

**PROBATE LITIGATION:
WHAT CPAs IN PUBLIC PRACTICE NEED TO KNOW**

**WILLIAM R. (BUTCH) KORB, JR.
BOURLAND, WALL & WENZEL, P.C.
301 Commerce Street
Suite 1500
Fort Worth, Texas 76102
(817) 877-1088
(817) 877-1636 (FAX)
e-mail: bkorb@bwwlaw.com**

**FORT WORTH CPA TAX INSTITUTE
August 22, 2003
Fort Worth, Texas**



WILLIAM R. KORB, JR

Shareholder

Bourland, Wall & Wenzel, P.C.

817.877.1088

Fax: 817.877-1636

bkorb@bwwlaw.com

Bourland, Wall & Wenzel, P.C.
301 Commerce Street, Suite 1500
Fort Worth, Texas 76102

Mr. Korb is a shareholder of Bourland, Wall & Wenzel, P.C. with areas of emphasis including business and commercial litigation, probate and trust litigation, fiduciary litigation, employment litigation, general civil litigation, family law litigation and divorce, marital property law, religious organization law, real estate and creditor rights law

Relevant Experience

- Frequent speaker to churches and church leaders on avoiding legal liability in Texas, Louisiana, Mississippi and Georgia
- Co-author of "[Keeping Your Church Out of Court](#)", first and second editions in Texas, and Louisiana, Mississippi and Georgia Editions
- Co-Author and presenter of the article, "Avoiding Business Litigation"
- Co-Author and presenter of the article, "Employment Law: Issues and Alternatives"
- Author and presenter of the article, "Sexual Misconduct"
- Author and presenter of the article, "Legal Issues in Ministry."
- Author and presenter of the article, "Clergy and the Law - Resolving Church Conflict."
- Author and presenter of the article, "Professional and Pastoral Counseling."
- Author and presenter of the article, "Child Abuse Presentation."
- Author and presenter of the article, "Church Records and Policies."
- Author and presenter of the article, "Common Pitfalls for Churches."
- Author and presenter of the article, "Employment - Hiring/Firing Practices for Churches."

Practice Area Links

Litigation

[Business & Commercial Litigation](#)

[Creditor Rights Litigation](#)

[Employment Litigation](#)

[Fiduciary Litigation](#)

[Probate & Trust Litigation](#)

[Marital Property Rights and Divorce](#)

[Real Estate](#)

Nonprofit Organizations

[Religious Organizations](#)

Real Estate Law

[Residential & Commercial Transactions](#)

[Farms & Ranches](#)

[Acquisition & Development](#)

[Tax-Free Exchanges](#)

[Leasing & Management](#)

[Financing](#)

[Residential & Commercial Construction](#)

Background & Education

Born in Cleburne, Texas in 1961

B.S. Texas A&M University, Summa Cum Laude
1983

J.D. Baylor University School of Law, Cum
Laude, associate editor of Baylor Law Review
1986

Admissions & Certifications

Admitted: 1986, Texas

1987, U.S. District Court, Northern District of
Texas

Membership

State Bar of Texas (Member: Litigation Section)

Tarrant County Bar Association

Burleson Rotary Club

Board member of Fan The Flames
Ministries and Lighthouse Church

PROBATE LITIGATION
TABLE OF CONTENTS

I.	Will Contests.....	5
A.	Steps to Probate a Will.....	5
1.	Application.....	5
2.	Lost Will	5
3.	Notices	5
4.	Probate Hearing	6
5.	Effectiveness of a Will.....	6
B.	Possible Causes of Action to Attack a Will.....	6
1.	Formalities	6
2.	Non-Revocation	7
3.	Testamentary Capacity.....	7
4.	Undue Influence.....	8
5.	Standing	8
C.	Urgency of Filing Timely Will Contests	9
1.	General Rules for Filing Will Contest	9
2.	Burden Shifting.....	9
3.	Attorney’s Fees	9
4.	Control of the Estate	10
D.	Protecting Against the Will Contest	10
1.	Multiple Wills.....	10
2.	In Terrorem Clauses.....	11
II.	Estate Litigation	12
A.	Characterization of Property.....	12
B.	Temporary Administrator	13
C.	Contractual Wills	13
D.	Marital and Premarital Agreements.....	14
E.	Survivorship Accounts.....	14
III.	Fiduciary Litigation	15
A.	Powers of Attorney	15
B.	Duties of Executors/Trustees/Administrators.....	17
C.	Other Fiduciaries.....	18
D.	Other Causes of Action.....	18
1.	Fraud	18
2.	Negligence and Negligent Misrepresentation.....	19
3.	Conspiracy	19
4.	Tortious Interference With Inheritance Rights	19
IV.	Trust Litigation	19
A.	Removal of Trustee.....	19
B.	Actions to Compel Distributions	20

C.	Breach of Trust Concerning Investment Standards and Allocations by Trustee	20
D.	Accountings	21
E.	Modifications	22
F.	Exculpatory Clauses.....	23
V.	Procedural Issues in Litigation.....	24
A.	Privileges.....	24
B.	Experts: Qualifications and Admissibility of their Opinions.....	26
VI.	Tort Reform	27
A.	Damages.....	27
1.	Exemplary Damage Verdicts	27
2.	Existing Caps on Exemplary Damages.....	27
3.	Application of Exemplary Damage Elements.....	28
4.	Reduction of Compensatory Damages for Taxes	28
5.	Effective Date	28
B.	Interest on Judgments.	28
C.	Settlement Offers.	29
1.	Supreme Court Rules.	29
2.	Triggered by Defendant	29
3.	Application.....	29
4.	Exceptions.....	30
5.	Settlement Offer Requirements.....	30
6.	Effective Date.	30
7.	Valuing the Settlement Offer	30

PROBATE LITIGATION

INTRODUCTION

This article focuses on various types of probate court litigation that may be of interest to certified public accountants. In their public practice, accountants may be asked by their clients for advice in connection with matters which may arise in probate court. This article will address information and strategies which may be important to those clients.

I. Will Contests

A. Steps to Probate a Will

1. Application

In order to probate a will, the written will must, if within the control of the applicant, be filed along with an application for its probate with the clerk of the court having probate jurisdiction in the county of residence of the decedent at the time of the decedent's death. *Tex. Probate Code Sections 81, 5 and 6*. In Tarrant County, Texas there are two statutory probate courts. *Tex. Government Code Section 25.2221*. In those counties in which there is a statutory probate court, all applications, petitions and motions regarding probate or administrations shall be filed and heard in the statutory probate court, unless otherwise provided by law. *Tex. Probate Code Section 5(d)*.

2. Lost Will

In the event the original written will cannot be located after a decedent's death, a presumption exists that the decedent destroyed the will, thereby revoking it. *Mingo v. Mingo*, 507 S.W.2d 310, 311 (Tex. Civ. App.--San Antonio 1974, writ

ref. n.r.e.). This presumption can be overcome by filing a copy of the written will with the application and by making satisfactory proof at the probate hearing to explain that the loss of the original will was not intended by the decedent to constitute a revocation. *Id.*

3. Notices

Upon filing of the application with the court clerk, the clerk will issue notice of the application to probate the will, which notice will be posted where public notices are customarily posted in the courthouse. No other personal notice by citation, mailing, or publication in a newspaper is necessary to any person. Therefore, no actual notice is delivered to heirs, devisees under either the will which is the subject of the application for probate or prior wills, or other persons. Also, spouses of the decedent are not required to be sent actual notice. Thus, because the probate proceeding is considered an "in rem" proceeding, the application may be filed after a decedent's death without notification to any party. The notice must be posted for not less than ten days, exclusive of the date of posting, prior to the hearing on the application. For purposes of this rule, the return date is the Monday following the expiration of ten days from the date of posting. Therefore, in applying the rule it is necessary to count the days beginning on the date following the date of posting through ten days and then go to the following Monday as the first day in which the hearing can be held on the application to probate a will. *Tex. Probate Code Section 33*.

For persons interested in an estate who desire to either contest or act as a proponent of a particular will of a decedent, those persons must regularly check with the court clerk in order to be aware of the filing of probate proceedings concerning a decedent in order to avoid a will of a decedent being probated without that person's knowledge.

4. Probate Hearing

If a proper application has been filed and notice has been posted for the requisite time period, the hearing may be held with the probate court for the purpose of providing testimony of one or more witnesses necessary to probate the will. The type and substance of testimony will depend on the circumstances, including whether the will is "self proved". *Tex. Probate Code Section 84*. The hearing itself is usually short (five to ten minutes) and the court is generally presented with and signs an order probating the will at that hearing. The court may also appoint an executor or administrator of the estate at that hearing. If an executor or administrator is appointed, that person will have to sign an oath and file a bond, if the bond has not been waived, in order to be issued letters testamentary for an executor or letters of administration for an administrator. These letters are issued by the court clerk and evidence the written authority of the representative of the estate to act on behalf of the estate.

5. Effectiveness of a Will

A will, being testamentary in character, is not effective during the life of the testator, and by its very nature may be revoked and replaced at any time during the life of the testator while the testator remains competent to make a will. After the death of a testator, a will still has no effect until the

will is probated. *Tex. Probate Code Section 94*. Thus, in order to make a will effective to transfer a decedent's assets, the will must be probated pursuant to the procedure outlined above.

B. Possible Causes of Action to Attack a Will

1. Formalities

Texas Probate Code Section 59 requires that a will be in writing and signed by the testator in person or by another person for him by his direction and in his presence. A very limited exception applies to oral or noncupative wills made during the time of the last illness of the deceased. *Tex. Probate Code Section 65*. If a written will is not wholly in the handwriting of the testator, the will must be attested by two or more credible witnesses above the age of 14 years. These witnesses must subscribe their names to the will in their own handwriting in the presence of the testator. In addition to these statutory requirements, the testator must have intended the document he signed to be a testamentary disposition of his property as opposed to a document used for some other purpose. *Shiels v. Shiels*, 109 S.W. 2d 1112, 1113 (Tex. Civ. App.--Texarkana 1937, no writ). It is also necessary that the testator know and understand the contents of the document the testator is signing as his will, which will be presumed absent evidence that suspicious circumstances exists. *Boyd v. Frost National Bank*, 196 S.W.2d 497 (Tex. 1946).

Texas Probate Code Section 88(b) also requires that at the time of executing the will, the testator be at least 18 years of age, or lawfully married, or a member of the armed forces of the United States or of the auxiliaries thereof, or of the maritime service of the United States, that the testator

be of sound mind at the time of execution, and that the will was not thereafter revoked by the testator prior to the testator's death.

2. Non-Revocation

A will must not have been revoked prior to a testator's death, in order to admit the will to probate. Revocation of a will may be accomplished by a written document, such as a later will which revokes all prior wills and codicils. A will may also be revoked by any other intentional unequivocal act, such as that of destruction of the document by the testator. *Morris v. Morris*, 642 S.W.2d 448 (Tex. 1982). Note that in order to revoke a will, the testator must have testamentary capacity. *Lowry v. Saunders*, 666 S.W.2d 226 (Tex. App--San Antonio 1984, writ ref. n.r.e).

3. Testamentary Capacity

Texas Probate Code Section 88, which requires that the testator be of sound mind at the time of execution of a will, has been interpreted to mean that the testator has testamentary capacity at such time. See *Bracewell v. Bracewell*, 20 S.W.3d 14, 26 (Tex. App.--Hou.[14th Dist.] 2000, no pet.). Testamentary capacity has been defined to mean the person making the will at the time of execution of the will has sufficient mental ability to: (1) understand the business in which the testator is engaged, (2) the effect of the testator's act in making the will, (3) the general nature and extent of the testator's property, (4) the ability to identify the testator's next of kin and natural objects of the testator's bounty, and (5) sufficient memory to collect in the testator's mind the elements of the business to be transacted and to hold them long enough to perceive 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, 678

(Tex. 1964). Because testamentary capacity on the day the will is executed is the relevant fact, evidence of incapacity at other times is admissible only to demonstrate that the condition persisted and had a probability of having the same condition which obtained at the time of the will's execution. *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968).

Because the most common attack on a will is based upon lack of testamentary capacity, there have been many cases that have developed Texas law on this subject. Information that is relevant to the issue will include, but not be limited to, the physical conditions of the person, medical conditions, diseases, or illnesses of the person, the person's age, prior mental problems, prior adjudications of incompetency, other documents written by or signed by the person at or near the time of the will execution, video tape or audio tape of the testator during or near the time of will execution, medications that the person was on during the time of the will execution, descriptions by the person of his or her property, statements by the person concerning the person's intended beneficiaries or those others who the person does not intend to leave property, the accuracy of other statements made by the person, the education and experience of the person, and previous alcohol or substance abuse. Evidence of unnatural dispositions of the person's property may be considered. In addition to video tape and audio tape of the testator and documents written or signed by the testator, the testator's medical records, estate planning records from the attorney drafting the will, and other financial records may be relevant.

It is sometimes suggested that the execution ceremony for the will be video taped. This is at best risky if the sole motive for video taping is that a will contest is

anticipated. Because the testator is not in his usual surroundings and conducting his usual daily affairs during the will execution, and will not be accustomed to being the subject of a video tape ceremony, any erroneous statements, peculiar conduct, or other perceived inability to clearly articulate the testator's desires and intentions with respect to his property, beneficiaries, and will could lead to undesirable results. Video tapes of will execution ceremonies rarely turn out perfect. The author submits that evidence of a bad video which was later destroyed is much worse than having not video taped the execution ceremony at all.

The assistance, or lack thereof, that the testator receives in caring for himself or herself and carrying out his or her normal business activities is also relevant. These assistants may intent to be proponents of the testator's sound mind, but often supply important evidence of the testator's lack of ability to perform routine life functions and/or business transactions, which is the entire reason for the presence of assistants in the first place. It is important to determine in these instances who in reality is making the decisions on behalf of the testator.

4. Undue Influence

Undue influence has been defined as: (1) the existence and exertion of an influence, (2) the effective operation of such influence so as to subvert and overpower the mind of the testator at the time of the execution of the testament, and (3) the execution of a testament which the maker thereof would not have executed but for such influence. *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963). Undue influence takes many forms, from fraud and deceit, to threats, to more subtle strategies intended to overpower the testator's intent. *Curry v. Curry*, 270 S.W.2d 208, 214 (Tex.

1954). Undue influence includes fraud in the inducement, which consists of a misrepresentation of facts (other than the contents of the document) which induced the testator to execute the will when the testator would not have done so otherwise. *See Curry, supra*. It also includes fraud in factum which occurs when a testator is misled as to the nature or content of the document being executed. *Guthrie v. Suiter*, 934 S.W.2d 820, 833 (Tex. App.--Hou. [1st Dist.] 1996, no writ). As is clear from the cases, not every influence will constitute undue influence, but only those that were successful in subverting the will of the testator and replacing it with the will of the influencer. *Rothermel v. Duncan, supra*.

5. Standing

Persons who have standing, or who are entitled, to file a will contest are those that are "persons interested" in the estate. This term has been defined to mean heirs, devisees, spouses, creditors, or others having a property right in, or claim against, the estate being administered. *Tex. Probate Code Section 3(r)*. Standing is a matter of the court's jurisdiction and cannot be waived by the opposing party failing to bring it to the court's attention initially. *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 445-446 (Tex. 1993). A better definition is that the contestant must have a pecuniary interest which will be affected by the probate of a will or the defeat of a will for probate. *Logan v. Thomason*, 202 S.W.2d 212, 217 (Tex. 1947). Thus, friends, family members or strangers to the estate that for moral, ethical, social or other reasons desire to file a will contest, but do not have an individual pecuniary interest to be gained by the result in which they are requesting, lack the standing in which to bring such contest.

C. Urgency of Filing Timely Will Contests

1. General Rules for Filing Will Contest

Texas Probate Code Section 10 allows any person interested in an estate, at any time before a will is probated, to file an opposition thereto in writing. In addition, Texas Probate Code Section 93 allows an interested person, after a will has been admitted to probate, to institute suit to contest the validity of a will within two years after such will was admitted to probate, with certain exceptions. Thus, persons interested in an estate may file a will contest both before and after a will is admitted to probate. However, there are certain consequences that result from a contestant delaying the filing of a will contest until after a will has been admitted to probate.

2. Burden Shifting

Prior to a will being admitted to probate, the proponent of a will has the burden to prove the formalities of execution of the will as discussed above, the testamentary capacity of the testator, and non-revocation of the will sought to be probated. *See Broach v. Bradley*, 800 S.W.2d 677, 679-680 (Tex. App.--Eastland 1990, writ den.). However, after a will has been admitted to probate, the burden of proof is on the contestant to show lack of testamentary capacity, lack of the existence of formalities of execution, or revocation of the probated will. *Guthrie v. Suiter*, 934 S.W.2d 820 (Tex. App.--Hou [1st Dist.] 1996, no writ). Thus, the burden of proof shifts to the contestant with respect to these matters after a will has been admitted to probate.

Contestants, however, always have the burden of proof on the issue of undue influence. *Cobb v. Justice*, 954 S.W.2d 162 (Tex. App.--Waco 1997, writ den.).

3. Attorney's Fees

Texas Probate Code Section 243 states as follows:

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

Ultimately, a person acting as either an executor or as a beneficiary must obtain a ruling from the court or obtain a finding from a jury concerning good faith and just cause in order to receive the benefit of expenses being paid from the estate. A distinction, however, exists as to whether a person waits until the end of the case to receive reimbursement of that person's expenses (the person having been required

to fund the litigation expenses during the course of the proceeding out of the person's own pocket), as opposed to having the estate advance those expenses during the course of the proceeding. Because many litigants do not have sufficient funds to pay the expenses necessary to litigate a contest to completion, a case is either never filed or is settled early rather than fully prosecuted. The person who has the advantage of litigation expenses being advanced by the estate is in an obviously better position as a litigant.

After a will has been probated and the executor appointed, the executor has the ability to fund the litigation from estate assets. An executor who is named in a will that has not been probated has no authority over estate assets until after the executor's appointment by the court. Thus, a contestant's opposition to the admission of a will to probate which is filed prior to the appointment of an executor dramatically changes the financial ability of the executor to prosecute or defend litigation concerning the probate of a will.

4. Control of the Estate

After a will has been probated and an executor has been appointed to administer the estate, that executor has control over the entire estate. Not only does the executor have the ability to pay and advance his expenses in a will contest from the estate, he also administers the estate during the proceedings. In a will contest, it is often the case that opposing parties do not agree as to how an estate should be administered during the progress of the litigation. The executor has another distinct advantage that he has the ability and discretion to administer the estate in accordance with his own desires as opposed to the desires of his opponent, as long as he is fulfilling his fiduciary obligations.

D. Protecting Against the Will Contest

1. Multiple Wills

The result of a will contest where a contestant successfully sets aside the probate of a will or prevents an alleged will from being probated is that the latest executed prior will of a decedent would then become available to be admitted to probate, unless the same grounds exist for attacking the next earlier will. In that event, each earlier will could then be examined to determine if it met the requisite requirements to probate that instrument as the last will of the decedent.

In this regard, a person who executes one will during his or her lifetime would subject his or her estate to pass by interstate succession to that person's heirs in law in accordance with the Texas Probate Code, in the event the one will was set aside or successfully opposed. However, a person who has executed multiple wills during a lifetime would create multiple chances for at least one of those instruments being held to be entitled to probate. For example, for a person who is held to lack testamentary capacity in later years, that person's earlier wills signed before the incapacity would still be entitled to probate. In addition, if family members or caretakers who performed the caretaking for that individual in later years were accused of undue influence in causing the execution of a will during that period of time, then an earlier will of the decedent could be admitted to probate. To the extent a person has left a succession of wills that has a consistent basic dispositive plan concerning the testator's assets, a will contest would be successfully thwarted unless a contestant could set aside every will ever executed containing that basic dispositive plan.

Wills may be amended without being revoked in their entirety and totally replaced. A document which amends a will is referred to as a codicil. Typically a codicil contains language ratifying the will to which it is intended to amend, subject to the revisions to that will which are contained in the codicil. The use of codicils therefore creates the same effect as executing multiple wills, because the execution of the first will and each codicil thereafter causes a contestant to have to prove the existence of undue influence, lack of testamentary capacity, or lack of formalities with respect to each one of those documents in order to successfully thwart the admission of any of them to probate.

For the proponents of the estate plan who are trying to successfully defend the probate of the will and any codicils, the fact that the testator had a consistent dispositive scheme over many years as proven by the existence of multiple wills or a will and multiple codicils lessens the possibility for accusation that undue influence operated to change the dispositive scheme, or that a state of incapacity existed on each of these occasions. The fact that the testator considered the estate plan on those several occasions and consistently chose a similar dispositive scheme greatly assists in the defense of a will contest. Because the contestant must show lack of formalities, revocation, undue influence or lack of testamentary capacity on each and every occasion of execution, the burden on the contestant significantly increases with the execution of each new will or codicil having a similar dispositive scheme.

In addition, will contests in connection with lack of testamentary capacity and undue influence claims are fact intensive and often unique concerning the

facts of the case. In other words, a testator may have been sick just before executing one instrument but very healthy when executing the next instrument. The testator may have had a family member present which was alleged to have exerted undue influence at the time of execution of a particular instrument, but that person may have been nowhere close to the testator or otherwise involved in the execution of another instrument. The execution of each new instrument which is based upon a similar dispositive scheme thereby multiplies the difficulty of winning for the contestant.

2. In Terrorem Clauses

An in terrorem clause is a clause in a will that a beneficiary's interest, or bequest under the will, is automatically forfeited if the beneficiary asserts a will contest against the will or takes other specified actions as set forth in the clause. In terrorem clauses are generally valid in Texas. *Hammer v. Powers*, 819 S.W.2d 669 (Tex. Civ. App.-- Ft. Worth 1991, no writ). However, in terrorem clauses are strictly construed. *Estate of Newbill*, 781 S.W.2d 727 (Tex. Civ. App.--Amarillo 1989, no writ). There is some argument, as well, that contests or other litigation brought in good faith and with probable cause would prevent the enforcement of an in terrorem clause.

In terrorem clauses, on their face, treat a beneficiary as having predeceased the testator if that beneficiary files a will contest. If properly drawn, the in terrorem clause can have two purposes. First, to the extent that a beneficiary is given a fairly substantial bequest under a will, that beneficiary must soberly weigh the consequences of filing a contest and losing the bequest which the contestant would have otherwise received. Thus, it would not

achieve this objective to dissuade an estranged child from filing the contest if that child received a \$1.00 bequest under the will. However, a bequest of one million dollars would require the estranged child to soberly weigh the consequences of filing the contest, even though if successful he or she may be entitled to an intestate share of a significantly higher amount. In addition, it does not practically help to have an in terrorem clause in a will if a bequest is left to a particular person, but the will provides that if that person has predeceased the testator then that person's spouse or child or other decedent receives the same bequest. For those potential contestants that are not concerned whether the bequest goes directly to them or to their family member, the existence of an in terrorem clause would have no effect to dissuade them from filing the contest.

The second reason for use of an in terrorem clause is that a properly drafted in terrorem clause may remove the standing of the contestant once they have filed a contest in violation of the in terrorem clause. As discussed above, the contestant must have standing, that is, a pecuniary interest that will be affected by the outcome of the contest, in order to show standing. If the filing of the will contest effectively removes the contestant from receiving that pecuniary interest and the contestant is not a beneficiary under the prior will or heir at law if there is no prior will, the contestant loses standing to continue to the contest.

II. Estate Litigation

A. Characterization of Property

In estates where decedents leave surviving spouses, characterization of the assets of the estate as either community property or separate property becomes of critical importance to both the beneficiaries

of the estate as well as the surviving spouse. Disputes over the characterization of assets can lead to litigation over ownership of these assets. To a significant degree the rules concerning characterization and tracing of community property and separate property that apply during marriage and in a divorce proceeding will equally apply during estate litigation. This topic is too broad for comprehensive analysis in this article, but there are some general guidelines to remember. Separate property generally consists of the following: (1) property owned prior to marriage, (2) gifts received by a spouse, (3) traceable mutations of separate property, (4) inheritances and bequests received by a spouse, (5) marital partitions of community property into separate property portions, (6) certain personal injury recoveries, (7) certain credit acquisitions, and (8) certain other separate property created pursuant to marital and/or premarital agreements. However, all property that exists during the marriage is presumed to be community, and the spouse or personal representative of the probate estate of a deceased spouse who claims certain property to be separate has the burden of proof on that issue by clear and convincing evidence. Although the death of a spouse ends the community, the community property that exists as of the date of death must be partitioned into two halves and divided between the estate of the deceased spouse and the surviving spouse.

In order for either a probate estate or a surviving spouse to prove the existence of his or her separate property by clear and convincing evidence, the estate or surviving spouse must trace the property in its present form by proper tracing methods to the forms of separate property that are identified above. Several tracing methods exist. This article won't describe how these methods are applied, which is outside the scope of

this article, but examples of tracing methods are: (1) clearinghouse and identical sum inference method, (2) minimal sum balance method, (3) community out first method, (4) pro rata approach, (5) item tracing, and (6) value tracing.

There are a few significant differences between the division of the community estate upon divorce and at death. First, in a divorce the court must order a division of the community estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. *Tex. Family Code Section 7.001*. That does not mean a 50/50 division in every case. The Family Code and Texas law requires the court to look at many factors in determining the “just and right” division, which include the relative earning power and education of each spouse, the separate property owned by each spouse, fault in the break up of the marriage, which spouse will have primary possession of the children, if any, as well as other factors. Often times, the division of the community estate is made in favor of one spouse over another. However at death community property is divided in equal halves between the probate estate and surviving spouse.

A second difference in the division of a community estate upon divorce is that a divorce court can divide certain separate property of a spouse under special circumstances. Specifically property that was acquired by a spouse while domiciled in another estate and that would have been community property of the spouse who acquired the property had the spouse been domiciled in Texas at the time of acquisition, and mutations of that property, may be divided by a divorce court as it deems just and right. *Tex. Family Code Section 7.002*. This type of property has

been commonly referred to as quasi community property, due to the fact that it is separate property based upon the characterization of the property in the state where the property was acquired, but it would have been community property had the person been domiciled in Texas at the time it was acquired. However, the result is different with respect to quasi community property upon the death of a spouse. Upon death, quasi community property will be characterized by the probate court as separate property of the acquiring spouse and will not be divided. *Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987).

B. Temporary Administrator

When estate litigation arises prior to the appointment of an independent executor, it is often times helpful to have a personal representative appointed for the estate to marshal the assets of the estate, to prevent their dissipation or waste, and to take other matters to maintain the status quo of the estate. The temporary administrator can also prevent loss to the estate by beneficiaries who may choose to use self help to gain possession or control over assets of the estate.

C. Contractual Wills

There are instances when persons may choose to enter into an agreement to make their testamentary dispositions irrevocable. A basic principal related to a testator’s will is that it is not intended to have any present dispositive effect, but it is strictly testamentary, meaning that it will have effect after the testator’s death, and is revocable until the testator’s death. Therefore, the testator can choose to change and/or revoke the testator’s will at any time and from time to time. Thus, the concept of persons entering into irrevocable

testamentary dispositions is a departure from basic Texas law concerning wills. Texas Probate Code Section 59A addresses this matter as follows:

“(a) A contract to make a will or devise, or not to revoke a will or devise, if executed or entered into on or after September 1, 1979, can be established only by provisions of a will stating that a contract does exist and stating the material provisions of the contract.

(b) The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract.”

For those persons who desire to enter into contracts concerning their wills, they must expressly state in their wills the existence of a contract and the material terms of that contract. It should be noted that a bequest under a will that becomes irrevocable under a contract changes the tax effects of that bequest. The bequest may not qualify as a marital bequest or charitable bequest, depending on the terms of the contract. Thus, one must be careful in estate planning in connection with these provisions, when dealing with estates that are of the size to be subject to federal estate and gift taxes.

Although not seen as often as in the past, there remains instances where wills that were executed prior to September 1, 1979 are offered for probate. For these instruments, allegations of a contractual will can be based upon oral and other extrinsic evidence. Texas case law concerning wills dated prior to September 1, 1979 is fairly inconsistent in its application as to what evidence constitutes sufficient evidence of a contractual will.

The effect of a testator entering into a contractual will is that the beneficiary or beneficiaries of those contractual dispositive provisions, at the testator’s death, can enforce the contract by asking the court to impose a constructive trust on the assets which are the subject of the dispositive provisions and award those assets to those beneficiaries. This breach of contract claim does not prevent a testator from revoking a contractual will and executing subsequent wills, which may be probated at the testator’s death. The contractual claim does however take the assets subject to those contractual dispositive provisions effectively out of the estate of the testator and those assets are awarded to the beneficiaries of that contract by the court.

D. Marital and Premarital Agreements

Texas law now allows persons intending to be married to enter into premarital agreements and spouses to enter into marital property agreements as well as agreements to convert separate property to community property. These agreements can deal with many different issues including characterization of assets and management rights with respect to those assets. Because these agreements, to the extent valid and effective, will be binding on the estate of a deceased spouse, they must be examined as part of the estate plan in order to determine what assets a spouse has the power to dispose of under his or her will, in order not to create estate litigation by attempting to act in contravention of those agreements.

E. Survivorship Accounts

The Texas Probate Code allows account documents which create accounts, including checking accounts, savings accounts, certificates of deposit, share

accounts, or other like arrangements, at a financial institution to include a contractual provision for the accounts to be payable on death to a designee, or for a multi-party account to have rights of survivorship whereby the proceeds of the accounts will be owned by the last survivor of the parties to the account. *Tex. Probate Code Sections 436-462*. However, in order to create these types of accounts, the contract of deposit between the parties to the account and the financial institution must contain sufficient language to be classified as such. While the Texas Probate Code offers form language for financial institutions to use in their contracts of deposit with depositors, it is not typical for financial institutions to go strictly by the offered language. Therefore, it is often that parties who do not intend to have a pay on death or survivorship feature on an account end up with the “wrong” boxes checked which purport to create those rights. Also, parties who do intend to create pay on death and survivorship rights often find out too late that there was not sufficient language in the contract of deposit or account documents with the financial institution to create such rights on the account.

If a pay on death or survivorship account is correctly created under Texas law, then that account is not a probate asset that will pass and be disposed of under a testator’s will. To the contrary, that asset will pass in accordance with the contract to the pay on death beneficiary or to the survivor of the account in the case of a survivorship account. A fair amount of estate litigation is created due to accounts at financial institutions that are not properly set up in accordance with the depositors’ intent. Accounts that were intended to be pay on death or survivorship accounts and were not properly set up are assets of the depositors’ estate at the depositors’ death, rather than

the pay on death beneficiary or the survivor. Often times there is litigation between the personal representative of the estate and the survivor or beneficiary of the account as to whether the account did or did not constitute a proper survivorship or pay on death account. It would be helpful if the estate plan of a person dealt with those accounts by will consistently with the intention of the testator so that if the contractual provision failed for lack of enforceability, the account will be disposed of under the will consistently with the testator’s intent.

III. Fiduciary Litigation

A. Powers of Attorney

A power of attorney is an instrument which authorizes another to act as one’s agent within the scope of the matters set forth in that instrument. A power of attorney can provide broad or general powers to the agent, or can be special or limited in the scope of authority given to the agent. The power of attorney can also give immediate authority upon execution or can provide for the authority to only become effective subsequently upon the occurrence of an event, such as the principal’s disability. This latter form of a power of attorney is referred to as a springing power of attorney. Finally, if the principal grants a power of attorney and later loses mental capacity to transact business, the power of attorney ceases at that time unless it is expressly made durable. *Tex. Probate Code Section 490(a)*. However, even a durable power of attorney ceases on the death of the principal or upon the appointment of a guardian of the principal’s estate once the guardian has qualified.

A power of attorney creates an agency relationship between the principal and the attorney-in-fact, and the attorney-in-fact owes a fiduciary duty to its principal. Texas

case law had interpreted the scope of this fiduciary duty to consist of a fiduciary duty with respect to matters within the scope of the attorney-in-fact's agency. *Plummer v. Estate of Plummer*, 51 S.W.3d 840, 842 (Tex. App.--Texarkana 2001, pet. den.). In this respect, a fiduciary owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability. *Sassen v. Tanglegrove Townhouse Condominium Association*, 877 S.W.2d 489, 492 (Tex. App.--Texarkana 1994, writ den.). an agent must fulfill its duties with reasonable care, diligence, good faith, and judgment, and if it fails to do so, it will be liable to its principal for the resulting damage. *Id.*

Cases which involve claims of undue influence in a will contest where the alleged influencer was also acting as an attorney-in-fact under a power of attorney create special obstacles for the proponents of the will who are trying to defend the attack. The existence of a fiduciary duty will generally cause the burden of proof with respect to the transactions and dealings between the principal and the attorney-in-fact to require that the attorney-in-fact show that the attorney-in-fact acted in utmost good faith and with honesty and fair dealing. Although the burden of proof on the existence of undue influence remains on the contestant with respect to setting aside the will, the additional issues introduced into the case and the heavy burden placed on the attorney-in-fact concerning loyalty and fairness in his or her dealings can make a significant difference to the jury and how they evaluate the evidence overall.

The use of powers of attorney also create obstacles in estate litigation concerning survivorship accounts. For instance, in *Plummer v. Estate of Plummer*, *supra*, an out of town sister sued her brother

and sister who were acting as attorneys-in-fact under a power of attorney for their mother when they closed a certificate of deposit which gave the out of town sister rights of survivorship and placed the proceeds of the certificate of deposit in a checking account giving the brother and sister rights of survivorship. The burden of proof was on the brother and sister to show they acted in compliance with their fiduciary duties in these transactions. The court found they met their burden because there was a need to have the funds in a checking account to pay the medical bills of their mother, and they disclaimed their rights as survivors on the account.

An interesting recent development in this area is found in the case of *Vogt v. Warnock*, 2003 WL 21197043 (Tex. App--El Paso 2003, pet. filed) In this case, the executor of the decedent's estate filed suit against the decedent's fiancé for breach of fiduciary duty as the decedent's attorney-in-fact. After the couple had become engaged, the decedent named his much younger fiancé as attorney-in-fact under a statutory durable power of attorney. The fiancé never acted under this document. The decedent also employed her under a contract for employment for the remainder of her lifetime and transferred four real properties to her by gift. He also named her as beneficiary of a brokerage account and a life insurance policy.

The court phrased the question before the court as follows: Does execution of a power of attorney in favor of a person who has never acted under its authority create a fiduciary relationship as a matter of law? The court concluded that it did and that the fiancé was required as a fiduciary to prove the fairness of the gifts to her. If this court correctly decided Texas law on this matter (which is ultimately up to the Texas

Supreme Court), then it requires any person to use extreme caution in either naming or consenting to be named as an attorney-in-fact. The mere existence of a power of attorney, if it creates a fiduciary relationship between the parties on all matters, whether within the scope of the power of attorney or not and whether exercised or not, would mean that the attorney-in-fact must bear the burden of proving utmost good faith and fair dealing, honesty in fact, and fairness of all transactions. These are not burdens normally existing in dealings between persons, either with respect to gifts given or with respect to contractual matters entered into in otherwise arms length transactions. It is suggested that caution be used in naming attorneys-in-fact based upon this holding.

B. Duties of Executors/Trustees/Administrators

Executors, trustees, and administrators are all fiduciaries as a matter of law. Executors and administrators are fiduciaries over the property in the probate estate and owe their fiduciary obligation to the beneficiaries of the estate. Trustees are fiduciaries over the property in the trust and owe their fiduciary obligations to the beneficiaries of the trust. Generally, these fiduciary duties include the following: (a) duty of loyalty, (b) duty not to delegate, (c) duty to keep and render accounts, (d) duty to furnish information, (e) duty to exercise reasonable care and skill, (f) duty to take and retain control of trust or estate property, (g) duty to preserve trust or estate property, (h) duty to enforce claims, (i) duty to defend the estate or trust against claims of third parties, (j) duty not to commingle trust or estate assets from the fiduciary's own assets, (k) duty to use reasonable care in selecting a financial institution, to properly designate the deposit as a trust or estate deposit, to not

subject the deposit to unreasonable restrictions on withdrawal or leave the assets in non-interest bearing accounts for unduly long periods, (l) duty to act reasonably with respect to the management of investments with respect to preservation of value and insuring the assets are productive, (m) duty to deal impartially with beneficiaries, (n) duty to participate in administration of the estate or trust with co-fiduciaries and to not delegate duties to co-fiduciaries, and (o) duty to use reasonable care to prevent co-fiduciaries from committing a breach of duty and to not follow the directives of any person the fiduciary knows or should know is exceeding or violating the person's authority with respect to that direction.

A detailed study of these duties are covered in "Trust Administration: A Handbook for the Trustee" and "Trust Administration: A Handbook for the Independent Executor", both by H. Kate Hopkins.

Another excellent article concerning fiduciary duty is entitled "Litigation Involving Fiduciaries: Trial Handbook" written by Joyce W. Moore. In her article, Ms. Moore divides the duties of a fiduciary into four headings as follows: (a) The duty of competence, (b) the duty to reasonably exercise discretion, (c) the duty of loyalty, and (d) the duty to make full disclosure of material facts. While the burden of proof will be on the claimant to show that the fiduciary failed to comply with its duty of competence and duty to reasonably exercise discretion, the fiduciary has the burden to show that it complied with its duty of loyalty and duty to make full disclosure of material facts.

C. Other Fiduciaries

Unlike attorneys-in-fact, executors, administrators, and trustees, who are fiduciaries as a matter of law, accountants and other non-legal professionals are not fiduciaries as a matter of law. However, a fact question can arise whether a relationship of trust and confidence arises that changes the arms length nature of the transaction to one of a fiduciary relationship.

In *Dominguez v. Brackey Enterprises, Inc.*, 756 S.W.2d 788 (Tex. App.--El Paso 1988, writ den.), investors who lost their investment in a sea food company sued several defendants, including their accountant who recommended the investment. The jury found that a fiduciary relationship existed between the investors and the accountant. The evidence consisted of a long association between the investors and accountant in a business relationship as well as a personal friendship, which justified the investors' placing confidence that the other party would act in the investors' best interest.

In *Blue Bell, Inc. v. Peat Marwick Mitchell & Co.*, 715 S.W.2d 408 (Tex. App.-Dal. 1986, writ ref. n.r.e.), a trade creditor sued an accounting firm that had performed an audit of financial records for the trade creditor's debtor before that debtor went bankrupt. Causes of action included breach of fiduciary duty. The court stated, "the usual fiduciary relationships are those such as between attorney and client, partners, joint venturers, and close family members such as parent and child. A fiduciary relationship may arise outside these usual situations where the dealings between the parties have continued for such a period of time that one party is justified in relying on the other to act in his best interest. Mere subjective trust, however, is not enough to

transform arms-length dealing into a fiduciary relationship (citations omitted)." In this case, the court held that no evidence existed to create a fact issue concerning the existence of a fiduciary relationship between the trade creditor and the accounting firm.

D. Other Causes of Action

In fiduciary litigation, it is common to see other causes of action joined with claims of breach of fiduciary duty. Such causes of action include the following:

1. Fraud

Fraud can consist of either an intentional misrepresentation or a concealment or failure to disclose information when there is a duty to disclose. The elements of intentional misrepresentation fraud are: (a) the party makes a material misrepresentation, (b) the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth of the representation and as a positive assertion, (c) the misrepresentation is made with the intention that it should be acted on or relied upon by the other party, and (d) the other party acts and/or relies on the misrepresentation which proximately causes damages to the other party. Elements of concealment or failure to disclose fraud are: (a) a party has a duty to disclose due to a fiduciary or other special relationship and the party conceals or fails to disclose a material fact within the knowledge of that party, (b) the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, (c) the party intends to induce the other party to take some action by concealing or failing to disclose the fact, and (d) the other party suffers damages proximately caused by the failure to disclose such facts. *Formosa Plastics Corporation*

USA v. Presidio Engineers and Contractors, Inc., 960 S.W.2d 41 (Tex. 1998).

2. Negligence and Negligent Misrepresentation

In the context of providing professional services, negligence exists from the breach of the duty owed by the professional to its client to exercise the degree of care, skill, and competence that reasonably competent members of the profession would exercise under the same or similar circumstances, which proximately causes damages to the client. *Averit v. Price, Waterhouse, Coopers, L.L.P.*, 89 S.W.3d 330 (Tex. App.--Ft. Worth 2002, no pet.). Negligent misrepresentation occurs when: (a) a party makes a representation in the course of his business or in a transaction of which he has pecuniary interest, (b) the representation supplies false information for the guidance of others and their business, (c) the party making the representation did not exercise reasonable care or competence in obtaining or communicating the information, (d) the receiver of the information is within the class of persons that the party making the misrepresentation knew was intended to rely on that information, (e) the receiver's reliance on the information was justified, and (f) damages were proximately caused to the receiver of the information due to the reliance. *Federal Land Bank Association of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). As an example of this cause of action, the court in *Blue Bell, Inc.*, *supra*, found that a fact issue existed whether the accounting firm made a negligent misrepresentation, although a fiduciary relationship was found not to exist.

3. Conspiracy

Civil conspiracy is another tag along cause of action that may be brought against a second defendant after the first defendant has been found to have committed a tort or statutory violation that proximately caused the plaintiff damages. The elements of civil conspiracy are: (a) two or more defendants, (b) an objective to be accomplished, (c) a meeting of the minds on the objective or course of action, (d) one or more unlawful overt acts and (e) damages as a proximate result. *Massey v. Armco Steel Company*, 652 S.W.2d 932 (Tex. 1983). Thus, hypothetically, if a fiduciary breaches a fiduciary duty and is knowingly assisted in that objective by another party such as a lawyer or an accountant, the lawyer or accountant could be held liable under the cause of action of civil conspiracy.

4. Tortious Interference With Inheritance Rights

In *King v. Acker*, 725 S.W.2d 750 (Tex. App.--Hou. [1st Dist.] 1987, no writ), the court held that one who by fraud, duress, or other tortious means, intentionally prevents another from receiving from a third party an inheritance or gift, commits the act of tortious interference with inheritance rights. The claimant must show that they would have received the property but for the tortious interference in order to have standing to bring the claim. *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144 (Tex. App.--Hou. [14th Dist.] 1998, writ denied).

IV. Trust Litigation

A. Removal of Trustee

Settlers and beneficiaries on occasion desire to re-examine and change the identity of the trustee in both revocable and irrevocable trust instruments. In order

to explore the alternatives of who may serve as trustee or co-trustees, one must start with the trust instrument. If the trust instrument fails to provide a mechanism to change trustees, then the settlor and beneficiaries are left to request that the trustee resign in order to accommodate their wishes. However, in the absence of a provision in the trust instrument, a right to revoke the trust, or a violation of the trustee's duties giving rise to a right of removal, the trustee has complete discretion whether or not to resign.

In the event the settlor, beneficiaries and trustee cannot work out a mutual agreement concerning replacing a trustee, the beneficiaries are left with the alternative of a removal action against the trustee. Generally, settlers of an irrevocable trust do not have standing absent a provision in the trust instrument to bring an action to remove a trustee, unless they are also a beneficiary of the trust. Grounds for removal actions can involve a breach of fiduciary duty, a failure to comply with the terms of a trust instrument, or hostility exhibited toward the beneficiary by the trustee. In order to remove a fiduciary for misconduct, the acts or omissions must be material. *Tex. Property Code Section 113.082*; *Tex. Probate Code Section 149C*. Not every breach of fiduciary duty will justify removal.

In *Akin v. Dahl*, 661 S.W.2d 911 (Tex. 1983), cert. den. 466 U.S. 938 (1984), the Texas Supreme Court stated that hostility, ill will, or other factors that have affected the trustee so that he cannot properly serve in his capacity is grounds to remove a trustee. However, the court stated that hostility must not have been primarily created by the beneficiaries' actions or such hostility is not sufficient for removal.

Texas Property Code Section 113.082(a) was amended, effective September 1, 2003, to add that a trustee may be removed or its compensation denied if the trustee fails to make an accounting that is required by law or by the terms of the trust.

B. Actions to Compel Distributions

Trust instruments must be followed with respect to distribution standards, and when a trust instrument sets forth a standard, that standard is strictly construed. For example, a health, support and maintenance standard would prevent a trustee from making trust distributions to a beneficiary for something in excess of those expenses. However, there are many trust instruments that provide discretion to a trustee with respect to distribution standards. Notwithstanding, a trustee's discretion is never absolute, and must be exercised reasonably. *See Sassen, supra*. A court can review the trustee's decision to determine if it was an abusive discretion. *Corpus Christi Bank and Trust v. Roberts*, 597 S.W.2d 752, 754 (Tex. 1980); *First National Bank of Beaumont v. Howard*, 229 S.W.2d 781, 783 (Tex. 1950); *Lucas v. Lucas*, 365 S.W.2d 372, 376 (Tex. Civ. App.--Beaumont 1962, no writ). When in doubt, trustees may seek clarification from the court concerning disagreements between interested persons of how to exercise such discretion or in questions where the trust instrument is not clear. *Tex. Trust Code Section 115.001(1), (4) and (7)*.

C. Breach of Trust Concerning Investment Standards and Allocations by Trustee

As part of a fiduciary's duty to act with competence, the law in Texas concerning a trustee's standard of care to be utilized in investment and management of the trust's

property has been that which a person of ordinary prudence, discretion and intelligence would exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probably income from as well as probable increase in value in safety of their capital. In other words, Texas law has used the ordinary prudent person standard. *Tex. Property Code Section 113.056(a)*.

House Bill 2240 passed by the 78th Legislature on June 20, 2003 amended the Texas Property Code to remove the ordinary prudent person investment standard and to replace it with the Uniform Prudent Investor Act. This Act has been codified as Texas Property Code Chapter 117. This Act requires a trustee, subject to the provisions of the trust instrument, to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust, using reasonable care, skill, and caution. In addition, the act states, “a trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.” It appears that, on the face of the Act, the investment standard has been increased by the change from an ordinary prudent person to a prudent investor standard.

House Bill 2241 was passed by the Legislature on June 20, 2003 and enacted the Uniform Principal and Income Act, setting forth a comprehensive procedure for fiduciaries to allocate receipts and disbursements between principal and income. This Act is codified as Chapter 116 of the Texas Property Code. This Act not

only applies to trustees, but also fiduciaries of an estate.

Both the Uniform Prudent Investor Act and the Uniform Principal and Income Act are effective January 1, 2004 for trusts existing on or created after that date. The Uniform Principal and Income Act is also applicable to estates of a decedent who dies on or after January 1, 2004 or whose estate is pending as of January 1, 2004.

Texas Property Code Section 113.0211 was also added by the 78th Legislature in 2003 to allow adjustments between principle and income by a charitable trustee to carry out the purposes of the trust.

D. Accountings

Texas Property Code Section 113.151(a) previously required that upon written demand from a beneficiary, the trustee was required to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later. In addition, that section provided that if the trustee failed or refused to deliver the statement within a “reasonable time” after the demand was made, any beneficiary of the trust could file suit to compel the trustee to deliver the statement to all beneficiaries of the trust.

The 78th Legislature in 2003 amended this section to provide that if the accounting is not delivered by the trustee within 90 days after demand, unless a longer period is ordered by the court, the trust beneficiary may file suit to compel the accounting and, if successful, be awarded attorneys’ fees and costs against the trustee either in its individual capacity or in its capacity as trustee. Thus, the time frame has been revised to be more definitive, and there is

now potential penalties of attorneys' fees and costs either against the trustee or against the trust for failure to comply.

E. Modifications

A client's need to modify a trust after it has been created and that is otherwise irrevocable is commonly encountered. Texas Property Code Section 112.054 sets forth the requirements in such a case, and reads as follows:

“(a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:

(1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; or

(2) because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust.

(b) The court shall exercise its discretion to order a modification or termination under Subsection (a) in the manner that conforms as nearly as possible to the intention of the settlor. The court shall consider spendthrift provisions as a factor in making its decision whether to modify or terminate, but the court is

not precluded from exercising its discretion to modify or terminate solely because the trust is a spendthrift trust.”

Common reasons for modifications include:

1. Changing provisions concerning the identity of present and successor trustees,
2. Changing the instrument based upon tax law changes.

For example, a trust that the client perceives to be too small to justify a corporate trustee, but which includes a provision requiring a corporate trustee, may be sought to be modified to allow an individual trustee based upon the relatively small size of the trust and the increased cost in administering the trust which were not known to or anticipated by the settlor at the time the trust was created. In addition, it is often that trust instruments do not have provisions for successor trustees in the instrument, or those provisions have become unworkable because of deaths, disabilities, or refusals to serve. Modification of these provisions allows a comprehensive plan of succession to be put in place.

Tax law changes that constitute circumstances not known to or anticipated by the settlor, which impair the accomplishment of the purposes of the trust, provide the court with grounds to modify the trust to be administered in conformance with the updated tax law. Where the original intent of the testator is being followed as closely as possible, courts have granted such relief.

Attorneys must use care in modifying trusts that are exempt from generation skipping tax (“GST”). Generally,

irrevocable trusts executed prior to September 25, 1985 which have not been substantively modified since that date are exempt from generation skipping tax. However, a modification of the substantive terms of the trust would subject the GST exempt trust to GST taxes. For example, a person may give property to his or her descendants by skipping a generation up to \$1,060,000 per donor during life or at death under the general skipping tax rules. However, any additional transfers that skip a generation (e.g., a transfer from a grandfather to a grandchild, skipping the generation of the child, is a generation skipping transfer) will be subject to generation skipping tax. If a client has created irrevocable trusts prior to September 25, 1985 that were not subject to generation skipping tax rules and has subsequently through lifetime and testamentary planning made generation skipping transfers to the maximum extent allowed without being taxable, then a modification of an exempt GST trust would cause adverse tax consequences which should be avoided.

In addition to modifications under Section 112.054, drafting errors in the original instrument may provide grounds for common law reformation, if unintentional errors create conflicts or ambiguities in the document. When lines of text have been accidentally dropped from one draft to the next, or when conflicting paragraphs are accidentally included in the instrument, these matters can be addressed by judicial reformation.

F. Exculpatory Clauses

Exculpatory clauses are provisions within a trust instrument which purport to limit the liability of a trustee for what would otherwise be a breach of fiduciary duty. Texas Property Code Section 113.059 allows a settlor of a trust in the trust

instrument to relieve the trustee from a duty, liability, or restriction imposed by the Texas Trust Code, with certain exceptions for corporate trustees. However, exculpatory clauses will be strictly construed. *Jewed v. Capital National Bank of Austin*, 618 S.W.2d 109 (Tex. Civ. App.--Waco 1981, writ ref. n.r.e.).

It was thought that there were other reasons, based upon public policy grounds, that exculpatory clauses would not be enforced, such as in the case of self-dealing. See *Langford v. Chamburger*, 417 S.W.2d 438 (Tex. App.--Ft. Worth 1967, writ ref. n.r.e), and *Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App.--Texarkana 1987, rehearing den.). However, the Texas Supreme Court in *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240, 249-251 (Tex. 2002), disapproved *Langford* and its progeny. Specifically, the *Grizzle* court held that the state's public policy is reflected in its statutes, and with respect to self-dealing and exculpatory clauses those statutes are contained in the Texas Trust Code. The Court explained that the legislature has expressly authorized the use of exculpatory clauses, stating that they can relieve trustees from liability, and the court held that public policy does not preclude a settlor from relieving a corporate trustee from liability for self-dealing, except for what is specified in the Texas Trust Code. In *Clifton v. Hopkins*, 107 S.W.3d 755 (Tex. App.--Waco 2003, no pet.), the Waco court cited *Grizzle* and stated, "The Texas Supreme Court has recently affirmed that exculpatory clauses in trusts regarding the statutory and common-law duties of trustees are valid under the Trust Code and are not precluded by public policy." Therefore, these clauses provide a significant defense to claims of breach of trust, where the trustee acts in accordance with the language in the trust instrument for its protection.

V. Procedural Issues in Litigation

A. Privileges

The two most commonly used privileges in litigation are work product and attorney/client privilege. The work product privilege is currently defined in Texas Rule of Civil Procedure 192.5(a) as follows:

“(a) Work Product Defined. Work product comprises:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.”

The attorney/client privilege is found in Texas Rule of Evidence 503 and reads as follows:

“(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.

(2) A "representative of the client" is:

(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or

(B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is:

(A) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or

(B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) Rules of Privilege.

(1) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

(2) Special rule of privilege in criminal cases. In criminal cases, a client has a privilege to prevent the lawyer or lawyer's representative from disclosing any other fact which came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have

authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.”

Under the work product privilege, material prepared and communications made prior to litigation but after the date that litigation is anticipated, or during the

pendency of litigation, by a party or a party's representatives, including attorneys and accountants who serve as consultants, are privileged.

Under the attorney/client privilege, communications not intended to be disclosed to third parties other than in furtherance of the rendition of professional legal services are confidential if between the client, the client's representatives, the client's lawyer, the lawyer's representatives or any combination of them. Because a representative of the lawyer expressly includes an accountant who is reasonably necessary for the lawyer's rendition of professional legal services, the work of an accountant can be privileged under this rule.

The better practice is to have the law firm execute an engagement letter with the accounting firm employing the accountants as the lawyer's representative for the purpose of furthering the rendition of professional legal services when it is desired that the work and communications from accountants be confidential and privileged. However, if the accountant's work is going to be used as evidence in a case or if the accountant is going to act as a testifying expert, there is no privilege on any communication or work material of the accountant. Nor is there any privilege with respect to any material the accountant has reviewed. Thus, it is important for the client, accountant and attorney to make a decision whether the accountant is going to act in a consulting role only, and therefore a privilege be claimed with respect to communications and work product of the accountant, or whether the accountant will serve the role of a testifying expert in which event none of the communications from or to the accountant or other materials prepared by or reviewed by the accountant will be privileged. Information intended to remain

privileged which is shared early in a case or transaction with the accountant may end up having adverse consequences if the client later wants to use the accountant as a testifying expert.

It is common, however, to start an engagement using an accountant as a consultant to prepare preliminary work and opinions, with the possibility remaining open that the accountant will later be named as a testifying expert. In these cases, while a privilege initially attaches to the accountant concerning communications and material prepared or reviewed, it is important to not share anything that is intended to remain privileged with the accountant if there is any intention to designate the accountant as a testifying expert.

B. Experts: Qualifications and Admissibility of their Opinions

There have been significant developments concerning the standards for admission of expert testimony in the last ten years, beginning with the case of *Daubert v. Merrell-Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993) which was later followed by the Texas Supreme Court's decisions in *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995) and *Merrell-Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). In the article, "Eight Gates for Expert Witnesses," 36 *Houston Law Review* 743 (Fall 1999) and "Procedural Issues Under Daubert," 36 *Houston Law Review* 1133 (Winter 1999), Harris County District Judge Harvey Brown provides the following outline for analysis of admissibility standards for expert opinions under the Daubert and Robinson cases and their progeny:

- a. The First Gate: Helpfulness - Pursuant to Rule 702, the subject matter of the

expert's testimony must "assist the trier of fact." If the expert's methodology, reasoning, or foundation is unreliable, the evidence will not assist the trier of fact.

- b. The Second Gate: Qualifications - the expert must be qualified on a case specific opinion-by-opinion basis.
- c. The Third Gate: Relevancy - The expert testimony must be sufficiently tied to the facts of the case so that it will aid the jury in resolving the factual dispute.
- d. The Fourth Gate: Methodological Reliability - The experts methodology must be reliable.
- e. The Fifth Gate: Connective Reliability - The expert's reasoning applying his/her methodology must be sound for the expert's opinion to be admissible.
- f. The Sixth Gate: Foundational Reliability - Reliability of the underlying facts or data upon which the expert's opinion is based.
- g. The Seventh Gate: Reliance Upon Inadmissible Evidence Used by Other Experts - The expert's opinion is inadmissible if the foundational data relied upon by an expert is inadmissible evidence not relied upon by other experts in the field.
- h. The Eighth Gate: Rule 403, "Unfair Prejudice" - Even if the expert opinion testimony passes the seven gates, if it is unfairly prejudicial pursuant to the standards of TRE 403, then it is inadmissible.

As can be seen from an analysis of the foregoing eight gates, an accountant who

intends to act as a testifying expert with respect to matters to which the accountant is qualified, such as accounting procedures or tracing concepts, must ensure that the foundation information or underlying facts and data is accurate. The accountant must also ensure that the methodology used by the expert is sound and reliable (for tracing methods, as an example, that the tracing method is one supported in law and applicable to the specific facts of the case), and that the opinion reached by the expert will assist the trier of fact in answering the specific question being presented.

VI. Tort Reform

The 78th Legislature has adopted new additions in the area of tort reform. House Bill 4 was passed into law and signed by Governor Perry in June of 2003, to be effective on September 1, 2003. Some of the highlights of tort reform in Texas consist of the following:

A. Damages

1. Exemplary Damage Verdicts

The jury must be unanimous in regard to finding liability for and the amount of exemplary damages. A certain instruction of exemplary damages must be included in charge to the court to the effect: "You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous." *Tex. Civil Practices and Remedies Code §41.003*.

2. Existing Caps on Exemplary Damages

The existing caps on exemplary damages are as follows: Exemplary damages are not to exceed the greater of: 2 times (economic + noneconomic damages not to exceed

\$750,000) or \$200,000. The cap does NOT apply to penal code offenses of: (1) murder, capital murder, aggravated kidnapping, aggravated assault, sexual assault, aggravated sexual assault, forgery, commercial bribery, misapplication of fiduciary property or property of financial institution, securing execution of document by deception, fraudulent destruction, removal, or concealment of writing, and theft/third degree felony if any of these are committed knowingly or intentionally; (2) intoxication assault, or intoxication manslaughter; and (3) knowing or intentional injury to a child, elderly or disabled individual unless the conduct occurred while providing emergency health care (but not in a hospital or other health care facility or means of medical transport). These provisions are not made known to a jury by any means and do not apply in cases where damages arise from the manufacture of methamphetamine. *Tex. Civil Practice and Remedies Code §41.008*.

3. Application of Exemplary Damage Elements

To recover for exemplary damages, plaintiffs in probate litigation must prove fraud, malice, or gross negligence and get a unanimous jury verdict in regard to liability for and amount of exemplary damages. Malice and gross negligence are defined below:

Malice - a specific intent by the defendant to cause substantial injury or harm to the claimant.

Gross Negligence – an act or omission, 1) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others;

and 2) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. *Tex. Civil Practice and Remedies Code §41.001*.

4. Reduction of Compensatory Damages for Taxes

When compensatory damages are sought for proof of loss of earnings, loss of earning capacity, loss of inheritance, or loss of contributions of pecuniary value, proof must be presented in the form of net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law. *Tex. Civil Practice and Remedies Code §18.091*. The court will now instruct the jury as to whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes.

5. Effective Date

September 1, 2003 is the effective date for all causes of action filed on or after this date. Actions filed before the effective date, but where a party is joined or designated after the effective date are also included.

B. Interest on Judgments.

Previously, the post-judgment interest rate was the auction rate quoted on a discount basis for US treasury bills published by the Federal Reserve. The floor under old law was 10%, with the ceiling being 20%. Effective September 1, 2003, the post-judgment interest rate is reduced to the prime rate as published by the Federal Reserve Bank of New York on the date of judgment, but not less than 5% nor more

than 15% per annum. *Tex. Finance Code, § 304.003(c)*.

The prime rate may be obtained from the Federal Reserve Bank of New York. (Website: <http://www.ny.frb.org/>).

Pre-judgment interest may not be assessed or recovered on an award of future damages, which are damages incurred after the date of judgment, excluding exemplary damages. *Tex. Finance Code, §304.1045*.

C. Settlement Offers.

In order to promote settlements, the 78th Legislature has adopted provisions to require payment of litigation expenses by opposing parties who do not accept reasonable settlement offers.

1. Supreme Court Rules.

The new legislation provides that the Texas Supreme Court is to issue rules concerning settlement offers by January 1, 2004. House Bill 4 provides that the Supreme Court of Texas must set deadlines for when a defendant must make a declaration to trigger a settlement offer position, the date before which a party may not make a settlement offer, the date after which a party may not make a settlement offer, as well as the procedure for making a settlement offer and in cases where there are multiple parties.

2. Triggered by Defendant

A defendant in a lawsuit must trigger the settlement offer procedure by filing a declaration that the settlement procedure can be used. If there are multiple defendants, each defendant must opt for the settlement provision; otherwise, it only applies to the offering defendant.

When a defendant elects to trigger these provisions, the electing defendant and the parties that make or receive settlement offers in relation to that defendant are subject to these provisions.

3. Application

An offering party is entitled to recover litigation costs (incurred by the offering party after the date the rejecting party rejected the settlement offer) from a rejecting party if the judgment to be rendered will be significantly less favorable to the rejecting party than was the settlement offer.

- a. Definition of Litigation Costs. Litigation Costs are defined as “money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made. . .[and] includes courts costs, reasonable fees for not more than two testifying expert witnesses, and reasonable attorney’s fees.” *Tex. Civil Practice and Remedies Code §42.001*.
- b. Significantly Less Favorable. A judgment will be significantly less favorable to the rejecting party than is the settlement offer if:
 - i. if the rejecting party is the claimant and the award is less than 80% of the rejected offer; or
 - ii. if the rejecting party is the defendant and the

award is more than 120% of the rejected offer. *Tex. Civil Practice and Remedies Code §42.004.*

Note: the term “award” has not been defined in this legislation, though it would seem the total jury award would be what is measured above.

- c. Litigation costs awarded under this chapter may not be greater than:

- 50% of the economic damages awarded
- +100% of the noneconomic damages awarded
- +100% of the exemplary damages awarded
- any statutory or contractual liens in connection with the claim.

- d. Costs limited to those incurred after Rejection Date. The litigation costs to be recovered are limited to those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer. *Tex. Civil Practice and Remedies Code §42.004.*

Also, it should be noted that a party may not recover costs if litigation costs are already awarded or recovered under other law.

4. Exceptions.

The following are excluded the settlement offer provisions: class actions; shareholder’s derivative actions, actions by or against a governmental unit; actions

under the Family Code, workers compensation actions, actions in Justice of the Peace courts, and any other action the Supreme Court chooses to exempt.

5. Settlement Offer Requirements.

A settlement offer is required to be in writing, state that it is made under Chapter 42 of the *Texas Civil Practice and Remedies Code*, state the terms which claims may be settled, state the deadline in which the settlement offer must be accepted, and the settlement must be served on all parties to whom settlement offer is made.

6. Effective Date.

This settlement offer legislation applies to actions filed on or after January 1, 2004.

7. Valuing the Settlement Offer

The House Bill 4 legislation gives no direction or guidance as to valuing the settlement offer when a promise of future services, future payment, or other acceptable settlement term is used. How these types of offers will be compared to an award, which is necessarily stated in present dollar terms, is uncertain. For payouts into the future, will these be required to be computed in terms of present value and, if so, what discount rate will be used? These questions hopefully will be addressed by the Texas Supreme Court in formulating rules.

118640