HOW THE LEGISLATURE HAS CHANGED YOUR DOCUMENTS

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TABLE OF CONTENTS

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I. INTRODUCTION

A. Background

A will, being a revocable disposition of property that becomes effective at the testator's death, creates numerous opportunities for ambiguity and uncertainty because many years can pass before the testator dies and the will is probated. During the intervening period of time, the size, nature, extent and value of the testator's estate can change considerably; intended beneficiaries of the estate can die or become incapacitated; other persons of interest may be born or adopted.

A will which does not anticipate these changes in property and beneficiaries through the clear expression of the testator's intent in view of all of the possibilities that could occur after the date of execution will likely need either interpretation or construction following probate. Although frequently used interchangeably, the two concepts will be distinguished in this article. Interpretation will be described as the process of determining the actual intent of a testator from the four corners of the will and any other admissible extrinsic evidence; it is factual in nature. Will construction will be used to describe the legal process of ascertaining the testator's "deemed intent" when the rules of interpretation do not reveal the testator's actual intent. Historically, a court resolved the controversy by applying an established, or creating a new, rule of construction where the testator failed to express his or her intent in the will itself.

Accordingly, the rules of will construction are important not only to the probate lawyer representing the personal representative or beneficiaries of the estate but also to the estate planner whose understanding of the rules can help the planner prepare a well drafted will that does not need construction in the future. In other words, a well drafted will, in the author's opinion, is one that is drafted in a way that avoids the need to resort to the rules construction to determine the proper distribution of the estate (i.e., the testator's intent is clearly expressed for all possibilities within the will's four corners).

However, over the last thirty years or so, the legislature has passed a number of statutory provisions which either override, modify or confirm many of the rules of the common law that had added a measure of certainty to the administration of estates and the drafting of wills. During this same time period, another phenomena has occurred. The will has been replaced by the revocable trust, as the key dispositive document, in increasing numbers of estate plans. This outline will attempt to identify these changes and discuss how they affect the estate practice.

For example, in some states, statutes have been passed that direct that a revocable trust, being a will substitute, should be interpreted and construed as a will. Revocable trusts in Texas are still governed generally by the law of trusts. Other will substitutes, like life insurance and retirement benefits, are also being widely used. However, the law of wills remains the focal point due, in large part, to the absence of established rules of construction in these other areas, and throughout the outline, the differences in results when using a will substitute rather than a will will be noted. One conclusion that will be reached is that there are relatively few generally accepted rules of construction for the will substitutes.

B. The Role of the Court

The Texas Supreme Court has described the role of a court in the interpretation and construction of a will. The focus should be on the testator's intent, intent to be ascertained from the language found within the four corners of the will. The focus should not be on what the testator intended to write, but the meaning of the words actually used. Accordingly, courts are not to redraft wills to vary or add provisions "under the guise of construction of the language of the will" in order to reach a presumed intent.

The determination of a testator's actual intent from the four corners of a will requires a careful examination of the words used. If it is unambiguous, a court should not go beyond specific terms in search of the testator's intent. When there is no dispute about the meaning of words used in a will, extrinsic evidence is not admissible to show that the testator intended something outside of the words used. On the other hand, a court may consider evidence concerning the situation of the testator, the circumstances existing when the will was executed, and other material facts in order for the court to place itself in the testator's position at the time, when a term is open to more than one construction. San Antonio Area Foundation v. Lang, 35 S.W.3d 636 (Tex. 2000).

Only when the testator's actual intent cannot be determined from the "four corners" or any admissible evidence are rules of construction to be applied to determine the testator's presumed intent.

II. TYPES OF TESTAMENTARY GIFTS

Traditionally, the terms "bequest," "legacy" and "devise" have referred to differing types of testamentary gifts (gifts under a will) and their differences depended primarily on the nature of the property that was the subject matter of the gift. Modern terminology frequently uses these terms interchangeably as testamentary gifts of real and/or personal property. Tex. Prob. Code § 3(h),(i) &(s). To avoid any confusion, this outline will use the more generic term, "testamentary gift." However, it is important to distinguish the four basic types of testamentary gifts because the rules of construction can apply differently to different types of gifts. See Hurt v. Smith, 744 S.W.2d 1 (Tex. 1987).

A. Specific Gifts

A "specific gift" is a testamentary gift of a particular item of real or personal property that is distinguishable from all other assets of the testator's probate estate. Generally, it can be satisfied only by delivering the subject of the gift to the intended beneficiary. In other words, the beneficiary has a right to the specific property itself. Common examples include: (i) "I devise Blackacre to my son Charles"; (ii) "I bequeath my 1000 shares of IBM common stock to my daughter Ann"; (iii) "I give my NationsBank checking account to my sister Sue"; and (iv) "I give the money owing to me from brother Mike to my sister Sue."

B. General Gifts

A "general gift" under a will is one that can be satisfied out of the general assets of the estate, but it is not a gift of a specific item of property. In other words, a certain quantity or type of property is the subject of the gift. The intended beneficiary is not entitled to any specific item in the probate estate as of the time of the testator's death. In effect, at the testator's death, the intended beneficiary has a "claim" against the estate to be satisfied by the executor selecting what asset to distribute among several choices or perhaps purchasing the subject of the gift for the beneficiary with estate assets. Common examples include: (i) "I give $5,000 dollars to my sister Sue"; (ii) "I bequeath 1,000 shares of Exxon stock to my brother Bill"; and (iii) "I devise 500 acres of land to my son Charles."

C. Demonstrative Gifts

A testamentary gift is "demonstrative" if the testator intends for it to be satisfied initially from a particular source, but if the indicated source is insufficient or unavailable to satisfy the gift, the executor is directed to satisfy it out of the general assets of the estate. In effect, it is a hybrid, taking on the characteristics of both specific and general gifts. An example is: "I bequeath to my brother Bill $10,000 from the sale of my home, otherwise from the general assets of my estate." These gifts are not very common.

D. Residuary Gifts

A "residuary gift" is a testamentary gift that is a type of general gift (although a

particular will may direct that a specific item be included as part of the residuary, thus being specific as to that asset). It is the disposition of the assets of the estate remaining after the distribution of the specific, general and demonstrative gifts. It is also usually defined to refer to the estate after the satisfaction of the claims and other obligations of the estate. The absence of a residuary clause will likely result in some assets of the probate estate passing by intestate succession.

III. RULES OF WILL CONSTRUCTION

When a person dies testate in Texas, the property devised in the decedent's will, both real and personal, vests immediately in the devisees of the estate subject to the payment of the debts of the testator and subject to the right of possession of a court appointed personal representative who has the duty to hold such estate in trust to be disposed of in accordance with the Texas Probate Code. Tex. Prob. Code § 37. At common law, real property vested in devisees, but personal property vested in the personal representative. Although the statute appears to be straight forward, determining the identity of the devisees and exactly what they are entitled to will likely depend to some degree on certain rules of construction which apply to all testamentary gifts.

A. Surviving the Testator

As discussed above, the title to the testator's real and personal property vests in the testator's devisees at the time of death. Since a will is defined as a revocable disposition that takes effect at the testator's death, it only follows that a devisee under will must survive the testator in order to receive the testamentary gift since the testator's date of death is the effective date of the disposition. If the beneficiary predeceases the testator, the beneficiary does not own a property interest that becomes a part of the deceased devisee's probate estate. In other words, the subject of the testamentary gift does not pass to the beneficiary's heirs and/or devisees, unless the testator's will designates them as substituted devisees. Carr v. Rogers, 383 S.W.2d 383 (Tex. 1964). This fundamental concept was modified when the Texas Probate Code was amended in 1979 to require a devisee not only survive the testator, in fact, but also that the devisee survive the testator by 120 hours, unless the will provides differently. Tex. Prob. Code § 47(c).

Note: Section 47, by its own terms, also applies to other types of dispositions, life insurance, trusts, including revocable trusts.

B. Predeceasing the Testator

A testamentary gift for an individual beneficiary who either predeceased a testator or who is deemed to have predeceased a beneficiary due to Sec. 47 (or the terms of the will itself) is said to have "lapsed." Further, unless the will provides differently, the subject property of the lapsed gift passes under the residuary clause of the testator's will, if any, or if the lapsed gift is the residuary gift itself (or if there is no residuary clause) the lapsed gift passes by intestate succession to the testator's heirs at law. See Sewell v. Sewell, 266 S.W.2d 924 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.) These common law concepts have been recently codified into the Texas Probate Code. See Tex. Prob. Code § 68(b) and (d), effective Sept. 1, 1993. Sec. 68(b) seems to apply regardless of the exact wording of the residuary clause unless the will expressly provides that a lapsed specific or general gift is pass elsewhere.

1. ANTI-LAPSE STATUTE

The gift will not, however, lapse if the deceased devisee was a member of a statutorily defined set of the testator's family who died before (or who are deemed to have died before) the testator leaving lineal descendants of the devisee surviving the testator (by at least 120 hours). In that event, the subject matter of the lapsed gift passes to the lineal descendants of the deceased beneficiary, as substituted takers under the testator's will, unless the will provides differently. Tex. Prob. Code § 68(a). It is important to note that the lapsed gift does not become a part of the deceased beneficiary's

estate; it does not pass to the deceased beneficiary's heirs and/or devisees in those capacities.

2. 1991 AMENDMENT

Prior to 1991, the anti-lapse statute was limited in application to devisees who were lineal descendants of the testator. In 1991, it was expanded to include lineal descendants of the testator's parents. See Tex. Prob. Code § 68(a).

3. TESTATOR'S INTENT

The "anti-lapse" statue, Sec. 68(a), applies only if the testator does not indicate a contrary intent in the will. For example, a gift to "my son Bill, if he survives me," or "to my surviving children" will negate its application. See Sec. 68(e), which was clarified in 1993 with the addition of some illustrative language. It should be noted that the statutory phrase, "to my surviving children," is similar to "surviving children of this marriage" which has been held to refer to the testator's children living at the time the will was executed. Henderson v. Parker, 728 S.W.2d 768 (Tex. 1987).

4. STRICT CONSTRUCTION

Texas courts have held that the "anti-lapse" statute should be applied only in the particular situations described in the statute. See Logan v. Thompson, 202 S.W.2d 212 (Tex. 1947) and Andrus v. Remmert, 146 S.W.2d 728 (Tex. 1941).

Note: Section 69, by its own terms, applies only to wills.

C. Fractional Gifts

A testamentary gift to two or more individuals can trigger an unanticipated application of the concept of lapse and anti-lapse, if the will does not indicate an intent to the contrary. For example, if Blackacre is left in a specific gift to the testator's friends, "Tom, Dick and Harry," the gift is considered a fractional gift of an undivided one-third interest to Tom, an undivided one-third interest to Dick and an undivided one-third interest to Harry. If Harry predeceases the testator, the gift of his undivided one-third interest lapses and passes as part of the residuary estate of the testator, if any, and not to Tom and Dick. If the subject matter of the gift was the residuary estate itself, the gift of Harry's undivided one-third interest in the residuary estate would lapse pursuant to the common law rule and pass by intestate succession to the testator's heirs at law. On the other hand, if Harry had been a lineal descendant of the testator or a lineal descendant of the testator's parents, then Harry's undivided one-third interest in a specific, general or residuary gift would pass to his lineal descendants who survived the testator under the anti-lapse statute. See Jensen v. Cunningham, 596 S.W.2d 266 (Tex. Civ. App.—Corpus Christi 1980); Tabor v. National Bank of Commerce, 351 S.W.2d 126 (Tex. Civ. App.—San Antonio 1961), Riley v. Johnson, 367 S.W.2d 83, (Tex. Civ. App.—Waco 1963), Swearingen v. Giles, 565 S.W.2d 574 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.), Estate of O'Hara, 549 S.W.2d 233 (Tex. Civ. App.—Dallas 1977). This fractional gift rule was modified by the legislature in 1993. Sec. 68(c) & (d) of the Texas Probate Code now provide that unless the "anti-lapse" statute applies:

> (c) . . . if the residuary estate is devised to two or more persons and the share of one of the residuary devisees fails for any reason, the residuary devisee's share passes to the other residuary devisees, in proportion to the residuary devisee's interest in a residuary estate.
>
> (d) . . . if all of the residuary devisees are dead at the time of the execution of the will, fail to survive the testator, or are treated as if they had predeceased the testator, the residuary estate passes as if the testator had died intestate.

Presumably, however, the fractional gift rule remains in effect for specific and

general gifts. Further, if gift is made to two or more individuals who are also described as a class, the gift is treated as a fractional gift, not a class gift. McGill v. Johnson, 775 S.W.2d 826 (Tex. Civ. App.—Austin 1989, aff'd in part, rev'd in part, 799 S.W.2d 673 (Tex. 1990).

D. Class Gifts

If a testamentary gift is left to a class of beneficiaries consisting of lineal descendants of the testator's parents (rather than a fractional gift to a group of individuals), and if one of the members of the class predeceases the testator, a conservative court may view the anti-lapse statute as being inapplicable because the potential member of class who predeceased the testator was never a member of the class, since, under class gift rules, the class opens at the testator's death. Accordingly, the gift to that person technically did not lapse; thus, the anti-lapse statute would not be applicable. Texas courts have, however, applied the anti-lapse statute to class gifts which otherwise qualify for anti-lapse treatment. Burch v. McMillin, 15 S.W.2d 86 (Tex. Civ. App.—Eastland 1929). This concept was codified into the Texas Probate Code in 1991. See Tex. Prob. Code § 68(a). If the anti-lapse statute is not applicable, the surviving members of the class, if any, receive the gift. Hagood v. Hagood, 186 S.W. 220 (Tex. Civ. App.—Ft. Worth 1916, writ ref'd).

E. Abatement

All assets of the decedent's estate (except the homestead and other exempt personal property) are liable for the decedent's debts. Tex. Prob. Code § 37. Which particular assets should be used to actually pay the debts depends initially on the testator's intent as expressed in the will. See Kennard v. Kennard, 84 S.W.2d 315 (Tex. Civ. App.—Waco 1935, writ dism'd). In the absence of a stated intent on the part of the testator, Texas courts prior to 1987 followed the common law principal of "abatement." Technically, "abatement" is the reduction of testamentary gifts if the estate is insufficient to pay all of the debts and all of the testamentary gifts. ATKINSON, WILLS, 754 (1953). Practically, it refers to the order of payment, as well.

1. COMMON LAW ABATEMENT

Under the common law concept, intestate property was to be applied first to pay the debts, then the decedent's residuary assets, then the other general assets of the and finally the specific and demonstrative bequests. If both real and personal property were included within a priority category, personal property was to be used before any real property within that category. See Thompson v. Thompson, 236 S.W.2d 779 (Tex. 1951); Avery v. Johnson, 192 S.W. 542 (Tex. 1917); McNeill v. Masterson, 15 S.W. 673 (Tex. 1891). Warren v. Smith, 620 S.W.2d 725 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

2. STATUTORY ABATEMENT

In 1987, the Texas Legislature adopted a statutory abatement process. Sec. 322B of the Texas Probate Code now directs that testamentary gifts will abate in the following order to pay debts and administration expenses:

a. Property not disposed of by will, but passing by intestacy;
b. Personal property of the residuary estate;
c. Real property of the residuary estate;
d. General bequests of personal property;
e. General devises of real property;
f. Specific bequests of personal property;
g. Specific devises of real property.

The statute does not affect the right of a secured creditor to elect a "preferred debt and lien" or "matured, secured claim." See Section 322B (b) of the Texas Probate Code.

3. TESTATOR'S INTENT

Statutory abatement applies in all situations except where the testator provides to the contrary in the will, and the testator may very well need to express a different intent depending on the testator's own circumstances. For example, where stock in a closely held corporation and real estate investments are passing as part of the residuary estate, the testator may wish to direct the executor to liquidate the real property prior to the stock in the closely held business, because, absent such a provision, the executor may be forced to first liquidate the stock under Sec. 322B.

4. NONPROBATE ASSETS

Sec. 322B fails to allocate debts to any nonprobate assets although such assets are generally reachable by the decedent's creditors unless there is a specific statutory exemption.

(a) Multiple Party Bank Accounts

Sec. 442 of the Texas Probate Code imposes secondary liability on funds on deposit in "P.O.D." accounts, "trust" accounts or "joint accounts with survivorship rights" if the probate estate proves to be insolvent. Further, due to a 2003 amendment, any party to a multiple party account, other than a convenience signer, may pledge the account, or otherwise create a security interest in the account, regardless of whether there is a right of survivorship.

(b) Life Insurance

Proceeds of a policy made payable to a beneficiary other than the insured's estate are generally exempt from the claims of the decedent's creditors unless the insured committed fraud in the acquisition of the policy. See Pope Photo Records, Inc. v. Malone, 539 S.W.2d 224 (Tex. Civ. App.—Amarillo 1976, no writ) and San Jacinto Bldg. v. Brown, 79 S.W.2d 164 (Tex. Civ. App.—Beaumont 1935, writ ref'd) but consider the impact of the 1987 amendment to former Art. 21.22 of the Texas Insurance Code, now §§ 1108.051 and 1108.052 which appears to even exempt proceeds payable to the insured's estate.

(c) Qualified Employee Benefits

In the past, it has been generally believed that benefits payable to the employee's estate, like life insurance, will be subject to creditor's claims, but payments made directly to designated third party beneficiaries should be protected from the claims of the deceased employee's creditors. But consider the impact of Sec. 42.0021 of the Texas Property Code, which was added to the exempt property section of the Texas Property Code in 1987 and last amended in 2005.

(d) Revocable Trust Assets

Although there are no definitive cases on point, it is probable that the assets held in a revocable trust will be secondarily liable for the settlor's debts, either before or after the settlor's death.

(e) Joint Tenancies

In a common law joint tenancy, the deceased tenant's interest ceased to exist at death and the unsecured creditors of the deceased tenant could not reach the property since it was then owned by the surviving tenant; however, Sec. 46 of the Texas Probate Code does not authorize true joint tenancies, but joint tenancy by agreement. The author is not aware of any Texas cases that would exempt this property from the deceased joint tenant's creditors.

(f) Sec. 450(b) of the Texas Probate

Sec. 450 technically takes an asset out of the probate category but does not necessarily limit the rights of the decedent's creditors. Sec. 450(b) of the Texas Probate Code.

(g) Uniform Fraudulent Transfer Act

The provisions of this Act may give creditors an additional theory whereby assets

passing nonprobate or inter vivos can be reached to satisfy the decedent's debts. Tex. Bus. & Comm. Code §§ 24.001-24.013.

5. UNRESOLVED ISSUES

It should also be noted that Sec. 322B fails to give direction in a community property situation upon the death of the first spouse. In such situations, "community debts" are primarily payable out of the community property of both spouses. Nesbitt v. First National Bank of San Angelo, 108 S.W.2d 318 (Tex. Civ. App.—Austin 1937). A testator's direction to pay the decedent's debts does not require the use of the decedent's one-half to satisfy the whole debts. Grant v. Marshall, 280 S.W.2d 559 (Tex. 1955). Further, where the estate consists of both non-exempt separate and community assets, there is potential conflict of interest for the personal representative; the expenditure of separate funds to satisfy the debt will inure to the benefit of the surviving spouse while using community funds would accrue to the benefit the decedent's estate. Presumably Sec. 3.203 of the Texas Family Code would be relevant and the facts and circumstances surrounding the source of the debt should be considered. For example, is it a purchase money indebtedness? Is it tortious or contractual in nature? The author is not aware of any definitive cases.

6. ADMINISTRATION OF COMMUNITY

During formal administration, the personal representative is entitled to possession of not only the deceased spouse's separate property but also the couple's joint community property and the decedent's special community property. The surviving spouse may retain possession of the survivor's special community property during administration or waive this right and allow the personal representative to administer the entire community probate estate. Tex. Prob. Code § 177. This division of authority does not affect ownership, and of course, both the personal representative and surviving spouse should eventually account for both halves of the community in order to settle the estate. The division of authority prescribed by Sec. 177 is inconsistent with the Sec. 156, which probably imposes at least secondary liability on the decedent's one-half interest in the survivor's special community property in the possession of the survivor. This division of authority dovetails with the contractual management and liability rules of the Texas Family Code and facilitates the personal representative's ability to step into the decedent's shoes and satisfy his debts. Tex. Fam. Code §§ 3.102 and 3.202.

Note: Obviously, Sections 177 and 156 apply only in probate administrations.

F. Apportionment

Prior to 1987, Texas courts treated death taxes as if they were general debts of the estate to be paid out of the estate as ordinary debts pursuant to the rules of common law abatement as discussed in Paragraph III E, supra, unless the will or a particular provision of the Internal Revenue Code directed that taxes be apportioned to a certain recipient. See I.R.C. § 2206 (life insurance), 2207 (general powers), and 2207A (QTIP property). Also see Sinnot v. Gidney, 322 S.W.2d 507 (Tex. 1959). This approach changed in 1987 when the Texas legislature passed an apportionment statute, which now provides, in effect, that in absence a provision in the will, federal estate taxes and state inheritance taxes are to be apportioned to the persons receiving the assets that are included in the decedent's taxable estate, whether by probate or nonprobate disposition, based upon the "taxable value of each person's interest in the estate." Tex. Prob. Code § 322A(b)(1). A 1991 amendment to Sec. 322A makes it clear that a will can include a direction for apportionment or non-apportionment for both probate and nonprobate assets so long as the will does not allocate more than a pro rata share to an interest passing under an instrument created by another. Bequests which qualify for either the federal estate tax marital deduction or charitable deduction do not have to bear any of the death taxes unless the will provides to the contrary. Tex. Prob.

Code § 322A(g). The executor also has a duty to charge each beneficiary of the estate of both of nonprobate and probate assets with his or her prorated share of the death taxes. Tex. Prob. Code § 322A(u).

G. Dissolution of Testator's Marriage

The Texas Probate Code has long provided that, if a testator is divorced after making a will, all provisions in the will in favor of the testator's spouse, or appointing such spouse to any fiduciary capacity, are to be deemed null and void. Tex. Prob. Code § 69. This section was amended in 2007. Not only was the section's title changed, but it's impact was expanded. For decedents who die on or after Sept. 1, 2007, if after executing a will, the testator's marriage is dissolved, all provisions in the will, including fiduciary appointments, shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator, unless the will expressly provides to the contrary. There is also reference to new Sec. 47A. It describes a new probate procedure to have a marriage of less than three years declared void on the grounds that a party lack mental capacity to marry. Tex. Prob. Code § 47A.

H. Texas Redesignation Statutes

While the divorce of a testator generally voids all provisions in the testator's will in favor of the now former spouse, Sec. 472, enacted in 2005, "revokes" provisions in a revocable trust in favor of the settlor's now former spouse (but not the former spouse's relatives). Similarly, beneficiary designations found in life insurance policies and retirement plans in favor of the former spouse are (but not the former spouse's relatives) rendered ineffective according to Texas law, if the divorce occurred on or after Nov. 1, 1987. Tex. Fam. Code.§§ 9.301 and 9.302.

I. ERISA Death Benefits

Notwithstanding Tex. Fam. Code §§ 9.301 and 9.302, which generally void the designation of an ex-spouse as the beneficiary of a life insurance policy or a retirement plan, Federal law appears to preempt the application of those two Texas statutes in situations involving life insurance policies and retirement plans provided by an employer and governed by ERISA. In Egelhoff v. Egelhoff, 532 U.S. 141, 147, 121 S.Ct. 1322, 1327, 149 L.Ed.2d 264 (2001) a resident of the State of Washington obtained a divorce but did not change the designation of his former wife as the beneficiary of a group life insurance policy. Upon Egelhoff's death, his ERISA plan administrator paid the policy proceeds to his former wife. His children then sued her to recover those proceeds, based on a state statute that revoked a designation of a spouse as the beneficiary of a life insurance policy upon divorce. The Supreme Court held that ERISA preempts state law, reasoning, that state law was at odds with ERISA's directives that a plan administrator must make payments to the beneficiary designated by the plan participant.

In Keen v. Weaver,121 S.W.3d 721 (Tex. 2003), the Texas Supreme Court ruled that, notwithstanding the Egelhoff case, a former spouse was *not* entitled to the death benefit of the employee's pension plan after the employee failed to change the beneficiary designation following his divorce. The court of appeals had already reversed the trial court's ruling in favor of the former spouse by reasoning that the Texas redesignation statute, *applied as federal common law*, prevented the former spouse from receiving the ERISA benefits. Compare Heggy v. American Trading Employer's Ret. Account Plan, 123 S.W.3d 770 (Tex. App.—Houston 14 Dist. 2003).

The Texas Supreme Court in Keen concluded that, while Tex. Fam. Code § 9.302 was preempted by ERISA, the former spouse, as part of the original divorce proceeding, had effectively waived her interest in the employee's ERISA benefits. The waiver was enforceable under federal common law in that ERISA's anti-alienation provisions did not apply to such a waiver. It is interesting to note that the U.S. Supreme Court denied the former spouse's writ of certiorari. *See* Keen v.

Weaver, 540 U.S. 1047, 124 S.Ct 808, 157 L. Ed. 2d 695 (2003).

J. Debtor/Beneficiary

If a beneficiary of the estate is indebted to the testator at the time of the testator's death, the testator in the will may forgive the indebtedness as a form of testamentary gift. McNabb v. Cruze, 125 S.W.2d 288 (Tex. 1939). If the indebtedness is not forgiven by the testator, the share of the testator's estate passing to the debtor/beneficiary should be reduced by the amount owed by the beneficiary to the estate, unless the will provides differently, according to the common law concept of "retainer" or "offset." In some jurisdictions, even a debt that has been barred by the statute of limitations can be set off against the beneficiary's share of the estate. The net effect of this concept of retainer is to reduce the share distributable to the debtor/beneficiary and to increase the amount available for others. This principle has been recognized in Texas in intestate situations. Oxsheer v. Nave, 40 S.W. 7 (Tex. 1987). However, a specific devisee who was indebted to the estate was entitled to the gift. Russell v. Adams, 299 S.W. 889 (Tex. Com. App. 1927, approved). No Texas cases were found addressing general or residuary legatees or beneficiaries of life insurance, retirement plans or revocable trusts.

IV. RULES AFFECTING ONLY SPECIFIC GIFTS

Because a specific gift in a will is usually one of a specific item of property owned by the testator on the date the will is executed, the subject of the gift may not be owned by the testator at the time of death or it may have been pledged as the collateral for an indebtedness of the testator or it may have gone through a significant change in value. In other words, a change in the property itself may have a significant effect on the testator's will when it becomes effective.

A. Ademption by Extinction

If the subject of specific gift is not part of the testator's probate estate at the time of the testator's death, the testamentary gift is a nullity unless the current owner of the property at the time of the testator's death (either pursuant to inter vivos transaction or a nonprobate disposition of the testator) is put to an express or equitable election. See VI, infra. Although frequently criticized as being an unduly harsh rule particularly in those situations where there is a clearly traceable mutation of the subject of the gift remaining in the testator's probate estate, Lord Thurlow's "strict identity test" has been followed by the courts unless an apparently adeemed specific gift is construed to be a general or demonstrative one. See O'Neill v. Alford, 485 S.W.2d 935 (Tex. Civ. App.—Houston [1st] 1972).

1. TEXAS DECISIONS

"Absent a contrary intention expressed in the will, the alienation or disappearance of the subject matter of a specific bequest from a testator's estate adeems the devise or bequest." Shriner's Hospital v. Stahl, 610 S.W. 147 (Tex. 1980). The Stahl case also adopts the "strict identity test" by failing to recognize the concept of traceable mutations so that the proceeds received upon the property's sale pass under the residuary clause and not to the specific devisee. A specific gift of the testator's residence described at the time the will has executed does not include an after acquired residence. Wolf v. Hartmangruber, 162 S.W.2d 112 (Tex. Civ. App.—Ft. Worth 1942). Texas courts have even suggested that ademption can occur if the subject matter of the gift is subject to a specifically enforceable contract to sale at the time of the testator's death, thereby causing the proceeds of the sale during administration to pass to the residuary beneficiary, rather than the intended specific devisee. See Willie v. Waggoner, 181 S.W.2d 319 (Tex. Civ. App.—Austin 1944, writ ref'd); Lampman v. Sledge, 502 S.W.2d 957 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.); and Parson v. Wolfe, 676 S.W.2d 689 (Tex. Civ.

App.—Amarillo 1984). Texas courts have also recognized partial ademptions. Rogers v. Carter, 385 S.W.2d 563 (Tex. Civ. App.—San Antonio 1964, writ ref'd).

2. INVOLUNTARY CONVERSIONS

Common law courts justified the sometimes harsh results of the "strict identity test" by reasoning that the testator was aware of the inter vivos disposition of the subject of the specific gift and could have changed the will, if that was what the testator would have desired. For that reason, some states have created exemptions to the rule when the inter vivos disposition of the testator occurred when the testator was not competent and could not have changed the will. See Morse v. Converse, 113 A. 214 (N.H. 1921); Estate of Mason, 397 P.2d 1005 (Ca. 1965); In re Estate of Anton, 731 N.W.2d 19 (Iowa 2007).

3. CHANGES IN FORM

If the change subsequent to the date of the will's execution is one merely of form, rather than of substance, some courts have relaxed the "strict identity test" and refused to adeem the gift. For example, a specific bequest of certain common stock should not be adeemed because the corporation changed its name. See Goode v. Reynolds, 271 S.W. 600 (Ky. 1925). Texas has recognized this exception. See Shriners v. Stahl, supra. An aspect of this concept was incorporated into Section 70A(a) of the Texas Probate Code as it applies to corporate securities. See IV C, infra.

4. TESTATOR'S INTENT

A specific gift of corporate stock "together with all dividends, rights and benefits thereon" was found to include the stock of a holding company in which the specific stock had been merged. Guy v. Crill, 654 S.W.2d 813 (Tex. App.—Dallas 1983). See IV C, infra.

B. Accessions and Accretions

The increase or decrease in value of the subject matter of a specific gift prior to the testator's date of death does not affect the specific gift in the will. Stock splits will likewise pass to the specific devisee of the stock in existence prior to the split. Morriss v. Pickett, 503 S.W.2d 344 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.). This rule has also been applied to a general gift of so many shares of corporate stock. O'Neill v. Alford, 485 S.W.2d 935 (Tex. Civ. App.—Houston [1st Dist.] 1972). On the other hand, it also generally held that the devisee of a specific gift is not entitled to any of the pre-death income the subject of the specific gift generates, unless the will provides the contrary. Texas codified this principle in 1993 as it applies to corporate securities. See Tex. Prob. Code § 70A(b). Post-date of death income is, however, payable to the specific devisee. Hurt v. Smith, 744 S.W.2d 1 (Tex. 1987). This principle was also codified in 1993. See Tex. Prob. Code § 378B(c).

C. Sec. 70a(a), Texas Probate Code

Section 70A(a) of the Texas Probate Code, effective Sept. 1, 1993, provides that unless the will clearly provides differently, a specific devise of securities includes (i) securities of the same organization acquired because of stock splits, stock dividends, and new issues of stock acquired in a reorganization, redemption, or exchange (other than securities acquired through the exercise of purchase options or through a plan of reinvestment) and (ii) securities acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization. Tex. Prob. Code § 70A(a) Further, unless the will provides differently, a devise of securities does not include a cash distribution accruing before death, whether or not the distribution is paid before death. Tex. Prob. Code § 70A(b).

Note: Section 70A, by its own terms, applies only to wills.

D. Exoneration

At common law, a beneficiary of a specific gift is generally entitled to receive the subject matter of a specific gift free and clear of any encumbrances. In other words, unless the will provides differently, a specific devisee had a right to have any indebtedness secured by the subject matter of the specific gift paid out of the residue of the estate, if the testator was personally liable for debt. Texas courts adopted this common law concept. See Currie v. Scott, 187 S.W.2d 551 (Tex. 1945). In 2005, the Legislature changed the rule. For wills executed on or after Sept. 1, 2005, a specific devise passes to the beneficiary subject to any debt secured by the property on the date of death. While a general direction in the will to pay all debts does not give the beneficiary a right of exoneration, a specific provision stating that the devise passes without the debt will be given effect. Tex. Prob. Code § 71A.

Note: Section 71A, by its own terms, applies only to wills.

E. Contents

Sec. 58(c) of the Texas Probate Code provides that, unless the will provides to the contrary, a specific gift of personal property does not include any of the subject property's contents and a specific devise of real property does not include any personal property located on or associated with the subject matter. Real property is defined as land and generally whatever is erected or growing upon, or affixed to, land. Personal property is defined broadly to include everything subject to ownership not falling within the definition of a real property. San Antonio Area Foundation v. Lang, 35 S.W.3d 636 (Tex. 2000). The terms "contents" and "titled personal property" have also been defined. See Tex. Prob. Code § 58(c). Terms such as "personal belongings," "furnishings" and "household furnishings" are not defined words of art in the probate code or in the cases. See Goggans v. Simmons, 319 S.W.2d 442 (Tex. Civ. App.—Fort Worth 1958, writ ref'd. n.r.e.); Erwin v. Steele, 228 S.W.2d 882 (Tex. Civ. App.—Dallas 1950, writ ref'd n.r.e.). Similarly, the terms "cash," "money," "funds" have vague meanings. See Stewart v. Selder, 473 S.W.2d 3 (Tex. 1971); In re Estate of Strubar 728 S.W.2d 437 (Tex. Civ. App.—Houston [1st] 1987); Paul v. Ball, 31 Tex. 10 (1968).

Note: Section 58, by its own terms, applies only to wills.

F. Insurance

A specific gift does not include the policies of insurance covering the subject of the gift unless the will provides to the contrary. See Springfield Fire & Marine v. Boon, 194 S.W. 1006 (Tex. Civ. App.—Texarkana 1917 writ ref'd) and In re Barry's Estate, 252 P.2d 437 (Okla. 1952). Consider the impact of this rule when coupled with the concept of ademption where the subject matter of the specific gift is destroyed in the same event that terminates the testator's life; the specific devisee will be entitled only to the subject matter in its damaged condition on the date of death and the residuary beneficiary will receive the insurance proceeds, unless specific gift is defined in the will to include the insurance.

V. RULES AFFECTING GENERAL AND RESIDUARY GIFTS

Changes in the nature, extent and the value of the testator's estate between the date of the will's execution and the date of the testator's death can also affect the testator's general and residuary gifts. Because residuary gifts are a type of general gift, the rules affecting one usually apply to the other.

A. Satisfaction

Sometimes referred to as "ademption by satisfaction," the common law concept of satisfaction is the testate equivalent of advancements in intestate situations; both relate to situations where the owner of property makes an inter vivos disposition that is intended to be either a total or partial satisfaction of the recipient's share of the

property owner's estate at death. Unlike its cousin, ademption by extinction, the concept of satisfaction is applicable to general and residuary gifts (an inter vivos disposition of a specific gift works in ademption by extinction) and is dependent on the testator's intent at the time of the inter vivos disposition. In other words, the testator's intent is the determinative factor, and there exists a presumption of that intent if the testator transfers the property of a similar nature to that devised in the will to the beneficiary and the beneficiary is a child of the testator or if the testator stands in a parental like relationship to the beneficiary. See Hunsucker v. Hunsucker, 455 S.W.2d 780 (Tex. Civ. App.—Waco 1970, writ refused n.r.e.). In 2003, the Legislature created Sec. 37C of the Texas Probate Code, which states that for wills executed on or after Sept. 1, 2003, an inter vivos gift will be considered a satisfaction of a devise only if the testator's will provides for the deduction of the gift, or the testator so declares in a contemporaneous document, or the devisee so acknowledges in writing.

In 1993, the legislature amended Section 44 of Texas Probate Code, relating to intestate advancements, to include non-testamentary dispositions to an heir apparent (such as a life insurance beneficiary designation) as possible advancements and to require written evidence signed by either the testator or the recipient. Further, an advancement is now to be valued at the time the heir came into possession or at the time of the intestate's death, whichever occurs first. Could a non-testamentary disposition to a general or residuary beneficiary be considered a partial or total satisfaction? Possibly, Sec. 37C says property given in partial satisfaction is to be valued as of the earlier of the date on which the devisee acquires possession or the date the testator dies. But, it does not refer to non-testamentary transfers.

Note: Section 37C, by its own terms, applies only to wills.

B. Pecuniary Bequests

As explained in II C.supra, the beneficiary of a general bequest has more of a claim against the testator's estate than a property interest in the specific property of the estate. For example, if the general gift is "$50,000 in cash," the executor has a duty to distribute to the beneficiary upon termination of the estate $50,000 in cash out of the available cash resources of the estate or raised by the sale of non-cash assets in the residuary estate. The executor may deliver to the beneficiary non-cash assets worth $50,000 on the date of distribution, if the will authorizes the executor to "fund in kind" or if the beneficiary agrees to an "in kind" distribution. These common law concepts were codified in 1991. See Tex. Prob. Code § 378A(b). Further, if the gift is one intended to qualify for the federal estate tax marital deduction and the executor has been instructed by the testator to fund at federal estate tax values rather than date of distribution values, the amount distributed by the executor to the beneficiary must be "fairly representative" of the appreciation and depreciation in the available asset pool. See Tex. Prob. Code § 378A(a).

Note: Section 378 applies to both wills and revocable trusts.

C. Interest on Pecuniary Bequests

At common law, the beneficiary of pecuniary bequest was entitled to interest on the bequest after one year had elapsed. Texas courts modified this rule to provide for interest once the bequest became "due and payable" upon the payment of the decedent's debts and the other obligations of the estate. Williams v. Smith, 206 S.W.2d 208 (Tex. 1947). However, in 1993, the legislature, in effect, went back to the common law approach with the passage of Sec. 378B of the Texas Probate Code. The legislature changed the rule again in 2003.

D. Sec. 378b, Texas Probate Code

However, Section 378b, as amended in 2003, effective as of Jan. 1, 2004, addresses

the allocation of debts, expenses, taxes and allowances, as well as income, but also incorporated the then contemporaneously passed Uniform Income and Principal Act. The amended version states:

> (a) Except as provided by Subsection (b) of this section and unless the will provides otherwise, all expenses incurred in connection with the settlement of a decedent's estate, including debts, funeral expense, estate taxes, interest and penalties relating to estate taxes, and family allowances, shall be charged against the principal of the estate. Fees and expenses of an attorney, accountant, or other professional advisor, commissions and expenses of a personal representative, court costs, and all other similar fees or expenses relating to the administration of the estate and interest relating to estate taxes shall be allocated between the income and principal of the estate as the executor determines in its discretion to be just and equitable.
>
> (b) Unless the will provides otherwise, income from the assets of a decedent's estate that accrues after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined according to the rules applicable to a trustee under the Texas Trust Code (Subtitle B, Title 9, Property Code) and distributed as provided by Chapter 116, Property Code by Subsections (c) and (d) of this section.
>
> (c) The income from the property bequeathed or devised to a specific devisee shall be distributed to the devisee after reduction for property taxes, ordinary repairs, insurance premiums, interest accrued after the death of the testator, other expenses or management and operation of the property, and other taxes, including the taxes imposed on the income that accrues during the period of administration and that is payable to the devisee.
>
> (d) The balance of the net income shall be distributed to all other devisees after reduction for the balance of property taxes, ordinary repairs, insurance premiums, interest accrued, other expenses of management and operation of all property from which the estate is entitled to income, and taxes imposed on income that accrues during the period of administration and that is payable or allocable to the devisees, in proportion to the devisees' respective interests in the undistributed assets of the estate.
>
> (e) Repealed (2003).
>
> (f) Repealed (2003).
>
> (g) Income received by a trustee under this section shall be treated as income of the trust.

E. § 116.051. Determination and Distribution of Net Income

After a decedent dies, in the case of an estate, or after an income interest in a revocable trust ends, Section 116.051 of the Texas Trust Code provides:

> (1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Subchapters C, D, and E which apply to trustees and the rules in Subdivision (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.
>
> (2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Subchapters C, D, and E which apply to trustees and by:

(A) including in net income all income from property used to discharge liabilities;

(B) paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under Subdivision (2) or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will. *Unless otherwise provided by the will or the terms of the trust, a beneficiary who receives a pecuniary amount, regardless of whether in trust, shall be paid interest on the pecuniary amount at the legal rate of interest as provided by Section 302.002, Finance Code. Interest on the pecuniary amount is payable:*

(A) under a will, beginning on the first anniversary of th date of the decedent's death; or

(B) under a trust, beginning on the first anniversary of the date on which an income interest ends.

(4) A fiduciary shall distribute the net income remaining after distributions required by Subdivision (3) in the manner described in Section 116.052 to all other beneficiaries even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in Subdivision (1) because of a payment described in Section 116.201 or 116.202 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

(6) A fiduciary, without reduction for taxes, shall pay to a charitable organization that is entitled to receive income under Subdivision (4) any amount allowed as a tax deduction to the estate or trust for income payable to the charitable organization.

F. Residuary Estate

In Texas, a residuary estate under a will is presumed to include any lapsed specific or general gift. Shriners Hospital v. Stahl, supra. This concept has been codified. Tex. Prob. Code § 68(b). Further, residuary beneficiaries are entitled to all of the income of the estate not otherwise properly distributable to specific and general

beneficiaries. Tex. Prob. Code § 378B and Tex. Trust Code § 116.0651. In other words, in a typical residuary clause, such as "I devise the rest residue and remainder of my estate", the clause disposes of that portion of the testator's probate estate which was not specifically or generally given away, including not only those assets not expressly mentioned in the will, but also (i) property not even known to the testator, (ii) property acquired after the execution of the will, (iii) future interests owned by the testator, (iv) proceeds of adeemed property, and (iv) bequests forfeited due to an in terrerorem clause. In other words, there is a strong constructional preference against any property of the estate passing by intestate succession, if there is a residuary clause. In fact, the Legislature has strengthened this presumption. Section 68(c) now provides that, if the residuary estate is devised to two or more persons, and the share of one fails, the share passes to the other residuary beneficiaries, rather than by intestate succession.

On the other hand, a residuary clause in Texas is not presumed to include any property over which the decedent possessed a power of appointment. Republic National Bank v. Fredericks, 283 S.W.2d 39 (Tex. 1935). This concept was codified as well in 2003. Tex. Prob. Code § 58(c). Texas courts have, however, recognized the concept of "implied exercise" of powers. See Republic National Bank, supra. An express exercise of a testamentary general power of appointment in a residuary clause is called a "blending clause, resulting in the property subject to the power becoming part of the residuary estate -- "the doctrine of capture."

Note: As discussed, Section 116.051 applies to both wills and revocable trusts. However, Sections 68 and 58(c) apply only to wills. Further, "lapsed" specific or general gifts in a revocable trust may not pass pursuant to the revocable trust's residuary clause, unless the document so provides in view of the common law rule that does not imply conditions of survivorship on future interests.

G. Apportionment Within the Residuary

The interrelationship of the fractional gift rule discussed above and Sec. 322A can generate an interesting application of statutory apportionment, if the residuary estate is left to more than one beneficiary and at least one of the residuary beneficiaries is the recipient of a fractional gift that qualifies for the federal estate tax marital or charitable deduction. For example, assume that (i) the residuary estate is left to the decedent's children by the first marriage, the decedent's surviving spouse, and the decedent's favorite charity and (ii) that the will does not direct how death taxes are to be paid (or it simply directs death taxes to be paid out of the residuary estate without specifying if the death taxes are to be paid before or after the division into undivided shares), how are the death taxes to be allocated?

1. THE ARGUMENTS

The children will argue that all the death taxes should be paid before the residuary is divided into "thirds." The charity and the spouse will argue their fractional interests are exempt from the payment of death taxes since they qualify for the marital or charitable deduction, causing all of the death taxes being generated by the children's share to bear all of its share of the taxes, thereby increasing the marital and charitable deductions and resulting in a decreased overall death tax liability of the estate.

2. ANALYSIS

Although this issue has not been addressed by the Texas courts, there is, authority from other jurisdictions that support the construction offered by the spouse and the charity. Most courts have reached this conclusion because most testators who leave property to charity or their spouses want to get the largest possible tax deduction. Other courts rely on broader equitable principles and place the ultimate burden of the federal estate tax on the property which generates the tax and not on the property which does not. With

or without an apportionment statute, most states tend to exempt from the ultimate burden of death taxes shares of the estate which qualify for a deduction.

3. MCKINNEY CASE

A leading case on point is the Matter of McKinney, 101 A.D.2d 477, 477 N.Y.S.2d 367 (1984), appeal denied, 63 N.Y.2d 607, 482 N.Y.S.2d 1024, 472 N.E.2d 48 (1984). This is a fact situation arising out of New York which has an apportionment statute similar to Texas' apportionment statute. In that case, the decedent's will directed that all estate and inheritance taxes "be paid out of my testamentary residuary estate." She then left seventy percent of the residue to a hospital and thirty percent to an individual. The court accepted the argument that all the taxes should be allocated to the individual, stating: "Statutory tax apportionment must be applied within the residuary. If the residuary includes. . . a disposition . . . to either a surviving spouse or a charity, those dispositions are totally exonerated from the payment of taxes. . . . It is presumed that the testatrix intended that the St. Agnes Hospital receive the maximum benefit afforded by way of the charitable deduction authorized by Section 2055 of the Internal Revenue Code." Therefore, the 70/30 allocation was to be made before rather than after the death taxes were paid. See also "Construction and Effect of Will Provisions Expressly Relating to the Burden of Estate Taxes," 69 A.L.R.3rd 122, 211 (1976); "Construction and Application of 'Pay-All-Taxes' Provisions in a Will, as Including Liability of Nontestamentary Property for Inheritance and Estate Taxes." 56 A.L.R.5th 133 (1998).

VI. OTHER RELATED CONCEPTS

Other concepts and principals of the law can have a dramatic effect on the disposition of the decedent's estate, if the situations to which they relate are not addressed expressly in the will. Many of these concepts have been affected in recent years by legislation.

A. Equitable Election

Whenever any devisee is entitled to a benefit under a will and asked to suffer a detriment under the will, the devisee cannot accept the benefit without suffering the detriment. The choice is left to the devisee who can elect to accept under the will or elect against the will. The most common example of an election is when the testator attempts to dispose of property which the testator does not own while at the same time devising other property to the actual owner. *See* Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955). Dunn v. Vinyard, 251 S.W. 1043 (Tex. Com. App. 1923, opinion adopted).

1. COMMUNITY PROPERTY ELECTION

It is common for one spouse to attempt to leave a community asset to a third party while leaving the surviving spouse another asset. Such a disposition would put the surviving spouse to an election, the commonly called "widow's election." The surviving spouse is also put to an election when the decedent gives the surviving spouse a life estate in the entire community estate while expecting the survivor to allow her one-half of the community to pass under the decedent's will. Wheeler v. United States, 116 F.3d 749 (5th Cir. (Tex.) 1997), United States v. Past, 347 F.2d 7 (9th Cir. 1965); Vardell's Est. v. Comm., 307 F2d 688 (5th Cir. 1962).

2. THE TEXAS RULE

In Wright v. Wright, *supra,* the Texas Supreme Court explained the Texas rule. First, the will must dispose of property owned by the surviving spouse while at the same time granting some benefits to the surviving spouse. Second, the surviving spouse must elect to allow all or part of his property to pass as provided in the will before accepting the benefits conferred. Third, the will must clearly put the survivor to an election.

3. PROCEDURE

Where one spouse is incapacitated and a guardianship is likely to be needed following the death of the other spouse, the other spouse's will could put surviving spouse to an express election to allow his or her property to pass under the deceased spouse's will in exchange for a benefit under the will. In other words, the language of the will would specifically and expressly set forth the intent to require an election. Calvert v. Ft. Worth Nat. Bank, 348 S.W.2d 19 (Tex. Civ. App.—Austin, 1961). If an election is made by or on behalf of the incapacitated spouse to "accept" the terms of the other's will, the surviving spouse's property would pass into a trust created in the other spouse's will. The question of whether the survivor is put to an election is one of the law for the court. Wright, *supra*. The question of whether the survivor has made an election is one of fact. Generally, two factors are involved. First, the survivor must have been aware of the choice. Second, the survivor must intend to so elect; however, the totality of the circumstances are considered in making this determination. Dunn v. Vinyard, *supra*. Mere acceptance of benefits may be deemed an election to take under the will. See Dougherty, "Election", *Texas Estate Administration* §§ 8.1, 8.2.

B. Pour Over Planning

Section 58A of the Texas Probate Code was amended in 1993 to permit the "pour over" of probate assets to a trustee of an inter vivos trust ". . . if the trust is identified in the testator's will and its terms are in a written instrument, other than a will, that is executed before, with, or after the execution of the testator's will or in another person's will if that other person has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust." In other words, the trust "pour over" no longer needs to be either in existence prior to the testator's death or at the time of the wills execution. Prior to the enactment of Sec. 58A in 1961, the common law concepts of incorporation by reference and facts of independent significance were used to validate pour over wills.

C. Negative Will

Section 58 of the Texas Probate Code was amended in 1991 to eliminate any reference to the term "expectancy" as something that can be devised since one person does not have the power to devise an expectuary in another's estate. In addition, Sec. 58 now permits a testator to disinherit an heir through a testamentary document in order for the testator to eliminate the possibility of a particular person of receiving anything.

D. Duties of Life Tenant

The second Section 5.009 found in the Texas Property Code was added in 1993 and provides that, if a life tenant of a legal life estate is given the power to sell and reinvest any life tenancy property, the life tenant is subject, with respect to the sale and the investment of the property, to all of the fiduciary duties of a trustee imposed by the Texas Trust Code or the common law. It further provides that the life tenant may retain, as life tenancy property, any real property originally conveyed to the life tenant without being subject to the fiduciary duties of a trustee, although the life tenant would remain subject to the common law duties of a life tenant. A life tenant does not have the authority to sell the property absent authority in the disposition that created the life estate. Ellis v. Bruce, 286 S.W.2d 645 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.).

E. Acceleration of Future Interests

Both Sec. 112.010(d) of the Texas Property Code and Section 37A of the Texas Probate Code were amended in 1993 to make it clear that a disclaimer of a present interest in a will or a trust will accelerate any future interest following the disclaimed present interest. Prior to these amendments, it was not clear whether or not the following future interest was accelerated. See Barrows v. Ezer, 668 S.W.2d 854 (Tex. Civ. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) and Aberg v. First National Bank in Dallas, 450 S.W.2d 403 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.).

F. Disclaimers by Surviving Spouse

The 2007 amendments to Sec. 37A were primarily non-substantive; subsections were added and titles given. The only substantive change is one that extends the time for charities and governmental entities to file disclaimers. Sec. 37A of the Texas Probate Code was also amended in 1993 to make it clear that a surviving spouse may disclaim a specific devise (or other form of transfer) in favor of a bypass trust (or any other form of transfer) in which the surviving spouse is a beneficiary. The proposed amendment enables the surviving spouse to make a qualified disclaimer pursuant to Sec. 2518 of the Internal Revenue Code and Treas. Reg. § 25.2518-2(e)(2). Further, the surviving spouse is specifically authorized to disclaim under a community property survivorship agreement in order for the deceased spouse's one-half interest to pass under the decedent's will or by intestacy. Tex. Prob. Code § 37A. Of course, Sec. 37A was enacted in 1971 to negate the old common law dichotomy – devisees could disclaim under a will but heirs could not renounce their intestate share. Now both devisees and heirs can disclaim.

Note: Section 37A applies to wills, life insurance, multiple party accounts and retirement benefits, but the disclaimer rules for revocable trusts are found in the Texas Trust Code. Tex. Trust Code § 112.010.

G. Effect of Disclaimer on Devisee's Creditors

The 1993 changes also codified the result of Dyer v. Eckols, 808 S.W.2d 531 (Tex. App. —Houston [14th Dist.] 1991, writ dism'd), which held that a disclaimant's creditors could not attach the disclaimed property. Section 37A was amended in 1993 to provide that a disclaimer should relate back for all purposes to the death of the decedent, thereby exempting the property from the claims of any creditor of the disclaimant. Similar changes were made to Sec. 112.010(d) of the Texas Property Code and to Sec. 24.002(12) of the Texas Business and Commercial Code in order to coordinate all those sections and provide consistency under Texas law. A Texas court has held that a beneficiary can disclaim even though a turnover order had been entered. Parks v. Parker, 957 S.W.2d 666 (Tex. App.—Austin 1971, no writ). However, a disclaimer is not effective as against a federal tax lien. Dryer v. U.S., 120 S.Ct. 474 (1999). In the Matter of Homer Simpson v. Penner, 36 F.3d 450 (5th Cir. 1994), the Fifth Circuit, in a bankruptcy case, held that a disclaimer under Texas law does not constitute a fraudulent transfer. However, in a recent bankruptcy case in Texas, the court held that a debtor's disclaimer filed after her Chapter 7 petition was filed could be avoided by the trustee as an unauthorized post-petition transfer after reviewing the Simpson case. In re Schmidt, 362 B.R. 318 (Bankr. W.D. Tex. 2007); see also In re Frausto, 259 B.R. 201 (Bankr. N.D. Ala. Dec. 12, 2000) [FN 15 "fifth line of cases"] and 11 U.S.C.A. § 348(f)(1)(A) and Bankruptcy Reform Act of 1994, Pub.L. No. 103- 394, § 702(b), 108 Stat. 4106, 4150 (1994).

H. Representation

Section 43 and Section 45 of the Texas Probate Code were amended in 1991 to provide that representation for intestate succession purposes will be determined using "per capita with representation" for intestacy purposes, inheritance for lineals and collaterals alike, rather than strict "per stirpes" as was the case for lineal descendants of the intestate. This change went into effect for decedent's dying after Sept. 1, 1991. Accordingly, any property passing by intestacy will pass differently if no child of the person in question is surviving, but grandchildren are surviving.

I. Community Property Inheritance

Sec. 45 of the Texas Probate Code was amended again in 1993 to provide that, on the intestate death of one of the spouses to a marriage, the community property of the deceased spouse passes to the surviving spouse, if no child or other descendant of the deceased spouse is surviving or if all

surviving children and descendant of the deceased spouse are also children of the surviving spouse. If there are any children or descendants of the deceased spouse, the deceased spouse's one-half interest passes to all of the deceased spouse's descendants, as it was prior to Sept. 1, 1993.

J. Pretermitted Children

Sec. 67 of the Texas Probate Code had been amended in 1993 to broaden the scope of Sec. 67's language "provided for" and "provision is made" to include gifts by the testator's will in trust and nonprobate dispositions outside the testator's will which were intended to take effect at the testator's death. In effect, if any provision made for the after-born or after-adopted child, whether in the will or by a non-testamentary disposition, then the child is not pretermitted. A 2003 amendment made it clear that, if there were any other children when the will was executed, the preterminated child's share is limited to a share in the other children's interest, whether vested or not. Tex. Prob. Code § 67(A)(1)(B).

K. Cy Pres and the Rule Against Perpetuities

Sec. 5.043 of the Texas Property Code was amended in 1991 to clarify that a non-charitable gift or trust which violates the rule against perpetuities can be reformed so that it does not violate the rule in order to avoid the confusion created by Foshee v. Republic National Bank, 617 S.W.2d 675 (Tex. 1981) and Ball v. Knox, 768 S.W.2d 829 (Tex. App.—Houston [14th Dist.] 1989).

L. Division and Combination of Trusts

Sec. 112.057 of the Texas Property Code was amended in 2005 to permit a non-judicial division or combination of an existing trust for any reason, if division or combination does not impair the rights of the beneficiaries or the purposes of the trust.

M. Non-Marital Children

The statute setting forth the standards of inheritance for non-marital children for intestate succession purposes was substantially rewritten in 1989 to provide that a child would be considered the child of the biological father if the child was born under circumstances described by the predecessor to § 160.204 of the Texas Family Code, was adjudicated to be the child of the father by court decree as provided in the predecessor to Chapter 160 of the Texas Family Code, was adopted by the father, or the father executed a statement of paternity as provided in the predecessor to §§ 160.301 and 160.302 of the Texas Family Code (or like statement property executed in other jurisdiction). Further, if none of those actions took place during the father's lifetime, the child may now petition the probate court to determine if the alleged father was the biological father of the child. If the biological link is established, the child is to be treated as if such a child were a natural, legitimate child of the father for intestacy purposes and pretermission purposes, as well as homestead, exempt property and allowance purposes. Tex. Prob. Code § 42(b). For purposes of inheritance, a non-marital child has always been deemed to be legitimate to the child's mother. Tex. Prob. Code § 42(a). Of course, in a will, what is meant by the term "child" or "children" will depend on the intent of the testator. Traditionally, the terms "issue" or "children" or "descendants" have been construed not to include non-marital children of a father unless the will indicates a contrary intent. Hayworth v. Williams, 116 S.W. 43 (Tex. 1909); Tindol v. McCoy, 535 S.W.2d 745 (Tex. Civ. App.—Corpus Christi 1976 n.r.e.) Will a change in policy for intestacy purposes mean a change in presumption for will construction purposes?

N. Adoption

Sec. 162.017(c) of the Texas Family Code provides that the "term 'single child,' 'descendent,' 'issue' and other terms indicating the relationship of parent and child include an adopted child unless the context or express language clearly indicates otherwise."

One court of appeals case has stated that this adoption statute "is no more than an aid to be employed in the construction of the will and is not controlling". Sharp v. Broadway National Bank, 761 S.W.2d 141 (Tex. App.—San Antonio 1988 no writ). In Ortega v. First RepublicBank, Fort Worth, N.A. Trustee, 792 S.W.2d 452 (Tex. 1990), the term "any other great grandchildren who may be born after my death" was found not to include adopted children. In Lehman v. Corpus Christi National Bank, 668 S.W.2d 687 (Tex. 1984), an adopted adult was included under bequest to "descendants" where the will specifically defined descendants to include adopted children and issue. In Diemer v. Diemer, 717 S.W.2d 160 (Tex. Civ. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.), the term "issue" was said to indicate a greater preference to blood relationships thru the term "descendants." In Parker v. Parker, 131 S.W.3d 524 (Tex. App.—Ft. Worth 2004), the court held that, notwithstanding language in the will stating children "born of the daughters' bodies" would share equally, adopted great-grandchildren were included in the class of great-grandchildren.

O. Devise to an Attorney

A devise to an attorney who prepares/supervises the preparation of a will (as well as others related to or associated with the attorney) is void unless the person is the testator's spouse, an ascendant or descendant of the testator, or related within the third degree of consanguinity. Tex. Prob. Code § 58(b).

VII. CONCLUSIONS

The will of a testator who died thirty years ago would have been construed very differently than one with identical terms for an individual who died today. The revocable trust of a settlor would be construed very differently today than a will with essentially the same terms. A dispositive document, whether it is a will or a revocable trust, written today may be construed in the future very differently than it would be today.

Thus, care must also be taken when an issue arises today in determining the meaning of the will of a testator or settlor who died years before. Are the relevant rules of construction that have been adopted in subsequent years applicable or are the rules in effect years ago the rules to apply?

These difficulties confirm the truism that a well drafted will or revocable trust is one which does not need the application of ever changing rules of construction to determine who gets what, when and how!

Accordingly, the following list of rules for drafting are suggested to help ensure that the actual intent of a client will be carried out 10, 15, 25, 35 or 50 years from now:

1. *Define who are the beneficiaries*.
   For example, what does the client actually mean when using terms like "children", "grandchildren", "descendants", "issue" or "nieces or nephews"? Are step-children, non-marital children, pretermitted children, adopted children, and adults who are adopted as adults to be included within those terms? What about scientifically generated descendants?

   Expressly state what happens if an individual beneficiary, fractional gift beneficiary or class member predeceases the client. Make it clear whether the beneficiary of a future interest must survive the termination of the preceding interest. Define "survivorship" for the beneficiaries; 120 hours, 30 days, 60 days or 90 days, etc.

   Further, at a minimum have any property passing to a minor distributable be a custodian under T.U.T.M.A. or contingent trustee for the minor.

2. *Avoid implied elections*.
   For example, the plan should distinguish between probate and nonprobate assets. The will should

attempt to dispose of only the testator's probate assets and not any nonprobate assets of the decedent passing to a third party beneficiary unless the testator intends to put the recipient of the nonprobate asset to an express election. If married, the testator should distinguish between the testator's separate property and the couple's community property and clearly manifest the intent to dispose of only the decedent's one-half interest in the community. In other words, do not create an implied widow's election situation. Further, clarify whether or not the testator intends to exercise any powers of appointment in the will. Further, do not attempt to dispose of any other person's property in the will unless the testator intends to put that person to an express election.

When marital property is to be placed into a revocable trust, steps should generally be taken to ensure that the planning:

(a) Is not deemed fraudulent or even "illusory" under *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968). In this case, the husband placed his sole management community property into a revocable trust; upon his death, the wife disrupted the plan by pulling her one-half interest out of the trust under the "illusory" transfer doctrine.

(b) Is not deemed void because one spouse unilaterally attempted to transfer community property subject to joint control into the trust.

(c) Does not amount to a "mixing" of the different types of community property so that special community assets become joint community property.

(d) Does not work a commingling of community and separate funds as to risk losing the separate character of the separate property.

(e) Does not amount to, nor was it intended to be, a partition of community property into their respective separate estates.

In other words, precautions should be taken in the drafting and funding of the trust to document that the retained equitable interest in community assets placed in the trust remain community during the balance of the marriage, and if an asset was a spouse's special community property, that it maintains that character as well unless a different result is intended after due consideration of the consequences. Of course, a spouse's retained interest in any separate property should remain separate in most situations.

3. *Anticipate changes in the subjects of specific gifts*.
For example, stipulate whether any specific gift is to pass "free of" or "subject to" any indebtedness existing with the respect of the property at the time of the decedent's death. Further, stipulate whether any specific gifts are to include any casualty insurance policies in order to negate ademption by extinction. Anticipate which assets may undergo changes of substance or form and state whether or not traceable mutation thereof, or an alternative gifts, is to pass to the intended beneficiary.

4. *Return to an employee or an insured any interest one person, particularly a*

spouse, may have in another person's retirement plan or an insurance policy on another's life.

5. *Always include a residuary clause and an alternative residuary disposition. Further, expressly provide what happens if a beneficiary dies before the client. Make it clear that, if a specific or general gift fails, the property passes as part of the residuary.*

6. *Express specifically how death taxes, debts and administration expenses should be paid and whether or not assets passing outside of the will are to be burdened to avoid statutory abatement and apportionment.*

7. *Clarify what type of representation is desired by the testator, "per stirpes" or "per capita with representation."*

8. *Include spendthrift provisions and perpetuities savings clauses for any trusts created for intended beneficiaries.*

9. *Stipulate whether or not any amount owing by beneficiary to the client, whether enforceable or not, is to be taken into consideration in determining the beneficiary's net share of the estate.*

10. *Negate any implication that the plan is being executed pursuant to a contract.* Of course, if there is a contract, the plan should comply with Section 59A of the Texas Probate Code, if a will is involved. If it is a trust, focus on when the revocable trust can be revoked by a spouse.

Finally, whether a will or revocable trust is the key dispositive document, coordinate the disposition of other assets, probate or nonprobate, with the key document.

APPENDIX NO. 1
Testamentary and Nontestamentary Dispositions
Statutory Rules of Construction

TEXAS PROBATE CODE

Sec. 37A, 1971
Means of Evidencing Disclaimer or Renunciation of Property or Interest Receivable from a Decedent – applies to wills, community property survivorship agreements, joint tenancies, survivorship accounts, life insurance policies, and retirement plan.*

Sec. 37C, 2003
Satisfaction of Devise – applies only to wills.

Sec. 47, 1979
Requirement of Survival by 120 Hours – applies to wills, community property survivorship agreements, joint tenancies, life insurance policies and living trusts.

Sec. 58(c), (d), 1993
Interests Which Must Pass Under Will (contents defined) – applies only to wills.

Sec. 58(a), 1961
Devises or Bequests to Trustees – applies only to wills.

Sec. 58(b), 2001
Devises and Bequests That Are Void – applies only to wills.

Sec. 58(c), 2003
Exercise of Power of Appointment – applies only to wills.

Sec.6-7, 1955
Pretermitted Child – applies only to wills.

Sec. 68(a), 1955
Prior Death of Legatee (anti-lapse provisions) – applies only to wills.

Sec. 68(c), (d), 1993
Prior Death of Legatee (lapse provisions) – applies only to wills.

Sec. 69, 1955
Voidness Arising from Divorce – applies only to wills.**

Sec. 79A, 1993
Increase in Securities; Accessions – applies only to wills.

Sec. 71A, 2005
No Right of Exoneration of Debts; Exception – applies only to wills.

Sec. 322A, 1987
Apportionment of Taxes – applies to wills and any other disposition included in decedent's gross estate for federal tax purposes.

Sec. 322B, 1987
Abatement of Bequests – applies to wills only.

Sec. 378A, 1987
Satisfaction of Pecuniary Bequests – applies to wills and revocable trusts.

Sec. 378B, 1993
Allocation of Income and Expenses During Administration of Decedent's Estate – applies only to wills.***

Sec. 472, 2005
Revocation of Certain Nontestamentary Transfers on Dissolution of Marriage – applies to revocable trusts only.**

*See Tex. Trust Code § 112.010, 1983, Acceptance or Disclaimer by or on Behalf of Beneficiary (applies to revocable trusts).

**See Tex. Family Code §§ 9.301 and 9.3-2, Pre-Decree Designation of Ex-Spouse and Beneficiary of Life Insurance and Pre-Divorce Designation of Ex-Spouse as Beneficiary in Retirement Benefits and Other Financial Plans.

***See Tex. Trust Code §§ 116.051, 116.052, 2003, Determination and Distribution of Net Income – applies to wills and revocable trusts. See also Tex. Trust Code §§ 116.101, 116.102 and 116.103.

TEXAS TRUST CODE

Sec. 111.0035, 2005
Default and Mandatory Rules; Conflicts Between Terms and Statute – applies to revocable trusts and testamentary trusts.

Sec. 112.010, 1983,
Acceptance or Disclaimer by or on Behalf of Beneficiary (applies to revocable trusts).

Sec. 112.035, 1983
Spendthrift Trusts – applies to revocable and testamentary trusts.

Sec. 112.036, 1983
Rule Against Perpetuities – applies to revocable trusts and testamentary.

Sec. 112.051, 1983
Revocation, Modification or Amendment by Settlor – applies to inter vivos trusts.

Sec. 112.054, 1983
Judicial Modification on Termination of Trusts – applies to revocable trusts and testamentary trusts.

Sec. 113.021, 1983
Distribution to Minor or Incapacitated Beneficiary – applies to revocable and testamentary trust.

Sec. 113.022, 1983
Power to Provide Residence and Pay Funeral Expenses – applies to revocable and testamentary trusts.

TEXAS PROPERTY CODE

Sec. 5.009, 1993
Duties of Life Tenant – applies to legal life estates.

Sec. 5.042, 1983
Abolition of Common Law Rules – applies to any testamentary or nontestamentary disposition.

Sec. 5.043, 1983
Reformation of Interests Violating Rule Against Perpetuities – applies to any testamentary or nontestamentary disposition.