destroyed any testamentary intent the decedent might otherwise have expressed. However, the record reflected no reference to an incomplete will in Doris' possession. The court held that the statement making reference to an "incomplete will" did not identify and incorporate such instrument and therefore was not part of the holographic will. Mere reference to the "incomplete" document was not only insufficient for incorporation, but insufficient to adequately describe such document for it to be capable of identification. The court found the testator's intention to incorporate by reference must be

clearly expressed in the will. See *Taylor v. Republic Nat'l Bank of Dallas*, 452 S.W.2d 560, 563 (Tex. Civ. App.--Dallas 1970, writ ref'd n.r.e.). The instruction, "handle pursuant to," following the decedent's testamentary intent, was an expression of the decedent's desire for his survivor to manage and dispose of his estate in a particular manner. It was not intended to control the disposition of his estate and thus, lacked testamentary character. The court of appeals upheld the summary judgment finding that the decedent intended to will all of his property to the appellee.

## 2. Proof.

a. Express language. The maker must express his testamentary intent in the particular instrument offered for probate. *Preston v. Preston*, 617 S.W.2d 841 (Tex. Civ. App.--Amarillo 1981, writ ref'd n.r.e.). Absent express language evidencing testamentary intent, the writing is not a will, and no amount of extrinsic evidence can supply testamentary intent to make the instrument a will. *Straw v. Owens*, 746 S.W.2d 345 (Tex. App.--Fort Worth 1988, no writ).

(i) Attorney's testimony was competent to show what he thought the testatrix intended to do, but was not competent to show what the testatrix' actual intention was, as expressed in the will. *Kaufhold v. Mclver*, 682 S.W.2d 660 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

(ii) Although the title "Codicil" on the document was not itself controlling as to whether the document was a testamentary disposition, the decedent's use of the term "it is my will and desire that in the event of my death ... any and all interests pass ..." was expressive of the decedent's testamentary intent. *In re Rogers*, 895 S.W.2d 375 (Tex.App.- Tyler 1994, writ denied).

(iii) A handwritten instrument was found to be a holographic will written with testamentary intent because the decedent used the terms "shall remain" and "will be divided," suggesting a future division of property as well as the term "beneficiary," suggesting a post mortem scheme of division. Furthermore, extraneous evidence that the decedent wrote the document while he was in the hospital about to undergo a serious operation was admissible to show testamentary intent. *Ayala v. Martinez*, 883 S.W.2d 270 (Tex. App.--Corpus Christi 1994, writ denied).

## D. PROPER EXECUTION.

### 1. Texas Probate Code.

a. Section 59(a): Requisites of a Will. Every will shall be:

(i) in writing and signed by the testator in person or by another person for him by his direction and in his presence; and

(ii) if not wholly in the handwriting of the testator, be attested to by two or more credible witnesses above the age of fourteen years who shall sign their names in the presence of the testator. TEX. PROB. CODE ANN. § 59(a) (Vernon Supp. 1995).

b. Section 59(b),(c): Requisites of a [Self-Proved] Will.

(i) A will may be self-proved, making the testimony of witnesses in the probate of the will unnecessary, by affidavits of the testator and attesting witnesses made under oath. To be self-proving, an affidavit must substantially comply with the form and content of Section 59(a) of the Probate Code. TEX. PROB. CODE ANN. § 59(b) (Vernon Supp. 1995).

(ii) A signature on a self-proving affidavit is considered a signature to the will if it is necessary to prove that the will was signed by the testator or witnesses, or both, but in such a case, the will is not self-proved. TEX. PROB. CODE ANN. § 59(c) (Vernon Supp. 1995).

c. Section 88(b): Additional Proof for the Probate of Will. If a will is not self-proved, it must be shown that the testator was at the time of execution of the will:

(i) at least eighteen years of age, or was or had been lawfully married, or was a member of the armed forces of the United States; and

(ii) that the will was executed with the formalities and solemnities and under circumstances required by the law to make it a valid will. TEX. PROB. CODE ANN. § 88(b) (Vernon 1980). The Probate Code does not define the phrase "formalities and solemnities." However, the Probate Code does require that every will comply with § 59 of the Texas Probate Code. *Broach v. Bradley*, 800 S.W.2d 677 (Tex. App.--Eastland 1990, writ denied).

2. Texas cases applying the elements of a proper execution.

a. Evidence must show that testator had testamentary capacity and that attesting witnesses were credible on the date the will was executed.

(i) *In re Estate of Hutchins*, 829 S.W.2d 295 (Tex. App.--Corpus Christi 1992, writ denied per curiam, *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992), the testator's daughter brought a proceeding to set aside the probate of her father's will because the proponents of the will did not prove that the will had been executed in the manner required by the Texas Probate Code. The will in question was signed by the decedent and contained an attestation clause in accordance with Section 59(a) of the Texas Probate Code. However, the will was not self-proved. Under Section 88(b), if a will is not self-proved, it must be shown that the testator at the time of the execution of the will was at least eighteen years of age, or was or had been lawfully married, or was a

member of the armed forces of the United States and that the will was executed with the formalities and solemnities and under circumstances required by the law to make it a valid will. The evidence established that the testator was over the age of eighteen when he executed the will. A witness at the hearing on the application to probate the will, testified that the decedent was sixty-five years old when he died. The probate court was authorized to infer from the testimony of the witness that the decedent was at least eighteen years old as calculated from the date of the will and the defendant's age at the time of his death. Therefore, the will proponents did not have to present any evidence regarding the marital status of the decedent or his military activity.

As none of the attesting witnesses were living on the date the will was offered for probate, the proponents met the burden of proving the will by having two witnesses testify to the handwriting of one of the subscribing witnesses. Such testimony made the facts in the attestation clause admissible. However, the will proponents also were required to produce evidence to prove that the testator had testamentary capacity on the date the will was executed. The proponents produced no such evidence. Furthermore, no evidence was presented to the probate court at the hearing on the application to probate the will of the decedent concerning the credibility or competence of the attesting witnesses. The court of appeals held that the probate court reversibly erred in admitting the will to probate because there was no evidence that the decedent had testamentary capacity to execute the will, and there was no evidence that the attesting witnesses were credible on that date.

(ii) In *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992), the admission of a will to probate was challenged by one of the named legatees under the will. The challenge was based on the failure of the will proponent to present evidence that the witnesses to the will were "credible" as required by Section 59(a) of the Texas Probate Code. The Texas Supreme Court found that a credible witness was one who received no pecuniary benefit under the terms of the will and that the will itself could be evidence as to whether the witnesses to the will were "credible." Accordingly, the Texas Supreme Court concluded that some evidence as to the credibility of the attesting witnesses was presented when the will was offered for probate.

b. Self-proving affidavit not required to qualify a document as a will. A self-proving affidavit is not required for the execution of a will. Instead, it functions as an alternative to resorting to the testimony of a subscribing witness. *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966); *Broach v. Bradley*, 800 S.W.2d 677 (Tex. App.--Eastland 1990, writ denied). In *Broach*, a will which included a self-proving affidavit was offered for probate, and an opposition to the probate of the will was filed. The appellant objected that the self-proving affidavit was invalid because the notary who executed the affidavit had not properly sworn the witnesses. The trial court sustained the objection and struck the self-proving affidavit. However, there was testimony of a subscribing witness, and the will was admitted to probate. On appeal, the appellant urged that "formalities and solemnities" also included the additional components of the self-proving affidavit prescribed in Section 59. The court of appeals noted that the appellant's proposition was rejected in *Fox v. Amarillo Nat'l Bank*, 552 S.W.2d 547 (Tex. Civ.

App.--Amarillo 1977, writ ref'd n.r.e.), and agreed with the holding in *Fox*. The court stated that the only purpose of the form and contents of the Section 59 self-proving affidavit was to admit a will to probate without, and as an alternative to resorting to, the testimony of a subscribing witness. *Boren*, 402 S.W.2d at 728.

c. Will must be signed at testator's direction. In *Muhlbauer v. Muhlbauer*, 686 S.W.2d 366 (Tex. App.--Ft. Worth 1985, no writ), the testator's wife contested a 1970 will filed by the testator's daughter and applied for probate of a 1979 will. The wife alleged that a 1979 will, which designated her as primary beneficiary, was read to her blind, crippled husband and was signed by him with her guiding his hand. Evidence offered included proof that the testator could manipulate his hands for pipe smoking and to use his watch, proof that testator was never asked to make his own mark on the 1979 will without assistance, proof that the signature on the 1979 will differed substantially from the testator's signature on the 1970 will, and ambiguous testimony as to whether the testator ever specifically requested any person to assist him in signing the 1979 will. Such evidence was sufficient to support a finding that the statutory requirement that a will signed by a person other than testator must be signed by the testator's direction was not met. TEX. PROB. CODE ANN. § 59(a) (Vernon Supp. 1995).

#### E. REVOCAION OF WILL.

##### 1. Texas Probate Code.

a. Section 63: Revocation of Wills. To establish the revocation of a written will, it must be shown that the testator:

(i) was of sound mind when he executed subsequent instrument;

(ii) intended to revoke the will; and

(iii) revoked the will by a subsequent will, codicil, or declaration in writing, executed with like formalities, or by destroying or cancelling the will, codicil, or declaration or causing it to be done in his presence. TEX. PROB. CODE ANN. § 63 (Vernon 1980); *Lowery v. Saunders*, 666 S.W.2d 226 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.).

(a) Cancellation of the will. Testator whose testamentary intent and capacity were undisputed sufficiently cancelled the previously executed first codicil to the will by writing "canceled" (sic) and "void" across the codicil's gift provisions. TEX. PROB. CODE ANN. § 63 (Vernon 1980); *Dean v. Garcia*, 795 S.W.2d 763 (Tex. App.--Austin 1989, writ denied).

b. Section 85: Proof of Written Will Not Produced in Court. If an original will cannot be produced in court:

(i) the will must be proved in the same manner as an attested written will or a holographic will;

- (ii) the cause of the will's non-production must be proved;
- (iii) the court must be satisfied that the will cannot be produced by any reasonable diligence; and
- (iv) the contents of the will must be substantially proved by the testimony of a credible witness who has read it or heard it read. TEX. PROB. CODE ANN. § 85 (Vernon 1980).

c. Section 81(b): Contents of Application for Letters Testamentary for Probate of Written Will Not Produced. This section of the Probate Code further provides that the applicant for probate of a non-produced will must show:

- (i) the reason why the will cannot be produced;
- (ii) the contents of the will as far as known;
- (iii) the date of the will and the executor appointed therein; and
- (iv) the name, age, marital status and address, if known, and the relationship to the decedent, if any, of each devisee, and of each person who would inherit as an heir in the absence of a valid will, and in cases of partial intestacy of each heir. TEX. PROB. CODE ANN. § 81(b) (Vernon 1980).

d. Section 88(b)(3): Additional Proof for Probate of Will. To obtain the probate of a will, the applicant must prove, among other things, that the will was not revoked by the testator. TEX. PROB. CODE ANN. § 88(b)(3) (Vernon 1980).

## 2. Proof.

a. Presumptions relating to production/nonproduction. There is a presumption of non-revocation if the will is produced in court and no suspicion is cast upon its genuineness. If a contestant introduces evidence of revocation or casts suspicion as to genuineness, the presumption is rebutted, and the proponent bears the burden of proving nonrevocation. *Ashley v. Usher*, 384 S.W.2d 696 (Tex. 1964); *Turk v. Robles*, 810 S.W.2d 755 (Tex. App.--Houston [1st Dist.] 1991, writ denied). See also TEX. PROB. CODE ANN. §§ 81(b), 85 (Vernon 1980).

(i) Production of the will creates presumption of continuity. Proponents of an undated holographic will, having proved that the will was otherwise valid and executed with required formalities and solemnities, were not required to prove by direct evidence the nonrevocation of the will since they were entitled to a rebuttable presumption of continuity of the will. *Gillispie v. Reinhardt*, 596 S.W.2d 558 (Tex. Civ. App.--Beaumont 1980, writ ref'd n.r.e.).

(ii) Testimony involving acts of revocation rebuts presumption of non-revocation.

(a) Testimony that testatrix had revoked earlier will was sufficient to rebut the presumption that the will continued and required the proponent of the will to prove by a preponderance of the evidence that the testatrix did not have testamentary capacity when she executed the document revoking the will. *Turk v. Robles*, 810 S.W.2d 755 (Tex. App.--Houston [1st Dist.] 1991, writ denied).

(b) Testimony of attorney as to the execution of revised wills was sufficient to present the question for the jury as to the revocation of previous will. *Lisby v. Estate of Richardson*, 623 S.W.2d 448 (Tex. App.--Texarkana 1981, no writ).

(iii) Evidence of revocation rebuts presumption of non-revocation. Wife's daughter failed to rebut presumption that husband intended to revoke his will when he destroyed it. There was testimony that the husband participated in tearing up his will, and the daughter was the only witness who had seen the will and testified to its contents. TEX. PROB. CODE ANN. § 63 (Vernon 1980); *Pearce v. Meek*, 780 S.W.2d 289 (Tex. App.--Tyler 1989, no writ).

(iv) Preponderance of evidence is the standard of review to rebut presumption of destruction with the intent to revoke. In *Matter of Estate of Glover*, 744 S.W.2d 197 (Tex. App.--Amarillo 1987), writ denied per curiam, 744 S.W.2d 939 (Tex. 1988), when the will was not produced in court and there was a presumption that the will was revoked, the court found the evidence factually sufficient to support the jury's verdict that a will under which a hospital was the sole beneficiary was not revoked by the testatrix prior to her death. Testatrix' will was last seen in her possession or was accessible to her and was not produced at testatrix' death, giving rise to the presumption that the will was destroyed with the intention to revoke it. Evidence showed that the testatrix had repeatedly expressed the desire that her property go to the hospital and that opponent of the will had easy access to testatrix' residence and would have substantially gained if the earlier will were not in existence. Also, evidence showed that the opponent of the will had unlawfully appropriated funds of the testatrix prior to her death.

b. Strict adherence to statute governing revocation of written will. If an instrument revoking a will is offered for probate, Texas courts require strict adherence to the statute providing for the revocation of the will before finding that the testator revoked the written will. The intent of the testator to destroy the will, standing alone and absent a later written express or implied revocation, cannot abrogate the clear wording of the statute providing an exclusive method of revoking the will. TEX. PROB. CODE ANN. § 63 (Vernon 1980); *Morris v. Morris*, 642 S.W.2d 448 (Tex. 1982); *Turk v. Robles*, 810 S.W.2d 755 (Tex. App.--Houston [1st Dist.] 1991, writ denied); *Goode v. Estate of Hoover*, 828 S.W.2d 558 (Tex. App.--El Paso 1992, writ denied). Preponderance of evidence, rather than clear and convincing evidence, is the

standard to review the sufficiency of evidence indicating whether testator has revoked the will. *Matter of Estate of Glover*, 744 S.W.2d 197 (Tex. App.--Amarillo 1987) writ denied per curiam, 744 S.W.2d 939 (Tex. 1988).

(i) Testator cannot remove some part of a valid will by obliteration. A testator cannot make changes in his will by substituting one page of his will for another. In *Goode v. Estate of Hoover*, 828 S.W.2d 558 (Tex. App.--El Paso 1992, writ denied), the testator executed a self-proving will, the first page of which provided entirely for his estate. This will left twenty-five percent of the testator's estate to his wife and the remainder in equal shares to whichever of his four sisters should survive him. Page two of the will contained the signatures of the testator and three witnesses, and part of that page and page three contained self-proving provisions and signatures of the testator and witnesses.

The record reflected that the testator was asked by one of his wife's nephews if the couple had a will. In response to this inquiry, the testator gave his wife's nephew an envelope with a copy of his will in it. The first page of the will left the testator's entire estate to his wife, and if she should predecease him, then to his wife's daughter. There was no evidence as to when or by whom the first page of the will was changed prior to the testator handing an envelope containing the new will to his wife's nephew. After the testator died, one of his sisters filed an application to admit to probate a copy of the testator's will which left twenty-five percent of his estate to his wife and the remainder to his sisters. The wife filed an opposition to the application for probate and sought letters of administration upon her husband's estate. The county court at law ordered that the will offered by the testator's sister be admitted to probate. The testator's wife died shortly after the court's ruling, and the executor of her estate appealed the case contending that the first will of the testator was destroyed by the testator with the intention of revoking it and that the testator died intestate.

As there was no subsequent will, codicil or declaration in writing executed with like formalities as the original will, the court of appeals looked to whether the change of the first page resulted from the testator destroying or cancelling the will. In making this determination, the court turned to *Leatherwood v. Stephens*, 13 S.W.2d 726 (Tex. Civ. App.--Waco 1929), *aff'd*, 24 S.W.2d 819 (Tex. Comm'n App. 1930), where the court there had to consider whether the names which were blotted out on a will resulted in the will being revoked. The *Leatherwood* court said the changes were futile and amounted to nothing, whether made by the testator or someone else. The court also relied upon *Pullen v. Russ*, 209 S.W.2d 630 (Tex. Civ. App.--Amarillo 1948, writ ref'd n.r.e.), in which a will was offered for probate that had both erasures and interlineations, reflecting changes made on at least two separate occasions by the testator to alter his beneficiaries. The *Pullen* court held that the will should have been admitted to probate as originally written because a will could not be changed or revoked except in the manner provided by law. 209 S.W.2d at 636. The court of appeals in *Goode* concluded that a testator could not remove some parts of a valid will by obliterations. In this case, an attempt was made by someone to change all of the dispositive clauses in the will while

leaving the execution and self-proving provisions intact. The court found that if in fact the testator did make the substitution of one page of the will for the original first page, he never intended to revoke his will and die intestate because clearly the execution pages remained in contact and fully operative on any disposition clauses that were valid. The changes which were made by the substitution of another page were not ones made in accordance with the statute which permits revocation of the original will. See TEX. PROB. CODE ANN. § 63 (Vernon 1980). The original will was valid, and the changes were not. The court of appeals concluded that the trial court properly ordered that the original will be admitted to probate.

(ii) Revocation of codicil would not revoke the will. A codicil will not effectuate a revocation of a will or a part thereof except by express language. *Logue v. Scrivener*, 355 S.W.2d 87, 89 (Tex. Civ. App.--San Antonio 1962, writ ref'd n.r.e.). In *Dean v. Garcia*, 795 S.W.2d 763 (Tex. App.--Austin 1989, writ denied), testimony and revocation language found in the codicil clearly showed that the testator intended to cancel only the codicil, and the testator had executed the will and codicil on separate sheets of paper. Thus, the court held that nothing in the record or in the revocation language could be construed as an intent to revoke the entire will.

c. Possession of will. Where the will was last seen in the possession of the testator and the will cannot be found after the testator's death, it is presumed that the testator destroyed the will with the intention of revoking it. TEX. PROB. CODE ANN. § 63 (Vernon 1980); *Pearce v. Meek*, 780 S.W.2d 289 (Tex. App.--Tyler 1989, no writ). The presumption of revocation arising when a will cannot be found although last seen in possession of the testator may be overcome by clear and convincing evidence which is not ambiguous, equivocal, or contradictory and is sufficient to carry a conviction to an unbiased and unprejudiced mind. TEX. PROB. CODE ANN. § 88 (Vernon 1980); *Hoppe v. Hoppe*, 703 S.W.2d 224 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.).

(i) Will last seen in possession of the testatrix. Testimony of attorney that the testatrix had expressed a clear intention to leave everything to her daughter and had never mentioned her will again after it was drawn, nor ever indicated a change of mind, was sufficient to overcome the presumption of revocation which arose from the fact that the will could not be found after the death of the testatrix yet was last seen in possession of testatrix or in a place where she had ready access to it. TEX. PROB. CODE ANN., § 88 (Vernon 1980); *Hoppe v. Hoppe*, 703 S.W.2d 224 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.).

(ii) Will found in likely place rebuts the presumption of revocation. Where the will produced in court comes from the custody of those to whom the testator has delivered it, or is found among the testator's papers, and no suspicion is cast upon the genuineness of the will, a presumption exists that the will has not been revoked. Under such circumstances, the proponent has satisfied the statutory requirement to prove no revocation. TEX. PROB. CODE ANN. § 88(b)(3) (Vernon 1980); *Ashley v. Usher*, 384 S.W.2d 696 (Tex. 1964).

d. Divorce operates as a revocation of the part of the will making provisions for the former spouse. Divorce nullified provision of joint will appointing wife executrix, as well as dispositive provisions in her favor. TEX. PROB. CODE ANN. § 69(a) (Vernon 1980); *Formby v. Bradley*, 695 S.W.2d 782 (Tex. App.--Tyler 1985, writ ref'd n.r.e.).

e. Will not admitted to probate may operate as an effective revocation of a previous testamentary instrument. In the case of *In re Rogers*, 895 S.W.2d 375 (Tex.App.-Tyler 1994, writ denied)., a decedent executed a codicil in 1959. In 1988, she executed a holographic will stating that all previous wills were revoked. Because of certain interlineations on the will in another person's handwriting, at the time of her death the 1988 document was held not to be a valid testamentary instrument. In 1989, the decedent executed another document which was an invalid testamentary instrument from inception. Upon the decedent's death, her sister offered the 1959 holographic codicil for probate. The decedent's nephew filed a contest, claiming that the 1988 and/or the 1989 documents revoked the 1959 codicil. The trial court ruled that the 1959 codicil was not a valid testamentary instrument, necessitating administration of the estate under the laws of intestate succession. The appellate court held that the 1989 document did not revoke the 1959 codicil as it was never a valid testamentary instrument. However, adopting the trial court's finding of fact that the 1988 document was validly executed before the interlineations rendered it invalid, the appellate court held that the 1988 will revoked the 1959 codicil. The court stated that a revocation of a will occurs at the moment the subsequent testamentary instrument is executed, even if the new instrument is later rendered invalid. Further, subsequent invalidity of a testamentary instrument does not reinstate the previous instrument.

#### F. LOST WILL.

1. Elements. The proponent of an alleged lost will must show that:

a. the will was duly executed as called for in § 84 of the Texas Probate Code;

b. the cause of nonproduction and proponent's inability to produce the will with reasonable diligence; and

c. substantial proof of the contents of the will by a credible witness. TEX. PROB. CODE ANN. § 85 (Vernon 1980); *Coulson v. Sheppard*, 700 S.W.2d 336 (Tex. App.--Corpus Christi 1985, no writ).

2. Proof.

a. Lost revoking will. To show the revocation of a previous will, where the alleged revoking will was not produced at trial because, according to testimony, it had been lost, it was not necessary to prove execution of the lost revoking will by method of proof prescribed by the statute for proving lost wills offered for probate. *Lisby v. Estate of Richardson*, 623 S.W.2d 448 (Tex. App.--Texarkana 1981, no writ).

b. Establishing due execution and/or contents of will.

(i) Testator's declarations alone are insufficient to establish due execution of the contents of an alleged lost will, but such declarations before or after the execution of the will are competent to corroborate the main facts sought to be established by the proponent of the will. *Miller v. Miller*, 285 S.W.2d 373 (Tex. Civ. App.--Eastland 1955, no writ).

(ii) No evidence of due execution of an alleged lost will existed in the record where an unsigned copy of the will was admitted into evidence, the sister of the deceased testified she had read the will and that it was signed by her sister and two witnesses on page three, but she could not remember whether page four, the self-proving affidavit, was signed and properly executed. TEX. PROB. CODE ANN., §§ 59 (Vernon Supp. 1995), 88(b)(2) (Vernon 1980); *Coulson v. Sheppard*, 700 S.W.2d 336 (Tex. App.--Corpus Christi 1985, no writ).

(iii) Evidence that deceased had made a will shortly before her last illness and that the will was lost or destroyed by her husband, was sufficient for the jury, in a will contest instituted by the decedent's brother who offered for probate a copy of the will after the original could not be found. *In re Estate of Caples*, 683 S.W.2d 741 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.).

(iv) Where the alleged beneficiary under a lost will did not locate any person who could testify to either the signature or handwriting of the testator or the signature or handwriting of either of the two attesting witnesses, there was no "substantial proof" of the contents of the lost will. *Howard Hughes Medical Institute v. Neff*, 640 S.W.2d 942 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.). In *Howard Hughes Medical Institute*, a witness testified that he glanced at a document identified as the decedent's will and that his "impression" was that everything was left to the alleged beneficiary under the will. However, the witness did not read the will nor testify that what he saw was actually the will as opposed to a copy, and it was unclear whether he remembered seeing the decedent's signature on the document. Also, the witness could not remember the signatures of the attesting witnesses.

c. Search for witnesses to lost will. The mere showing that a diligent search had been made to determine the identity and whereabouts of subscribing witnesses to alleged lost will did not mean that such witnesses had been "accounted for" nor that due execution of the will could be proved without them. *Howard Hughes Medical Institute v. Neff*, 640 S.W.2d 942 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.).

G. UNDUE INFLUENCE.

1. Elements. Elements necessary to prove undue influence are:

a. existence and exertion of influence;

b. effective operation of influence so as to subvert and overpower the mind of the testator at the time of the will's execution; and

c. execution of a testament which the maker would not have executed but for such influence. *Dulak v. Dulak*, 513 S.W.2d 205, 209 (Tex. 1974); *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963); *Boyer v. Pool*, 280 S.W.2d 564 (Tex. 1955); *Hoffman v. Texas Commerce Bank*, 846 S.W.2d 336 (Tex. App.--Houston [14th Dist.] 1992, writ denied).

## 2. Proof.

a. Undue influence exerted at the time the will was executed. In order to establish undue influence, it is not enough that the beneficiary of the will have had the opportunity to exert influence; the beneficiary must have actually exerted undue influence at the time the will was made. *Green v. Earnest*, 840 S.W.2d 119 (Tex. App.--El Paso 1992, writ denied); *In re Estate of Riley*, 824 S.W.2d 305 (Tex. App.--Corpus Christi 1992, writ denied).

(i) In *Green v. Earnest*, 840 S.W.2d 119 (Tex. App.--El Paso 1992, writ denied), a will contestant brought an action alleging that a will was the result of undue influence exerted by the will proponent. The county court granted summary judgment for the will proponent, and the contestant appealed. The court of appeals held that the contestant's opinions and beliefs on the subject of undue influence, which the contestant admitted were his only evidence, lacked probative force, and thus failed to raise the issue of undue influence.

The will proponent lived with the decedent, and there is some evidence that they may have had a common law marriage. The will contestant was a former employee of the decedent. Prior to his death, the decedent executed three wills each of which revoked all prior wills. The first will bequeathed the decedent's estate to the will proponent and the decedent's two sons in equal shares. The second will divided the decedent's estate equally among the will proponent, the will contestant, and the decedent's two sons. The third will, the one which was admitted to probate, followed the same testamentary disposition as the first will and thus, eliminated the will contestant as a beneficiary.

The will contestant in his deposition admitted that the only evidence he had that the will proponent had exerted undue influence over the decedent to get him to make the third will was based on his opinions and beliefs. The court found that the circumstances raised at most a mere surmise or suspicion that the third will was the result of an improper influence, but were not themselves sufficient to produce a reasonable belief that an undue influence was exerted. *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963). Moreover, the fact that the third will returned to the same dispositive scheme as the first will easily allayed that suspicion. The court stated that even the fact that the will proponent caused the testator's death by shooting him with a gun a little more than a month after the third will was executed was not logically or rationally circumstantial evidence of undue influence at the time of the will's execution. The court noted in a

footnote that a jury had found and the trial court agreed that the will proponent caused the death of the testator, but found that zero damages would reasonably compensate the two sons for their damages resulting from the death of their father. Thus, the court of appeals affirmed the summary judgment granted the will proponent.

b. Direct and circumstantial evidence. Undue influence may involve an extended course of dealings and circumstances which may be proven by circumstantial evidence as well as by direct evidence. *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963); *In re Olsson's Estate*, 344 S.W.2d 171 (Tex. Civ. App.--El Paso 1961, writ ref'd n.r.e.). If circumstantial evidence is relied upon to show undue influence, it must be so strong and convincing and of such probative force as to lead a well-guarded mind to the reasonable conclusion not only that undue influence was exercised but that it controlled the power of the testator at the precise time the will was executed. *Green v. Earnest*, 840 S.W.2d 119 (Tex. App.--El Paso 1992, writ denied). Evidence of all relevant matters that occur within a reasonable time before or after the execution of the will may be offered if it tends to indicate the existence of undue influence. *Watson v. Dingler*, 831 S.W.2d 834 (Tex. App.--Houston [14th Dist.] 1992, writ denied).

c. Material facts to consider. In ascertaining whether undue influence has been exercised over the testator, all material facts may be considered, including circumstances attending the execution of the instrument; the relationship between the maker and the beneficiary; motive, character, and conduct of those benefitted by the instrument; 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 or her age, weakness, infirmity, and dependency on or subject to the control of the beneficiary; and the improvidence of the transaction by reason of unjust, unreasonable, or unnatural disposition. *Watson v. Dingler*, 831 S.W.2d 834 (Tex. App.--Houston [14th Dist.] 1992, writ denied).

d. Burden of proof. After mental capacity has been shown, the burden of proving undue influence is on the party contesting the will. *Long v. Long*, 125 S.W.2d 1034 (Tex. 1939, conformed to 129 S.W.2d 1206, writ dism'd 138 S.W.2d 798). The contestant must prove the allegation of undue influence by a preponderance of the evidence. *Estate of Woods*, 542 S.W.2d 845 (Tex. 1976); *Wood v. Stute*, 627 S.W.2d 539 (Tex. App.--Fort Worth 1982, no writ).

### 3. Texas cases considering facts material to determining undue influence.

a. Weakness. The weakness of mind and body may be considered as circumstances in determining whether the testator was a person susceptible to undue influence. *Long v. Long*, 125 S.W.2d 1034 (Tex. 1939, conformed to 129 S.W.2d 1206, writ dism'd 138 S.W.2d 798); *Matter of Estate of Murphy*, 694 S.W.2d 10 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.).

b. Control over the testator. Undue influence may be exercised through threats or fraud or silent power of a strong mind over a weak one. *In re Estate of Riley*, 824 S.W.2d 305 (Tex. App.--Corpus Christi 1992, writ denied).

c. Mental condition of the testator. Undue influence assumes the existence of testamentary capacity, *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963), and evidence of impaired mentality not amounting to testamentary incapacity may afford an opportunity for the excise of undue influence. *Lowery v. Saunders*, 666 S.W.2d 226 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.).

d. Unnatural dispositions. Undue influence may be established when the executed testament is unnatural in its disposition of property, and all reasonable explanations in affection are lacking. In *Smallwood v. Jones*, 794 S.W.2d 114 (Tex. App.--San Antonio 1990, no writ), the court held that the disposition of the testatrix' property with eighty percent bequeathed to her sister and twenty percent to her son was not an unnatural disposition so as to support a claim of undue influence.

e. Words and actions of all attending parties. Evidence may support a finding that no undue influence was exercised. *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App.--Dallas 1991, writ denied). In *Holcomb*, the testator directed his attorney to draft his will several weeks prior to his confinement in the hospital, he revealed his desire for his daughter to gain an equal share of his previous marital estate, and he expressly mentioned that his son would be equally provided for by receiving property from his mother. Furthermore, during hospitalization the testator specifically requested that the will be brought to him for execution, he specifically named those individuals he wished to act as witnesses, and his attending physician performed a standard medical procedure to determine his mental capacity prior to execution of the will.

f. Motive, character, and conduct of those benefited by the instrument.

(i) Evidence supported the trial court's conclusion that the testator's spouse exercised undue influence over the testator when the spouse obtained a preprinted will the day before the testator's surgery, completed the form herself, and falsely told the testator that the will conformed to his wishes. *In re Estate of Riley*, 824 S.W.2d 305 (Tex. App.--Corpus Christi 1992, writ denied).

After the testator's first wife died, the testator remarried a several-time divorcee who was almost thirty years his junior. With his remarriage, the testator's once close relationship with his children deteriorated rapidly. The children claimed their relationship with their father deteriorated due to the second wife's manipulation of their father. The second wife claimed the relationship deteriorated because the children disapproved of the marriage. Only a few months after the testator's remarriage, the testator suffered a heart attack and was to undergo major surgery. The day before his operation, the testator's new wife prepared and helped the testator execute a "fill-in-the-blank" will which

left all of the testator's property to her if she survived the testator. The testator's children claimed that the testator's previous will divided the testator's property evenly between his children. When the testator died, his wife filed his will for probate, but the testator's children opposed the probate. After a jury trial, the will was denied probate on the grounds that the testator lacked testamentary capacity and that his wife had exercised undue influence over him.

The record showed that a witness testified that the will form's predetermined language left the testator no choice but to give all of his property to one person, and that it would have been difficult to alter the form to accomplish a different distribution. The witness further testified that when the will was executed, the testator expressly stated how he wanted his property divided. The will accomplished a different distribution. After completing the form will, the testator's wife read it back to the testator. She claimed that the will gave her a life estate in the property with the remainder to one of the testator's sons, just as the testator had intended. The will in fact gave all property to the testator's wife. The court of appeals held that all of the circumstances, considered together with the discrepancy in distribution and the fact that the testator's wife told him that his will conformed to his wishes when it did not, were sufficient for the trial court jury to have inferred that the testator suffered from a diminished mental capacity which made him susceptible to undue influence. As such, the court found the evidence supported the jury's verdict on undue influence. The court also noted that undue influence may be exercised through threats or fraud or the silent power of a strong mind over a weak one.

(ii) In *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App.-- Dallas 1991, writ denied), evidence supported a jury finding that the testator's last two wills were the result of undue influence exercised by the testator's son and were thus invalid. There was testimony that the testator desired for both his children to be provided for equally. After the testator executed his first will, the son told the testator that property conveyed to him by his mother was less valuable than the testator believed. Then, the son made an agreement with the testator to equalize both estates if the testator would divide his estate equally between his two children. As a result of the son's statements, the testator executed two subsequent wills.

(iii) Evidence that testator suffered from brain cancer, could only communicate through nodding, and changed his will to leave everything to his daughter after his daughter learned that he had only three days to live, together with the daughter's admission that she stayed up all night trying to talk the testator into changing his will, was sufficient to establish that the will was procured through undue influence. *Watson v. Dingler*, 831 S.W.2d 834 (Tex. App.--Houston [14th Dist.] 1992, writ denied).

In *Watson*, the testator was diagnosed with brain cancer and given approximately a year to live. During his illness, the testator was primarily taken care of by his ex-wife who lived with the testator for most of the last ten years of his life. However, sometime just prior to the last two weeks of the testator's life, the testator and his ex-wife got into an argument which resulted in the ex-wife moving out of the testator's house. One of the

testator's daughters by a previous marriage moved into the house to allegedly take care of the testator. The daughter refused to let the ex-wife visit the testator. The day after the daughter moved in she took the testator to his attorney's office to change his will. The new will left everything to the daughter except for a \$10 bequest to each of the testator's children from his common law marriage. The testator's prior will had left a car lot and a bank account to the daughter and had left \$10 to each of the testator's other children and the testator's house, two luxury cars, and a bank account to the testator's ex-wife. The evidence showed, that when the new will was executed, the testator's communication was limited to nodding. Shortly after the new will was executed, the testator was rushed to the hospital where a doctor told the testator's daughter and sister that the testator had only three or four days to live. Soon after receiving this news, the daughter went to the testator's house and started searching for his bank records and house papers. The daughter collected the papers and returned to the hospital where, when the testator had no other visitors, she secured the testator's signature on a document. The document gave the daughter check-writing powers on the testator's checking accounts, which contained about \$261,000. The notary to the document stated that the decedent could not really speak, but communicated by nodding his head and blinking his eyes. After obtaining the testator's signature, the daughter left the hospital. Subsequently, the testator lost consciousness and passed away.

The court found that the evidence established that the testator was completely dependent upon others for care and companionship. The testator's feeble condition indicated that he was physically incapable of resisting or that his mind was susceptible to an influence exerted. Testimony given by the testator's sister was evidence that the appellant's undue influence overpowered the mind of the testator at the time of the execution of the testament. The testator's sister testified that the daughter admitted to staying up all night trying to convince the testator to change his will. The sister testified that the daughter stated, "it took a lot to do," but she managed to talk him into changing his will. The court of appeals found, that based upon the circumstantial and direct evidence presented in the record, the evidence was legally and factually sufficient to support the trial court's holding that the will was procured through undue influence.

g. Mental condition of maker at time of execution.

(i) In *Hammer v. Powers*, 819 S.W.2d 669 (Tex. App.--Fort Worth 1991, no writ), the finding that the testatrix had testamentary capacity and was not subject to undue influence was supported by affidavits and a videotape of the signing of the will. The affidavits and videotape included evidence as to the soundness of the testatrix' mind, opinions that she knew what she was doing, and evidence that she was an independent person who was not influenced in the preparation of the will.

(ii) In *Broach v. Bradley*, 800 S.W.2d 677 (Tex. App.--Eastland 1990, writ denied), the finding that the will proponent did not exert undue influence over the testatrix was not against the great weight of the evidence and the preponderance of the evidence. Evidence showed that although the proponent worked for the testatrix,

drove the testatrix to her attorney's office, and was present when the testatrix signed her will, the testatrix was a strong-willed person who could not be easily influenced.

h. Circumstances attending the execution of the instrument. In *Molnari v. Palmer*, 890 S.W.2d 147 (Tex. App.--Texarkana 1994, no writ), a husband and wife signed a warranty deed conveying through a trust their land to the wife's child and grandchildren. After the wife died, the trustee, who was one of the beneficiaries of the trust, recorded the deed. The husband then sued the trustee to cancel the deed, claiming the deed was obtained by undue influence exerted by the trustee. Evidence indicated, that at the explicit request of the husband, the trustee made an appointment with an attorney to prepare the deed and traveled with the husband to the attorney's office. The trustee also was present when the deed was signed and paid the attorney for the legal work. The court held that while a beneficiary's voluntary participation in the preparation or signing of a deed could be one of the considerations used to determine if there was undue influence, such participation here was instigated and explicitly requested by the husband and was not evidence of undue influence. This was especially true as the husband testified that he did not rely on the beneficiary's advice. The husband also testified that he thought that he had been tricked into the deal, but that he did not know who tricked him and that he did not blame the trustee. Thus, the court held that the husband failed to produce probative evidence supporting his theory of undue influence, and affirmed the trial court's judgment for the trustee.

#### H. FORGERY.

1. Elements. A person commits an offense if he forges a writing with the intent to defraud or harm another. TEX. PENAL CODE ANN. § 32.21(b) (Vernon 1989). "Forgery" in a will contest includes the forgery of a signature of a testator or the purported witnesses as well as an alteration or substitution of pages of the document.

#### 2. Proof.

a. Statute of limitations. The two-year statute of limitations for suits to contest the validity of a will, which has been admitted to probate, on the theory that the will is a forgery does not begin to run until the forgery is discovered or until the plaintiff acquires such knowledge as would lead to its discovery by the exercise of reasonable diligence. TEX. PROB. CODE ANN. § 93 (Vernon 1980); *Aston v. Lyons*, 577 S.W.2d 516 (Tex. Civ. App.--Texarkana 1979, no writ).

b. Testimony as to testator's substitution of pages of the document. In *Douglas v. Winkle*, 623 S.W.2d 764 (Tex. App.--Texarkana 1981, no writ), the evidence was sufficient to support the verdict that a page of the will offered for probate, containing beneficiary designations, was not part of the will at the time it was executed. The court admitted testimony by the testatrix' accountant concerning statements made to him by the testatrix' attorney. The attorney told the accountant that he was afraid that a page of the will containing beneficiary designations had been changed, that the testatrix' brother had requested that the attorney's

office retype a page of the will, and that the brother had come to the attorney's office while the attorney was absent and had taken the page of the will.

c. Testimony as to testator's signature. All wills must be signed by the testator. TEX PROB. CODE ANN. § 59 (Vernon Supp. 1995). A holographic will also must be wholly in the handwriting of the testator. TEX. PROB. CODE ANN. § 60 (Vernon 1980). Therefore, forgery cases may turn on proof of an alleged signature and/or other handwriting of the testator.

(i) A witness put on to prove that a holographic will is wholly in the testator's handwriting or that a signature is the genuine signature of the testator may or may not be a handwriting expert. Thus, a lay witness familiar with the testator's handwriting may testify. See 17 M. Woodward and E. Smith, Probate and Decedent's Estates § 315 (Texas practice 1971).

(ii) The finding that the signature on a will was not a forgery was supported by the testimony of a handwriting expert, even though the signature used a lower case "a" to start the testator's first name, whereas the testator had previously signed his name with a capital "A." *Estate of Jernigan*, 793 S.W.2d 88 (Tex. App.--Texarkana 1990, no writ).

#### I. NO CONTEST CLAUSE (In Terrorem Clause)

1. Elements. A testator may provide in his will through the use on a no contest (or *in terrorem* clause) that any beneficiary not satisfied with the terms of his will shall be disinherited. *First M.E. Church South v. Anderson*, 110 S.W.2d 1177 (Tex. Civ. App.--Dallas 1937, writ dism'd). Such no contest clauses are to be strictly construed, and forfeiture is to be avoided if possible. Breach of an *in terrorem* clause will only be found when acts of the parties clearly fall within the express terms of the clause. *In re Estate of Hamill*, 866 S.W.2d 339 (Tex. App.--Amarillo 1993, no writ). Section 64 of the Texas Probate Code provides as follows:

"A provision in a will that would cause a forfeiture of a devise or void a devise or provision in favor of a person for bringing any court action, including contesting a will, is unenforceable if:

- (1) probable cause exists for bringing the action; and
- (2) the action was brought and maintained in good faith"

2. Intestacy laws may not be repealed. A testator can not repeal the laws of intestacy by providing a forfeiture clause in the will that stipulates an heir is not to inherit by law if the heir contests the will. *Matter of Estate of Hodges*, 725 S.W.2d 265 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.). Even if the interests of the testator's daughters were forfeited because they filed a petition for declaratory judgment in regard to the will, the estate would still pass by intestate succession to the daughters.

#### 3. Actions brought in connection with the will.

a. Breach of fiduciary duties. In *McLendon v. McLendon*, 862 S.W.2d 662 (Tex. App.--Dallas 1993, writ denied), the beneficiaries of a will brought suit against the will's co-executors for breach of fiduciary duties and to declare the amendments to the partnership agreements invalid. The court held that the co-executors breached their fiduciary duties, but refused to declare that the *in terrorem* clause did not apply. The court of appeals also found that the co-executors breached their fiduciary duty, but held that the suit did not contest the validity of the will, and subsequently, the *in terrorem* clause did not apply.

In *McLendon*, the management of an estate by the executors was challenged by the decedent's granddaughters who were to receive twenty percent of the decedent's estate. The decedent's estate included two family partnerships. The decedent's grandson owned an interest in the partnerships as well, and was the managing partner of the partnerships. The grandson and an employee of the family business were named co-executors of the decedent's estate. The grandson, as co-executor, voted to amend the partnership agreements to provide that any challenge to the management of the partnerships would result in the expulsion of the challenging partner. An expelled partner would receive book value for his or her interest.

The will of the decedent contained a no contest clause. The granddaughters brought suit against the executors for numerous reasons, including a breach of fiduciary duty related to the management of the estate's interest in the partnerships in a manner which benefited the grandson at the expense of the estate. The executors notified the granddaughters that by bringing suit they had forfeited their inheritance due to the "no contest" clause contained in the will. The court of appeals found that the suit challenged the administration of the estate by the executors, but did not challenge any of the terms of the will itself. Thus, the court held that the no contest clause was not triggered by the actions against the executors.

b. Determination of debt owed to the estate. An action brought to determine whether any debts were properly payable to the estate did not constitute a will contest for purposes of determining whether the distributees were disqualified from distribution under the no contest clause of the will. *In re Estate of Hamill*, 866 S.W.2d 339 (Tex. App.--Amarillo 1993, no writ).

In *In re Estate of Hamill*, the appellant brought an appeal from an order approving the final account of the temporary administrator of an estate and distributing the assets of that estate. The appellant contended, in one point of error, that three of the distributees forfeited their right to take under the will pursuant to an *in terrorem* clause. Appellant argued that three of the will's distributees violated the *in terrorem* clause when they opposed the temporary administrator's payment of a debt to a bank. The appellant contended that when the distributees challenged the payment of the debt, the challenge amounted to a contest of the validity of a provision of the will as prohibited by the no contest clause. The provision of the will in question directed the administrator to use the testatrix' assets "to pay any debts and taxes which [were] payable because of [the testatrix'] death and administrative expenses ...." The court of appeals held that an action to determine the validity of a debt assertedly owed by an estate would be in pursuance of an obligation under the will to ascertain whether any such debts were properly payable and would not constitute a contest of the will. The court of appeals noted that the distributees did

not initiate the suit that challenged the payment of the debt to the bank, but rather, were cross defendants in the cause. The court stated that even if that the suit in question was a will contest, the no contest clause specifically excluded party defendants to such actions.

c. Will contest brought on minor's behalf. Even if a will contest brought by a mother on her child distributee's behalf did not trigger a no contest clause, the distributee's ratification of the mother's action did. *In re Estate of Hamill*, 866 S.W.2d 339 (Tex. App.--Amarillo 1993, no writ).

Appellant appealed an order distributing the assets of an estate, contending that the trial court erred in distributing assets to one of the granddaughters who was provided for under the terms of the testatrix' will. The wife of the testatrix' deceased son and the mother and next of friend of one of the testatrix' granddaughters, filed an action contesting the testatrix' will. The contest, asserting mental incapacity of the testatrix, was denied by the trial court. The appellant contended that the suit initiated by the mother on her daughter's behalf constituted a will contest sufficient to invoke the provisions of the no contest clause, thereby compelling forfeiture of the daughter's bequest. The court of appeals found nothing in the record to demonstrate that the mother had an interest adverse to the daughter which would disqualify her from bringing suit on her daughter's behalf. Additionally, the daughter, as an adult, pursued an appeal from the trial court's judgment refusing her will contest. Thus, even if the original action brought by the mother on her daughter's behalf did not trigger the no contest clause, the daughter's subsequent appeal of the trial court's judgment was clearly a violation of the provision. By filing the appeal, the granddaughter of the testatrix, in effect, adopted or ratified the will contest brought in the trial court. As a result, the court of appeals held that the daughter forfeited her bequest under the will pursuant to the no contest clause.

d. Will contest action dismissed prior to any legal proceedings. *In re Estate of Hamill*, 866 S.W.2d 339 (Tex. App.--Amarillo 1993, no writ), the court held that the mere filing of a will contest is not sufficient to invoke the harsh remedy of forfeiture under a no contest clause if the contest is later dismissed prior to any legal proceedings being held on the contest and if the action is not dismissed pursuant to an agreement settling the suit. The rule applies to a no contest clause that does not expressly provide that the mere filing of the contest is sufficient to invoke the clause.

The probate court entered an order approving the final account of a temporary administrator and distributing the assets of the estate. The order allowed for a distribution to a distributee who had filed a suit directly challenging the validity of the will. The suit was later dismissed for undisclosed reasons. The distributee later filed a disclaimer as an heir under the will, acknowledging that as a result of her suit, she would receive nothing through the will. The disclaimer was filed a number of years after the death of the decedent. Still later, the distributee was allowed by the court to rescind her disclaimer. The distribution was appealed, and the appellant claimed that the distributee had forfeited her right to a distribution from the estate because of an *in terrorem* clause in the will. The court of appeals, however, held that the distributee was entitled to receive her share of the estate. The distributee had filed her disclaimer well after the nine month period in which such disclaimers were required to be filed,

so she had never made a valid disclaimer. As no intent to make a gift was evidenced by the attempted disclaimer, the attempted disclaimer also did not serve as an assignment of her interest in the estate. The court next examined the failure of the record to indicate the reason for dismissal of the will contest suit filed by the distributee. The court held that merely filing a will contest did not trigger an *in terrorem* clause if the suit was dismissed prior to any legal proceedings being held on the contest.

e. Challenge to appointment as executor. The beneficiary's challenge to the suitability of another beneficiary's appointment as temporary administrator and executor of the will under the Probate Code section governing legal qualifications of executors did not violate the *in terrorem* provision of the will. TEX. PROB. CODE ANN. § 78(f) (Vernon 1980); *Estate of Newbill*, 781 S.W.2d 727 (Tex. App.--Amarillo 1989, no writ).

f. Construction of family settlement clause. In *Matter of Estate of Hodges*, 725 S.W.2d 265 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.), a declaratory judgment suit was filed that, among other things, asked the court to decide whether a family settlement agreement would cause a forfeiture under the terms of the will. The court held that this was a request to aid in the construction of the will, not an attack on the will. As such, the request did not activate the clause in the will forfeiting the interest of any devisee who directly or indirectly attacked, questioned, or contested the will.

g. Ascertainment of testamentary intent. The mere filing of a petition to ascertain testamentary intent and enforce the same did not, as a matter of law, constitute a will contest so as to invoke the *in terrorem* clause in a will. *Sheffield v. Scott*, 662 S.W.2d 674 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.). The court in *Sheffield* held that this is particularly the case where a party against whom the petition sought relief and who drafted the will did not provide that the "mere filing" would have such effect, and the party successfully challenged the petition on procedural grounds prior to any judicial proceedings which might have thwarted the testatrix' intention.

h. Will contest brought in good faith. In *Veltmann v. Damon*, 696 S.W.2d 241 (Tex. App.--San Antonio 1985, affirmed in part, rev'd in part 701 S.W.2d 247), the court held that rights may not be forfeited under a no contest clause if a will contest is made in good faith and upon probable cause. In order to avoid forfeiture of their bequests under an *in terrorem* clause, opponents have the burden at trial to prove that their contest was made in good faith and upon probable cause. Where opponents do not plead in any way that their contest of a will was made in good faith and upon probable cause, the *in terrorem* clause is properly enforceable. *Hammer v. Powers*, 819 S.W.2d 669 (Tex. App.--Fort Worth 1991, no writ). Thus, an *in terrorem* clause of a will should be effectuated if the purpose of the suit involving the will is to thwart the testator's intent.

(i) In *Hammer v. Powers*, 819 S.W.2d 669 (Tex. App.-- Fort Worth 1991, no writ), the decedent's relatives contested the probate of the decedent's will. The will named as co-executor and beneficiary of the residuary estate the

decedent's relatively young stockbroker. In a summary judgment, the trial court denied the contest of the will. The trial court also denied the contestants' specific bequests that they would have received under the will but for the will's *in terrorem* clause. The trial court found that the contestants failed to plead or give any proof that the contest was brought in good faith and with probable cause. On appeal, the court of appeals affirmed the trial court finding that the evidence proved, as a matter of law, that the decedent had testamentary capacity and that she was not unduly influenced. The court held that because the contestants failed to plead or present summary judgment proof that they filed their contest in good faith and with probable cause, the trial court properly enforced the will's *in terrorem* clause.

J. RECOVERY OF ATTORNEY'S FEES.

1. Texas Probate Code.

a. Section 243: Allowance for Defending Will. Effective September 1, 1987, Section 243 of the Texas Probate Code was amended to allow a person designated as a devisee, legatee, or beneficiary in a will who defends such will or prosecutes a proceeding in good faith and with just cause for the purpose of having such will admitted to probate to recover from the estate his necessary expenses and disbursements, including reasonable attorney's fees, incurred in such proceedings. This amendment of Section 243 was a significant expansion of the previous statute which allowed only a named executor or appointed administrator to recover such expenses and disbursements from the estate. TEX. PROB. CODE ANN. § 243 (Vernon Supp. 1995).

(i) The proponent of a will was not entitled to an award of attorney fees incurred in an unsuccessful defense, in the absence of a jury finding of her good faith offering of the will for probate. *Alldridge v. Spell*, 774 S.W.2d 707 (Tex. App.--Texarkana 1989, no writ).

(ii) Pleadings which alleged that the will was filed for probate in good faith and with just cause and that expenses and attorney fees were incurred in the amount of at least \$12,000 were sufficient to permit the award of \$11,932.36 to the will proponent, after probate of the purported will was successfully contested. *Candelier v. Ringstaff*, 786 S.W.2d 41 (Tex. App.--Beaumont 1990, writ denied).

(iii) An independent co-executrix defending an action involving benefits to the estate was entitled to have her costs paid by the estate. *Lesikar v. Rappeport*, 809 S.W.2d 246 (Tex. App.--Texarkana 1991, no writ).

b. Section 245: When Costs are Adjudged Against Representative. Effective August 29, 1983, Section 245 of the Texas Probate Code was amended to allow recovery from an estate of reasonable attorney's fees incurred in removing a personal representative of an estate and in obtaining compliance with any statutory duties he had neglected as a personal representative. Previously, the statute did not allow recovery of

attorney's fees for obtaining the removal of a personal representative. TEX. PROB. CODE ANN. § 245 (Vernon Supp. 1995); *Lawyers Sur. Corp. v. Larson*, 869 S.W.2d 649 (Tex. App.--Austin 1994, writ denied).

(i) A successor administrator is entitled to recover attorney fees incurred in removing a prior representative and in obtaining statutory compliance of the prior representative if, rather than undertaking to compel the prior representative to perform duties he has neglected, the successor administrator takes steps to correct the problem; however, the successor administrator need not pursue both courses of action before becoming eligible to collect attorney fees. *Lawyers Sur. Corp. v. Larson*, 869 S.W.2d 649 (Tex. App.--Austin 1994, writ denied).

In *Lawyers Sur. Corp.*, the successor administrator of two estates filed suit against the surety for the prior administrator, seeking attorney fees and costs incurred in bringing the estates of the deceased husband and wife into statutory compliance following the removal of the prior administrator. The probate court awarded fees and costs of each estate. The surety appealed. In one of its points of error, the surety challenged the probate court's application of Section 245 of the Texas Probate Code. The surety interpreted Section 245 to mean that a personal representative and his or her surety could only be held liable for fees that had been incurred by a person who both removed the administrator and attempted to obtain that administrator's compliance with neglected statutory duties. The surety contended that because the successor administrator was not involved in the removal of the original administrator and did not incur any fees associated such removal, the successor administrator could not recover under Section 245. In the alternative, the surety asserted that the Texas Probate Code limited recovery to attorney's fees incurred in compelling the former administrator to perform the neglected duties, as distinguished from attorney's fees associated with a successor administrator performing those neglected duties himself.

The court of appeals declined to adopt either reading of the statute offered by the surety. The court held that Section 245 allowed a successor administrator to recover attorney's fees incurred in removing a prior representative and allowed recovery of any attorney's fees incurred by the successor administrator if, rather than undertaking to compel the prior administrator to perform the duties he has neglected, the successor administrator took steps to correct the problem. The court therefore rejected a construction of Section 245 that would require the successor administrator to pursue both courses of action before becoming eligible to collect attorney's fees from the prior administrator and the surety.

Furthermore, the court held that the purpose of Section 245 was not to encourage successors to force an unwilling or incompetent administrator to carry out administrative acts required by the Texas Probate Code after judicial removal. Rather, Section 245 was designed to ensure that expenses associated with, and caused by, the administrator's neglect of statutory duties were charged not against the estate, but against the culpable administrator and the surety. The court held that it would be an unwise and impractical

construction of the Code to read Section 245 to allow the successor administrator to recover only those expenses incurred in compelling the administrator to perform the very duties he had already been found incapable of performing adequately.

c. Section 149C: Removal of Independent Executor. Section 149C of the Texas Probate Code was also amended effective August 31, 1987, by the addition of Subsection (d), under the terms of which a party seeking removal of an independent executor appointed without bond can recover from the estate his costs and expenses, including reasonable attorney's fees, incident to the removal. TEX. PROB. CODE ANN. § 149C(d) (Vernon Supp. 1995).

(i) A former executor may not be charged personally for a challenger's attorney's fees incurred in his removal, where a former executor fights the removal action in good faith. However, the estate is required to pay the former executor's attorney fees. *Garcia v. Garcia*, 878 S.W.2d 678 (Tex. App.--Corpus Christi 1994, no writ).

In *Garcia*, the appellee served as successor executor of his father's estate after the death of his brother. The appellee served as executor for approximately ten years before an application was filed for his removal. The appellee was removed by the court for his failure to timely file accurate estate tax and fiduciary income tax returns, to timely pay ad valorem taxes or estate taxes, and to make a final settlement. The court also found the executor guilty of gross misconduct and gross mismanagement in the performance of his duties. After the executor's removal, a successor administrator was appointed. Then, the court heard applications to pay the former executor for his work as executor and to pay his attorney for fees incurred in defending and probating the will as well as in defending his post as executor. An application was also filed to pay the appellant's attorney for fees incurred during the removal action. The court found that the executor had defended the action for his removal in good faith and granted his application to pay fees from the estate as well as the appellant's application. The appellant then filed an application to surcharge certain expenses, fees, and costs of the estate against the former executor. The county court rejected the application, and the appellant appealed to the appellate court. The appellant contended, among other things, that the court failed to surcharge the former executor for attorney's fees unnecessarily incurred by the executor's failure to properly manage and timely close the estate and for attorney's fees awarded the appellant's attorneys accrued in the application to remove the executor.

The court of appeals held that under the Texas Probate Code, the estate had to pay the former executor's attorney's fees. TEX. PROB. CODE ANN. § 149C(c) (Vernon 1980). The court did not remand any issues relating to attorney's fees incurred in the removal proceeding. However, the court did remand as to all other attorney's fees unnecessarily incurred by the executor's failure to properly manage and timely close the estate. The court also denied to remand any issues pertaining to attorney's fees awarded to the appellant's attorney which accrued in the application to remove the executor. The court of appeals held that the Code allowed the estate to pay the attorney's fees of the challenger. TEX. PROB. CODE ANN. § 149C(d) (Vernon Supp. 1995). The court's ruling

that the executor fought the removal action in good faith defeated any attempt to charge the executor personally with fees incurred to unseat him. The court stated that the legislature determined that an estate could be liable for the attorney's fees of both sides of an action to remove an executor that was defended in good faith. Surcharging the removed executor with the challenger's attorney's fees would subvert the legislature's clear support of executors who defended challenges in good faith. Because the finding of good faith was not challenged, the court overruled the objection.

K. Standing.

1. General Principles: The legal right of a person to maintain an action, referred to as "standing," is a component of a court's subject matter jurisdiction that cannot be waived and may be raised at any stage of the proceeding, even for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993); *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996); *Coastal Liquids Transp. L.P. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 885 (Tex. 2001). Lack of standing will void any judgment entered in the proceeding. The court's only option upon finding that one party lacks standing is to dismiss the entire proceeding for lack of subject matter jurisdiction.

Any party opposing or contesting a will has an affirmative obligation to plead and, if necessary, prove that he has standing to bring the action. *Abrams v. Ross' Estate*, 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923).

2. Texas Probate Code §§10 and 93: "Interested Person". Any person interested in an estate may file an opposition under Section 10 of the Texas Probate Code before the will is admitted to probate. For contests filed after the will has been admitted to probate, Section 93 also defines the contestant's standing in terms of "any interested person." Section 3(r) of the Probate Code defines "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 a minor or incompetent ward.

Despite the fact that Section 10 specifically refers to a person interested in the estate, this definition is too broad for standing in 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. Further, he must have a pecuniary interest that will be "affected by the probate or defeat of the will." *Logan v. Thomason*, 202 S.W.2d 212, 217 (Tex. 1947) (a moral or "social" interest is not sufficient; if the interest is lacking, the party is a mere meddlesome intruder); *Abrams v. Ross' Estate*, 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923) (the "interest" in the estate must be affected by whether or not the will is admitted to probate). 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 the ultimate devisees or heirs of the

decedent are determined to be. *Logan v. Thomason*, 202 S.W.2d 212, 217 (Tex. 1947); see also *Daniels v. Jones*, 224 S.W. 476, 477 (Tex. Civ. App.- San Antonio 1920, writ ref'd).

Many standing issues involving the Estate of Mrs. Sarita K. East were discussed in *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978). For other examples of cases involving will contest standing, and lack thereof, see *Foster v. Foster*, 884 S.W.2d 497, 501 (Tex. App.- Dallas 1993, no writ) (appointee under exercise of power of appointment has standing); *Maurer v. Sayre*, 833 S.W.2d 680, 683 (Tex. App.- Fort Worth 1992, no writ) (alternate beneficiary on life insurance policy had standing to contest will); *Dickerson v. Dickerson*, 5 S.W.2d 744 (Tex. Comm'n App. 1928) (devisee of heir who died after decedent had standing to contest will); *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) (contingent beneficiary of trust had standing to attack will where he also sought to enforce another will leaving the bulk of the estate to the trust); *Aven v. Green*, 320 S.W.2d 660, 662-63 (Tex. 1959) (a devisee whose "interest" is predicated solely on a will already denied probate lacked standing to contest an earlier will); *Muse, Currie, & Kohen v. Drake*, 535 S.W.2d 343, 344 (Tex. 1976) (a court-appointed administrator lacked "standing" to contest a will); and *Matter of Estate of Hodges*, 725 S.W.2d 265, 269 (Tex. Civ. App.- Amarillo 1986, writ ref'd n.r.e.) (independent executor who was not also a beneficiary lacked standing to object to a family settlement agreement); but see *Travis v. Robertson*, 597 S.W.2d 496, 498 (Tex. App.- Dallas 1980, no writ) (once a will has been admitted to probate, the executor named therein does have standing to defend it under TEX. PROB. CODE §243).

3. Loss of Standing. A person who may have at one time possessed the requisite standing to contest a will may nevertheless lose it by his acts or the acts of others in privity with him.

a. Res Judicata. The doctrine of *res judicata* precludes the re-litigation of claims that have been finally adjudicated, or that arise out of the same subject matter as a prior action and could have been litigated in the prior action. *Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). 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 that were raised or could have been raised in the first action. *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (emphasis added).

Clearly, a person who has once unsuccessfully contested a will is barred by *res judicata* from bringing another contest even on different grounds. A difficult 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 has viewed privity in terms of a class of beneficiaries:

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...'

*In re Estate of Ayala*, 986 S.W.2d 724, 727 (Tex. App.-Corpus Christi 1999, no pet.) (internal citations omitted). Specifically, the *Ayala* 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. *Id.*

In *Neill v. Yett*, 746 S.W.2d 32 (Tex. App.-Austin 1988, writ denied), 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. The *Neill* court held that 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, her assertion of the claim. The fact that the granddaughter had not personally participated in the prior probate proceedings did not prevent the judgment from precluding her later action. The court relied on the doctrine of constructive notice to find that the granddaughter was deemed to have "actual" notice of the prior proceedings and that she was bound by the order admitting the will to probate because "probate proceedings are actions *in rem* and bind all persons unless set aside in the manner provided by law." *Id.* at 36; see also *Stovall v. Mohler*, 100 S.W.3d 424, 429 (Tex. App.-San Antonio 2002, pet. denied) (Green, J., concurring) (granddaughter non-suited from earlier will contest proceeding 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 and, once filed, the interest disclaimed passes to the next taker as though the person disclaiming had pre-deceased the testator. Disclaimers must be filed within nine months of the decedent's death, well before the limitations period for filing a will contest under Section 93 expires. What happens if, after a Section 37A disclaimer is filed, a different will changing the "next taker" is offered for probate? If a total disclaimer in the estate has been filed, the party disclaiming will not have standing to contest the new will although the original next taker would have standing. Partial disclaimers under Section 37A(e) and disclaimers of a certain, defined interest under a specific will may keep open the possibility of standing if an alternative will is subsequently discovered.

c. Assignment. Standing to contest a will may also be lost if the devisee or heir assigns his 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." TEX. PROB. CODE § 37B(e); see also *Morris v. Halbert*, 36 Tex. 19 (1871); *Geraghty v. Randals*, 224 S.W.2d 327 (Tex. Civ.

App.-Waco 1949, no writ). Once the assignment is made, the assignee acquires whatever standing his assignor may have had. See *Dickson v. Dickson*, 5 S.W.2d 744, 747 (Tex. Comm'n App. 1928); cf. *Trevino v. Turcotte*, 564 S.W.2d 682, 687 (Tex. 1978) (a person otherwise estopped from contesting a will by his own acts may not acquire standing via an assignment).

d. Estoppel. A person who is found to be 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. *Trevino v. Turcotte*, 564 S.W.2d 682, 687 (Tex. 1978); *Sheffield v. Scott*, 620 S.W.2d 691, 693-94 (Tex. Civ. App.-Houston [14th Dist.] 1981, writ ref'd n.r.e.). It has long been the law in Texas that a person cannot take a beneficial interest under a will and at the same time try to defeat any part of the will. *Trevino v. Turcotte*, 564 S.W.2d 682, 687 (Tex. 1978). It has been said that a beneficiary under a will must accept the whole contents of the instrument. *Smith v. Butler*, 85 Tex. 126, 19 S.W. 1083, 1085 (1892). The fact that the beneficiary may not have known all the facts that the time he accepted benefits will not, in the absence of fraud, prevent the estoppel from being effective against him. *Kellner v. Blaschke*, 334 S.W.2d 315, 320 (Tex. Civ. App.- Austin 1960, writ ref'd n.r.e.). Most courts follow the "whole contents" (all or nothing) rule set forth in *Smith v. Butler*. See *Sheffield v. Scott*, 620 S.W.2d 691, 694 (Tex. Civ. App.- Houston [14th Dist.] 1981, write ref'd n.r.e.).

Two opinions, however, have indicated a different test for determining whether estoppel applies. In *Matter of Estate of McDaniel*, 935 S.W.2d 827 (Tex. App.- Texarkana 1996, writ denied), the court held that the proper test for determining whether a beneficiary under a will has received benefits that estop him from contesting a will was "whether the benefits granted him by the will are or are not something of which he could be legally deprived without his consent." *Id.* at 829 (relying on *Wright v. Wright*, 274 S.W.2d 670, 676 (Tex. 1955) (a widow's election case)). Another court, relying on the language "challenge of the will must be *inconsistent* with the acceptance of benefits" from *Trevino v. Turcotte*, 564 S.W.2d 682, 687 (Tex. 1978), held that the party relying on the affirmative defense of estoppel must demonstrate that the contestant had in fact received benefits to which *she would not be entitled under either will or even under the laws of intestacy*. *Holcomb v. Holcomb*, 803 S.W.2d 411, 414 (Tex. App.- Dallas 1991, writ denied).

#### L. OTHER CASES.

##### 1. Attorney for the will proponent called as a witness.

a. Attorney is not disqualified from representing a proponent of a will in a will contest just because the opponent of the will might call the attorney as a witness. *May v. Crofts*, 868 S.W.2d 397 (Tex. App.--Texarkana 1993, no writ), involved a will contest where the opponent of the will moved to have the attorney for the will proponent disqualified. The attorney had drafted the will, supervised the execution of the will, and filed the application for probate of the will. Since the opponent was contesting, among other things, the formalities of the execution of the will, the opponent planned to call the attorney as a witness. On this ground, the opponent moved to disqualify the attorney.

The appellate court found that the applicable Texas Disciplinary Rule, Rule 3.08, did not automatically disqualify an attorney under these facts. The court held that Disciplinary Rule 3.08 existed to set forth standards of professional discipline, applied to attorneys who might have to testify on behalf of their client, and should seldom be used for disqualifying an attorney. The court noted that Rule 3.08 was not designed to be used as a way to deprive an opposing party of the right to be represented by the lawyer of his or her choice. *Ayres v. Canales*, 790 S.W.2d 554, 556 n. 2 (Tex. 1990); TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 10 (1989). The court looked to *Ayres v. Canales*, 790 S.W.2d 554, 556 n. 2 (Tex. 1990), in analyzing Rule 3.08. In *Ayres*, the court held that a trial court should require the party seeking disqualification to demonstrate actual prejudice to itself resulting from the opposing lawyer's service in dual roles. The *Ayres* court contended that this requirement would prevent misuse of Rule 3.08. *Ayres*, 790 S.W.2d at 558; TEX. DISCIPLINARY R. PROF. CONDUCT 3.08 cmt. 10 (1989). Applying the *Ayres* court requirement, the court of appeals in *May* concluded that the opponent did not show she was prejudiced by the attorney for the will proponent serving in dual roles of witness and counsel. Furthermore, the court noted that the testimony of the attorney did not appear to be necessary to prove any point of the attorney's client's (the will proponent's) case and that only the will opponent planned to call the attorney as a witness. Based on these facts, the court of appeals held that the trial court did not abuse its discretion in overruling the contestant's motion to disqualify the will proponent's attorney. Thus, the court overruled the petition for writ of mandamus. A dissent to the majority opinion would have held for the attorney to be disqualified.

2. Standing of alternate beneficiary of life insurance policy to contest the will.

a. Alternate beneficiary of a life insurance policy has standing to challenge the probate of a will where the beneficiary is the trustee under a will. In *Maurer v. Sayre*, 833 S.W.2d 680 (Tex. App.--Fort Worth 1992, no writ), a decedent purchased life insurance policies which designated the trustee appointed in the decedent's will as the beneficiary. The decedent's sister was named as the alternate beneficiary of the policies. The amount of proceeds payable under the policies was \$900,000.00. The decedent's will devised all of the decedent's property to a trust for the benefit of the appellee, and named appellee as executrix and trustee. After the will was admitted to probate, the decedent's sister challenged the validity of the will. The trial court dismissed the sister's challenge, finding that she had no standing to contest the will. The trial court's decision was based on the finding that the sister did not have an interest in the probate assets of the estate and so was not a "person interested in the estate" as required in order to challenge a will pursuant to Section 10 of the Texas Probate Code. See TEX. PROB. CODE ANN. § 10 (Vernon 1980).

The sister argued on appeal that the beneficiary under the policies had not yet been determined as the will was being contested. The sister also argued that if the will was found invalid, a trustee would not be named, and she would receive the proceeds as the alternate beneficiary. The appellee contended that the trial court's holding should be affirmed because the proceeds from a life insurance policy not naming the estate as the beneficiary would not be an asset of the estate and would pass outside of the estate. As a result, the appellee argued that the sister's contingent interest was not a claim against the estate.

In analyzing the case, the court relied on language in *Logan v. Thompson*, 202 S.W.2d 212 (Tex. 1947), defining a "person interested in an estate." The *Logan* court stated that the interest referred to by the term "person interested" must be a pecuniary one, which will be affected by the probate or defeat of the will. The court held that the sister's interest was a contingent one involving \$900,000.00 in prospective proceeds and that this interest would be materially affected by the probate or defeat of the will. Furthermore, the court found that the broad language in *Logan* appeared to encompass assets both within and outside the estate. The court also examined *In re Rasco*, 552 S.W.2d 557 (Tex. Civ. App.--Dallas 1977, no writ), where a surety who was to be bound by any judgment entered against a former guardian, was held to have standing to contest the accuracy of a final accounting. The *Rasco* court held that the proceeds of a surety bond would be an asset of an estate depending on whether or not a guardian had mismanaged, wasted, or defrauded the ward's estate. The *Mauer* court found that *Rasco* was analogous to *Mauer* because it also involved a situation where a contestant could have standing but hold no pecuniary interest in the assets of an estate. Thus, the appellate court found that standing to challenge a will exists when the challenger has some legally ascertainable pecuniary interest which will be impaired or benefited by the probate of the will, even if the pecuniary interest involves assets outside of the probate estate, such as insurance. The court reversed the decision of the trial court and remanded the cause.

### 3. Probating the will as a muniment of title.

a. Will may be probated as a muniment of title after the statutory time period for probating a will lapses where the party applying for probate was not in default. In *In the Matter of Estate of McGrew*, No. 00003 (Tex. App.--Tyler, Jan 31, 1995, writ requested) (not yet reported), the testator died and his wife could not find his will. The wife filed an application for letters of administration that was granted by the probate court in Van Zandt County. Subsequently, the will was located, and the wife filed an application to probate the will in Dallas County. The Dallas County probate court admitted the will to probate, but the court of appeals reversed on jurisdictional grounds. The wife never attempted to further probate the will, but did sell the property owned by she and her husband in Van Zandt County. The wife died and not too long after, the testator's daughter notified the couple who had purchased the land that she claimed an intestate interest in the property. The purchasers filed an application for the probate of the testator's will as a muniment of title approximately fifteen years after the testator's death. The daughter contested the application, but the probate court in Van Zandt County admitted the will into probate. The daughter argued on appeal that the trial court erred in admitting the will into probate more than four years after the testator's death. The daughter contended that the purchasers were in default because they had waited almost three years after the daughter had notified them of her claim before filing an application for probate. The daughter also argued that the will should not have been probated because the wife had waived any rights she had under the will.

The court of appeals held that the will was properly admitted to probate. The court noted that a will could be admitted to probate after the lapse of four years from the death of the testator if it was proved that the party applying for probate was not in default for failing to probate the will. See TEX. PROB. CODE ANN. § 73(a) (Vernon 1980). The court also noted that according to

*Wycough v. Bennett*, 510 S.W.2d 112 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.), a will may be probated as a muniment of title after the lapse of a four year period. The court found that the purchasers were justified in their delay in applying for probate as the purchasers did not even acquire the property until ten years after the testator had died. Furthermore, the court found that the evidence failed to show a lack of due diligence on the purchasers' part. Also, the court held that the default of the wife was not an issue. The court noted in *Fortinberry v. Fortinberry*, 326 S.W.2d 717 (Tex. Civ. App.--Waco 1959, writ ref'd n.r.e.), that one will proponent will not cut off the right of another to probate the will as a muniment of title, if the second proponent is not in default.

b. Will may be admitted to probate as a muniment of title more than four years after the decedent's death when there is sufficient evidence of fraud in inducing an applicant not to probate the will. In *Buckner v. Buckner*, 815 S.W.2d 877 (Tex. App.--Tyler 1991, no writ), the decedent's son prevented his wife for five years from filing the decedent's will for probate. The decedent's estate consisted of the family farm. In his will, the decedent devised one-half of his estate to his wife and one-half of his estate to his son and his son's wife. Thus, under the will, the son's wife inherited an undivided one-fourth interest in the property. The wife tried on numerous occasions to have the will probated and was dissuaded by her husband who asserted that the property was "theirs" and that probating the will was not necessary. Finally five years after the decedent's death, the wife filed for divorce and offered the will for probate. The wife alleged that she was not in default for failing to offer the will for probate within four years because the delay was a result of fraud on the part of her husband. The trial court admitted the will to probate as a muniment of title, and the husband appealed.

The husband made misrepresentations to his wife that the property already belonged to them and that the will did not need to be probated. These misrepresentations were a legal opinion. A legal opinion will not ordinarily support an action for fraud. *Fina Supply, Inc. v. Abilene Nat'l Bank*, 726 S.W.2d 537, 540 (Tex. 1987). However, misrepresentations about a point of law are actionable if the misrepresentation was so intended and understood. *Safety Casualty Co. v. McGee*, 127 S.W.2d 176, 178 (Tex. Comm'n App. 1939, opinion adopted); *Marlow v. Medlin*, 558 S.W.2d 933, 938 (Tex. Civ. App.--Waco 1977, no writ). Also, an exception to the general rule pertaining to misrepresentations of legal opinions is recognized for confidential relations of trust between communicating parties. *Fina Supply, Inc.*, 726 S.W.2d at 540. Such confidential relationship exists between a husband and his wife. *Wiley and Co. v. Prince*, 21 Tex. 637 (1858); *Bohn v. Bohn*, 455 S.W.2d 401, 406 (Tex. Civ. App.--Houston [1st Dist.] 1970, writ dism'd).

The court concluded that the husband was apparently misinformed about the law of intestate succession in Texas and that there was no proof that he knew his statements about the land ownership to be false. Nevertheless, the court found that if a person makes an unqualified statement that he knows a fact exists for the purpose of inducing another to act upon it, the purpose is effectuated, and the fact represented does not exist, the law imputes to the person a fraudulent purpose. *White v. Bond*, 355 S.W.2d 225, 229 (Tex. Civ. App.--Amarillo 1962), *rev'd on other grounds*, 362 S.W.2d 295 (Tex. 1962); *United States Gypsum Co. v.*

*Shields*, 106 S.W. 724 (Tex. Civ. App.--Austin 1907), aff'd, 108 S.W. 1165 (1908). The court found that the husband's objective was to prevent his wife from probating the will, and the husband's misrepresentations successfully achieved this. The wife relied upon her husband's statements to her detriment because her one-fourth interest could not be passed and devised to her until the will was probated. Thus, the court affirmed the judgment of the probate court.

## II. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS

### A. DEFINITION OF TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS.

Tortious interference with inheritance rights was recognized by the Texas appellate courts in 1987. As discussed in more detail below, Texas has not yet defined the scope of the tort, and the elements are unclear. However, the cases from other states support the following elements of the tort:

1. existence of an expectancy of inheritance or gift;
2. intentional interference with the expectancy;
3. the interference was tortious, such as fraud, duress or undue influence;
4. the defendant's actions proximately caused damage to the plaintiff (*i.e.* plaintiff would have inherited but for defendant's actions); and
5. damages.

B. RESTATEMENT (SECOND) OF TORTS. The Restatement of Torts defines intentional interference with inheritance or gift as the following:

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. Restatement of Torts (Second) § 774B.

### C. DEFINITION OF TERMS. Restatement of Torts (Second) § 774B.

1. Inheritance or Gift. "Inheritance" is used to include any devise or bequest that would otherwise have been made under a testamentary instrument or any property that would have passed to the plaintiff by intestate succession. Thus, the tort applies when the testator has been induced by tortious means to make his will or not make it; and it applies also when he has been induced to change or revoke his will or not to change or revoke it. It applies also when a will is forged, altered, or suppressed.

2. Gift. "Gift" is used to include in the broad sense any donation, gratuity, or benefaction that other would have received from the third person. It includes, for example, a

beneficiary designation under an insurance policy that the actor interferes by tortious means.

D. TORTIOUS INTERFERENCE V. WILL CONTEST.

1. A will contest is an action to contest the probate of the will, to contest the validity of a will, or to assert an interest in the estate because a will is ineffective, because another will exists, or because the decedent breached a contract to make or revoke a will.

2. A tortious interference action does not challenge the probate or validity of a will. Rather, the action seeks damages from a third party because of the plaintiff's loss of an expectancy. The tort action accrues when the wrongful act is complete. This may be before the testator's death, after the testator's death, or even after the probate proceedings have ended.

E. JURY CHARGE FOR TORTIOUS INTERFERENCE CAUSE OF ACTION. The following is a jury charge that was submitted for a tortious interference cause of action in one of the authors' Harris County cases:

Do you find from a preponderance of the evidence that the defendant tortiously interfered with the plaintiff's right to inherit property from the testator?

\_\_\_\_\_ YES    \_\_\_\_\_ NO

INSTRUCTION

You are instructed that a party tortiously interferes with another's inheritance rights when he: (1) participates in or receives benefits from a wrongful or tortious act; (2) proximately causes an event which prevents or interferes with an inheritance or another person; (3) and this results in damages or loss to that person.

INSTRUCTION

You are instructed that fraud, misconduct, an illegal action and intentional invasion of or interference with property or property rights, causing injury without just cause or excuse, constitute tortious or wrongful acts.

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for his losses or injury, if any, proximately caused by the defendant's tortious interference?

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F. TEXAS CASES.

1. King v. Acker, 725 S.W.2d 750 (Tex. App.--Houston [1st Dist.] 1987, no writ). In *King*, the decedent's wife transferred stock to herself using a forged power of attorney and filed an application to probate a forged 1982 will. The plaintiffs, who were beneficiaries under a previous will, brought a will contest and prevailed. After prevailing in the will contest, the plaintiffs brought suit against the wife, her attorney, and the "witnesses" to the forged will. The case against the attorney and witnesses was severed before trial. At trial, a jury found that the decedent's wife had maliciously conspired to tortiously interfere with the inheritance rights of the beneficiaries under the actual will of the decedent and awarded the beneficiaries punitive damages.

On appeal, it was initially noted that Texas courts had never addressed the issue of whether such a cause of action existed. The court held that "a cause of action for tortious interference with inheritance rights exists in Texas" and affirmed the trial court's award of actual and punitive damages. The court based its decision on:

- a. decisions from other jurisdictions;
- b. Restatement (Second) of Torts § 774B (1977);
- c. the recognition of a cause of action for tortious interference in other contexts by Texas courts; and
- d. previous cases implying that interference with inheritance rights is an actionable tort.

2. Damages in King v. Acker.

- a. The court approved recovery of the temporary administrator's commission on stock that had to be redeemed because of the acts of the defendant.
- b. The court did not allow recovery of the handwriting expert's fees because such fees were litigation expenses.
- c. The jury awarded punitive damages equal to the plaintiff's attorney's fees.

3. Implications of King v. Acker for probate and trust litigation. The court's rationale in *King* provides no reason to believe that its holding is limited solely to actions for interference with inheritance rights. In reaching its holding, the court recognized:

- a. that "equity will not suffer a right to be without a remedy" [*citing Chandler v. Wellborn*, 156 Tex. 312, 294 S.W.2d 801, 807 (1956)];

b. that an intentional and injurious invasion or interference with property or personal rights is an actionable tort [*citing Cooper v. Steen*, 318 S.W.2d 750, 757 (Tex. Civ. App.--Dallas 1958, no writ)]; and

c. that "Texas seems to recognize a cause of action for tortious interference" [*citing Tippet v. Hart*, 497 S.W.2d 606 (Tex. Civ. App.--Amarillo 1973, writ ref'd n.r.e.)].

The court's reliance on these general principles was seemingly applied to the particular allegation made in this case, interference with inheritance rights. However, it seems very possible that such principles could be applied to support the existence of a cause of action for almost any act, whether by an executor, trustee, beneficiary, or third party, which constitutes an intentional interference with or disruption of the proper administration or distribution of a trust or estate.

4. Possible cause of action for interference with "inheritance expectancy". In *Neill v. Yett*, 746 S.W.2d 32 (Tex. App.--Austin 1988, writ denied), the decedent left a will in which his granddaughter was not remembered. The granddaughter attempted to extend the principles of *King* by pleading that, based on fraud and undue influence committed by the decedent's wife, a cause of action existed for tortious interference by the decedent's wife with the granddaughter's inheritance expectancy. The trial court granted summary judgment against the granddaughter. The court of appeals held that the judgment of the probate court admitting the will to probate barred the granddaughter's claim for tortious interference with her inheritance expectancy; as long as such judgment remained valid, the granddaughter had no inheritance expectancy. The court then noted that the granddaughter failed to either set out the elements of her claimed cause of action for tortious interference with her inheritance expectancy or to describe the basis for such cause of action. Apparently, the granddaughter cited *King* for the first time in her appellate brief in support of her claim. The court recognized the general conclusion in *King* that the cause of action for tortious interference with inheritance rights exists in Texas, but observed that the elements of such cause of action were not delineated in the *King* opinion. However, while never stating that a cause of action for tortious interference with an inheritance expectancy exists, the court stated that "if, indeed, a cause of action for tortious interference with inheritance expectancy exists," the granddaughter's assertion of such cause of action was barred by limitations.

5. *King* and *Neill* distinguished. It should be observed that the facts of *Neill* are clearly distinguishable from *King*. In *King*, the parties who brought the action for tortious interference were named as beneficiaries in a will that was ultimately admitted to probate. The granddaughter in *Neill* could make no such claim. Additionally, the defendant in *King* was found to have engaged in fraudulent activity in connection with the decedent's disposition of the property in question. In *Neill*, no evidence was discussed which could be viewed as demonstrating that there was anything unusual about the disposition of the estate in question. These clearly distinguishable facts make the decision in *Neill* noteworthy primarily because the court refused to preclude the possible existence of a cause of action for tortious interference with

an expectancy of inheritance even though the facts supporting the granddaughter's case were relatively weak. To the contrary, the court in *Neill* gave every indication that with its elements properly pled and its basis properly described, such a cause of action would indeed exist.

6. Filing or Contesting a Pleading is Not Tortious Interference. Section 10C was added to the Texas Probate Code to clarify that 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.

7. Possible elements of tortious interference in Texas.

a. Texas cases discussing interference with inheritance.

(i) *Pope v. Garrett*, 204 S.W.2d 867 (Tex. Civ. App.--Galveston 1947), rev'd on other grounds, 211 S.W.2d 559 (Tex. 1948). The appellee in *Pope v. Garret*, sought to recover damages caused by the acts of two of the appellants in physically preventing the decedent from executing a will under which property would have passed to appellee. As a result of such action, the decedent died intestate, and his property passed to eight appellants who would take decedent's property under the laws of descent and distribution. The trial court imposed a trust on the property received by the eight appellants which would have passed to appellee under the will. On rehearing of the appeal, the court observed that the appellee might have obtained a judgment against the two appellants who by their wrongful act prevented the execution of the will and stated that "[t]he measure of damages would have been the value of the property which would have passed by the will except for the wrongful act." However, the court of appeals held that the interests of the six appellants who did not participate in preventing the execution of the will were not subject to the trust imposed by the trial court. Such ruling as to the six non-participating appellants was reversed by the Texas Supreme Court, and the trial court's judgment was affirmed.

(ii) *Teague v. Stephens*, 564 S.W.2d 437 (Tex. Civ. App.--Tyler 1978, no writ). In *Teague v. Stephens*, the plaintiff sued the defendant for negligently or intentionally causing the disappearance or destruction of a will under which the plaintiff was a beneficiary. The defendant's motion for summary judgment was granted based on his affidavit stating that he had never seen nor had knowledge of a will executed by the decedent under which the plaintiff would receive property and that he had never destroyed or lost a will of the decedent. The plaintiff presented summary judgment evidence which suggested that the decedent may have executed a will under which the plaintiff was a beneficiary. Stating that the focused issue of the case was whether the defendant had destroyed or lost the decedent's will, the court of appeals upheld the summary judgment on the ground that the plaintiff's summary judgment evidence failed to create a genuine issue of material fact.

(iii) Summary. The language in *Pope* can be interpreted to break the cause of action for tortious interference with inheritance rights into the following elements:

- (a) participation in or receipt of benefits from,
- (b) a wrongful act,
- (c) proximately causing an event,
- (d) which prevents or interferes with an inheritance,
- (e) and results in damages or loss to the plaintiff.

Such interpretation is supported by the language in *Teague* which stated that the key issue in that case was whether the defendant had negligently lost or intentionally destroyed the alleged will, preventing the plaintiff from receiving his bequests thereunder.

(iv) Tortious interference not addressed. Several Texas cases have been brought asserting tortious interference, but for a variety of reasons, the appellate courts have not addressed the merits of the tort action:

(a) A remainderman brought suit against the life tenant's executor for conversion and tortious interference with inheritance rights. The jury found both conversion and tortious interference with inheritance rights. The plaintiff elected to recover damages on the finding of conversion. *Rice v. Gregory*, 780 S.W.2d 384 (Tex. App.--Texarkana 1989, writ denied).

(b) Plaintiff, who was the beneficiary of a specific bequest under a will, sued the executor for tortious interference, breach of fiduciary duty, fraud, bad faith, and conversion. The trial court directed a verdict for the plaintiff on the conversion action. On appeal, the court determined that the plaintiff had elected the conversion remedy. The opinion can be read to indicate that other remedies may have been available if the plaintiff had preserved his rights. *Matter of Estate of Crawford*, 795 S.W.2d 835 (Tex. App.--Amarillo 1990, no writ).

(c) Remaindermen brought suit against the life tenant's executor arising from a sale by the life tenant of certain real property. The action included a cause of action for tortious interference with inheritance rights. The defendants responded that the life tenant's right to sell the property extinguished any inheritance rights of the plaintiff. The jury failed to find that anyone tortiously interfered with plaintiff's inheritance rights. *Hext v. Price*, 847 S.W.2d 408 (Tex. App.--Amarillo 1993, no writ).

b. Texas cases discussing tortious interference with contract rights. When defining the limits of tortious interference with inheritance rights, the Texas appellate courts will likely be guided by cases discussing tortious interference with contract rights. The following is a survey of Texas decisions:

(i) Sakowitz, Inc. v. Steck, 669 S.W.2d 105 (Tex. 1984). In *Sakowitz, Inc. v. Steck*, the Texas Supreme Court held that to establish the necessary elements of tortious interference with contract, the claimant must show (1) "that the defendant maliciously interfered with the contractual relationship; and (2) without legal justification or excuse." The court defined malice as "an act without excuse or just cause." *Sakowitz*, 669 S.W.2d at 107.

(ii) American Petrofina, Inc. v. PPG Industries, Inc., 679 S.W.2d 740 (Tex. App.--Fort Worth 1984, writ dism'd by agr.). Another court has held that "[i]n maintaining a cause of action for tortious interference with contract, it must be established that (1) there was a contract subject to interference; (2) the act of interference was intentional and willful; (3) such intentional act was a proximate cause of plaintiff's damage; and (4) actual damage or loss occurred." *American Petrofina, Inc. v. PPG Industries, Inc.*, 679 S.W.2d 740 (Tex. App.--Fort Worth 1984, writ dism'd by agr.).

(iii) Tippet v. Hart, 497 S.W.2d 606, 610-11 (Tex. Civ. App.--Amarillo 1973, writ ref'd n.r.e.). To be actionable, the interference need not procure a breach of the contract. Any invasion which injures or destroys property and interferes with or makes more difficult the performance of the contract can give rise to the cause of action. *Tippet v. Hart*, 497 S.W.2d 606, 610-11 (Tex. Civ. App.--Amarillo 1973, writ ref'd n.r.e.).

(iv) Summary. If the Texas courts look to the elements of tortious interference with contractual relations to determine the elements of tortious interference with inheritance rights, the holding in *American Petrofina* seems most applicable. By analogy to that holding, the elements of tortious interference with inheritance rights would be:

- (a) existence of a will or potential testator/beneficiary relationship subject to interference,
- (b) intentional and willful interference with such will or relationship,
- (c) which proximately causes,
- (d) actual damage or loss.

Under the language of *Tippet*, it seems likely that actionable interference would not require complete elimination of a potential inheritance. Instead, any interference which causes the testator's intent, as set forth in his statements or will, to be more difficult to carry out would be sufficient to give rise to the cause of action.