

**THE ANATOMY OF A WILL:  
PRACTICAL CONSIDERATIONS IN WILL DRAFTING\***

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**CHAPTER 2.1**



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## ANATOMY OF A WILL

### SCOPE OF PRESENTATION.

The outline is divided into four major parts.

- Part 1 Nutshell of Substantive Law Regarding Validity of a Will. Part 1 presents a "nutshell" discussion of substantive wills law doctrines regarding the validity and legal effectiveness of a last will and testament.
- Part 2 Specific Will Provisions. The typical estate planning client's first comments regarding the estate planning process often are: "I only need a simple will." Therefore, it is important to understand the substantive law reasons that particular clauses are needed in wills. Part 2 reviews various specific provision contained in wills, and summarizes will law, probate law and trust law doctrines affecting the specific provisions.
- Part 3 Coordinating Nonprobate Assets. Part 3 briefly describes beneficiary designations for coordinating life insurance proceeds and death benefits from employee benefit plans with the provisions in the will.
- Part 4 Appendix. Part 4 contains a will form checklist and samples of basic wills.

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### PART 1.

#### NUTSHELL OF SUBSTANTIVE LAW REGARDING VALIDITY OF A WILL

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##### I.

#### FUNDAMENTAL REQUIREMENTS OF A WILL

##### • What Is a "Will"?

**1. GENERALLY.** Broadly stated, a "will" is the legal declaration of a person's intentions which he or she wills to be performed after his or her death. "A will is generally defined as an instrument by which a person makes a disposition of his property to take effect at his death, and which by its own nature is ambulatory and revocable during his lifetime." *In re Estate of Brown*, 507 S.W.2d 801, 803 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.). While clearly not an advisable practice, a single document may be drafted to serve as both a will and another legal instrument. *See Calhoun v. Killian*, 888 S.W.2d 51 (Tex. App.--Tyler 1994, writ denied) (single document qualified as both a will and a lease); *compare Dickerson v. Brooks*, 727 S.W.2d 652, 654 (Tex. App.--Houston [1st. Dist.] 1987, writ ref'd, n.r.e.)

(single instrument qualified as a promissory note and a non testamentary transfer under Texas Probate Code § 450(a); therefore, transfer at death was effective notwithstanding lack of donor's signature).

The Texas Probate Code clarifies the breadth of the term "Will" as follows:

"'Will' includes Codicil; it also includes a testamentary instrument which merely: (1) appoints an executor or guardian; (2) directs how property may not be disposed of; or (3) revokes another will." TEX. PROB. CODE ANN. § 3(ff) (Vernon 2003).

**2. ORIGIN OF THE TERM "LAST WILL AND TESTAMENT"**. The origin of the term "Last Will and Testament" itself is interesting. A common belief is that the term "Will," being an old English word, was used by the king's common law courts, who administered real property, and that the term "Testament," being a word of Latin origin, was used by Latin-trained ecclesiastical courts, which administered personal property. However, there is evidence that these common stated assumptions are incorrect, and that the words have been used interchangeably as far back as the English records go, even before the development of the Court of Chancery. *See* DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 331 (1963). Professor Mellinkoff's theory is that the phrase "Last Will and Testament" is traceable to the English law's custom of doubling words of English origin with synonyms of French or Latin origin (free and clear, had and received, etc.).

##### **3. SUMMARY OF BASIC REQUIREMENTS.**

The basic requirements of a will are:

- It must identify the testator;
- It must be written with "testamentary intent";
- The testator must have "testamentary capacity" to execute a will (i.e., over eighteen years of age and of sound mind); and
- The will must be executed with the requisite testamentary formalities.

##### • Testamentary Intent

**1. GENERALLY.** The testamentary intent requirement is not statutory, but is required under a well-developed body of case law. *See generally* EDWARD W. BAILEY, *TEXAS PRACTICE - TEXAS LAW OF WILLS* §§ 221-226 (1968). "The animus testandi does not depend upon the maker's realization that he is making a will, or upon his designation of the instrument as a will, but upon his intention to create a revocable disposition of his property to take effect after his death.

It is essential, however, that the maker shall have intended to express his testamentary wishes in the particular instrument offered for probate." *Hinson v. Hinson*, 280 S.W.2d 731, 733 (Tex. 1955).

**2. INSTRUMENT CLEARLY LABELED AS A WILL.** Typically, there will be no question regarding the testamentary intent of a testator who signs an instrument that is clearly labeled as a will and is in the general form of a will. However, an instrument in the form of a will is not executed with testamentary intent where it is executed under compulsion, merely as part of a ceremony, or for purposes of deception. See *Shiels v. Shiels*, 109 S.W.2d 1112, 1115 (Tex. Civ. App.--Texarkana 1937, no writ) (instrument labeled as a will denied probate where the instrument was signed solely for the purpose of complying with requirements to enter into a lodge, but testator told witnesses that he did not want to make a will and signed the instrument only after being told he would be able to revoke it after the completion of the initiation).

**3. MODELS OR INSTRUCTION LETTERS.** Numerous cases have indicated that letters directing the preparation of a will or codicil may not be probated as the person's will. See *Price v. Huntsman*, 430 S.W.2d 831, 833 (Tex. Civ. App.--Waco 1968, writ ref'd n.r.e.) ("writings were not themselves intended to be her will or codicil, but were instructions or directions to her attorney to prepare a new will or codicil"). These cases are merely a corollary to the doctrine that the writer must manifest in the writing an intent to make a testamentary disposition of property "by that particular instrument."

**4. EXTRANEOUS EVIDENCE OF TESTAMENTARY INTENT.** Extraneous evidence is admissible to show testamentary intent only if the instrument itself that is offered for probate contains language evidencing testamentary intent, but is ambiguous on this point. *Straw v. Owens*, 746 S.W.2d 345 (Tex. App.--Fort Worth 1988, no writ) (no amount of extrinsic evidence can supply absent testamentary intent to make instrument will); *Harper v. Meyer*, 274 S.W.2d 904, 906 (Tex. Civ. App.--Galveston 1955, writ ref'd n.r.e.) ("But if the instrument does not possess in some degree the essential characteristics of a will as above defined, sufficient, at least, to give rise to the doubt, extraneous evidence cannot supply that which is otherwise totally lacking."); *Maxey v. Queen*, 206 S.W.2d 114, 117 (Tex. Civ. App.--Fort Worth 1947, writ ref'd n.r.e.) (extraneous evidence inadmissible because proposed instrument did not contain language of a testamentary nature).

## • Testamentary Capacity - Who Can Make a Will

**1. STATUTORY PROVISION.** Section 57 of the Texas Probate Code sets forth a two part test for testamentary capacity. The first component is a status and age requirement: In order to have testamentary capacity, the individual must (i) have attained eighteen

years of age, or (ii) be or have been lawfully married, or (iii) be a member of the armed forces of the United States or of the auxiliaries thereof or of the maritime service. TEX. PROB. CODE ANN. § 57 (Vernon 2003). Whether a particular individual satisfies this objective test is rarely an object of much controversy.

The second requirement of Section 57 is that the testator be "of sound mind." TEX. PROB. CODE ANN. § 57 (Vernon 2003). This subjective component of the testamentary capacity test is the inquiry relevant to this article and is a frequent object of controversy. Frequently, the reporting cases simply reference the question of the testator's sound mind as one of "testamentary capacity," without mention of the status and age component.

## **2. JUDICIAL DEVELOPMENT OF THE "SOUND MIND" REQUIREMENT**

**a. Five Part Test--Current Rule.** In order for an individual to be of sound mind, the evidence must support a *jury finding* that the individual possesses the following characteristics:

- Sufficient ability to understand the business in which he is engaged;
- Sufficient ability to understand the effect of his act in making the will;
- The capacity to know the objects of his bounty;
- The capacity to understand the general nature and extent of his property; and
- "memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least their obvious relation to each other, and to be able to form a reasonable judgment as to them."

*Prather v. McClelland*, 13 S.W. 543 (Tex. 1890).

**b. Old Four Part Test--No Longer the Law.** Numerous earlier decisions of the courts of civil appeals have approved a short form definition of testamentary capacity that ignores the fifth "memory requirement." See, e.g., *Gayle v. Dixon*, 583 S.W.2d 648, 650 (Tex. Civ. App.--Houston [1st Dist.] 1979, writ ref'd n.r.e.). However, the prudent practitioner should not attempt to rely on these cases.

One commentator has suggested that the fifth requirement is very important, and that if the testator is not able to realize that a relationship exists between the separate elements, he "is probably not competent to make a will." WILLIAM MARSCHALL, *Will Contests*, TEXAS EST. ADMINISTRATION 204 (1975). Failure to use the long form will, at the very least, present an argument for appeal. See *Gayle v. Dixon, supra*; 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 16.2 (3d ed.

2002) ("the safer case would seem to be to use the long form, where it is requested by either party at the trial, or where either party objects to omission of the final element").

The more recent cases consistently use the long form. See *Tienken v. Midwestern State University*, 912 S.W.2d 878, 882 (Tex. App.--Fort Worth 1995, no writ); *Oechsner v. Ameritrust*, 840 S.W.2d 131, 134 (Tex. App.--El Paso 1992, writ denied); *Campbell v. Groves*, 774 S.W.2d 717, 718 (Tex. App.--El Paso 1989, writ den'd); *Alldridge v. Spell*, 774 S.W.2d 707, 774 (Tex. App.--Texarkana 1989, no writ); *Broach v. Bradley*, 800 S.W.2d 677, 680-681 (Tex. App.--Eastland 1990, writ denied); *Kenney v. Estate of Kenney*, 829 S.W.2d 888, 890 (Tex. App.--Dallas 1992, no writ); but see *Hoffman v. Texas Commerce Bank*, 846 S.W.2d 336, 340 (Tex. App.--Houston [14th] 1992, writ denied) (short form definition of testamentary capacity used).

**c. Lucid Intervals.** Testamentary capacity on the day the will was executed is all that is required. *Croucher v. Croucher*, 660 S.W.2d 55 (Tex. 1983) (medical evidence of incompetency could be considered regarding lack of capacity where the evidence was probative of testator's lack of testamentary capacity on the date of execution of the will). However, evidence of incapacity at other times is generally relevant. *Lee v. Lee*, 424 S.W.2d 609, 611 (Tex. 1968) (evidence of incompetency at other times is admissible only if it demonstrates that the condition persists and has some probability of being the same condition which obtained at the time of the will's making); *Lowery v. Saunders*, 666 S.W.2d 226, 236 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.); *Kenney v. Estate of Kenney*, 829 S.W.2d 888, 890 (Tex. App.--Dallas 1992, no writ); *Accord Hammer v. Powers*, 819 S.W.2d 669, 672 (Tex. App.--Fort Worth 1991, no writ) (evidence was sufficient to show witnesses' personal knowledge of testamentary capacity where witnesses observed testatrix on the day the will was executed but not at any other time; summary judgment admitting will to probate upheld); compare *Alldridge v. Spell*, 774 S.W.2d 707, 710 (Tex. App.--Texarkana 1989, no writ) (evidence of incapacity at other times supported jury finding of lack of testamentary capacity notwithstanding direct evidence of capacity on the day the will was executed.)

In *In Re Neville*, 67 S.W.3d 522 (Tex. App.--Texarkana 2002, no pet. h.), the proponents of the will, citing *Lee v. Lee*, *supra*, asserted that evidence of incapacity at other times may only be considered when there is no direct evidence of the testator's testamentary capacity on the date the will is actually signed. Rejecting this analysis, the court stated as follows.

It has always been the rule in Texas that, although the proper inquiry is whether the testator had testamentary capacity at the time he executed the will, the court may also look to the testator's state of mind at other times if those times tend to show his state of mind on the day the will was executed. Evidence pertaining to those other times, however, must show that the testator's condition persisted

and probably was the same as that which existed at the time the will was signed. Whether the evidence of testamentary capacity is at the very time the will was executed or at other times goes to the weight of the testimony to be assessed by the fact finder.

*In Re Neville*, 67 S.W.3d at 525 (emphasis in original).

**d. Lay Opinion Testimony Admissible.** Lay opinion testimony of witnesses' observations of the testator's conduct, either prior or subsequent to the execution of the will, is admissible to show incompetency. *Kenney v. Estate of Kenney*, 829 S.W.2d 888, 890 (Tex. App.--Dallas 1992, no writ), citing *Campbell*, above, 774 S.W.2d at 719.

**e. Prior Adjudication of Insanity--Presumption of Continued Insanity.** A prior adjudication of insanity generally raises a presumption of continued insanity until the status of that person has been changed by a subsequent judgment of the county court in a proceeding authorized for that purpose. *Bogel v. White*, 168 S.W.2d 309, 311 (Tex. Civ. App.--Galveston 1942, writ ref'd w.o.m.). A prior adjudication of insanity is admissible but not conclusive, and the presumption of continuing insanity may be rebutted. Further, a prior adjudication of mental illness is also admissible, but not conclusive. See *Haile v. Holtzclaw*, 414 S.W.2d 916 (Tex. 1967). In *Haile*, fifteen days before the date he executed his will, the testator was determined to be mentally ill. He was committed to a mental hospital, and the court appointed a temporary guardian for him. Nevertheless, the testator was found to have testamentary capacity. *Haile* was decided under TEX. REV. CIV. STAT. ANN. art. 5547-83, Acts 1957, p. 505, ch. 243, § 83, the predecessor to HEALTH AND SAFETY CODE ANN. § 576.002 (Vernon 2003). The current statute, unlike the statute applicable in *Haile*, specifically provides that the provision of mental health services does not limit the patient's mental capacity. The revised statutory language does not seem to alter the rule of admissibility.

**f. Subsequent Adjudication of Insanity--Not Admissible.** According to the Texas Supreme Court, an adjudication of insanity subsequent to the time of the execution of a will is not admissible. See *Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965) (appointment of guardian twenty-one days subsequent to execution of will inadmissible). Compare *Stephens v. Coleman*, 533 S.W.2d 444 (Tex. Civ. App.--Fort Worth 1976, writ ref'd n.r.e.). In *Stephens*, the trial court admitted evidence that, three days after the date he signed his will, the testator was adjudged incompetent to handle his affairs. The appellate court did not discuss whether this evidence was properly admissible, but simply noted that this subsequent adjudication did not raise a presumption of incapacity on the date the will was signed. The court upheld the trial court's finding that the testator had testamentary capacity. See also 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 16.5 (3d ed. 2002).

### **g. Comparison of Testamentary Capacity with Contractual Capacity**

(1) *Contractual Capacity in General.* Section 39, *Contracts*, Texas Jurisprudence provides a concise summary of contractual capacity:

"Mental capacity" may be defined as the ability of a person to understand the nature and effect of the acts in which he or she is engaged and the business that he or she is transacting. One of the tests of the right to rescind or avoid a contract is whether the contracting party, at the time of making the agreement, possessed sufficient mental capacity to know and understand the nature and consequences of his or her act in entering into the contract. However, mere mental weakness is not in itself sufficient to incapacitate a person; and mere nervous tension, anxiety, or personal problems do not amount to mental incapacity to enter into contracts. Moreover, the fact that one has a firm belief in spiritualism is not sufficient to incapacitate a person, especially where such belief is founded on reading and other evidence deemed by the person to be sufficient. On the contrary, the disposition of property and the conduct of business affairs will be upheld where a grantor, though old and infirm physically and mentally, nevertheless responds to tests that are applicable generally to people in the ordinary experiences of life. Indeed, it is presumed by law that every party to a valid contract had sufficient mental capacity to understand his or her legal rights with respect to the transaction. The burden of proof with regard to overcoming this presumption rests on the person who asserts the contrary.

Where the evidence presented is sufficient to raise an issue as to the mental capacity of a party to enter into a contract, the question whether the party possessed the requisite capacity is one of fact for the jury. However, the quantum of intelligence or mental capacity to make a valid contract is a question of law.

14 TEX. JUR. 3rd *Contracts* § 39 (1981).

(2) *Testamentary and Contractual Capacity Compared.* Less mental capacity is required for making a will than for entering into a contract. *Vance v. Upson*, 1 S.W. 179 (Tex. 1886); *Hamill v. Brashear*, 513 S.W.2d 602, 607 (Tex. Civ. App.--Amarillo 1974, writ ref'd n.r.e.). This statement of the general wisdom is certainly accurate, but it seems an oversimplification of the rule inasmuch as it implies that contractual capacity and testamentary capacity are substantively different.

A review and comparison of the respective authorities supports the view that the difference between contractual capacity and testamentary capacity is purely

quantitative, not qualitative. Fundamentally, both tests look to the capacity of the individual to appreciate what he is doing and to understand the nature and effect of what he is doing. It is because of the differing nature and effect of contracts and wills that the requisites of this singular concept are different in the two circumstances.

Because a will has no legal effect until death and remains revocable during life, its execution cannot have any effect on the testator's own circumstances. The testator, therefore, need not have the capacity to understand the effect that signing a will has on his own circumstances (as there isn't any) in order to have the capacity to understand the effect of his act of making a will. On the other hand, the testator does need the capacity to know the objects of his bounty and the nature and extent of his property if he is to appreciate the nature and consequence of his making a disposition of his property at his death.

### **h. Insane Delusion**

(1) *General Rule.* Even though the general requirements of testamentary capacity described above are satisfied, a will or an affected portion of a will may be held invalid on the basis of an "insane delusion" if (1) the testator was laboring under the belief of a state of supposed facts that do not exist, and (2) which no rational person would believe. *Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964). There is *some* authority that the second requirement may be satisfied only by showing that an organic brain defect or a functional disorder of the mind existed. *Spillman v. Estate of Spillman*, 587 S.W.2d 170 (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.). *Compare Oechsner v. Ameritrust*, 840 S.W.2d 131, 134 (Tex. App.--El Paso 1992, writ denied) (court embraced Texas' 100 year old 2 pronged definition of insane delusion, declining to adopt more detailed definition from other jurisdictions incorporating reference to, *inter alia*, organic brain defect and function disorder of the mind).

(2) *Examples.* Examples of insane delusions are described by the court in *Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964):

Examples of such false beliefs are cases where the "testator believed, in spite of the fact that all the evidence was to the contrary, that his son had been to the planet Mars and had conspired against the United States and should therefore be disinherited; or that his wife was plotting to kill him; or that his daughter had murdered his father; or that he was hated by his brothers and sisters who were bent on persecuting him."

(3) *Delusion Must Have no Basis in Fact.* "A mere mistaken belief or an erroneous or unjust conclusion is not an insane delusion if there is some foundation in fact or some basis on which the mental operation of the testator may rest, even though the basis may be regarded by others as wholly insufficient." *Navarro v. Rodriguez*, 235 S.W.2d 665, 668 (Tex. Civ.

App.--San Antonio 1950, no writ) (quoting from 68 C.J. 433, *Wills*, § 30). The practitioner hoping to defeat a will on grounds of insane delusion should endeavor to specifically rebut any express or implicit facts or circumstances that might constitute a basis for the testator's belief. See *Orozco v. Orozco*, 917 S.W.2d 70 (Tex. App.--San Antonio 1996, writ denied) (testatrix believed that an individual was her son; the jury found that testatrix's belief was mistaken but also found that testatrix had testamentary capacity; held: because record contained no evidence that testatrix was *not* pregnant and did *not* give birth on the date of the individual's birth, the two jury findings were consistent).

(4) *Delusion Must Affect Will Provisions.* The clearly deluded client does not necessarily lack testamentary capacity. Rather, the delusion must affect the provisions in the will in order for the will to be invalidated based on insane delusion. *Bauer v. Estate of Bauer*, 687 S.W.2d 410, 411-12 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). The mere appearance of a delusion does not in and of itself prohibit a finding of testamentary capacity. *Campbell v. Groves*, 774 S.W.2d 717, 719 (Tex. App.--El Paso 1989, writ denied) ("A person could appear bizarre or absurd with reference to some matters and still possess the assimilated and rational capacities to know the objects of his bounty, the nature of the transaction in which he was engaged and nature and extent of his estate on a given date").

## Execution Requirements

### 1. SUMMARY

a. **Statutory Provision.** Section 59 of the Texas Probate Code contains three general execution requirements for wills: (1) the will must be signed by the testator or by another person at his direction and in his presence; (2) the will must be attested by two or more credible witnesses over fourteen years of age; and (3) the witnesses must sign in the presence of the testator. TEX. PROB. CODE ANN. § 59 (Vernon 2003). The latter two items are not required for holographic wills (i.e., entirely in the testator's handwriting; see Part 11.D.7 at page 10 of this outline).

b. **Self-Proved Requirements Need Not Be Satisfied.** Section 59 also provides that a will may be made self-proved, and sets forth the requirements for a valid self-proving affidavit. TEX. PROB. CODE ANN. § 59 (Vernon 2003). However, a will need not be executed with the additional requirements for a self-proving affidavit in order to be valid. "The only purpose of the form and contents of the Section 59 self-proving affidavit is to admit a will to probate without, and as an alternative to resorting to, the testimony of a subscribing witness." *Broach v. Bradley*, 800 S.W.2d 677 (Tex. App.--Eastland 1990, writ denied), citing *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966). See also *Fox v. Amarillo National Bank*, 552 S.W.2d 547 (Tex. Civ. App.--Amarillo 1977, writ ref'd n.r.e.) and *Cutler v. Ament*, 726 S.W.2d 605 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd, n.r.e.).

If a will is self-proved, the proponent has *prima facie* established that the will was executed with the requisite testamentary formalities. *Bracewell v. Bracewell*, 20 S.W.3d 14, 26 (Tex. App.--Houston [14th Dist.] 2000, no pet. h). In the absence of evidence or argument to rebut the *prima facie* showing, no further proof of the execution is necessary. *Id.*

c. **Substantial Compliance.** Under the Uniform Probate Code and the Restatement (Third) of Property, substantial compliance with the applicable formal execution requirements is sufficient. UPC Section 2-503 (1990); Restatement (Third) of Property (Wills and Other Donative Transfers) § 3.3 (1998). See also *Matter of Will of Ranney*, 124 N.J. 1, 589 A.2d 1339 (1991) (New Jersey Supreme Court applying the substantial compliance test to an alleged defective attestation of a will). Texas cases have not adopted a substantial compliance exception to the specific statutory requirements of Section 59. "Nowhere in this section, or any other, is there any mention of 'substantial compliance' with the attesting signature requirements of the will itself contained in Section 59(a)." *In re Estate of Iverson*, 150 S.W.3d 824, 826 (Tex. App.--Fort Worth 2004, no pet. h.). However, effective September 1, 1991, Section 59 was amended to solve the *Boren* problem (see Part 11.D.2.h at page 9 of this outline) and to permit forms of self-proving affidavits that substantially comply with the statutory form (see Part 2XIJ at page 74 of this outline).

d. **Reading of Will Not Required.** Whether the testator read the will before signing it is not an issue relating to the satisfaction of the execution requirements of Section 59. *In re Estate of Browne*, 140 S.W.3d 436 (Tex. App.--Beaumont 2004, no pet. h.). However, the prudent practitioner will make certain that the testator has read the will and understands the contents of the will.

### 2. SIGNED BY TESTATOR

a. **Handwriting Not Necessarily Required.** The testator's signature need not be in his own handwriting. *Zaruba v. Schumaker*, 178 S.W.2d 542 (Tex. Civ. App.--Galveston 1944, no writ) (typewritten signature on an attested will satisfies signature requirement); *Phillips v. Najjar*, 901 S.W.2d 561 (Tex. App.--El Paso 1995, no writ) (signature by rubber stamp sufficient).

b. **Initials by Testator.** "A signature by initials is sufficient to execute the instrument as a will." *Trim v. Daniels*, 862 S.W.2d 8, 10 (Tex. App.--Houston [1st Dist.] 1992, writ denied).

c. **Mark by Testator.** A number of Texas cases have recognized the validity of a testator's "mark" as a valid signature. E.g., *Orozco v. Orozco*, 917 S.W.2d 70 (Tex. App.--San Antonio 1996, writ denied); *Phillips v. Najjar*, 901 S.W.2d 561 (Tex. App.--El Paso 1995, no writ); *Guest v. Guest*, 235 S.W.2d 710 (Tex. Civ. App.--Fort Worth 1951, writ ref'd n.r.e.).

**d. Signature Written by Another Person.** The testator's signature may be written by another person at the testator's direction and in his presence. The testator's "direction" may be indicated by express words, an affirmative response to a question, or by mere gestures. See 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 18.6 (3d ed. 2002). However, if the testator does not specifically indicate in some manner that someone should sign for him, the will cannot be probated. *E.g., Muhlbauer v. Muhlbauer*, 686 S.W.2d 366, 376-77 (Tex. App.--Fort Worth 1985, no writ) (wife guided husband's hand as he signed will, but witnesses to the execution could not remember whether testator specifically asked his wife to help him; court denied probate of will, observing that mere acquiescence in help from wife does not satisfy the "at his direction" requirement in Section 59 of the Probate Code).

Effective as of September 1, 1997, Section 406.0165 of the Texas Government Code provides an additional method for signing a document. A notary may sign for an individual who is physically unable to sign or make a mark on the document presented for notarization if directed by the individual to sign his name. The notary must sign the individual's name in the presence of a witness who has no legal or equitable interest in any real or personal property that is the subject of, or is affected by, the document being signed. The notary must require identification from the witness just as if the witness was the person making the acknowledgment and the notary must write beneath his signature the following or substantially similar to the following: "Signature affixed by notary in the presence of (name of witness), a disinterested witness, under Section 406.0165, Government Code." TEXAS GOV'T CODE ANN. § 406.0165 (Vernon 2005).

**e. Forged Signature.** Obviously, a purported will containing a mere forgery of the testator's signature cannot be probated. *Aston v. Lyons*, 577 S.W.2d 516, 519 (Tex. Civ. App.--Texarkana 1979, no writ).

**f. Mark by Testator Combined with Signature by Another Person.** In many of the Texas cases where another person signed for the testator, the testator also made his mark on the will. *E.g., Phillips v. Najar*, 901 S.W.2d 561 (Tex. App.--El Paso 1995, no writ) (use of rubber stamp by third person to affix testatrix' signature, in accordance with her instructions, did not render her will invalid; stamp complied with procedure allowing testatrix to instruct another person to sign name by their hand and, in any event, handwritten mark by testatrix near stamp was valid substitute for signature); *Davenport v. Minshew*, 104 S.W.2d 951 (Tex. Civ. App.--San Antonio 1937, writ ref'd).

**g. Signature in Body of Will.** There is no Texas requirement that the will be signed "at the foot or end thereof" (as required by the English Wills Act of 1837 and by various American jurisdictions). The historic landmark English case of *Lamayne v. Stanley*, decided only four years after the enactment of the original Statute of Frauds, has been cited in several

Texas cases recognizing the validity of a signature in the body of a will. However, the only Texas cases applying the doctrine involve unattested holographic wills. *Burton v. Bell*, 380 S.W.2d 561, 568 (Tex. 1964) (dictum); *In re Estate of Brown*, 507 S.W.2d 801 (Tex. Civ. App.--Dallas 1974, no writ); *Lawson v. Dawson's Estate*, 53 S.W. 64 (Tex. Civ. App. 1899, writ ref'd n.r.e.).

**h. Signing Only Self-Proving Affidavit.** The self-proving affidavit is not a part of the will and under prior law, if the testator failed to sign the will, his signature on the self-proving affidavit was not sufficient and the will would not be admitted to probate. *Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1985); *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).

Effective as of September 1, 1991, Section 59 provides that "[a] signature on a self-proving affidavit is considered to be a signature to the will if necessary to prove that the will was signed by the testator or witness, or both, but in that case, the will may not be considered self-proved." TEX. PROB. CODE ANN. § 59 (Vernon 2003). Thus, if the testator signs only the self-proving affidavit, the will can still be admitted to probate, but the conditions of Sections 84(b) and 88(b) must be satisfied as if the will were not self-proved. Even if the will at issue was executed prior to September 1, 1993, this "anti-Boren" amendment to Section 59 will be applicable where the date of death is after September 1, 1993. *Bank One, Texas v. Ikard*, 885 S.W.2d 183, 186 (Tex. App.--Austin 1994, writ denied).

### **3. ATTESTED AND SUBSCRIBED BY TWO CREDIBLE WITNESSES**

**a. Attestation.** Section 59 of the Probate Code requires that the will "be attested by two or more credible witnesses ... who shall subscribe their names thereto." TEX. PROB. CODE ANN. § 59 (Vernon 2003). This language clearly indicates that the witnesses must both "attest" and "subscribe" (or sign) the will. The attestation requirement has been described as follows:

Attestation of a will consists in the act of witnessing the performance of the statutory requirements to a valid execution. This is done by the witnesses signing their names to the instrument in the presence of the testator.

*Davis v. Davis*, 45 S.W.2d 240, 241 (Tex. Civ. App.--Beaumont 1931, no writ).

Typically, an "attestation clause" is inserted directly preceding the witnesses' signatures reciting that the statutory execution requirements have been satisfied, but no such attestation clause is required.

**b. Order of Signing.** If the witnesses must attest performance of the statutory requirements to a valid execution, is it necessary that the testator sign the will in their presence before they sign the will? Texas cases clearly indicate that the will need not be signed by the testator in the presence of the attesting witnesses.

*Matter of Estate of McGrew*, 906 S.W.2d 53 (Tex. App.--Tyler 1995, writ denied) (testator need not sign will in presence of witnesses and, thus, fact that testator executed challenged will two years before witness signed will did not render will invalid); *Venner v. Layton*, 244 S.W.2d 852 (Tex. Civ. App.--Dallas 1951, writ ref'd n.r.e.). Furthermore, several Texas cases have suggested that a will might be valid even if signed by the testator out of the witnesses' presence after the witnesses had signed. *Ludwick v. Fowler*, 193 S.W.2d 692, 695 (Tex. Civ. App.--Dallas 1946, writ ref'd n.r.e.); *Guest v. Guest*, 235 S.W.2d 710, 713 (Tex. Civ. App.--Fort Worth 1950, writ ref'd n.r.e.). However, the general rule in American jurisdictions requires that the testator sign before the attesting witnesses subscribe their names, and the careful planner should not place too much reliance on the two cited Texas cases.

### c. Number of Witnesses.

(1) *Texas Statutory Requirement.* Section 59 requires "two (2) or more credible witnesses above the age of fourteen (14) years." TEX. PROB. CODE ANN. § 59 (Vernon 2003). While the will may be "proved" for probate by the testimony of any one of the attesting witnesses (*see* Tex. Prob. Code Ann. § 84(b)(1) (Vernon 2003)), two competent witnesses are required to have a valid will. Interestingly, at least one Texas case has recognized the notary's signature as constituting a witness's signature. *Reagan v. Bailey*, 626 S.W.2d 141 (Tex. App.--Fort Worth 1981, writ ref'd n.r.e.) (notary signed and notarized an acknowledgment following the testatrix's signature line, and one other witness signed; the codicil was admitted to probate). *See also In re Estate of Teal*, 135 S.W.3d 87 (Tex. App.--Corpus Christi 2002, no pet.) (notary public served as a subscribing witness, although she intended to sign only as a notary).

(2) *Signature by More Than Two Witnesses.* Texas attorneys differ in their practice as to whether two or three witnesses are used in execution ceremonies. Several states require three witnesses to have a valid will. However, all of the states requiring three witnesses have statutory provisions validating wills executed in accordance with the statutes of the state of execution. THOMAS ATKINSON, WILLS 308, 350 (2d ed. 1953). Although the testator may move to another state or own land in another state before his death, some writers question the advisability of using more than two witnesses because the statutes of some states require that all attesting witnesses testify on probate or be accounted for. *Id.* at 351.

**d. Credibility of Witnesses; Interested Witnesses.** As noted above, Section 59 of the Probate Code requires that the will "be attested by two or more *credible* witnesses." TEX. PROB. CODE ANN. § 59 (Vernon 2003) (emphasis added).

(1) *Meaning of "Credible".* For purposes of Section 59 of the Probate Code, "the word 'credible' . . . does not mean 'worthy of belief', but rather, 'competent' or 'able to tell about the attestation.'" *Lehmann v. Krahl*, 285 S.W.2d 179, 180 (Tex. 1955). *See also Triestman*

*v. Kilgore*, 838 S.W.2d 547 (Tex. 1992) (for purposes of Section 59, "credible" and "competent" are synonymous). Thus, as a threshold, every witness to the will must have sufficient mental capacity to be able to observe and testify as to the proper execution of the will. *See* 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 18.14 (3d ed. 2002).

(2) *Executor as Subscribing Witness.* A person named as an executor in a will may nevertheless be a competent attesting witness. *Connor v. Purcell*, 360 S.W.2d 438 (Tex. Civ. App.--Eastland 1962, writ ref'd n.r.e.). However, most careful planners avoid using a named executor as a witness.

(3) *Beneficiary as Subscribing Witness.* Under Texas law, the fact that an individual who is a beneficiary also signs the will as a witness does not in and of itself render the will invalid. *Scandurro v. Beto*, 234 S.W.2d 695, 697 (Tex. Civ. App.--Waco 1950, no writ) ("Nor is a will void because attested by one to whom a bequest is made."), cited with approval, *Triestman*, above, 838 S.W.2d at 547. However, prior to the effective date of the 1955 Texas Probate Code, "[a] will [was] still invalid unless attested by two *disinterested* witnesses who take nothing under it." *Scandurro*, above, 234 S.W.2d at 697 (emphasis added).

(4) *Interested Witness Statute.* Section 61 of the Texas Probate Code provides that, where a will contains a bequest to an individual who is also a witness, "if the will cannot be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made." TEX. PROB. CODE ANN. § 61 (Vernon 2003). This statute appears grounded in the public policy "to uphold the rights of a testator to make such dispositions and prevent their failing because of the incompetence of the witnesses." *Scandurro*, above, 234 S.W.2d at 697.

Note, however, that the forfeiture is not absolute. If the witness would have been entitled to an intestate share of the estate, he is entitled to so much of the intestate share as will not exceed the value of the bequest made to him in the will). TEX. PROB. CODE ANN. § 61 (Vernon 2003).

(5) *Corroboration of Testimony of Interested Witness-Old Law.* Under TEX. REV. CIV. STAT. art. 4873 (1879), the predecessor to Section 62 of the Texas Probate Code, a will could be proved by the testimony of the subscribing witnesses, even where a subscribing witness was also a beneficiary, provided that the witnesses' testimony was "corroborated by the testimony of one or more *other* disinterested and credible persons . . . in which event the bequest to such subscribing witness [would] not be void." (emphasis added).

This language was interpreted by the courts as requiring that the testimony of the beneficiary-witness be corroborated by someone other than the other disinterested witness. *Fowler v. Stagner*, 55 Tex. 393 (1881) (gift to one of only two attesting witnesses voided under predecessor to Probate Code § 61);

*Scandurro v. Beto*, 234 S.W.2d 695 (Tex. Civ. App.--Waco 1950, no writ) (*Fowler* followed on almost identical facts); see also 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 18.31-18.37 (3d ed. 2002) detailing the historical development of the interested witness rule in Texas.

(6) *Corroboration of Testimony of Interested Witness-Current Law*. Since 1955 the Probate Code has simply required that the testimony of a beneficiary-witness be corroborated "by one or more disinterested and credible persons who testify that the testimony of the subscribing [beneficiary-witness] is correct and such [beneficiary-witness] shall not be regarded as an incompetent or non-credible witness under Section 59 of this Code." TEX. PROB. CODE ANN. § 62 (Vernon 2003).

By eliminating the qualifying adjective "other", at least one commentator has concluded that "the Code leaves no ground for the inference that the testimony of both attesting witnesses, corroborated by some person other than an attesting witness, would be required to save the gift to an attesting witness." 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 18.37 (3d ed. 2002). This conclusion is consistent with the Interpretive Commentary to § 62, reproduced in *Wilkerson v. Slaughter*, 390 S.W.2d 372, 373 (Tex. Civ. App.--Texarkana 1965, writ dismissed), which states *inter alia* that "the last clause in this Section is intended to repudiate the holding in [*Scandurro*] that the testimony of the disinterested witness was not sufficient corroboration of the testimony of the [beneficiary-witness] and to incorporate into the code the contrary holding in *Ridgeway v. Keene*" 225 S.W.2d 647 (Tex. Civ. App.--Dallas 1949, writ refused, n.r.e.).

Nevertheless, the prudent practitioner will continue to avoid beneficiary-witnesses at all costs. Section 62 of the Texas Probate Code does not prohibit corroboration by an attesting witness but neither does it specifically authorize it. Further, no Texas case has been found that holds that the testimony of a disinterested attesting witness is sufficient corroboration of the beneficiary-witness's testimony. Rather, both of the relevant cases found used the testimony of an individual other than an attesting disinterested witness to corroborate the testimony of the beneficiary-witness. In *Ridgeway v. Keene*, 225 S.W.2d 647 (Tex. Civ. App.--Dallas 1949, writ refused, n.r.e.), there were 3 subscribing witnesses: 1 disinterested and 2 interested; however, there was a fourth individual present at the signing who was able to corroborate. In *Wilkerson v. Slaughter*, 390 S.W.2d 372, 373 (Tex. Civ. App.--Texarkana 1965, writ dismissed) there were again 3 witnesses: 1 disinterested and 2 interested; however, the notary who took the affidavits and acknowledgments was able to corroborate.

The risk is increased further by the Supreme Court case of *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992). In that case the court denied the writ of error, thus upholding the appellate court decision denying probate. However, in its *per curiam* decision the court stated flatly: "A competent witness to a will is one who

receives no pecuniary benefit under its terms. (citations omitted) Conversely, a person interested as taking under a will is incompetent to testify to establish it." 838 S.W.2d at 547. As support for its second statement, the Supreme Court cited to, *inter alia*, *Fowler*, above, which was presumably repudiated, along with *Scandurro*, by the 1955 Probate Code's new Section 62 (eliminating the "other" modifier and specifically providing that, if corroborated, a beneficiary-witness is a competent witness under Section 59).

(7) *Proof of Witness's Credibility*. The appellate court decision in *Triestman*, above, focused on the credibility requirement and set aside the probate of a non self-proved will where, *inter alia*, there had been no evidence presented to the probate court concerning the "credibility and competence" of the attesting witnesses. *Estate of Hutchins*, 829 S.W.2d 295 (Tex. App.--Corpus Christi 1992), writ denied *per curiam*, *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992). The proponent of the will had also failed to introduce evidence that the testator was of sound mind on the date that the will was executed. Noting that the facts set out in the attestation clause are admissible as evidence, the court determined that there was evidence that the witnesses were each over the age of 14 years, that they signed at the request of the testator, in his presence and in the presence of each other, and that the testator signed in the presence of the witnesses. Implicitly, then, a *prima facie* case that the witnesses are credible should be made by including a statement to that effect in the attestation clause.

Even though the appellate decision stood, the Supreme Court expressly disapproved of the appellate court's analysis as to credibility (instead stating that the witnesses were credible simply by virtue of being disinterested). However, the Supreme Court noted that "the will itself constitutes some evidence that the witnesses were credible." 838 S.W.2d at 547. Thus, it seems safe to rely upon this aspect of the appellate court's decision.

**e. Place for Witnesses' Signatures.** The witnesses' signatures need not necessarily appear on the same page as the testator's signature. *Tucker v. Hill*, 577 S.W.2d 321 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ refused n.r.e.). There is no particular place on the will that the witness must sign, as long as the witness signed the will at some place with intent to attest the will.

**f. Signing Only Self-Proving Affidavit.** The self-proving affidavit is not a part of the will. Under prior law, if a necessary witness signed only the self-proving affidavit, he had not signed the will and the will would not be admitted to probate. *Wich v. Fleming*, 652 S.W.2d 353, 354 (Tex. 1985) (testator signed at end of will but witnesses only signed self-proving affidavit; will denied probate); *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).

Effective as of September 1, 1991, Section 59 provides that "[a] signature on a self-proving affidavit is considered to be a signature to the will if necessary to

prove that the will was signed by the testator or witness, or both, but in that case, the will may not be considered self-proved." TEX. PROB. CODE ANN. § 59 (Vernon 2003). Thus, if a witness signs only the self-proving affidavit, the will can still be admitted to probate but the conditions of Sections 84(b) and 88(b) must be satisfied as if the will were not self-proved.

#### **4. WITNESSES SIGN IN PRESENCE OF TESTATOR.** Texas cases have applied a "conscious presence" test:

"[T]o be within the testator's presence, the attestation must occur where testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance." *Nichols v. Rowan*, 422 S.W.2d 21, 24 (Tex. Civ. App.--San Antonio 1967, writ ref'd n.r.e.).

In one case, the court found that the witness was not in the presence of the testator where the testator signed in a conference room and the witnesses signed in a secretary's office separated by two solid walls from the conference room. The testator could have seen the witnesses sign only by "arising from his chair, walking some four feet to the hallway and then walking about fourteen feet down the hallway to a point where he could have looked through the doorway and seen the witnesses as they signed their names." *Morris v. Estate of C.K. West*, 643 S.W.2d 204, 206 (Tex. App.--Eastland 1982, writ ref'd n.r.e.).

#### **5. REQUIREMENTS OF OTHER STATES.**

Miscellaneous additional execution requirements under the laws of other states include the following: (1) signature of three witnesses; (2) "publication" of the will by the testator, declaring to the witnesses that they are witnessing his last will and testament; (3) signature by the testator "at the foot or end thereof"; and (4) requirement that witnesses sign in the presence of each other.

#### **6. INTERLINEATIONS.**

**a. General Rule.** Alterations or interlineations made on the original will prior to its execution are controlling. *Schoenhals v. Schoenhals*, 366 S.W.2d 594, 599 (Tex. Civ. App.--Amarillo 1963, writ ref'd n.r.e.); *Freeman v. Chick*, 252 S.W.2d 763 (Tex. Civ. App.--Austin 1952, writ dismissed); see *Douglas v. Winkle*, 623 S.W.2d 764 (Tex. App.--Texarkana 1981, no writ). However, alterations to the will made after the original execution are not controlling, and the will stands as originally written. *Leatherwood v. Stevens*, 24 S.W.2d 819, 823 (Tex. Comm'n App. 1930, no writ).

**b. Excessive Revisions May Cause Will to Fail.** If alterations may have been made such that the proponent of a will cannot establish the terms of the will at the time it was executed, the will would be denied probate. *Mahan v. Dovers*, 730 S.W.2d 467 (Tex.

App.--Fort Worth 1987, no writ) (decedent had habit of changing will by pulling out pages and having them retyped and reinserted; noting that the various pages of the will had a different number of staple holes with the greatest number being in the signature page, the court held proponent of will did not meet his burden to prove that the will offered for probate was the same as the one formally executed by the decedent). Compare *Matter of Estate of McGrew*, 906 S.W.2d 53 (Tex. App.--Tyler 1995, writ denied) (marks on will made by testator's relative, who borrowed will as a form to use for her own, did not render will invalid); *Matter of Estate of Montgomery*, 881 S.W.2d 750, 753 (Tex. App.--Tyler 1994, writ denied) (certain provisions of will had been heavily obliterated by testator subsequent to proper execution; will challenged on grounds, *inter alia*, that will offered was not the same as will as properly executed; will admitted to probate where contestant failed to submit to jury the question of the validity of the attempt to eliminate the obliterated passage).

**c. Interlineations During Execution.** It follows that if there are any minor revisions or other interlineations made in a will immediately prior to its execution, the ability to prove that they were made before the will is executed becomes critical. The general rule in other jurisdictions is that a presumption arises that any alterations or interlineations were made *after* the execution of the will, and the burden of proof is on the proponent of the will to prove otherwise. See W.W. Allen, Annotation, *Interlineations and Changes Appearing on Face of Will*, 34 A.L.R.2d 619, § 7 (1954); *Freeman v. Chick*, 252 S.W.2d 763 (Tex. Civ. App.--Austin 1952, writ dismissed) (dictum). Indeed, an interlineation into a will drawn in a formal manner by an attorney is particularly suspicious, and the presumption might be particularly applicable in that circumstance. *Id.* at 765. Accordingly, if minor revisions or interlineations are made in a will at the execution ceremony, the testator and all witnesses should date and sign or initial the margin of the will beside the interlineation to assist in overcoming the presumption.

**d. Holographic Wills.** For holographic wills, an alteration made after the will is signed is treated as a valid revocation of the prior provisions and valid disposition pursuant to the new provisions, with the prior signature being adopted. *Hancock v. Krause*, 757 S.W.2d 117, 120-121 (Tex. App.--Houston [1st Dist.] 1988, no writ) (subsequent substitution of different beneficiary for a specific bequest was effective even though subsequent change was not signed).

### **7. HOLOGRAPHIC WILL**

#### **a. General Requirements - In Testator's Handwriting and Signed by Him.**

(1) *Statutory Provision.* Section 59 of the Texas Probate Code states that a will is valid if it is (1) "signed by the testator in person or by another person for him by his direction and in his presence" and (2) is "wholly in the handwriting of the testator." TEX. PROB. CODE ANN. § 59 (Vernon 2003). In a case where a holographic

codicil was not signed and an identical typewritten instrument was signed by the testator but not witnessed, the court refused probate of the codicil, holding that the two instruments could not be construed together. *In re Matter of Estate of Jansa*, 670 S.W.2d 767 (Tex. App.--Amarillo 1984, no writ).

(2) *Signature Requirement.* The law regarding the requirement of the testator's signature on an attested will applies equally to holographic wills, including the rule that the signature need not necessarily appear at the end of the will. See Part II.D.2.g at page 6 of this outline. "However, while the signature may be informal and its location is of secondary importance, it is still necessary that the maker intend that his name or mark constitute a signature, i.e., that it expresses approval of the instrument as his Will." *Luker v. Youngmeyer*, 36 S.W.3d 628, 630 (Tex. App.--Tyler 2000, no pet. h.) (testatrix's use of her name as part of the title of a trust she had previously created was insufficient to constitute a signature to express her approval of the dispositive provisions of the holographic instrument). See *Ajudani v. Walker*, 177 S.W.3d 415, 418 (Tex. App.--Houston [1st Dist.] 2005, no pet. h.).

(3) *"Wholly in Testator's Handwriting" Requirement.* The policy supporting the probate of holographic wills is that having a will entirely in the testator's own handwriting affords a safeguard against forgery and fraud which the attestation of witnesses is otherwise thought to provide. If the will consists primarily of the testator's handwriting but also other words typewritten, printed, or written by someone other than the testator, Texas courts apply a "surplusage" rule. The will is entitled to probate if the words not in the handwriting of the testator "are not necessary to complete the instrument in holographic form, and do not affect its meaning." *Maul v. Williams*, 69 S.W.2d 1107, 1109-1110 (Tex. Comm'n App. 1934, holding approved).

Certain other jurisdictions apply an "intent theory" which invalidates an unattested will if the testator "intended" the part not written by him to be a part of his will (even though the language may not affect the provisions of the will). ATKINSON, *WILLS* 357-59 (2d ed. 1953).

(4) *Date Not Required.* Unlike certain other American jurisdictions, there is no requirement that a holographic will under Texas law be dated. *Gunn v. Phillips*, 410 S.W.2d 202, 207 (Tex. Civ. App.--Houston 1966, writ ref'd n.r.e.).

**b. Testamentary Intent.** The holographic will must also satisfy the other general requirements of a will (i.e., that it be written with testamentary intent, and that the testator have testamentary capacity). Many of the reported cases regarding testamentary intent have involved holographic wills. A North Carolina court has held that a holographic will can satisfy the testamentary intent requirement even though it speaks in terms of request (instead of direction) and even though it does not specifically say that it is to take effect at death (provisions for property disposition and funeral

arrangements indicated intent that the instrument take effect at death). *Stephens v. McPherson*, 362 S.E. 826 (N.C. App. 1987).

**c. Self-Proving Affidavit May Be Used.**

Section 60 of the Texas Probate Code specifically allows the testator to add a self-proving affidavit to the holographic will at the time of its execution or afterward. TEX. PROB. CODE ANN. § 60 (Vernon 2003). Otherwise, a holographic will may be proved in probate by two witnesses to the testator's handwriting. TEX. PROB. CODE ANN. § 84(c) (Vernon Supp. 2005). The affidavit must state that it has been "sworn to" by the witnesses and has not merely been "acknowledged" by the witnesses. *Cutler v. Ament*, 726 S.W.2d 605, 607 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.).

**d. Construction Problems.** The major problem with holographic wills is not their validity, but construction problems that are often generated.

**8. EXECUTION CEREMONY.** For a detailed discussion of the proper procedures for signing a will, see Beyer, *The Will Execution Ceremony - History, Significance, and Strategies*, 29 S. TEX. L. REV. 413 (1987).

## II.

### UPHOLDING VALIDITY OF A WILL IN A WILL CONTEST

A detailed review of will contests is beyond the scope of this outline, but the outline will briefly summarize the possible grounds upon which a will contest may be instituted.

• **Lack of Testamentary Capacity and Insane Delusion; Burden of Proof.**

See Part II.C at page 2 of this outline for a discussion of testamentary capacity and insane delusion. Under Section 88(b) of the Texas Probate Code, the burden of proof is on the will proponent to show the existence of testamentary capacity. TEX. PROB. CODE ANN. § 88(b) (Vernon 2003). After the will has been probated, however, the burden of proof is on the contestant. *Cravens v. Chick*, 524 S.W.2d 425, 428 (Tex. Civ. App.--Fort Worth 1975, writ ref'd n.r.e.), 531 S.W.2d 319 (Tex. 1975); *Kenney v. Estate of Kenney*, 829 S.W.2d 888, 890 (Tex. App.--Dallas 1992, no writ). Where the will was not made self proved, testamentary capacity will not be presumed; in order for the will to be admitted to probate there must be at least some evidence that the decedent had testamentary capacity when the will was executed. *Estate of Hutchins*, 829 S.W.2d 295 (Tex. App.--Corpus Christi 1992), writ denied *per curiam*, *Triestman v. Kilgore*, 838 S.W.2d 547 (Tex. 1992) (probate of non self proved will set aside where, *inter alia*, proponent of will did not introduce evidence that testator was of sound mind on the date that the will was executed).

## Undue Influence

**1. LEGAL TEST.** The leading Texas Supreme Court case of *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963), lists the following legal requirements for proving the existence of undue influence:

(1) [T]he existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence.... It cannot be said that every influence exerted by one person on the will of another is undue, for the influence is not undue unless the free agency of the testator was destroyed and a testament produced that expresses the will of the one exerting the influence.

369 S.W.2d at 922.

The *Rothermel* case and other cases have established that merely showing *opportunity* to exercise influence, *susceptibility* of a testator to influence, or the existence of an *unnatural disposition* are not sufficient to establish the existence of undue influence. See generally *In the Matter of the Estate of M.L. Woods*, 542 S.W.2d 845, 847-48 (Tex. 1976); *Rothermel v. Duncan*, 369 S.W.2d 917, 923 (Tex. 1963); *Broach v. Bradley*, 800 S.W.2d 677, 680-81 (Tex. App.--Eastland 1990, writ denied); *Mackie v. McKenzie*, 900 S.W.2d 445, 449-450 (Tex. App.--Texarkana 1995, writ denied); *Longaker v. Evans*, 32 S.W.3d 725, 732 (Tex. App.--San Antonio 2000, pet. withdrawn by agr.). "Circumstantial evidence which is equally as consistent with the proper execution of the testator's intent as with undue influence is considered no evidence of undue influence." *Smallwood v. Jones*, 794 S.W.2d 114, 118 (Tex. App.--San Antonio 1990, no writ), citing *Rothermel*, 369 S.W.2d at 922. "It is only when all reasonable explanation in affection for the beneficiary is lacking that the trier of facts may take even an unnatural disposition of property as a sign of the testator's mental subjugation." *Smallwood*, 794 S.W.2d at 119, citing *Rothermel*, 369 S.W.2d at 923-24. See also *Cotten v. Cotten*, 169 S.W.3d 824 (Tex. App.--Dallas 2005, pet. denied).

**2. BURDEN OF PROOF.** The opponent of a will has the burden of proving the existence of undue influence. Often, only circumstantial evidence is available to prove undue influence. While the requirements for proving undue influence are strict, various fairly recent cases have upheld a jury finding of undue influence. *Cobb v. Justice*, 954 S.W.2d 162 (Tex. App.--Waco 1997, writ denied); *Tieken v. Midwestern State Univ.*, 912 S.W.2d 878 (Tex. App.--Fort Worth 1995, no writ); *Folsom v. Folsom*, 601 S.W.2d 79 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.); *Wilson v. Wilson's Estate*, 593 S.W.2d 789 (Tex. Civ. App.--Dallas 1979, no writ). See also

*Watson v. Dingler*, 831 S.W.2d 834 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (trial judge's finding of undue influence upheld). Further, the existence of undue influence only need be proved to have existed immediately prior to the execution of the will. *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App.--Dallas 1991, writ denied).

The existence of a confidential or fiduciary relationship to a testator is not sufficient to shift the burden of proof regarding undue influence to the proponent of the will. *Frost National Bank v. Boyd*, 196 S.W.2d 497 (Tex. 1945). However, some cases have suggested that the existence of a fiduciary relationship between the testator and the executor or beneficiaries under a purported will may raise a presumption of undue influence. *Spillman v. Estate of Spillman*, 587 S.W.2d 170, 172 (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.); see 10 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 51.21 (3d ed. 2002); but see *Dailey v. Wheat*, 681 S.W.2d 747 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (fact that bequest was made to attorney who occupied fiduciary relationship with deceased did not create a presumption of undue influence).

**3. RELEVANT FACTORS.** All material factors may be considered in determining whether undue influence existed at the time the will was executed. These include circumstances attending execution of will; relationship existing between testator and beneficiaries and others who might be expected to be recipients; motive, character and conduct of those who benefit under the will; participation, words and acts of all parties attending execution; physical and mental condition of testator at time of execution; age, weakness, infirmity and dependency on or subjection to control of beneficiary; and improvidence of transaction by reason of unjust, unreasonable or unnatural disposition. *Lowery v. Saunders*, 666 S.W.2d 226, 234 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.); *In re Olsson's Estate*, 344 S.W.2d 171, 174 (Tex. Civ. App.--El Paso 1961, writ ref'd n.r.e.); *Watson v. Dingler*, 831 S.W.2d 834 (Tex. App.--Houston [14th Dist.] 1992, writ denied). On the other hand, the fact that the testator shows signs of aging but is nevertheless a "normal and healthy man for an individual of his age" is not, without more, sufficient evidence of undue influence. *Matter of Estate of Montgomery*, 881 S.W.2d 750, 756 (Tex. App.--Tyler 1994, writ denied) (insufficient evidence to support jury finding of undue influence). *Compare Molnari v. Palmer*, 890 S.W.2d 147, 149 (Tex. App.--Texarkana 1994, no writ) (evidence addressing mental capacity "does not address fully the undue influence issue"; instructed verdict upholding validity of deed affirmed). Likewise, the mere opinion and belief of the will contestant that the testator was unduly influenced is not sufficient to raise the issue of undue influence. *Green v. Ernest*, 840 S.W.2d 119 (Tex. App.--El Paso 1992, writ denied) (summary judgment upholding validity of will upheld).

## • Fraud.

A will may be denied probate if an opponent to the will can prove that the testator was induced to sign the will by deception or misrepresentation. See *Vickery v. Hobbs*, 21 Tex. 570 (1858); *Stolle v. Kanetzky*, 259 S.W. 657, 663 (Tex. Civ. App.--Austin 1924, no writ). Note that fraud and undue influence overlap as grounds for setting aside a will in that both remedies address the problem of an individual who has gone beyond the bounds of legally permissible persuasion over the testator. *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App.--Dallas 1991, writ denied).

## • Mistake.

Generally, the execution of a will may not be set aside solely on the ground that it was induced by a testator's mistake of law or fact.

**1. MISTAKE IN THE FACTUM.** Mistake in the factum occurs when the testator is in error regarding the identity or contents of the instrument he is executing.

**a. Mistake in Identity of Instrument.** If the testator mistakenly signs his will when he thinks he is signing something else, or if he thinks he is signing his will but in fact he is signing another instrument (such as his wife's will), the instrument signed by the testator will not be admitted to probate as his will. See ATKINSON, WILLS 273-74 (2d ed. 1953).

**b. Mistake in Contents.**

(1) *Plain Meaning or Omission.* If there is a mistake regarding the contents of a will, extrinsic evidence may not be admitted to alter the plain meaning of words in the will or to provide a bequest that was mistakenly totally omitted. *Huffman v. Huffman*, 339 S.W.2d 885, 888 (Tex. 1960) (extrinsic evidence not admissible to contradict plain meaning; "the intent must be drawn from the will, not the will from the intent"); *Harrington v. Walker*, 829 S.W.2d 935, 938 (Tex. App.--Fort Worth 1992, writ denied) (unambiguous residuary clause resulted in partial intestacy, held: summary judgment was proper; affidavit of attorney/draftsman that testator intended Appellant to take property at issue was "not admissible to supply an omitted bequest."); *San Antonio Area Fdn. v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000) ("extrinsic evidence may not be used to create an ambiguity"). However, if the testator's incorrect understanding of the contents is claimed to be the result of fraud or undue influence, extrinsic evidence of the testator's true intent will be allowed without regard to whether the will is ambiguous. See *In Re: Estate of Riley*, 824 S.W.2d 305 (Tex. App.--Corpus Christi 1992, writ denied) (witness to execution testified that neither the testator's pre-execution remarks nor the testator's wife's purported reading of the will comported with the actual provisions of the will).

(2) *Latent Ambiguity.* Extrinsic evidence is admissible to clarify an ambiguity in a will, including even a latent ambiguity that arises because of extrinsic facts. See *McCauley v. Alexander*, 543 S.W.2d 699, 700-01 (Tex. Civ. App.--Waco 1976, writ ref'd n.r.e.).

(3) *Mistaken Insertion.* If a clause is inserted without the knowledge of the testator, the will might possibly be probated without the unintended clause. ATKINSON, WILLS 276-77 (2d ed. 1953); 10 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 51.33 (3d ed. 2002). Various will construction cases have established that words or clauses inserted in a will by mistake may be disregarded in the construction of the will to determine the testator's intent. *Mercantile National Bank v. National Cancer Research Foundation*, 488 S.W.2d 605, 608 (Tex. Civ. App.--Dallas 1972, writ ref'd n.r.e.).

## 2. MISTAKE IN THE INDUCEMENT.

Mistake in the inducement exists when the testator is induced to sign the will by his mistaken belief as to some extrinsic fact. As a general rule, no remedy is available for mistake in the inducement, because of the difficulty in determining what the testator would have done in the absence of the mistake. A generally stated rule throughout the U.S. is the following dictum in *Gifford v. Dyer*, 2 R.I. 99 (1852):

"The mistake must appear on the face of the will, and it must also appear what would have been the will of the testator but for the mistake."

For example, if a will says "I give all my property to my brother since my daughter Mary is dead," but Mary is in fact alive, the mistaken fact appears on the face of the will, and the mistake may be grounds for denying probate. However, if the will simply stated "I give all my estate to my brother," extrinsic evidence of the mistake as to the daughter's survival would not be admissible to deny probate of the will. See *First Christian Church of Temple v. Moore*, 295 S.W.2d 931, 934 n.1 (Tex. Civ. App.--Austin 1956, writ ref'd n.r.e.) ("the mistake here does clearly appear on the face of the will but there is nothing to show what the will would have been as far as the residuary clause is concerned if the mistake had not been made"); *Carpenter v. Tinney*, 420 S.W.2d 241, 243-44 (Tex. Civ. App.--Austin 1967, no writ) (oral statements made by testatrix at time will executed that she wanted to leave her property to two of her four children because her husband had made a will leaving his property to the other two children held inadmissible to deny probate of her will on the ground of mistake where husband's will did not leave his property to the other two children); *Bauer v. Estate of Bauer*, 687 S.W.2d 410, 412 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) ("No mere mistake, or prejudice or ill-founded conclusion, can ever be the basis of setting aside a will"); *Renaud v. Renaud*, 707 S.W.2d 750 Tex. App.--Fort Worth 1986, writ ref'd n.r.e.) (court refused reformation, holding for intestacy, where residuary testamentary trust made no provision for disposition in the event that daughter survived beyond a stated date and daughter did, in fact, survive;

"[we] have found that the implication sought by appellee Sara, that she be the sole beneficiary of the trust estate, is not a necessary or highly probable implication from the words of the will in question."); *Knesek v. Witte*, 715 S.W.2d 192 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.) (reformation denied where testatrix stated that her late husband had given her a life estate in a portion of property with remainder over to contestants but in fact her husband had given her the fee interest so that the property passed to other individuals as part of the residuary; held that it did not matter that testatrix was laboring under the false belief that she had only a life estate and that contestants held the remainder interest in the property); *Kilpatrick v. Estate of Harris*, 848 S.W.2d 859 (Tex. App.--Corpus Christi 1993, no writ) (will was admitted to probate despite testatrix's mistaken belief that deceased husband had died without a will; however, constructive trust was imposed to enforce contract to make a will that testatrix made with husband).

While a mistake of fact or law, standing alone, may not be sufficient grounds for denying probate of a will, such a mistake can apparently add cumulative weight to an otherwise insufficient undue influence or fraud claim so that probate will be denied. See *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App.--Dallas 1991, writ denied).

## • Testator Did Not Know Contents of Will

**1. GENERAL RULE.** If the testator does not have any knowledge of the contents of his will, testamentary intent would be lacking and the will would be denied probate. *Kelly v. Settegast*, 2 S.W. 870, 872 (Tex. 1887) ("The fact that a testator knew and understood the contents of a paper which he executed as a will is a necessary fact to be established before any will can be admitted to probate.").

**2. PRESUMPTION OF KNOWLEDGE OF CONTENTS.** A presumption exists that a person signing a will knows its contents. *Boyd v. Frost National Bank*, 196 S.W.2d 497, 507-08 (Tex. 1946).

**3. SUSPICIOUS CIRCUMSTANCES REBUT PRESUMPTION.** The presumption that the testator knew the contents of the will disappears upon proof of suspicious circumstances. An example of suspicious circumstances sufficient to rebut the presumption is provided by the leading Texas case of *Kelly v. Settegast*, 2 S.W. 870 (Tex. 1887). In that case, the testator was unable to read or write, was gravely ill at the house of one of the legatees, and signed a will by mark disinheriting his only living daughter, who was in the same house at the same time and did not even know her father was making a will. Neither beneficiary in the will was related to the testator, and it was not shown that he ever gave instructions to write a will nor that he had requested one to be written.

**4. BURDEN OF PROOF.** While the proponent has the burden of proving that the testator had knowledge of contents of the will, proof of due execution of a will, particularly by "a person of sound mind, able to read and write, and in no way incapacitated to acquire knowledge of the contents of a paper," is sufficient proof of knowledge of contents unless suspicious circumstances exist. *Boyd v. Frost National Bank*, 196 S.W.2d 497, 507 (Tex. 1946). "The will proponent need not produce evidence that the testator actually read and understood the will if he was of sound mind and not subject to undue influence. The fact that he signed it and requested witnesses to sign it, and acknowledged it as his last will, is *prima facie* evidence of his knowledge of its contents." *In re Estate of Browne*, 140 S.W.3d 436 (Tex. App.--Beaumont 2004, no pet. h.) (emphasis in original).

## • Will Subsequently Revoked.

Section 88(b)(3) of the Texas Probate Code requires that the proponent of a will must prove "[t]hat such will was not revoked by the testator." TEX. PROB. CODE ANN. § 88(b)(3) (Vernon 2003). See *Goode v. Estate of Hoover*, 828 S.W.2d 558, 559 (Tex. App.--El Paso 1992, writ denied). Proof of due execution raises a presumption of continuity, but the presumption may be rebutted by evidence of a later will or other facts. (See Part III.D at page 20 of this outline.) However, evidence of a later will is relevant only if the testator had testamentary capacity as of the date of the later will. *Turk v. Robles*, 810 S.W.2d 755 (Tex. App.--Houston [1st Dist.] 1991, writ denied).

## • Improper Execution.

It goes without saying that if a will is not executed with the requisite formalities (see Part II.D at page 5 of this outline), it may not be probated.

## • Prior Acceptance of Benefits by Contestant.

An individual who has accepted benefits under a will is generally estopped to subsequently contest the will, but only to the extent that the contest is inconsistent with the acceptance of the benefits. If the accepted benefits are no greater than those which the individual would receive if the will was defeated, the individual may contest the will notwithstanding the prior acceptance. See *Holcomb v. Holcomb* 803 S.W.2d 411, 412-413 (Tex. App.--Dallas 1991, writ denied). However, estoppel is an affirmative defense which the will proponent must affirmatively plead, as required by Texas Rules of Civil Procedure 94. TEX. R. CIV. P. 94. If the will proponent fails to properly plead, the contestant who has accepted benefits may still pursue his contest. See *In re Estate of Davis*, 870 S.W.2d 320 (Tex. App.--Eastland 1994, no writ). In *Davis*, the will proponent filed a motion to dismiss a will contest but he failed to raise the estoppel/acceptance of benefits issue until the hearing. The trial court agreed that the contestant was estopped

and dismissed the contest; however, the appellate court reversed.

• **Recovery of Attorney's Fees.**

**1. BY EXECUTOR.** If the person designated as executor in a will incurs expenses in connection with his efforts to have the will admitted to probate and if his efforts were taken in good faith and with just cause, he is entitled to recover his necessary expenses, including reasonable attorney's fees, from the estate, without regard to whether the will is ultimately upheld. TEX. PROB. CODE ANN. § 243 (Vernon 2003).

"The wording of Section 243 regarding an executor's recovery of fees is mandatory: '[W]hether successful or not, he *shall* be allowed out of the estate his necessary expenses . . . ' TEX. PROB. CODE ANN. § 243." *Harkins v. Crews*, 907 S.W.2d 51, 64 (Tex. App.--San Antonio 1995, writ denied) (emphasis in original).

**2. BY BENEFICIARIES.** Section 243 also allows a beneficiary of an alleged will to recover reasonable attorney's fees when promoting or defending a will in good faith and with just cause and, like an executor, the recovery is allowable without regard to whether the action is successful. However, the statute provides that the beneficiary "*may*" (not "*shall*") recover his fees. Thus, a beneficiary's ability to recover attorney's fees and other expenses is subject to the discretion of the trial court. TEX. PROB. CODE ANN. § 243 (Vernon 2003); *see also Harkins v. Crews*, 907 S.W.2d 51, 64 (Tex. App.--San Antonio 1995, writ denied) ("The wording regarding recovery of fees by beneficiaries is permissive"; however, both executor and beneficiary under purported will were allowed recovery of their attorney's fees). Furthermore, the right to seek attorney's fees under the statute is vested in a person designated as a devisee, legatee, or beneficiary in a will or an alleged will. *In Re Estate of Huff*, 15 S.W.3d 301, 306-308 (Tex. App.--Texarkana 2000, no pet. h.) (relatives and heirs at law who intervened were not designated beneficiaries in a will or alleged will, and who were not appointed administrator of a document not admitted to probate are precluded from being awarded attorney's fees under the statute)

**3. GOOD FAITH REQUIREMENT.** In any event, the executor or beneficiary seeking recovery of his attorney's fees must have acted in good faith and with just cause in order to be entitled to the recovery. TEX. PROB. CODE ANN. § 243 (Vernon 2003). If the executor or beneficiary fails to so plead and prove, no recovery will be allowed. *See Alldridge v. Spell*, 774 S.W.2d 707, 711 (Tex. App.--Texarkana 1989, no writ) (recovery of reasonable attorney's fees denied where will proponent failed to obtain jury finding of good faith); *compare Harkins v. Crews*, 907 S.W.2d 51, 62 (Tex. App.--San Antonio 1995, writ denied) (jury finding that will proponents acted in good faith in offering will for probate was not inconsistent with jury finding that will proponents had procured will by undue influence; attorney's fees were allowed).

• **Attorney Liability.**

**1. BARCELO V. ELLIOTT – CLAIMS BY INTENDED BENEFICIARIES.** On May 10, 1996, by a 5 to 3 decision, the Texas Supreme Court held that the draftsman of a will or other estate planning document owes no professional duty to the intended beneficiaries, thus placing Texas in the minority view among those states that have considered the matter. *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex., 1996).

**a. Background.** In *Barcelo*, the intended beneficiaries sued the draftsman of their grandmother's will and revocable trust alleging that, due to the attorney's negligence, they were forced to accept (in settlement) a smaller share of the estate than they would have received had the estate plan been properly prepared. The plaintiffs argued that the drafting attorney's duty extended to them and, alternatively, that they should recover under a third party beneficiary rule. The drafting attorney moved for summary judgment on the sole ground that he owed no duty to the plaintiffs because he never represented them.

The trial court granted the summary judgment; the appeals court affirmed in an unreported decision, *Barcelo v. Elliott*, No. 1-94-00830-CV (Tex. App.--Houston [1st Dist.] February 9, 1995); and the Texas Supreme Court granted writ of error, *Barcelo et al. v. Elliott*, 38 S.Ct. 1110 (August 5, 1995).

**b. Supreme Court Opinion.** The Supreme Court noted the inherent difficulty of determining the testator's intentions, the problems that would result from allowing extrinsic evidence to determine those intentions, and the difficulty of distinguishing between those cases where the draftsman was negligent and those where the draftsman was simply honoring the client's wishes. The court then stated:

"In sum, we are unable to draft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations. We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.

"We therefore hold that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust."

**2. ARLITT V. PATTERSON.** *Barcelo*, however, did not constitute an absolute protection. In *Estate of Arlitt v. Patterson*, 995 S.W.2d 713 (Tex.

App.--San Antonio 1999, pet. denied), following considerable litigation over a 1983 will and a 1985 codicil, the decedent's wife, individually and as executor of decedent's estate, along with some of decedent's children, sued the attorneys who drafted the instruments alleging negligence, negligent misrepresentation, negligent undertaking and breach of express and implied contract in connection with the attorneys' estate planning services.

**a. Negligent Misrepresentation Claims.** The appellate court first noted that negligence, negligent undertaking and breach of contract claims are legal malpractice claims under Texas law, and a plaintiff must show privity to prove the attorney owes her a duty of ordinary care. However, the appellate court held that privity is not a required element of negligent misrepresentation. Accordingly, a negligent misrepresentation claim is not equivalent to a legal malpractice claim.

**b. Claims by Surviving Joint Client.** The appellate court further held that by its terms, *Barcelo* only precludes legal malpractice claims by unrepresented beneficiaries, not claims by one of two joint clients. Accordingly, although the summary judgment denying the claims of the children was affirmed, the summary judgment denying the claims of the decedent's wife was reversed because a genuine issue of fact existed as to whether the attorneys represented the decedent and his wife in their estate planning efforts.

**3. BELT V. OPPENHEIMER – CLAIMS BY PERSONAL REPRESENTATIVE.** On May 5, 2006, the Texas Supreme Court held that the personal representative of a deceased client may bring a legal malpractice action against the drafting attorney on behalf of the estate, and recover actual damages to the estate resulting from the attorney's negligence. *Belt v. Oppenheimer Blend Harrison & Tate*, 192 S.W.3d 780 (Tex. 2006).

**a. Background.** In *Belt*, the independent executrixes brought a legal malpractice action against the attorneys who drafted the decedent's will, alleging negligence in advising decedent and drafting the will. The appellate court, refusing to overrule its decision in *Estate of Arlitt v. Patterson*, held that the independent executrixes had no cause of action against the attorneys due to a lack of privity. Noting several policy arguments in support of the independent executrixes, the appellate court stated that "[i]t is a tenet of our judicial system that we, as an intermediate appellate court, are bound by the pronouncements of the Supreme Court (in *Barcelo*), even though we may entertain a contrary opinion." *Belt v. Oppenheimer Blend Harrison & Tate*, 141 S.W.3d 706 @ 708, 709 (Tex. App.--San Antonio 2004, pet. granted) (parenthetical added).

**b. Supreme Court Opinion.** The Supreme Court began by briefly reaffirming the continued validity of *Barcelo* and confirming that a drafting attorney owes no duty of care to intended beneficiaries

(but made a point of noting that *Barcelo* represented a minority rule), 192 S.W.3d @ 783. The court then distinguished *Barcelo* on the facts, noting:

The question in this case, however, is whether the *Barcelo* rule bars suits brought *on behalf* of the decedent client by his estate's personal representatives.

(emphasis in original). The Court then focused on the survival of actions issue and analyzed as follows:

- Legal malpractice claims that allege pure economic loss survive in favor of a deceased client's estate because such claims are necessarily limited to recovery for property damage (which, under common law, *do* survive).
- A claim for estate-planning malpractice survives the client's death because:
  - when an attorney drafts estate planning documents, any alleged negligence occurs during the client's life, and
  - the client who discovers that negligence prior to his death could sue the attorney for forfeiture of fees and for the cost to restructure his estate plan (thus at least *some* damages – albeit nothing near as large as an alleged unnecessary estate tax liability – accrue prior to death).

(In this regard the Supreme Court expressly disapproved of the San Antonio Appeals Court holding in *Arlitt* that an estate-planning malpractice claim does not accrue during a decedent's lifetime-and therefore does not survive the decedent-because the estate's injuries do not arise until after death.)

**4. PRIOR TEXAS CASES.** Prior to *Barcelo*, the Texas cases had consistently denied claims by intended beneficiaries against the draftsman. For instance, the Houston Court of Appeals [1st Dist.], in a negligence action brought by the beneficiaries of a testamentary trust against the testator's attorney, has held that the attorney was not liable to the intended beneficiaries because there was no privity of contract between them and, in dicta, the court concluded that such beneficiaries likewise had no cause of action under a third party beneficiary theory. *Dickey v. Jansen*, 731 S.W.2d 581 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.).

The Dallas Court of Appeals subsequently followed *Dickey* in *Thomas v. Pryor* and the Supreme Court granted writ in on all points of error, thus setting the stage for what many observers believed would be a reversal of the privity defense to suits against draftsmen. However, the case was settled and the writ was dismissed. See *Thomas v. Pryor*, 847 S.W.2d 303 (Tex. App.--Dallas 1993, writ granted without reference to the merits and judgments of the courts below set aside

without reference to the merits, 862 S.W.2d 462 (Tex. 1993).

**5. OTHER STATES.** Even in those states that do allow intended beneficiaries to sue the drafters of wills and other estate planning instruments it appears clear that attorneys have no duty to draft "litigation proof" documents. In California, where estate planning attorneys clearly owe a duty to intended beneficiaries, the attorney's duty is by no means absolute, especially where the identity of the "intended beneficiaries" is uncertain. See e.g., *Ventura County Humane Society v. Holloway*, 40 Cal. App.3d 897, 115 Cal. Rptr. 464 (1984).

In *Ventura*, the draftsman of the will included, at the testator's request, a gift to the "Society for the Prevention of Cruelty to Animals (Local or National)." Because no organization by that name existed, a lawsuit against the attorney resulted. The court held for the defendant attorney, observing that "no good reason exists why the attorney should be held accountable for using certain words suggested or selected by the testator which later prove to be ambiguous" and reasoning that, were such a duty imposed, it "would result in a speculative and almost intolerable burden on the legal profession." 40 Cal.App.3d at 904. (Even in light of *Barcelo*, it should be self evident that reliance on *Ventura* would be ill advised; the prudent estate planner will make at least some effort to verify the proper names of the client's intended beneficiaries or clearly document his reliance upon the client to verify names.)

On the other hand, where the testator's intentions and the identity of the intended beneficiaries are clearly expressed in the will, the California cases "unhesitatingly support the view that an attorney may be held liable" if his or her negligence causes the beneficiaries to suffer a monetary loss as a direct result of such negligence. 40 Cal.App.3d at 903. This would be the case where the attorney, e.g., failed to have the will properly attested, or erred in his understanding of and planning under the applicable tax laws. See, e.g., *Bucquet v. Livingston*, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976) (revocable trust prepared by attorney granted surviving spouse a power of revocation over, *inter alia*, the by-pass trust, resulting in otherwise avoidable taxes; attorney was held liable).

Florida case law confers standing to sue the draftsman only on those who can demonstrate that the lawyer's negligence frustrated the testator's intent and, for this purpose, extrinsic evidence is inadmissible; only the language of the will can prove the testator's intent. *Kinney v. Schinholser*, 663 S.W.2d 643 (Fla. App. 1995) (husbands will devised his estate in trust for the benefit of his wife and it gave her a general power of appointment over the assets, which resulted in \$320,000 in taxes which would not have resulted had the assets been sheltered, however, the court found no evidence in the will which indicated an intention to minimize taxes, therefore the drafting lawyer was not liable).

## Proceedings Involving Charitable Trusts.

Chapter 123 of the Texas Property Code provides that the Attorney General is a proper party in any proceeding involving a charitable trust, except that effective September 1, 2007, such notice is not required in an uncontested probate proceeding. TEX. PROP. CODE ANN. § 123.002 (Vernon 1995). Notice must be given to the Attorney General of any proceeding involving a charitable trust. TEX. PROP. CODE ANN. § 123.003 (Vernon Supp. 2005). Effective September 1, 2005, Section 123.003 is amended to provide that notice shall be given to the Attorney General within 30 days of the filing of the petition, but no less than 25 days (rather 10 days) prior to a hearing in the proceeding. A judgment in a proceeding involving a charitable trust over a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust is voidable if the attorney general is not given notice. TEX. PROP. CODE ANN. § 123.004 (Vernon 1995). Proper venue of a proceeding brought by the Attorney General alleging breach of a fiduciary duty by the trustee of a charitable trust is in a court of competent jurisdiction in Travis County or in the county where the defendant resides or has its principal office. TEX. PROP. CODE ANN. § 123.005(a) (Vernon Supp. 2004). The Attorney General, if successful in the proceeding, is entitled to recover from the trustee actual costs and reasonable attorney's fees. TEX. PROP. CODE ANN. § 123.005(b) (Vernon Supp. 2004).

The term "charitable trust" is construed very broadly to cover practically all gifts to a charitable entity, even if a traditional express trust is not created. *Nacol v. State*, 792 S.W.2d 810, 812 (Tex. App.--Houston [14th Dist.] 1990, writ denied). A "proceeding involving a charitable trust" has also been construed to find that the Attorney General has standing to intervene on behalf of a charitable trust in an heirship proceeding where the gift to the charitable entity evolved from another gift under the will of an alleged heir. *In re Estate of York*, 951 S.W.2d 122 (Tex. App.--Corpus Christi 1997, n.w.h.).

### III.

## REVOCATION

Under the Texas Probate Code, a will may be revoked only by (i) a subsequent writing, (ii) a physical act, or (iii) operation of law. TEX. PROB. CODE § 63. No other method of revocation is valid. See *Goode v. Estate of Hoover*, 828 S.W.2d 558, 559 (Tex. App.--El Paso 1992, writ denied); *In re Estate of Wilson*, 7 S.W.3d 169 (Tex. App.--Eastland 1999, pet. denied) (agreement incident to divorce was not sufficient to revoke will). An intent to revoke must exist for a will to be revoked under the first two methods. Therefore, lack of testamentary capacity or intent or the existence of fraud or undue influence will invalidate the "revocation." See *In re Estate of Plohberger*, 761 S.W.2d 448 (Tex. App.--Corpus Christi 1988, writ

denied) (purported subsequent will that was denied probate because of undue influence did not revoke prior will); 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 33.4-33.5 (3d ed. 2002).

## • By Subsequent Writing.

### 1. STATUTORY "LIKE FORMALITIES" REQUIREMENT

**a. General Rule.** While Section 63 of the Texas Probate Code *literally* requires that a revocation in writing of a prior will be "executed with like formalities," this does not mean that an attested will may only be revoked by an attested writing, or that a holographic will may only be revoked by a holographic writing. *See Cravens v. Chick*, 524 S.W.2d 425, 427 (Tex. Civ. App.--Fort Worth 1975, writ ref'd n.r.e.). To the contrary, the statute simply requires that a revoking instrument, in order to be effective, must be executed "with the same formalities that are required to probate a will." *Harkins v. Crews*, 907 S.W.2d 51, 58 (Tex. App.--San Antonio 1995, writ denied).

**b. Revoking Instrument Need not be Probated or even Probatable.** Section 3(ff) of the Texas Probate Code defines the term "will" to include an instrument which revokes another will, and thus seems to imply that revoking instruments are effective only to the extent that they could be admitted to probate as full fledged wills. TEX. PROB. CODE ANN. § 3(ff) (Vernon 2003). The passage from *Harkins* quoted above suggests that this is in fact the rule. However, Texas law is clear that revoking instruments that otherwise satisfy the "like formalities" test are effective without regard to whether they are admitted to probate, offered for probate, or even capable of being admitted to probate as a valid will. *See Harkins v. Crews*, 907 S.W.2d 51, 59 (Tex. App.--San Antonio 1995, writ denied) (it is not necessary that a purported revoking instrument be offered for probate"); *Chambers v. Chambers*, 542 S.W.2d 901, 905 (Tex. Civ. App.--Dallas 1976, no writ) (will effectively revoked prior wills even though it could not be admitted to probate because of the four-year limitation in Section 73(a) of the Probate Code); and *Matter of Rogers*, 895 S.W.2d 375 (Tex. App.--Tyler 1994, writ denied) (parties stipulated that holographic instrument was not a valid testamentary instrument due to numerous interlineations in the handwriting of persons other than the testator, nevertheless, court found that it satisfied the "like formalities" standard and was effective to revoke a prior will). If the "like formalities" test is not satisfied, the instrument is not sufficient to revoke a will. *In Re Estate of Wilson*, 7 S.W.3d 169, 171 (Tex. App.--Eastland 1999, pet. denied) (agreement incident to divorce waiving right to inherit did not comply with Section 63 and was not sufficient to revoke the will).

**2. LANGUAGE IN WRITING SUFFICIENT TO CONSTITUTE REVOCATION.** Any language clearly showing an intent to revoke a former will is sufficient, and it is not essential that specific words be employed (or even that the word "revoke" appear).

However, the *intent* to revoke must be clearly expressed and the testator must have testamentary capacity at the time that the revocation instrument is executed. A reference to "this my Last Will and Testament" does not, by itself, constitute an effective revocation clause. *Lane v. Sherrill*, 614 S.W.2d 619, 621 (Tex. App.--Austin 1981, no writ). However, inconsistent provisions in a former will are revoked by implication, as discussed below. ATKINSON, WILLS 448 (2d ed. 1953). The language must manifest a present intent to revoke the former will by the writing itself. *Tynan v. Paschal*, 27 Tex. 286 (1863) (testator's letter to attorney directing the attorney to destroy his will did not constitute a valid revocation), discussed in 10 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 35.3 (3d ed. 2002).

**3. IMPLIED PARTIAL REVOCATION.** A will may be revoked, in whole or in part, by a subsequent inconsistent will, even if the subsequent will contains no express language of revocation. *See May v. Brown*, 190 S.W.2d 715, 718 (Tex. 1945). Unless the subsequent will contains an express clause revoking the prior will, the courts will, as far as possible, attempt to read the two wills together. *See Hinson v. Hinson*, 280 S.W.2d 731, 735 (Tex. 1955) and *Ayala v. Martinez*, 883 S.W.2d 883 (Tex. App.--Corpus Christi 1994, writ denied) (court probated decedent's last two wills; latter will controlled where conflicts between it and the prior will were apparent). But if a subsequent will is *totally inconsistent* with a former will, the former will is not entitled to probate. *Thomason v. Gwin*, 184 S.W.2d 542, 547 (Tex. Civ. App.--Amarillo 1944, writ ref'd w.o.m.); *Warnken v. Warnken*, 104 S.W.2d 935, 937 (Tex. Civ. App.--Austin 1937, writ dismissed by agr.).

## • By Physical Act.

### 1. STATUTORY REQUIREMENT.

Section 63 of the Texas Probate Code also provides that a will may be revoked "by the testator destroying or canceling the same, or causing it to be done in his presence." TEX. PROB. CODE ANN. § 63 (Vernon 2003). Therefore, the statute requires (1) a physical act, by the testator or someone at the testator's direction *and* in his presence, and (2) the intent to revoke.

**2. SUFFICIENCY OF PHYSICAL ACT TO ACCOMPLISH REVOCATION.** The tearing, cutting, or obliteration of the entire will, with intent to revoke, constitutes a valid revocation. *Simpson v. Neeley*, 221 S.W.2d 303, 311-14 (Tex. Civ. App.--Waco 1949, writ ref'd). Defacing the signature or cutting the signature from the instrument might also constitute a valid destruction. *Id.* Similarly, defacing all of the provisions of the will, or writing the word "canceled," "void," or "annulled" through *all* of the dispositive provisions or the signature would apparently suffice as a valid revocation. *See Dean v. Garcia*, 795 S.W.2d 763, 765 (Tex. App.--Austin 1989, writ denied) (writing "CANCELED" [sic] and "VOID" across all gift provisions of a codicil was sufficient to revoke the codicil, but did not effectuate a revocation of the will, even though codicil included language that republished

the will); 10 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 35.2 (3d ed. 2002). However, marking through or cutting out one or more dispositive clauses does not constitute a revocation of the will, even if the testator had the intent to revoke the entire will, because the physical act itself does not manifest an intent to revoke the entire will. See *Sien v. Beitel*, 289 S.W. 1057, 1058-59 (Tex. Civ. App.--San Antonio 1927, no writ).

### 3. MISTAKEN BELIEF OF DESTRUCTION

**INSUFFICIENT.** If a testator intends to revoke his will by destruction, but mistakenly destroys another paper, the will is not revoked. *Morris v. Morris*, 642 S.W.2d 448, 449 (Tex. 1982) (testator's wife said "I will destroy [the will] for you right now" and tore an envelope into shreds, but the will was not in the envelope and not destroyed); see *Sien v. Beitel*, 289 S.W. 1057, 1058 (Tex. Civ. App.--San Antonio 1927, no writ) (nurse pretended to destroy will upon testator's instructions, but did not actually do so; will entitled to probate). However, if a beneficiary under the will misled the testator into thinking that he was destroying the will when in fact he was not, such person taking under the will may be required to account for the property as a constructive trustee. *Morris v. Morris*, 642 S.W.2d 448, 450 (Tex. 1982).

### 4. PARTIAL REVOCATIONS BY PHYSICAL ACT.

**a. Not Recognized for Attested Wills.** A testator may not partially revoke certain provisions in an attested will by erasure, cancellation, or other obliteration of the specific clause. *Leatherwood v. Stevens*, 24 S.W.2d 819, 823 (Tex. Comm'n App. 1930, holding approved); *Huckaby v. Huckaby*, 436 S.W.2d 601, 607 (Tex. Civ. App.--Houston [1st Dist.] 1968, writ ref'd n.r.e.); *Goode v. Estate of Hoover*, 828 S.W.2d 558, 559 (Tex. App.--El Paso 1992, writ denied).

**b. Recognized for Holographic Wills.** A holographic will may be revoked in part by physical act. *Stanley v. Henderson*, 162 S.W.2d 95, 97 (Tex. 1942); see *Hancock v. Krause*, 757 S.W.2d 117, 120-21 (Tex. App.--Houston [1st Dist.] 1988, no writ) (alteration of holographic will treated as "both a revocation of the altered provisions and a valid disposition of the new provisions, with the prior signature pages being adopted"); *City of Austin v. Austin National Bank*, 488 S.W.2d 586, 592-93 (Tex. Civ. App.--Austin 1972) (court recognized the *Stanley v. Henderson* rule, but refused to recognize partial revocation of will on procedural grounds), *aff'd in part and rev'd in part on other grounds*, 503 S.W.2d 759 (Tex. 1974).

## . By Operation of Law

### 1. SUBSEQUENT DIVORCE.

**a. General Rule.** Section 69 of the Texas Probate Code provides that if a testator is divorced after making a will, all provisions in the will (i) in favor of the spouse or any relative of the spouse who is not

related to the testator or (ii) appointing the spouse or any such relative of the spouse to any fiduciary capacity, shall be read as if such persons failed to survive the testator. Tex. Prob. Code Ann. §69(a) (Vernon Supp. 2007). Prior to September 1, 1997, although it was clear that bequests to a former spouse were void, it was not clear how to treat gifts to contingent beneficiaries which were dependent on the survival of the former spouse. The 1997 amendment to Section 69 adopted the holding in *Calloway v. Estate of Gasser*, 558 S.W.2d 571 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.) and made it clear that in the event of a subsequent divorce, property bequeathed to the spouse passes to the contingent beneficiaries who would have received the property if the ex-spouse had predeceased the testator. If the spouses subsequently remarry before the testator's death, will provisions in favor of the spouse are given effect. See *Smith v. Smith*, 519 S.W.2d 152, 154-55 (Tex. Civ. App.--Dallas 1974, writ ref'd).

### b. Trusts and Pour Over Wills.

(1) *Law Before September 1, 2005.* If the will is a pour-over into an existing inter vivos trust, any provisions in the trust in favor of the divorced spouse are probably still valid. No Texas case has discussed this issue, and there is no analogous statute in the Texas Trust Code to Section 69 of the Probate Code. Some cases in other states have held that statutes governing implied revocation of testamentary gifts on divorce also apply to provisions benefitting prior spouses in unfunded revocable trusts that receive assets at the decedent's death under a pour-over will. See *Clymer v. Mayo*, 473 N.E.2d 1084 (Mass. 1985) ("Decedent's will and trust were integrally related components of a single testamentary scheme...[T]he trust, like the will, 'spoke' only at the Decedent's death. For this reason, [the prior spouse's] interest in the trust was revoked by operation of [the statute revoking testamentary gifts upon divorce] at the same time his interest under the Decedent's will was revoked"); *Miller v. First National Bank & Trust*, 637 P.2d 75 (Okla. 1981).

(2) *Law Effective September 1, 2005.* Effective September 1, 2005, the 2005 Texas Legislature enacted new Sections 471 through 473 of the Texas Probate Code. Section 472 provides that in a trust which is revocable by a divorced spouse, all dispositions or appointment of property and nominations to serve as a fiduciary in favor of a former spouse are revoked, unless the instrument is re-executed or a court order provides otherwise. The 2007 revisions to Section 69, which provide that divorce also voids gifts and fiduciary appointments of an ex-spouse's relatives, do not appear to apply to revocable trusts.

**c. Third Party Fiduciary Appointments may be Affected.** Subsequent divorce may also affect third party fiduciary appointments under a will. In *Formby v. Bradley*, 695 S.W.2d 782 (Tex. App.--Tyler 1985, writ ref'd n.r.e.), the will contained an alternate executor provision that was expressly conditioned upon simultaneous death of the testator and former spouse. The court held the appointment of alternate executor provision to be invalid because the decedent and former

spouse did not die simultaneously (indeed she was still living). However, the court distinguished that situation from the more common type of clause appointing an alternate executor "if my spouse predeceases me." In that latter situation, the court intimated that the alternate designation may have been given effect.

**d. Family Code Provision for Life Insurance.** Section 9.301 of the Texas Family Code provides that a divorce operates as an automatic revocation with respect to life insurance death proceeds passing to the divorced spouse. TEX. FAM. CODE ANN. § 9.301 (Vernon 1998).

**e. Family Code Provision for Retirement Benefits.** Section 9.302 of the Texas Family Code provides that a divorce operates as an automatic revocation of a designation of the divorced spouse as beneficiary under an individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant. TEX. FAM. CODE ANN. § 9.302 (Vernon 1998). However, in reviewing a State of Washington statute similar in effect to Section 9.302, the United States Supreme Court in *Egelhoff v. Egelhoff*, 121 S.Ct. 1322 (2001), held that ERISA preempted the Washington statute since the plan at issue was governed by ERISA, thereby resulting in the divorced spouse receiving the proceeds from the life insurance and pension plan.

Two Texas appellate courts considered the *Egelhoff* decision in connection with Section 9.302 of the Texas Family Code, reaching conflicting decisions. In *Weaver v. Keen*, 43 S.W.3d 537 (Tex. App.--Waco 2001, pet. granted), the court held that Section 9.302, although preempted by ERISA, applied as federal common law automatically terminated a former spouse's designation as beneficiary under an ERISA plan. The appellate court concluded that the *Egelhoff* decision did not affect the analysis applicable to the case, and that its conclusion was supported by *Egelhoff*. *Id.* at 544-45. In *Heggy v. American Trading Employee Retirement Account Plan*, 56 S.W.3d 280 (Tex. App.--Houston [14th Dist.] 2001, no pet.), the court expressly declined to follow *Weaver v. Keen*, and held that Section 9.302 was preempted by ERISA, citing the *Egelhoff* decision.

However, in *Keen v. Weaver*, 121 S.W.3d 721 (Tex. 2003), cert. denied, 124 S.Ct. 808 (2003), the Texas Supreme Court, in a five to four decision, affirmed the appellate judgment, but on different grounds. The Court noted that although ERISA expressly preempts the Texas redesignation statute (Section 9.302), it does not resolve the question of who is entitled to the ERISA plan proceeds. The issue thus becomes whether the federal law governing the resolution may be drawn from the text of ERISA itself, or must instead be developed as a matter of federal common law. *Id.* at 724. The Texas Supreme Court agreed that *Egelhoff* supports the conclusion that federal common law controls, but disagreed with the appellate court's formulation of federal law as a mere conduit for applying the Texas redesignation statute. *Id.* at 726.

Instead, the Court adopted the federal courts' formulation of a common law of waiver that recognizes "a former spouse's waiver of ERISA plan benefits in a divorce decree dividing the marital estate so long as it is specific, knowing, and voluntary." *Id.* at 727.

**2. SUBSEQUENT CHILDREN.** The "pretermitted child" statute (Section 67 of the Texas Probate Code) can operate as a partial revocation. TEX. PROB. CODE ANN. § 67 (Vernon 2003). See Part 2IV.B.2 at page 35 of this outline.

## • Presumptions Regarding Revocation

**1. PROPONENT OF WILL HAS BURDEN OF PROVING WILL NOT REVOKED.** Section 88(b)(3) of the Texas Probate Code requires proof "that such Will has not been revoked by the testator." TEX. PROB. CODE ANN. § 88(b)(3) (Vernon 2003). The proponent of the will has the burden of proving that the will offered for probate has not been revoked. *Brackenridge v. Roberts*, 270 S.W. 1001, 1002 (Tex. 1925).

**2. PRESUMPTION OF CONTINUITY.** When it is shown that a will has been executed with proper formalities, a "presumption of continuity" arises in favor of the proponent. *Gillispie v. Reinhardt*, 596 S.W.2d 558, 561 (Tex. Civ. App.--Beaumont 1980, writ ref'd n.r.e.); compare *Harkins v. Crews*, 907 S.W.2d 51, 59 (Tex. App.--San Antonio 1995, writ denied) (presumption of continuity arises when will is produced without mutilation or other evidence of intent to revoke--or when will cannot be produced but it was not in the testator's possession when last seen--and the will has been duly proved to have been executed without any circumstances to cast doubt on its execution).

**3. EVIDENCE OF REVOCATION REBUTS PRESUMPTION OF CONTINUITY.** The presumption of continuity disappears if the contestant introduces evidence of revocation, and the burden of proof shifts back to the proponent of the will to prove that the will was not revoked. Some Texas cases have recognized slight evidence of revocation as rebutting the presumption of continuity. *May v. Brown*, 190 S.W.2d 715 (Tex. 1945) (presumption of continuity rebutted by proof that a later will was executed, although the later will could not be produced and there was no evidence that it contained a revocation clause or that its contents were totally inconsistent with the provisions of the first will); *Brackenridge v. Roberts*, 267 S.W. 244, 248 (Tex. 1924) (second will rebutted presumption of continuity even though contestants were unable to prove the subsequent will for probate). However, other cases have stated that there must be "substantial evidence" of revocation before the presumption of continuity is rebutted. *Matter of Estate of Page*, 544 S.W.2d 757, 761 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.). Even if the presumption of continuity is rebutted, the proponent may then produce evidence satisfying his burden of nonrevocation. *Morgan v.*

*Morgan*, 519 S.W.2d 276, 278 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.).

**4. LOST WILLS.** Special revocation presumptions apply to lost wills. *Pearce v. Meek*, 780 S.W.2d 289, 291 (Tex. App.--Tyler 1989, no writ) ("When a will is in the possession of the testator when last seen, failure to produce the will after the testator's death raises the presumption that the testator destroyed the will with the intention of revoking it, and the burden is cast on the proponent to prove the contrary"); *In re Estate of Glover*, 744 S.W.2d 939, (Tex. 1998) (the standard by which the sufficiency of the evidence should be reviewed is by a preponderance of the evidence, rather than by clear and convincing evidence); *Hoppe v. Hoppe*, 703 S.W.2d 224, 227 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) (fact that the will was left in lawyer's office and that decedent could have requested will from attorney at any time was sufficient to support jury finding that will was last seen in the possession of decedent or in a place where she had access to it); *Cable v. Estate of Cable*, 480 S.W.2d 820, 821 (Tex. Civ. App.--Fort Worth 1972, no writ) ("where will of a testator was last seen in the presence of the testator...the failure to produce such will after his death raises the presumption that the testator had destroyed his will with the intent to revoke it"); *In re Estate of Capps*, 154 S.W. 3d 242 (Tex. App.--Texarkana 2005, no pet. h.) ('an original will's absence creates a rebuttable presumption of revocation; but that presumption can be overcome by proof and circumstances contrary to the presumption or that it was fraudulently destroyed by some other person'). For a general summary of proof requirements to probate a lost will, see *Coulson v. Sheppard*, 700 S.W.2d 336, 337 (Tex. App.--Corpus Christi 1985, no writ); see also Tex. Prob. Code Ann. (Vernon 2007); *In re Estate of James*, 197 S.W.3d 894 (Tex. App. – Beaumont 2006, pet. filed) (treating a photocopy of a will as an original will, even without compliance with Texas Probate Code § 85)

• **Revoked Will May Not Be Revived Except by Re-Execution or Republication.**

Unlike some other jurisdictions, Texas does not recognize the "revival" doctrine. Once a will is revoked by a later will, it cannot be revived unless (1) re-executed with the necessary formalities, *Brackenridge v. Roberts*, 267 S.W. 244 (Tex. 1924); *Chambers v. Chambers*, 542 S.W.2d 901, 905 (Tex. Civ. App.--Dallas 1976, no writ), or (2) republished by subsequent codicil, *Reynolds v. Park*, 521 S.W.2d 300 (Tex. Civ. App.--Amarillo 1975, writ ref'd n.r.e.).

• **Dependent Relative Revocation.**

Although the *execution* of a will may not be set aside on the ground that it was induced by a testator's mistake of law or fact (see Part III.D at page 12 of this outline), some courts have adopted a different attitude toward *revocation* which has been induced by mistake of law or fact. See 10 BEYER, TEXAS PRACTICE: TEXAS

LAW OF WILLS § 38.4 (3d ed. 2002) (discussing reason for the distinction).

**1. MISTAKE OF LAW.** The application of the dependent relative revocation doctrine to a mistake of law is best demonstrated by example. Assume a testator executes Will No. 1 leaving his estate to his nephew, and later executes Will No. 2 which leaves his estate in trust for life for his nephew, with the remainder to his nephew's children. Later, the testator decides he would rather leave all of his estate outright to his nephew, so he destroys Will No. 2 thinking that he would thereby revive Will No. 1. Since the testator's revocation was dependent upon his mistake of law that Will No. 1 was revived, the revocation is disregarded in order to best carry out the testator's intent: He would rather have the property pass in trust for his nephew under Will No. 2 than pass by intestacy.

However, the two Wills must be similar. For example, if Will No. 1 leaves property to a grandson, and Will No. 2 leaves property to a nephew, the dependent relative revocation doctrine would not apply to a subsequent revocation of Will No. 2 on the mistaken belief that Will No. 1 would be revived. The intention to revoke Will No. 2 would be *independent* of the desire to revive Will No. 1. In that situation, the testator has given indication that he did not want the property to pass to his nephew, so generally courts would attempt to carry out the testator's intent by upholding the revocation of Will No. 2 and allowing the property to pass by intestacy rather than by the terms of Will No. 2 that the testator had clearly revoked and that were clearly totally inconsistent with his desire. See *generally* ATKINSON, WILLS 453-54 (2d ed. 1953).

**2. MISTAKE OF FACT.** If the subsequent revoking instrument states *on its face* that the partial or complete revocation is being made because of a particular mistake in fact, the revocation would be invalid under the dependent relative revocation doctrine. For example, if the subsequent revoking codicil states "I revoke the bequest to Mary since she is dead," but in fact she is not dead, the revocation would not be recognized under the dependent relative revocation doctrine.

**3. APPLICATION OF DEPENDENT RELATIVE REVOCATION DOCTRINE IN TEXAS.** The only Texas case which has referred to the dependent relative revocation doctrine by name is *Chambers v. Chambers*, 542 S.W.2d 901 (Tex. Civ. App.--Dallas 1976, no writ). Discussions in this and various other Texas cases suggest that the doctrine has some validity in Texas. See 10 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 38.4 (3d ed. 2002).

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## PART 2.

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### SPECIFIC WILL PROVISIONS

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#### I.

#### EXORDIUM CLAUSE

##### . Example

"I, \_\_\_\_\_, residing and being domiciled in Dallas County, Texas, make, declare and publish this, my Last Will and Testament, and hereby revoke all previous Wills and Codicils made by me."

##### . Purposes of Exordium Clause

**1. IDENTIFY TESTATOR.** The will should identify the testator's full legal name. If the testator also has acquired title to substantial property in a name other than his full legal name, it might also be appropriate to include "also known as" names in order to avoid later title problems. *See generally* 7 TEXAS TRANSACTION GUIDE § 42.121[1](1) (2006).

**2. ESTABLISH DOMICILE.** Domicile is important in determining formal execution requirements for the will, property rights, rights of the surviving spouse, and any other issues that may arise regarding the substantive law of a particular jurisdiction. In particular, domicile is important for state death tax purposes. Most states follow a general pattern of taxing all real property actually located in that state as well as all personal property of a decedent who died as a domicile of that state. The declaration made in the will is not controlling, but can certainly be a factor in determining the decedent's domicile.

**3. DECLARATION AND PUBLICATION OF WILL.** One of the basic requirements of a will is that it be written with "testamentary intent." *Hinson v. Hinson*, 280 S.W.2d 731, 733 (Tex. 1955). The exordium clause clearly indicates that the instrument is made with testamentary intent. Some states specifically require publication of the will as a part of the execution requirements. ATKINSON, WILLS 327-30 (2d ed. 1953).

**4. REVOKE PRIOR WILLS.** Unless a subsequent will contains an express clause revoking a prior will, courts will, as far as possible, attempt to read the two wills together. *Hinson v. Hinson*, 280 S.W.2d 731, 735 (1955). Therefore, the will should clearly state that it is revoking prior wills and codicils. See generally Part III beginning at page 25 of this outline.

#### II.

### INTRODUCTORY PARAGRAPH IDENTIFYING FAMILY AND PROPERTY BEING DISPOSED

##### . Identify Family.

Identifying the testator's spouse at the beginning of the will provides a convenient means for thereafter referring to him or her as "my wife [or husband]" or "my spouse." If the testator indicates that he will be marrying an individual in the near future, the will should specifically indicate whether bequests to that person are contingent upon the marriage.

The pretermitted child statutes in some states (not Texas) give protection to children alive at the time the will is executed if they are not "named or provided for in the will." *See* John B. Rees, Jr., *American Wills Statutes: II*, 46 VA. L. REV. 856, 893-98 (1960) (summary of pretermitted child statutes in American jurisdictions); *e.g.*, *Estate of Cisco v. Cisco*, 707 S.W.2d 769 (Ark. App. 1986) (two of testator's children were deceased at time will was signed and were not "mentioned" in will; held the descendants of those children were entitled to part of estate under Arkansas law). Therefore, it is useful to identify *all* of the testator's children to guard against the possibility of the testator's subsequently moving to a jurisdiction with one of these types of statutes, in which event a child omitted from the dispositive scheme could argue that he or she was not "named or provided for in the will" and is therefore entitled to an intestate share of the estate.

The will should also identify the testator's stepchildren. Stepchildren or adopted children of the testator's spouse are generally not included within the definition of "children." *See Carroll v. Carroll*, 20 Tex. 731 (1858); B. DE R. O'Byrne and J. Kraut, Annotation, *Testamentary Gift to Children as Including Step-Child*, 28 A.L.R.3d 1307 (1969). Therefore, the will must specifically indicate what portion of the estate if any is left to stepchildren.

##### . Identify Property Being Disposed.

The will should clearly identify whether the testator is merely disposing of his or her property, or whether he is also attempting to dispose of property belonging to his or her spouse. For example, various Texas courts have been called upon to interpret whether dispositions of "all my property" means only the decedent's community one-half or the entire interest in the community asset registered in that spouse's name. *See Church of Christ v. Wildfong*, 265 S.W.2d 622 (Tex. Civ. App.--Waco 1944, no writ) (bequest of "all my property" disposes only the testator's one-half community interest). If the will is intended to dispose of *any* of the surviving spouse's property, it should clearly state whether the spouse is put to an election either to receive benefits under the will or to retain her

property interests. See Part 2IV.A.3.b at page 31 of this outline.

### III.

## APPOINTMENT OF FIDUCIARIES

### . Executor

#### 1. APPOINTMENT OF INDEPENDENT EXECUTOR

**a. Advantage of Having Independent Executor.** If the executor serves as an "independent executor" under the independent administration system, the executor essentially acts free of court control and with much greater convenience and flexibility than in a "dependent administration." Effective September 1, 1999, new Sections 149D - 149G of the Texas Probate Code established a procedure for obtaining a judicial discharge for independent executors. TEX. PROB. CODE ANN. §§ 149D-149G (Vernon 2003). However, this new procedure applies only to estates of decedents dying on or after the effective date.

**b. Requirements for Appointment of Independent Executor.** A testator may provide for an independent administration only by specifically appointing an independent executor. Section 145(b) of the Texas Probate Code provides as follows:

"Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisalment, and list of claims of his estate."

TEX. PROB. CODE ANN. § 145(b) (Vernon 2003).

The usual language for appointing an independent executor names the designated individual or bank as an "independent executor" and also paraphrases Section 145. However, no particular words of art are necessary so long as the testator makes it clear that he desires his executor to act free of court control.

(1) *Presumption in Favor of Dependent Administration.* While the courts have held that only general language indicating an intent to serve free of court control is sufficient to appoint an independent executor, when the language of the will is doubtful the doubt is resolved in favor of a dependent administration, on the theory that the testator would want all of the safeguards of the dependent administration system unless he specifically indicated to the contrary in his will. *McMahan v. McMahan*, 175 S.W. 157, 159 (Tex. Civ. App.--Dallas 1915, writ ref'd).

(2) *Appointment as "Independent" Executor Is Sufficient.* The appointment of a person as "independent" executor is sufficient without additional language limiting the action of the Probate Court. *In re*

*Dulin's Estate*, 244 S.W.2d 242, 244 (Tex. Civ. App.--Galveston 1951, no writ).

(3) *Use of "Independent" Adjective Not Necessary.* The will need not necessarily describe the executor as being an "independent executor." See *Stephens v. Dennis*, 72 S.W.2d 630, 632 (Tex. Civ. App.--Eastland 1934, writ ref'd).

(4) *Mere Indication to Serve "Without Any Court Action That Can Be Avoided."* The lead Texas case regarding the extent to which courts will go in finding that an independent executor was named is *Boyles v. Gresham*, 263 S.W.2d 935, 936 (Tex. 1954). The holographic will stated: "Would Like to have all of my affairs, Cash all assets including any Bank Balance turned over to Parties named below With out any Bond or any Court action that can be avoided." This language was sufficient to name an independent executor. See also *Long v. Long*, 169 S.W.2d 763, 764 (Tex. Civ. App.--San Antonio 1943, writ ref'd) (executor named to serve "without any legal requirements" held sufficient to create independent executor).

(5) *Appointment of Executor Without Bond Insufficient.* Merely appointing an executor to serve without bond does not, without more, show an intention to make him independent. *Gray v. Russell*, 91 S.W. 235 (Tex. 1906); *Pinkston v. Pinkston*, 270 S.W.2d 250 (Tex. Civ. App.--Waco 1954, writ ref'd n.r.e.).

(6) *Naming Persons as Independent Executor but Placing Under Probate Court Control for Specific Matters May Defeat Independent Administration.* Even if a testator clearly appoints an "independent executor," or appoints an executor to serve free of court control, if the will also subjects the executor to probate court control with respect to particular matters (such as providing annual reports for court approval), the creation of an independent administration may be defeated. *Hughes v. Mulanax*, 153 S.W. 299, 303 (Tex. 1913) (requirement of executor to make annual reports "which annual reports shall be acted on by said court in the same manner as the annual reports of other executors and administrators" held to defeat creation of independent administration); *Bain v. Coats*, 244 S.W. 130, 134 (Tex. Comm'n App. 1922, holding approved) (clause appointing independent executor but placing duty on Probate Court to require "a report of all acts of my executor" held not to create an independent administration); but see *John Hancock Mutual Life Insurance Company v. Duval*, 96 S.W.2d 740, 741-42 (Tex. Civ. App.--Eastland 1936, writ ref'd) (direction to executor to file annual report did not defeat appointment of independent executor because court approval of the report was not intended); compare *In Re Estate of Spindor*, 840 S.W.2d 665 (Tex. App.--Eastland 1992, no writ) (If residuary beneficiaries are unable to agree upon property division with independent executor, independent executor is authorized under Probate Code § 150 to have the court resolve the matter).

(7) *Independent Executor May Be Required to Give Bond.* The mere fact that the executor is required by will to give bond does not necessarily prevent him

from being appointed as an independent executor. *Stephens v. Dennis*, 72 S.W.2d 630, 632 (Tex. Civ. App.--Eastland 1934, writ ref'd).

**c. Necessity of Naming Successor Independent Executors.** The independent administration will continue only so long as the independent executor, or some substitute or successor specifically named in the will, continues to serve. *Rowland v. Moore*, 174 S.W.2d 248 (Tex. 1943); *In re Estate of Grant*, 53 S.W. 372, 373 (Tex. 1899). A testator may not delegate to another person, including the probate judge, the authority to name a successor independent executor. Therefore, the will should name several successor independent executors. General practice is to name a corporate fiduciary as the final successor to assure the availability of an independent executor able to serve in any event.

**d. Court-Appointed Independent Executor or Administrator.** Section 145 of the Probate Code gives the court authority to appoint an independent administrator (if there is no will or there is a will which does not name any executors able and willing to serve) or an independent executor (if the will names an executor but does not provide for an independent administration) if all of the distributees of the estate agree on the advisability of having an independent administration and collectively designate in the application for administration or for probate of the will an individual or entity to serve as the independent administrator or executor. TEX. PROB. CODE ANN. § 145(c)-(e) (Vernon 2003).

Despite the potential for appointing an independent executor or administrator if one is not properly named in a will, that process may be fairly cumbersome, particularly if there are multiple beneficiaries of the estate and if there are potential beneficiaries who are incapacitated: The court might refuse to appoint an independent executor or administrator if there are any incapacitated distributees. If the court is willing to consider appointment of an independent executor or administrator when there are incapacitated distributees, the court may require the appointment of a guardian *ad litem* to represent the incapacitated distributees. TEX. PROB. CODE ANN. § 145(i) (Vernon 2003). Furthermore, the court may want an inventory of the estate assets in the application for appointment of the independent executor or administrator.

Some judges typically decline to create court-ordered independent administrations over a concern that they have personal liability if they exercise discretion in appointing independent executors or administrators. The 1993 legislative session revised Sections 36, 145(q) and 154A to clarify that Section 36 (dealing with the personal liability of judges) will not subject judges to personal liability for acts committed by court-appointed independent executors or administrators. TEX. PROB. CODE ANN. §§ 36, 145(q) & 154A(i) (Vernon 2003).

## **2. PERSONS ELIGIBLE FOR APPOINTMENT AS EXECUTOR.**

**a. Statutory Provisions.** Section 77 of the Probate Code indicates that the probate court will grant letters testamentary to the person named as executor in the will. If no executor is named, a list is provided of other persons who are eligible for appointment as administrator. TEX. PROB. CODE ANN. § 77 (Vernon 2003).

Section 78 of the Probate Code specifically precludes the appointment of certain individuals and entities as executor: (1) an incapacitated person; (2) a convicted felon; (3) a nonresident individual or corporation who has not filed an appointment of resident agent for service of process; (4) a corporation unauthorized to act as a fiduciary in Texas; or (5) "a person whom the court finds unsuitable." TEX. PROB. CODE ANN. § 78 (Vernon 2003). However, a court has no discretionary power to refuse to issue letters testamentary to a person named as executor who comes forward within the statutory time and offers to probate the will and applies for letters unless the executor is incompetent, a minor or otherwise disqualified from serving. *Sales v. Passmore*, 786 S.W.2d 35 (Tex. App.--El Paso 1995, writ dismissed by agr.)

**b. "Unsuitable" Person.** There has been very little court interpretation of the last reason for disqualification (i.e., a person whom the court finds unsuitable). The expression of an intention by the independent executor to charge excessive compensation does not make the appointee unsuitable (because of the probate court's authority to pass upon the reasonableness of the compensation). *In re Estate of Roots*, 596 S.W.2d 240, 244 (Tex. Civ. App.--Amarillo 1980, no writ). However, taking actions that require court approval without first obtaining that approval is sufficient grounds for a determination that an applicant is unsuitable. *In re Estate of Stanton*, 202 S.W. 3d 205 (Tex. App.- Tyler 2005, pet. denied). In addition factors such as advanced age, physical infirmity, mental impairment short of incompetency, as well as adverse interests that might tempt the applicant to be unfaithful might well be grounds for disqualification. WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 260 (1971).

Just because a person is a creditor who asserts a good faith claim against the estate or is a beneficiary does not mean that the person is "unsuitable" to serve as independent executor. *See Boyles v. Gresham*, 309 S.W.2d 50, 54 (Tex. 1958). However, in one case where a person named as co-executor claimed ownership of practically the entire estate by reason of joint tenancy, designation was held to be "unsuitable" to serve as executor. *Bays v. Jordan*, 622 S.W.2d 148 (Tex. App.--Fort Worth 1981, no writ). "The trial court has broad discretion in finding a proposed executor 'unsuitable.'" *In re Estate of Robinson*, 140 S.W.3d 801, 807 (Tex. App.--Corpus Christi 2004, pet. dismissed). *See also Ayala v. Mackie*, 158 S.W.3d 568 (Tex. App.--San Antonio 2005, pet. filed). The proper

standard of review on appeal is an abuse of discretion standard. *Id.* In *Robinson*, the appellate court found insufficient evidence to support the asserted bases for disqualification - conflict of interest, adversary in will contest, hostility, inability to perform duties as co-executor and failure to investigate or contest will - and consequently held that the trial court abused its discretion. *Id.* at 812.

**c. Corporate Fiduciaries Eligible to Serve; Substitute Fiduciary Act.** A corporate fiduciary is a bank or trust company having trust powers, existing or doing business under the laws of Texas or of the United States which is authorized to act under the order of appointment of the court as an executor, administrator, guardian, trustee, receiver, or depository. TEX. PROB. CODE ANN. § 3(d) (Vernon 2003); see 12 U.S.C. § 92(a) (national bank operating in Texas may be empowered by the Comptroller of the Currency to act as an executor or administrator of a decedent's estate to the same extent that state banks in Texas may so operate).

A foreign bank or trust company organized outside the state of Texas (assuming it has the corporate power to act as an executor or administrator) may be appointed by a Texas court to act as executor or administrator if the jurisdiction in which the foreign bank or trust company is organized grants authority to Texas banks and trust companies to serve in a like fiduciary capacity. TEX. PROB. CODE ANN. § 105A(a) (Vernon 2003). Section 105A(b) lists the documents that a foreign bank or trust company must file with the Secretary of State of Texas before being authorized to do business in Texas.

When naming a corporate entity as executor, the draftsman should be aware of the Texas Substitute Fiduciary Act (TEX. FIN CODE ANN. §§ 274.001-274.203 (Vernon 1998 & Supp. 2005)), which became law on May 28, 1987. The Act generally permits a subsidiary trust company within a bank holding company to be substituted for the member bank named as executor in the will. Where a subsidiary trust company and member bank have entered into a substitution agreement pursuant to the Act, the testator's designation of the member bank generally will be deemed to be the designation of the subsidiary trust company with respect to all executor appointments, whether the appointment has matured or is prospective. However, the will may provide that the Act shall not apply. Thus, the testator may expressly prevent substitution from taking place. The constitutionality of the Act has been upheld. See *In Re Touring*, 775 S.W.2d 39 (Tex. App.--Houston 14th 1989, no writ). The Fifth Circuit has held that the Federal Deposit Insurance Corporation, in its capacity as receiver of an insolvent banking institution, has authority to transfer the fiduciary appointments held by the insolvent bank to a federally created bridge bank. *NCNB Texas National Bank v. Cowden*, 895 F.2d 1488 (5th Cir. 1990).

**3. SELECTION; RESTRICTIONS ON SELF-DEALING.** Various personal attributes which should be considered in selecting an executor include sound judgment, impartiality, financial ability and

responsibility, integrity, experience, knowledge, permanence, loyalty, and trustworthiness. In addition, the planner should be cognizant of Section 352 of the Texas Probate Code which specifically prohibits an executor from purchasing, directly or indirectly, any estate assets. TEX. PROB. CODE ANN. § 352 (Vernon 2003); see *Furr v. Hall*, 553 S.W.2d 666 (Tex. Civ. App.--Amarillo 1977, writ ref'd n.r.e.); *Seven Up Bottling Co. v. Capital National Bank*, 505 S.W.2d 624 (Tex. Civ. App.--Austin 1974, writ ref'd n.r.e.). The executor is not precluded, however, from purchasing assets from a beneficiary of an estate. *Langehennig v. Hohmann*, 365 S.W.2d 203 (Tex. Civ. App.--San Antonio 1963, writ ref'd n.r.e.). In addition, a sale by executors to their relatives has been held not to violate Section 352. *InterFirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 873 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Sections 352(b) and (c) of the Texas Probate Code were added in 1985. Subsection (b) permits a personal representative of an estate to purchase assets from the estate if the will expressly authorizes the sale. Subsection (c) permits a personal representative of an estate or of an incompetent ward to carry out a written executory contract signed by the decedent or ward including a contract for deed, an earnest money contract, a buy-sell agreement, or a stock purchase or redemption agreement. TEX. PROB. CODE ANN. § 352(b) & (c) (Vernon 2003). These provisions apply to estates under wills filed for probate after August 26, 1985. Section 352(a) was amended in 1989 to refer specifically to both of those exceptions to the general prohibition against self-dealing. TEX. PROB. CODE ANN. § 352(a) (Vernon 2003). Subsection (c) was also amended in 1989 to make clear that an executor may purchase property from the estate in compliance with a written executory contract signed by the decedent. The 1989 amendments are merely intended to clarify the changes made in 1985.

Under Section 352(d), which is applicable to sales made on or after September 1, 1991, the personal representative of an estate may purchase property from his estate upon a determination by the court that the sale is in the best interest of the estate. TEX. PROB. CODE ANN. § 352(d) (Vernon 2003). The comfort resulting from an advance court order approving the sale should significantly reduce the liability concern as to a self-dealing transaction.

**4. CO-EXECUTORS.** The will may designate one or more individuals or entities to serve as co-executors.

**a. Powers of Co-Executors.** Under Section 240 of the Texas Probate Code, the acts of one co-executor acting alone are valid, except with respect to conveyances of real estate, in which event all co-executors must join, unless the court authorizes less than all to act. TEX. PROB. CODE ANN. § 240 (Vernon 2003); See *Kelly v. Lobit*, 142 S.W.2d 301 (Tex. Civ. App.--Galveston 1940, no writ) (the act of one co-executor is regarded as the act of all); *Primm v. Mensing*, 38 S.W. 382 (Tex. Civ. App. 1896, no writ)

(either co-executor may create debt binding on the estate).

Apparently a decedent's will could override the provisions of Section 240 to require a specified number or all personal representatives to join in any type of action, or possibly even to allow less than unanimous action by co-executors with respect to conveyances of real estate. See *Becker v. American National Bank*, 286 S.W. 889, 890-92 (Tex. Civ. App.--Austin 1926, no writ) (will specified that "the concurrence of two of my executors or trustees shall be deemed sufficient and legal for all purposes, saving and excepting that in regard to the sale and conveyance of real estate the concurrence of the three executors or trustees is required"); WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 702 (1971).

**b. Compensation of Co-Executors.** Unless a will provides to the contrary, the amount of the executor's commission is fixed by statute. TEX. PROB. CODE ANN. § 241(a) (Vernon 2003). Generally, only one statutory commission is payable to co-executors, and each of the co-executors are entitled to a pro rata amount of the statutory commission (except for special commissions paid for special work or expenses). *Wright v. Wright*, 304 S.W.2d 951 (Tex. Civ. App.--Amarillo 1957, writ ref'd). However, corporate trust departments generally avoid this rule by contract and do not share fees with a co-representative. See Ben G. Sewell & Paul W. Nimmons, *The Executor's and Administrator's Statutory Compensation in Texas*, 3 ST. MARY'S L.J. 1, 5 n.20 (1971).

**c. Liabilities.** Generally, both co-executors are responsible for fulfilling the duties of an executor. A very early case indicates that a third party may sue either co-administrator to recover assets which have been misappropriated. *Davis v. Thorn*, 6 Tex. 482 (1851). One co-executor may sue the other for a claim alleged to be due to the estate. *Brown v. Fore*, 12 S.W.2d 114, 116 (Tex. Comm'n App. 1929, no writ). Furthermore, a co-executor is not personally liable on a contract made for the benefit of the estate by the other co-executor if he had no knowledge of the agreement and did not participate in making it. *Lobit v. Marcoulides*, 225 S.W. 757, 761 (Tex. Civ. App.--Galveston 1920, writ ref'd).

## 5. BOND.

**a. Bond Required Unless Waived.** Each executor of a Texas estate (other than banks and trust companies) must generally give bond unless the will directs that the executor may serve without bond. TEX. PROB. CODE ANN. §§ 194-198 (Vernon 2003). Typically, a decedent's will waives the requirement of bond by an executor.

**b. Amount of Bond.** The amount of the bond is generally equal to the value of all personal property plus the amount of revenue anticipated to be received during the first twelve months of the administration. TEX. PROB. CODE ANN. § 194(4) (Vernon 2003).

**c. Bond Premium Charged to Estate.** The cost of the bond is borne by the estate. TEX. PROB. CODE ANN. § 194(11) (Vernon 2003); see *Usher v. Glass, Sorenson & McDavid Insurance Company*, 409 S.W.2d 880, 882 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd n.r.e.) (indicating that the estate bears the cost of the bond in all situations, and not just when the bond exceeds \$50,000).

**d. Court May Subsequently Require Bond Even if Waived.** Even if the will indicates that an independent executor is not required to give bond, the court may thereafter require a bond to be posted if it appears that the independent executor is mismanaging the estate property, has betrayed or is about to betray his trust, or has in some other way become disqualified. TEX. PROB. CODE ANN. § 149 (Vernon 2003). In that event, it is possible that the premium for the bond would not be borne by the estate. See WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 728 (1971).

## . Trustee

### 1. SELECTION OF TRUSTEE

**a. Personal Attributes.** Various personal attributes to be considered in selecting the trustee include sound judgment, impartiality (or desired partiality toward decedent's preferred beneficiaries), financial ability and responsibility, integrity and honesty, locality, permanence and continuity (particularly important for long-lived trusts), loyalty, and trustworthiness.

### b. Tax Planning--Beneficiary as Sole Trustee

(1) *Income Tax Consequences.* If a beneficiary is serving as sole trustee, the trust income will be taxed to the beneficiary, regardless of whether or not it is actually distributed to him, to the extent that he has the *unilateral* power to vest corpus or income of the trust in himself. I.R.C. § 678(a)(1). Furthermore, it is unclear whether there is an "ascertainable standard" exception in Section 678. Compare Private Letter Ruling 8211057 (December 16, 1981) (trustee-beneficiary with discretionary principal interest for "support, welfare and maintenance" taxable on income under I.R.C. § 678(a)) with Private Letter Ruling 9227037 (April 9, 1992) (trustee-beneficiary with discretionary principal interest for "health, support and maintenance" held *not* taxable on income under I.R.C. § 678(a)). See also Private Letter Ruling 8939012 (June 29, 1989) (trustee-beneficiary not taxable as owner of trust under I.R.C. § 678; however, exact distribution discretion standard not clearly set forth in the ruling). However, items allocated to principal may possibly be taxable to the beneficiary only if distributed to him. See *U.S. v. De Bouchamps*, 278 F.2d 127, 130-31 (9th Cir. 1960) (sole "trustee" did not have absolute discretion to distribute trust assets to self, but only for "needs, maintenance and comfort"; held, undistributed capital gains not taxed to "trustee").

The authority of a sole trustee to make distributions that would satisfy such person's legal obligation of support will be taxed as income to the person only to the extent that such distributions are made. I.R.C. § 678(c). See Private Letter Ruling 8939012 (June 29, 1989) (sole trustee not taxable under § 678 where beneficiaries were trustee's adult children and descendants to whom he owed no legal obligation of support).

(2) *Effect if Beneficiary-Sole Trustee Appoints Co-Trustee.* If a beneficiary initially serves as sole trustee and appoints a co-trustee, the beneficiary who was initially the sole trustee will still likely be taxed on the trust income under Section 678. I.R.C. § 678(a)(2).

(3) *Estate Tax Consequences.* The beneficiary's authority to make distributions to himself or herself should be limited by an ascertainable standard relating to health, education, support or maintenance, or else such person will have a general power of appointment over the trust assets. I.R.C. § 2041(b)(1)(A). See generally John L. Peschel, *Family Members as Trustees: Tax Problems for the Trustee/Beneficiary*, 2 REV. TAX. INDIV. 351 (1978); Private Letter Ruling 8939012 (June 29, 1989) (power to distribute to others limited by ascertainable standard).

### c. Consideration of Self-Dealing Prohibition.

(1) *General Prohibition of Self-Dealing.* Section 113.053 of the Texas Trust Code prohibits the trustee from either buying or selling, directly or indirectly, any property owned by the trust to or from himself individually or certain other business affiliates. TEX. PROP. CODE ANN. § 113.053 (Vernon Supp. 2005). Furthermore, Section 113.054 of the Texas Trust Code prohibits a trustee of one trust from selling property to another trust of which the individual is also the trustee. TEX. PROP. CODE ANN. § 113.054 (Vernon 1995). In addition, a large body of case law has recognized, based upon general fiduciary principles, that a trustee is prohibited from engaging in self-dealing transactions. See *Slay v. Burnett Trust*, 187 S.W.2d 377, 387-91 (Tex. 1945). [For an excellent general summary of trust laws regarding self-dealing and conflicts of interest, see John R. Crews, *Conflicts of Interest, Self-Dealing Liabilities of Co-Trustees, and Other Related Matters*, 16 REAL PROP., PROB. & TR. L.J. 748 (1981); Leo Herzog & Dale E. Colling, *The Chinese Wall and Conflict of Interest in Banks*, 34 BUSINESS LAWYER 74 (Nov. 1978).]

(2) *Effect of Specific Trust Provision Authorizing Self-Dealing.* Prior to September 1, 2003, Section 113.059 of the Texas Trust Code recognized that a trustor may explicitly relieve the trustees from the statutory self-dealing restrictions (except for corporate fiduciaries). Unfortunately, there are various Texas cases containing rather general language to the effect that it is against the public policy of Texas to permit self-dealing between a person in his fiduciary capacity and in his individual capacity. E.g., *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App.--Texarkana 1987, no writ); *Langford v. Shamburger*, 417 S.W.2d 438, 444 & 47 (Tex. Civ. App.--Fort Worth 1967, writ ref'd n.r.e.) (dictum that "it

would be contrary to the public policy of this State to permit the language of a trust instrument to authorize self-dealing by a trustee"; on rehearing, court stated that the language of a trust instrument specifically authorizing self-dealing "could present a serious question of public policy"; *Three Bears, Inc. v. Transamerican Leasing Co.*, 574 S.W.2d 193, 197 (Tex. Civ. App.--El Paso 1978), *rev'd on other grounds*, 586 S.W.2d 472 (Tex. 1979) (citing *Langford* for proposition that it is against public policy for a trust instrument to authorize self-dealing in order to invalidate guaranty given by trust which also benefits trustees in other capacities; Supreme Court upheld language authorizing trustee to give the guaranty without discussing self-dealing issue). Accordingly, it is not possible to rely totally upon a provision in a trust instrument relieving the trustee from liability for engaging in a self-dealing transaction.

(3) *Grizzle and Legislative Response.* However, in *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 251 (Tex. 2002), the Texas Supreme Court disapproved *Langford* and its progeny to the extent they suggest public policy precludes a trust instrument from authorizing self-dealing by a trustee. See Part 2X.B.3.p at page 68 of this outline.

The 2003 Texas legislature responded to *Grizzle*, Texas by amending Trust Code Section 113.059. The 2003 amendments retained with no substantive changes (i) subsection (a) (settlor *may* generally relieve a trustee from a duty, liability, or restriction imposed by the Trust Code) and (ii) subsection (b) (settlor *may not* relieve a corporate trustee from the self dealing restrictions of Section 113.052 or 113.053).

The 2003 amendments also added two new subsections.

- Under new subsection (c), a settlor could not relieve any trustee of liability for (i) a breach of trust committed in bad faith, intentionally or with reckless indifference to the interest of the beneficiary, nor for (ii) any profit derived by the trustee from a breach of trust. TEX. PROP. CODE ANN. § 113.059(c) (Vernon Supp. 2005).
- Under new subsection (d), an exculpatory provision was ineffective "to the extent that the provision is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary duty to or confidential relationship with the settlor." TEX. PROP. CODE ANN. § 113.059(d) (Vernon Supp. 2005).

The 2005 legislature made additional amendments.

- Effective January 1, 2006, section 113.059 was repealed, although its substance was mostly retained in other provisions.
  - The subject matter of subsections (a) and (b) was moved to subsection (b) of new section 111.0035, "*Default and Mandatory Rules; Conflict Between Terms and Statute.*"

- Subsections (c) and (d) were moved to subsections (a) & (b) of new section 114.007, "*Exculpation Of Trustee.*"

The 2007 legislature repealed the prohibition section 111.0035(b)(2), which was the prohibition on provisions relieving corporate trustees from self dealing restrictions (from former subsection 113.059(b)).

Thus, the current applicable statutory rules appear to be:

- §§ 113.053, 113.054: Trustees are generally prohibited from self dealing.
- § 111.0035(b): The settlor can override the self dealing prohibitions (and is no longer prohibited from authorizing self dealing by corporate trustees) but not the applicability of §114.007.
- §114.007: An exculpation provision, including an exculpation for self dealing, cannot exculpate for liability for—
  - bad faith or intentional or reckless breaches of trust, nor for
  - any profit derived by the trustee from a breach of trust.

(4) *Consent by Beneficiaries or Court Authorization of Self-Dealing.* Other possible methods for avoiding the self-dealing restrictions would be for the trust beneficiaries to consent to each particular self-dealing transaction, see *Slay v. Burnett Trust*, 187 S.W.2d 377, 390 (Tex. 1945), or to obtain court authorization of specific self-dealing transactions under Section 115.001(8) of the Texas Trust Code. TEX. PROP. CODE ANN. § 115.001(8) (Vernon Supp. 2005).

**2. CO-TRUSTEES.** An excellent resource regarding the rights and duties of co-trustees is *Report of Committee on Trust Administration and Accounting, the Co-Trustee Relationship - Rights and Duties*, 8 REAL PROP., PROB. & TR. J. 9 (1973).

**a. Powers of Co-Trustees, Disputes Among Co-Trustees.** Section 113.085 of the Texas Trust Code indicates that unless a trust instrument provides otherwise, a power vested in co-trustees may be exercised by a majority of the co-trustees. TEX. PROP. CODE ANN. § 113.085 (Vernon 2008).

For twenty months Texas law appeared to require all co-trustees to attempt to reach a consensus before a majority vote action would be valid: Effective January 1, 2006, Section 113.085 was amended to provide that co-trustees "*that are unable to reach a unanimous decision*" may act by majority decision and to require that "a co-trustee *shall participate* in the performance of a trustee's function unless the co-trustee is unable to perform the function because of various reasons or has properly delegated the performance of the function to another co-trustee. However, effective September 1,

2007, the "unable to reach a unanimous decision" language was repealed.

Proper drafting will provide a means for resolving disputes among co-trustees and, where appropriate, will specify which co-trustee is to have ultimate authority to resolve disputes. (If co-trustees cannot agree on a course of action by majority vote for an issue that must be decided, there is some authority from other states that a court could appoint an additional co-trustee "upon examination by the present trustees, to cast a deciding vote." *Matter of Jacobs*, 487 N.Y.S.2d 992 (1985).)

**b. Compensation of Co-Trustees.** There are no Texas cases regarding whether the total amount of compensation paid to co-trustees may be more than the compensation for a single trustee, or how the compensation should be allocated among co-trustees. The position of the Restatement Second of Trusts was that the compensation paid to co-trustees should not exceed the compensation that would be allowed to a single trustee. *See* RESTATEMENT (SECOND) OF TRUSTS § 242(L)(1959); G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 978 (2d ed. 1962). However, the Restatement Third of Trusts takes the position that such a restriction will prove unfair in many situations and therefore was not included therein. The comment in the Restatement Third of Trusts notes that "[i]n the aggregate, the reasonable fees for multiple trustees may be higher than for a single trustee, because the normal duty of each trustee to participate in all aspects of administration . . . can be expected not only to result in some duplication of effort but also to contribute to the quality of administration." RESTATEMENT (THIRD) OF TRUSTS § 38(I)(2003).

**c. Responsibilities and Liabilities.** Prior to January 1, 2006, Section 114.006 of the Texas Trust Code provided that a co-trustee "who does not join in exercising a power held by three or more co-trustees is not liable to a beneficiary of the trust or to others for the consequences of the exercise nor is a dissenting trustee liable for the consequences of an act in which the trustee joins at the direction of the majority trustees if the trustee expressed the dissent in writing to any of the co-trustees at or before the time of joinder." However, that Section did not excuse a co-trustee from liability for failure to discharge his duties as trustee. TEX. PROP. CODE ANN. § 114.006(b) (Vernon 1995).

Effective January 1, 2006, Section 114.006 was amended to provide that a co-trustee who does not join in an action of a co-trustee is not liable for such action unless the co-trustee fails to exercise reasonable care to prevent a co-trustee from committing a serious breach of trust or to compel a co-trustee to redress a serious breach of trust. TEX. PROP. CODE ANN. § 114.006 (Vernon Supp. 2005).

Under generally recognized trust law doctrines, a co-trustee is liable to beneficiaries "if he participates in a breach of trust committed by his co-trustee, improperly delegates the administration, approves or conceals a breach of trust committed by the co-trustee, fails to exercise reasonable care which enables the

co-trustee to commit the breach of trust, or neglects to take the proper steps to compel the co-trustee to redress a breach of trust." *Report of Committee on Trust Administration and Accounting, The Co-Trustee Relationship - Rights and Duties*, 8 REAL PROP., PROB. & TR. J. 9, 19 (1973).

**d. Special Trustees with Limited Responsibilities.** Co-trustees have no power by agreement among themselves to divide their responsibilities and to limit the liability of any particular trustee to a portion of the trust property. GEORGE BOGERT, LAW OF TRUSTS AND TRUSTEES § 590, at 398 (1980). However, the settlor of the trust may specify limited responsibilities for particular co-trustees. See John R. Cohan, *Splitting Powers Between Fiduciaries*, 8 REAL PROP., PROB. & TR. J. 588 (1973); Cohan & Kahn, *Living with a Co-Trustee*, 109 TR. & EST. 5 (1970) (discussing planning possibilities of dividing responsibilities among co-trustees). Similarly, an investment advisor could be designated either to control or to advise with respect to trust investments without necessarily being named as a co-trustee. See *Report of Committee on Investments by Fiduciaries, Responsibility of Trustee Where Investment Power Is Shared or Exercised by Others*, 9 REAL PROP., PROB. & TR. J. 517 (1974).

### 3. SUCCESSOR TRUSTEES.

**a. Need for Naming Successor Trustee.** If co-trustees are designated, upon the death or failure to serve of one or more co-trustees, the remaining co-trustees will serve as the trustee(s) unless the terms of the will or agreement provide to the contrary. TEX. PROP. CODE ANN. § 113.085(b) (Vernon Supp. 2005). If the sole trustee fails to serve and no successor trustee is appointed in the trust instrument, the court will appoint a successor trustee. TEX. PROP. CODE ANN. § 113.083(a) (Vernon 1995). The appointed successor trustee will have the same powers, duties, and responsibilities as the original trustee unless the court directs otherwise. TEX. PROP. CODE ANN. § 113.084 (Vernon 1995).

**b. Methods for Appointing Successor Trustee.** Successor trustees may be designated (a) by naming specified individuals or entities in order of preference, (b) by giving specified persons the authority to appoint successor trustees, or (c) by appointing an "Advisory Board" that will be self-perpetuating and that will have the authority to appoint successor trustees. See generally Alan R. Bromberg & E.B. Fortson, *Selection of a Trustee; Tax and Other Considerations*, 19 S.W.L.J. 523, 551-52 (1965).

**4. REQUIREMENT OF BOND.** Unless a court orders otherwise or the instrument creating the trust provides to the contrary, all trustees (other than corporate trustees) are required to give a bond conditioned upon the full performance of their duties as trustee, and the amount of the bond is determined by the District Court. TEX. PROP. CODE ANN. § 113.058 (Vernon 1995). Section 113.058(b) was amended

effective January 1, 2006, to make it clear that a court may order a non-corporate trustee to post a bond even if waived by the governing instrument.

**5. REMOVAL POWER.** Section 113.082(a) of the Texas Trust Code provides for the removal of a trustee for material violation of (or attempt to violate) the trust which results in a material financial loss, for becoming incapacitated or insolvent, and for other causes in the court's discretion. Effective September 1, 2003, Section 113.082(a) was amended to also provide for the removal of a trustee for failure to make an accounting required by law or by the terms of the trust, and clarifies that the removal of a trustee is in the court's discretion. Effective January 1, 2006, Section 113.082(a) was amended to clarify that other causes may be bases for removal of a trustee. TEX. PROP. CODE ANN. § 113.082(a) (Vernon Supp. 2005). In addition, the trust instrument may provide a nonjudicial means of removal to particular beneficiaries or other individuals. However, if a beneficiary having the removal power has the authority to substitute himself as trustee, for income and estate tax purposes he will be regarded as having the powers of the trustee. Treas. Reg. §§ 1.678(a)-(1)(a); 20.2041-1(b)(1).

## . Guardian

### 1. SURVIVING PARENT'S AUTHORITY TO NAME GUARDIAN

**a. For Minor Children.** Section 676(d) of the Probate Code authorizes the last surviving parent of a minor "by will or written declaration" to appoint a guardian of the person of his or her minor children after his or her death. On compliance with the requirements of the Probate Code, that person is also entitled to be appointed guardian of the estate by the Probate Court. TEX. PROB. CODE ANN. § 676(d) (Vernon 2003).

**b. For Incapacitated Adult Children.** Effective September 1, 1995, the surviving parent of an incapacitated adult may appoint by will or written declaration a guardian of the person of the incapacitated child after his or her death, but only if the surviving parent is serving as guardian of the person of the incapacitated child. On compliance with the requirements of the Probate Code, the appointed person is also entitled to be appointed guardian of the estate by the Probate Court. TEX. PROB. CODE ANN. § 677(b) (Vernon 2003).

**c. Appointment by Written Declaration.** Effective September 1, 1995, new Probate Code section 677A sets forth specific requisites for a valid written declaration appointing a guardian for minor children as well as for adult incapacitated children. Specifically, the declaration must have two witnesses and must include a self proving affidavit. "A properly executed and witnessed declaration and affidavit are prima facie evidence . . . that the guardian named in the declaration would serve the best interests of the ward." A suggested form (non-mandatory) is also included in the statute. TEX. PROB. CODE ANN. § 677A (Vernon 2003).

Under prior law, guardian appointments by written declaration were permitted but there were no specific requirements for valid declarations; thus, the new requirements, especially the requirement for a self proving affidavit, make the written declaration less convenient. On the other hand, by providing that a properly executed and self proved declaration makes out a prima facie case that appointing the named guardian would be in the child's best interest makes the written declarations more likely to have the intended effect. By comparison, there is no statute providing that a guardian appointment in a valid will makes out a comparable prima facie case. However, all wills must have two witnesses so, if the will is self proved, it will fulfill all the new requirements for guardian appointments by written declaration. To that extent, it would be reasonable to argue that all guardian appointments, whether by will or by written declaration, make out the prima facie case--so long as a self proving affidavit is attached.

## **2. SELECTION OF GUARDIAN BY MINOR.**

Section 680(a) of the Probate Code gives minors age 12 or older the ability to take part in the guardian selection process. Under section 680(a), when an application for guardianship has been filed, a minor who is at least 12 may choose his own guardian if the court approves the choice and finds that the choice is in the minor's best interest. Under section 680(b), if the current guardian ceases to serve, the minor may choose "another" guardian if the court is satisfied that the person selected is suitable and competent and the appointment is in the minor's best interest. TEX. PROB. CODE ANN. § 680 (Vernon 2003).

Note that the Probate Code does not specify whether the minor may override a selection made by the surviving parent. Section 676, which grants the surviving parent the right to designate the guardian of the person of any minor children, begins "[e]xcept as otherwise provided by Section 680" (which is the section giving minors the right to select their own guardian). TEX. PROB. CODE ANN. § 676 (Vernon 2003). This suggests that the minor's authority is superior to that of the surviving parent's. However, section 680(b) implies that, if a guardian is serving pursuant to the surviving parent's will, the minor may make a selection only if and when that guardian ceases to serve. TEX. PROB. CODE ANN. § 680(b) (Vernon 2003).

## **3. EFFECT IF NO GUARDIAN APPOINTED BY LAST SURVIVING PARENT.**

If no guardian is appointed in the last surviving parent's will, the Probate Court will appoint a guardian in accordance with the priorities described in Section 676(c) of the Probate Code. First in order of priorities is the nearest ascendant of the ward, and if there is more than one ascendant in the same degree, the court chooses which would be in the best interests of the minor. If there is no ascendant, the nearest of kin has priority, with the court being given discretion to choose between relatives in the same degree of kinship to serve the best interests of the minor. If none of the above

apply to be designated as guardian, "the court shall appoint a qualified person" as guardian. TEX. PROB. CODE ANN. § 676(c) (Vernon 2003).

**4. ELIGIBLE APPOINTEES.** Section 681 of the Probate Code lists persons disqualified to serve as guardians, including: (a) a minor; (b) a person whose conduct is notoriously bad; (c) an incapacitated person; (d) a person who is a party (or whose parent is a party) to a lawsuit affecting the welfare of the child, unless the court determines that the claim of the guardian is not the type of claim which is in conflict with the claim of the ward, or unless the court appoints an ad litem to represent the ward in the lawsuit; (e) a person having an unpaid debt to the child or asserting any claim to property adverse to the child; (f) a person who by reason of inexperience or lack of education, or for other good reason, is incapable of properly and prudently managing and controlling the ward or his estate; (g) a person found unsuitable by the court; and (h) a nonresident person who has not appointed a resident agent for service of process. TEX. PROB. CODE ANN. § 681 (Vernon 2003).

Effective September 1, 2007, the county clerk is required to perform a criminal history background check on all proposed guardians other than a family member of the ward or an attorney. TEX. PROBATE CODE ANN. § 698 (Vernon 2007).

Generally, only one person may be appointed as guardian of the person or as guardian of the estate (although the same person need not serve as both). However, a husband and wife may be jointly appointed as co-guardians and, effective September 1, 1995, both joint managing conservators and co-guardians appointed under the laws of another state may be appointed as co-guardians. TEX. PROB. CODE ANN. § 690 (Vernon 2003).

## **5. "PARTY TO A LAWSUIT" PROBLEM.**

The 1993 legislative session amended the relevant statutory language to permit an individual to be appointed as guardian, in appropriate circumstances, even though the individual (or the individual's parent) was involved in a lawsuit affecting the welfare of the ward. The amendment also clarifies that if a spouse, parent, or child of a ward is disqualified from serving as guardian because of the "party to a lawsuit" test, that person may be appointed as successor guardian upon the removal of any conflict causing the initial disqualification; however, the pre-1993 statute, Section 110, was repealed, and the amended language was not carried over to the current statute, Section 681 of the Texas Probate Code. The revision was in response to *Morales v. Alvarez*, 789 S.W.2d 947 (Tex. App.--San Antonio 1990, writ denied). In *Morales*, the husband was removed as guardian for his wife who had been rendered physically and mentally incompetent as a result of injuries received in an automobile accident. The husband filed the lawsuit against parties in the automobile accident, both individually and as next friend for his wife. The court found that the husband

was disqualified from serving as guardian and removed him as guardian.

**6. SELECTION OF GUARDIAN.** The guardian is the person charged by the testator with rearing his or her minor children. Before automatically designating the testator's parents, consider whether they would want to serve, the age gap between the grandparents and the minors, whether the grandparents live in an area with other children in the neighborhood, whether the grandparents have friends with children, and whether it is likely that the grandparents will die before the children reach eighteen years of age, causing the children to have been twice uprooted out of their home.

#### IV.

### SUBSTANTIVE LAW DOCTRINES AND GENERAL CONSIDERATIONS REGARDING DISPOSITIVE PROVISIONS

This Section IV summarizes various substantive law doctrines generally affecting the disposition of assets under a will. Section V reviews the actual dispositive provisions of wills and discusses particular types of specific bequests and residuary estate bequests.

#### Freedom of Testamentary Disposition

**1. GENERAL RULE.** Texas cases have often stated that a testator has a right to dispose of his property by will in any way that he sees fit. *In re Bartel's Estate*, 164 S.W. 859, 866 (Tex. Civ. App.--Galveston 1914, writ ref'd) ("The right of the owner of property to dispose of it by will as he may please is one that is often of great value, especially to those who are old or infirm and dependent upon others for services and attention; and this right should be as jealously guarded as any other property right."). See Part III.B.3 at page 11 of this outline.

However, the fact that a testator made an "unnatural" disposition of his property is often mentioned in cases involving testamentary capacity and undue influence.

Section 69A of the Texas Probate Code, added by the 1993 legislative session, prevents a court from issuing an injunction prohibiting a person from executing a Will or a Codicil to an existing Will. TEX. PROB. CODE ANN. § 69A (Vernon 2003). Previously, one of the orders typically included in temporary orders pending in adjudication of a divorce action was an injunction against executing a will or codicil (that clause was included in the standard form of temporary orders contained in the State Bar Family Law Practice Manual).

**2. POWER TO DISINHERIT; POWER TO DIRECT INTESTATE DISTRIBUTION.** As of

September 1, 1991, a testator may specify in his will that a particular person is to receive no part of his estate under any circumstances. TEX. PROB. CODE ANN. § 58(b) (Vernon 2003). Under prior law it was not clear whether a person could effectively disinherit an heir. For example, if a will provided that a specified person was to receive no part of the estate but the testator died partially intestate, the disinherited person could receive a share of the estate by intestacy. See *Najvar v. Vasek*, 564 S.W.2d 202, 207 (Tex. Civ. App.--Corpus Christi 1978, writ ref'd n.r.e.). A comparable change applicable to trusts was made to Section 112.053 of the Texas Trust Code. TEX. PROB. CODE ANN. § 112.053 (Vernon 1995). The amendments were derived from New York Estates, Powers & Trusts Law section 1-2.118. See generally, *Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHICAGO L. REV. 177 (1985). Testators now have the clear authority to "cut out" an heir but caution should still be exercised where the client desires to state his reasons for the disinheritance. See Part 2X1.G at page 73 of this outline.

Also as of September 1, 1991, a testator may direct that property shall pass under the will by intestacy. When coupled with the power to disinherit, the testator has the ability to specify the general application of the rules of intestate succession yet specify that a particular relative is to receive nothing. TEX. PROB. CODE ANN. § 58(b) (Vernon 2003).

#### 3. PROTECTION OF SURVIVING SPOUSE.

Texas does not recognize a dower, curtesy, or statutory forced share for a surviving spouse. The spouse is accorded protection by the community property system.

**a. Power of Disposition Over Marital Property.** Each spouse generally has the power to dispose of his separate property and his one-half interest in community property. (An exception to this general rule applies to homestead and the family allowance, discussed in paragraphs c and d below).

**b. Widow's Election Will.** If a spouse's will purports to dispose of property owned by his spouse, the surviving spouse has an election either (1) to assert his or her property rights in lieu of accepting *any* benefits under the will, or (2) to relinquish any of the survivor's rights in property disposed of by the testator and accept benefits given to the surviving spouse under the will. *Jones v. State*, 5 S.W.2d 973 (Tex. Comm'n App. 1928, no writ); *Smith v. Smith*, 657 S.W.2d 457 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.). The surviving spouse is forced to make this election only if the language of the will unequivocally disposes of the surviving spouse's property, and the courts apply a general presumption that a will does not put a surviving spouse to an election. *Wright v. Wright*, 274 S.W.2d 670, 674-675 (Tex. 1955); *Avery v. Johnson*, 192 S.W. 542, 544 (Tex. 1917). For example, a bequest of "all my property" or "all of my estate" is deemed to dispose of only the testator's one-half community property interest. See *Church of Christ v. Wildfong*, 265 S.W.2d 622 (Tex. Civ. App.--Waco 1944, no writ) (bequest to wife of "one-half of all the property, real and personal

and mixed, which I own and may be entitled to at the time of my death," with the remaining one-half being bequeathed to church; court held this was not an election will, so surviving spouse was entitled to her one-half of community as well as one-half of the testator's community property).

Several cases have stated that the election doctrine could apply to reimbursement claims of surviving spouses. *Dakan v. Dakan*, 83 S.W.2d 620, 625-26 (Tex. 1935); *Colden v. Alexander*, 171 S.W.2d 328, 333 (Tex. 1943) ("in fact, she could have no interest in [asserting a claim for reimbursement] without electing to decline to take under her husband's will"); *Stutts v. Stovall*, 544 S.W.2d 938, 940-42 (Tex. Civ. App.--San Antonio 1976, writ ref'd n.r.e.) (election doctrine applied to surviving spouse's one-half of community claim for reimbursement for improvements and principal payments made on decedent's separate property that was devised to beneficiaries other than the spouse). As discussed further below, the election doctrine may also apply to homestead and family allowance claims where the testator's intent to that effect is clear.

There have been statements in various cases that in order to make an election under a will, the beneficiary must have acted with knowledge of the general consequences of his conduct and with the intent to elect. See *Dakan v. Dakan*, 83 S.W.2d 620, 626 (Tex. 1935). However, this rule does not require that the surviving spouse know "the exact extent of his legal rights and the exact legal effect of his choice. To impose such a requirement would, for all practical purposes, preclude the finding of an election by a lay person...." *Smith v. Smith*, 657 S.W.2d 457, 461 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.) (acceptance of benefits under will and acceptance of appointment as executor held under the facts of that case to constitute an election).

### c. Surviving Spouse's Homestead Rights.

Upon the death of a person, the person's homestead (1) is free from creditors' claims (subject to certain limitations), and (2) is subject to certain occupancy rights of the surviving spouse.

(1) *Occupancy Right of Surviving Spouse.* The homestead may not be distributed to beneficiaries of the estate "during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same." TEX. CONST. art. XVI, § 52; TEX. PROB. CODE ANN. § 283 (Vernon 2003).

(2) *Definition of Homestead.* The term "homestead" is defined by the Texas Constitution. A homestead not in a town or city cannot exceed two hundred acres of land. A homestead in a town or city may not exceed one acre of land. Either the rural or urban homestead includes any improvements on the land. TEX. CONST. art. XVI, § 51.

If used for the purposes of a rural homestead, the homestead may be in one or more parcels. TEX. PROB. CODE ANN. § 41.002(b)(1) (Vernon 2000). To establish a rural homestead, the surviving spouse must reside on part of the property, and use the property for purposes of a home. However, the surviving spouse need not reside on all the parcels so long as the other tracts are used for the support of the family. *Riley v. Riley*, 972 S.W.2d 149, 154 (Tex. App.--Texarkana 1998, no writ).

Prior to an amendment to the Texas Constitution on November 8, 1983, the urban homestead was limited to lots having a total value of not more than \$10,000 at the time they were designated as homestead. TEX. CONST. art. XVI, § 51. For purposes of the \$10,000 limit, the value of any improvements on the lots was immaterial. If the lot value did exceed \$10,000 at the time designated as homestead, the excess lot value did not constitute a portion of the homestead, and any subsequent appreciation in the value of the lot was apportioned pro rata between the homestead and nonhomestead portions of the property. All of the improvements constituted part of the homestead and were not allocated partly to the nonhomestead portion of the property. See *Hoffman v. Love*, 494 S.W.2d 591, 597 (Tex. Civ. App.--Dallas), writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973).

The 1983 amendment specifically provided that it would be effective for all homesteads, including homesteads acquired before adoption of the amendment. See H.J.R. No. 105, § 2. If the lot exceeds one acre, presumably only improvements located on the one acre designated as homestead will constitute part of the homestead.

(3) *Excess Portion Is Subject to Partition.* If, at a decedent's death, a portion of the residence does not qualify as "homestead" property within these limitations, the excess amount is subject to partition among the other estate beneficiaries. *Whiteman v. Burkey*, 282 S.W. 788, 789 (Tex. 1926), certified question conformed to, 286 S.W. 350, 351 (Tex. Civ. App.--Galveston 1926, no writ) (surviving husband should be given an opportunity to pay the beneficiaries of the wife's estate their portion of the excess value of the property not qualifying as "homestead," and if a sale became necessary to partition the excess, the surviving spouse should be awarded the portion of the proceeds attributable to the improvements and the fractional portion of the lot value that constitutes homestead). See *Hoffman v. Love*, 494 S.W.2d 591, 597 (Tex. Civ. App.--Dallas), writ ref'd n.r.e. per curiam, 499 S.W.2d 295 (Tex. 1973); Don D. Bush & John W. Proctor, *Piercing the Homestead: The Trial of an Excess Value Case*, 34 BAYLOR L. REV. 387 (1982).

(4) *Nature of Decedent's Interest in Residence May Affect Occupancy Rights.* The surviving spouse's homestead occupancy rights are the same whether the property was the separate property of the deceased spouse or community property. TEX. PROB. CODE ANN. § 282 (Vernon 2003). However, if the deceased spouse had previously been married and owned only one-half of the homestead, having only occupancy rights in the

other half, the surviving spouse's occupancy rights attach only to the half actually owned by the decedent. In that situation, the underlying owners of the one-half that was not owned by the decedent spouse (e.g., the children of the first marriage) may partition as to their half which formerly belonged to the prior spouse. *Horn v. Sankary*, 161 S.W.2d 156, 158 (Tex. Civ. App.--Fort Worth 1942, no writ).

(5) *Election Doctrine May Deny Occupancy Rights.* The surviving spouse's homestead occupancy rights may be affected by the election doctrine. If the surviving spouse finds that the rights granted to the surviving spouse under the will are inconsistent with the occupancy rights of a probate homestead, the surviving spouse may be put to an election and denied the use of the probate homestead by accepting other benefits conferred under the will. *Miller v. Miller*, 235 S.W.2d 624, 626-28 (Tex. 1951).

d. **Family Allowance.** The surviving spouse is entitled to a family allowance for the support of the surviving spouse and minor children of the deceased for a period of one year. The allowance is made only to the extent that the surviving spouse's separate property and property of the minor children are inadequate for their respective maintenance during the one-year period from the decedent's death. TEX. PROB. CODE ANN. §§ 286-288 (Vernon 2003). The receipt of life insurance proceeds by the surviving spouse apparently is taken into consideration in determining the amount of the family allowance. See *McCanless v. Devenport*, 40 S.W.2d 903, 906 (Tex. Civ. App.--Dallas 1931, no writ).

(1) *Election Doctrine May Deny Family Allowance.* The will may specifically put the surviving spouse to an election either to forego benefits under the will or to forego statutory rights to the family allowance. See *Miller v. Miller*, 235 S.W.2d 624, 626-28 (Tex. 1951); *Lindsley v. Lindsley*, 163 S.W.2d 633, 637 (Tex. 1942). Even if the will does not expressly condition the spouse's benefits under the will upon an election to forego statutory rights, an intention on the part of the testator to put the spouse to such an election may nevertheless appear from the terms of the will by "manifest implication." See *Miller*, 235 S.W.2d at 627; *Trousdale v. Trousdale's Executors*, 35 Tex. 756 (1872) (intent to put spouse to election appeared by manifest implication where spouse received everything except that which was specifically bequeathed to others; any award to her would necessarily have come from specifically bequeathed property and thus been inconsistent with and "disappointed" the will); compare *Churchill v. Churchill*, 780 S.W.2d 913, 914-915 (Tex. App.--Forth Worth 1989, no writ) (spouse was not put to an election where residuary estate was sufficient to satisfy statutory allowance and testator's nontestamentary "instructions" to executors--referred to in the will--were not shown to contemplate a specific use of the residuary estate assets that would be inconsistent with using those assets to provide a statutory allowance).

(2) *Obtaining Family Allowance Prior to Approval of Inventory.* Section 286 was amended in the 1993 legislative session to permit the beneficiaries of the family allowance to seek to have the family allowance fixed by the court prior to the approval of the inventory. TEX. PROB. CODE ANN. § 286 (Vernon 2003). Under prior law, the family allowance could be set aside to the surviving spouse and minor children only after the inventory was approved. In a contested case, this allowed the personal representative to defer the obligation of funding the family allowance by seeking extensions of time to file the inventory.

e. **Exempt Property.** In an insolvent estate, the court is directed to set aside property exempt from creditors' claims after the inventory has been approved by the court. The exempt property is set aside for the benefit of the surviving spouse, minor children, and married children remaining with the family. Section 271 was amended in the 1993 legislative session to permit the exempt property to be set apart prior to the approval of the inventory. TEX. PROB. CODE ANN. § 271 (Vernon Supp. 2005). The exempt personal property passes to the above-described family members only if the estate is insolvent. See TEXAS PROB. CODE ANN. § 278-279 (Vernon 2003). If the estate is not insolvent, the above-described family members are entitled to the "use and benefit" of the exempt personal property during the administration of the estate. When the administration terminates, the decedent's interest in the exempt property passes to his heirs or devisees. *Bolton v. Bolton*, 977 S.W.2d 157, 159 (Tex. App.--Tyler 1998, no writ).

#### 4. PROTECTION OF CHILDREN

a. **No Forced Heirship.** Interestingly, Texas is one of three states (the others being Louisiana and Idaho) that at one time have applied a "forced heirship" doctrine protecting children against disinheritance. See ATKINSON, WILLS 138-40 (2d ed. 1953). Texas no longer has a forced heirship provision.

b. **Pretermitted Child Statute.** Under Texas law, unlike the laws of some other states, a parent need not even mention in his will any children that are alive at the time the will is executed. However, Section 67 of the Texas Probate Code does give certain protection to afterborn children if they are not provided for or mentioned in the will. TEX. PROB. CODE ANN. § 67 (Vernon Supp. 2005). See Part 2IV.B.2 at page 35 of this outline.

5. **PUBLIC POLICY RESTRICTIONS.** A condition in a will designed to encourage murder or other crime would doubtlessly be declared invalid. However, provisions intended to prevent the remarriage of a surviving spouse are not invalid. ATKINSON, WILLS 405-08 (2d ed. 1953); cf. *Matter of Estate of Gehrt*, 480 N.E.2d 151 (Ill. App. 1985) (will provision leaving property on condition that beneficiary not remarry until testator's death held enforceable). Similarly, bequests which might have the effect of discouraging a child from living with his natural parent, or encouraging

divorce by accelerating termination of the trust upon the divorce of the beneficiary, have been declared valid by Texas courts. *Jenkins v. First National Bank*, 26 F. Supp. 312, 314 (N.D. Tex. 1939), *aff'd*, 107 F.2d 764 (5th Cir. 1939) (trust provided that income would not be paid to grandson during any time he was living with his father); *Ellis v. Birkhead*, 71 S.W. 31, 33-34 (Tex. Civ. App. 1902, writ ref'd) (trust terminated and daughter received remaining assets upon divorce from her husband; court concluded that provision was not "manifestly intended to incite divorce"). See generally Wanda Wakefield, Annotation, *Effect of Testamentary Gift to Child Conditioned Upon Specified Arrangements for Parental Control*, 11 A.L.R.4th 940 (1982) (lists numerous other annotations regarding public policy restrictions); 5A RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 858 (1988). One case on public policy grounds invalidated a will provision stating that assets in a trust for certain beneficiaries would be transferred to a trust for different persons if certain specified individuals were ever appointed by a court as guardian of the person or estate of those beneficiaries, *Stewart v. RepublicBank Dallas, N.A.*, 698 S.W.2d 786 (Tex. App.--Fort Worth 1985, writ ref'd n.r.e.).

## 6. PROPERTY LAW RESTRICTIONS.

Certain doctrines of property law affecting transfers generally also apply to testamentary dispositions, such as the rule against perpetuities (see Part 2X.B.2.a at page 62 of this outline), or the rule prohibiting direct restraints on alienation of property (see Part 2IV.D.6 at page 43 of this outline). See 5A R. POWELL, *THE LAW OF REAL PROPERTY* ¶¶ 839-48 (1988).

In addition, some states limit the period of time during which trust income may be accumulated and not distributed.

Certain restrictions may apply under the federal copyright laws. For items copyrighted before 1978, the initial term of the copyright lasted 28 years. At the end of that term, the copyright could be renewed. Federal laws designate that the spouse and children will have this renewal right if the creator dies during the initial term. A bequest purporting to leave this renewal right to someone else would not be recognized. See Francis M. Nevins, Jr., *Copyright Law v. Testamentary Freedom: The Sound of a Collision Unheard*, 23 REAL PROP., PROB. & TR. L.J. 47 (1988).

**7. RESTRICTIONS ON BEQUESTS TO DRAFTING ATTORNEY.** Section 58b of the Texas Probate Code provides that bequests to an attorney or to an heir or employee of an attorney who prepares or supervises the preparation of a will are void unless the attorney, heir or employee is the testator's spouse, an ascendant or descendant of the testator, or related to the testator within the third degree of consanguinity or affinity to the testator. Section 58b only applies to wills executed on or after September 1, 1997. Acts 1997, 75th Leg., Ch. 1054, § 2. Effective September 1, 2005, Section 58b(a) was amended to clarify who is affected by this section, being an attorney who prepares or supervises the preparation of the will, a parent,

descendant of a parent, or employee of the attorney and the spouse of such individuals. TEX. PROB. CODE ANN. § 58b (Vernon Supp. 2005).

However, Rule 108(b) of the Texas Disciplinary Rules of Professional Conduct provides that "[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(b). Although the preamble to the Disciplinary Rules states that the rules do not define standards of civil liability of lawyers for professional conduct and that a violation of a rule does not give rise to a private cause of action, a court may use the disciplinary rules to determine whether a contract is contrary to public policy. *Shields v. Texas Scottish Rite Hospital*, 11 S.W.3d 457, 459 (Tex. App.--Eastland 2000, pet. denied) (bequest of over \$2 million in securities and cash constitutes a substantial gift, and fails as a matter of public policy).

## 8. NO RESTRICTIONS ON GIFTS TO CHARITY.

A number of states have enacted "Mortmain" statutes restricting gifts to charity by imposing restrictions regarding the percentage of the estate that may be given to charity by will, or prohibiting charitable gifts made by will executed within a certain period (thirty days to one year) before the testator's death. See *Restrictions on Charitable Testamentary Gifts*, 5 REAL PROP., PROB. & TR. J. 290 (1970). Texas has never had such a statute.

## • Substantive Law Doctrines Regarding Changes of Beneficiaries After Will Is Executed

### 1. DEATH OF BENEFICIARY--LAPSE

**a. General Rule.** If the beneficiary of a bequest predeceases the testator, and if the bequest does not state who will be entitled to receive the property in that event, the bequest "lapses" instead of passing to the heirs or personal representative of the deceased beneficiary. See *Carr v. Rogers*, 383 S.W.2d 383, 384-385 (Tex. 1964).

**b. Lapsed Specific Bequest Passes to Residuary Estate.** For the estates of decedents dying on or after September 1, 1991, a lapsed specific bequest will become a part of the residue if the will contains a residuary clause. TEX. PROB. CODE ANN. § 68(b) (Vernon 2003). Under prior law the same rule was generally applicable. See *Sewell v. Sewell*, 266 S.W.2d 924, 926 (Tex. Civ. App.--Texarkana 1954, writ ref'd n.r.e.). However, uncertainty could arise under prior law where a specific bequest lapsed and the residuary clause provided for the disposition of "my other property." In such a case, the specifically bequeathed property is not "my other property."

**c. Lapsed Bequest in Residuary Estate.** For the estates of decedents dying on or after September 1,

1991, a lapsed bequest of the residuary estate passes to the other residuary beneficiaries in proportion to their respective interests in the residue estate. TEX. PROB. CODE ANN. § 68(c) (Vernon 2003). The so called "no residue of a residue" rule previously applied by Texas courts was that the lapse of a portion of a residuary bequest (where no substitutional takers are provided) passed by intestacy rather than passing to the other residuary beneficiaries. *Swearingen v. Giles*, 565 S.W.2d 574, 576-77 (Tex. Civ. App.--Eastland 1978, writ ref'd n.r.e.); *Estate of O'Hara*, 549 S.W.2d 233, 237 (Tex. Civ. App.--Dallas 1977, no writ). This rule had been criticized as frustrating the desire of the testator manifested by his residuary clause to pass his entire estate by his will. See 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 28.5 (3d ed. 2002).

Even prior to the statutory revocation of the "no residue of a residue" rule, at least one court seemed uncomfortable with the rule and was able to avoid its application via a perhaps liberal construction of the will. The will at issue provided for a disposition of the estate if the testator predeceased her husband or died simultaneously, but did not specifically provide for a disposition of the estate if the testator survived her husband. The court, applying the general presumption against intestacy, held that the estate passed pursuant to the simultaneous death dispositive scheme rather than by intestacy. *Chambers v. Warren*, 657 S.W.2d 3 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.).

**d. Exception: Antilapse Statute.** For the estates of decedents dying on or after September 1, 1991, Section 68 of the Probate Code provides that if (i) a bequest is made to a descendant of the testator or a descendant of the testator's parent, and (ii) such descendant was not living when the will was signed, predeceases the testator, or is treated as having predeceased the testator by virtue of a qualified disclaimer, then, the bequest will not lapse but shall pass to the descendants of such legatee, *per stirpes*. TEX. PROB. CODE ANN. § 68 (Vernon 2003).

For estates of decedents who died prior to September 1, 1991, the antilapse statute applied only to bequests to the testator's descendants. Cases decided under prior law held that the statute was applied strictly only in the situations described in the statute. See *Logan v. Thomason*, 202 S.W.2d 212, 215 (Tex. 1947) (statute does not apply to a bequest to a collateral relative); *Andrus v. Remmert*, 146 S.W.2d 728, 729 (Tex. 1941) (statute does not apply where legatee leaves no children or descendants).

Section 68 was revised in 1993 to give guidance as to what language in a will can override the antilapse provisions of § 68(a). It provides some "safe-harbor" language not intended to be exclusive, but by way of example, which the testator could use with assurance that the antilapse provisions of § 68(a) would not apply. The amended statute provides, for example, that a bequest to "my surviving children" will pass only to children who actually survive, and the antilapse statute will not apply to the interests of any predeceasing children. The 1993 amendment also clarifies that

decedents of the devisee must survive by 120 hours in order to receive assets from the estate under the antilapse statute. TEX. PROB. CODE ANN. § 68 (Vernon 2003).

**e. Exception: Class Gifts**

(1) *General Rule Regarding Lapse of Class Gifts.* If a bequest is made to a "class" of individuals (e.g., "to the children of X"), if one of the persons in the class dies before the testator's death, the remaining members of the class are entitled to receive the bequest, and the deceased beneficiary's portion does not lapse. See *Hagood v. Hagood*, 186 S.W. 220, 225 (Tex. Civ. App.--Fort Worth 1916, writ ref'd); see also *Turner v. Adams*, 855 S.W.2d 735 (Tex. App.--El Paso 1993, no writ) (where there is no express condition of survivorship, remainder estate following a life estate vests in members of class living as of testator's death). If a bequest is made to named individuals who are also described as a class, the bequest is ordinarily treated as a "gift to individuals, the class description being added merely by way of identification." *McGill v. Johnson*, 775 S.W.2d 826, 829 (Tex. App.--Austin 1989, no writ) (bequest to "my sisters, Ruth J. Gordon and Mary B. Hall").

(2) *Application of Antilapse Statute to Class Gifts.* For the estates of decedents dying on or after September 1, 1991, the antilapse statute expressly applies to class gifts. TEX. PROB. CODE ANN. § 68 (Vernon 2003). Thus, if a bequest is made "to the children of my son X" or "the children of my brother Y," and if any of the children predeceases the testator leaving surviving descendants, that child's share of the bequest will pass to his or her descendants under Section 68. This is consistent with the majority rule in the U.S., which is that antilapse statutes apply with respect to deceased class members. See JESSE DUKEMINIER & STANLEY M. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES, 652 (2d ed. 1978).

The 1993 amendment of Section 68 clarifies that the class gift provision in Section 68 does not apply to persons who were deceased when the will was executed. TEX. PROB. CODE ANN. § 68 (Vernon 2003). For example, assume T has one surviving brother and one surviving sister and one brother who died several years earlier (with surviving children). If T writes his will to leave a bequest "to my brothers and sisters," he probably did not intend to include the children of his deceased brother in that bequest. The 1993 amendment clarifies that the anti-lapse statute would not apply to the predeceased brother under this class gift.

For estates of decedents dying prior to September 1, 1991, Texas law was not totally clear as to whether the antilapse statute was applied to class gifts. One Texas court of appeals case indicated, in dictum, that the old antilapse statute would be applied to class gifts. *Burch v. McMillin*, 15 S.W.2d 86, 91 (Tex. Civ. App.--Eastland 1929, no writ). However, in a case that did not directly involve a class gift (the case involved a gift subject to express survivorship provisions), the Texas Supreme Court disapproved *Burch* to the extent

that it purported to say that the antilapse statute would override express survivorship provisions. *White v. Moore*, 760 S.W.2d 242, 244 (Tex. 1988). However, the Supreme Court did not address the applicability of the antilapse statute to a simple class gift that did not expressly contain survivorship requirements. *See also Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987) (court of appeals held that bequest to "surviving children of this marriage" was a "class bequest" conditioned on survivorship and that the antilapse statute did *not* apply, so the property passed only to the children who survived the testator; Supreme Court held that in light of the entire will, the bequest was to the children who were surviving at the time the will was signed, so the antilapse statute applied with respect to the children who subsequently predeceased the testator).

**f. Drafting Consideration.** The lapse doctrine and the antilapse statute should not present any problems to the careful drafter. The will should specifically provide who will be substitute takers in the event that a beneficiary does not survive the testator. In stating a survivorship requirement, the will should specifically make clear when the survivorship requirement is applied (for example, at the time of the testator's death or at the termination of a trust). *See Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987) (bequest to "surviving children of this marriage" held to refer to children surviving at the time the will was signed).

**2. PRETERMITTED CHILD.** Certain protection is given to children who are born *after* a will is executed under Section 67 of the Probate Code. TEX. PROB. CODE ANN. § 67 (Vernon Supp. 2005). If a child is born after an original will is executed but before a codicil is executed, the child will not be entitled to protection under the Texas statute because the codicil republishes the will. *Laborde v. First State Bank & Trust Co.*, 101 S.W.2d 389, 393 (Tex. Civ. App.--San Antonio 1936, writ ref'd).

**a. Law Effective For Decedents Dying Prior to September 1, 1989.**

(1) *Testator Has Child or Children Living at Time Will Is Executed (Section 67(a)).* If the testator has a child or children at the time the will is executed, and if a child is born or adopted after the will is executed and that child is "not provided for by settlement," the afterborn child is entitled to his or her intestate share of the estate unless (i) the surviving spouse is the father or mother of all of the testator's children (not counting adopted children), and (ii) the surviving spouse is the principal beneficiary under the will to the entire exclusion (by silence or otherwise) of the testator's other children.

One Texas case has addressed the meaning of the phrase "provided for by settlement." *In re Estate of Ayala*, 702 S.W.2d 708 (Tex. App.--San Antonio 1985, no writ). In that case, the decedent signed a will covering his U.S. property in 1953. After 1953, two additional children were born to him, and he subsequently signed a will in 1971 covering his Mexico

assets. The 1971 will included some specific bequests to his children, including the two children born after 1953. The court concluded that the decedent did "make a settlement" for the afterborn children by making bequests to them in the 1971 will, so the pretermitted child statute did not apply to the U.S. property being disposed of by the 1953 will. *Id.* at 711. The case summarizes various New York cases interpreting similar statutory language that have concluded that afterborn children can be provided for "by settlement" in any number of different ways in order to preclude application of the pretermitted child statute. *See e.g., In re Fabers Estate*, 280 A.D. 394, 114 N.Y.S.2d 119, *aff'd*, 305 N.Y. 200, 111 N.E.2d 883 (1953) (factors including the size of the settlement, value of the entire estate, and provisions made for other children, among others, are to be considered in determining whether the afterborn child has been provided for "by settlement").

(2) *Testator Has No Children Living at Time Will Is Executed (Section 67(b)).* If the testator has no children living at the time the will is executed, if a child is subsequently born or adopted after the will is executed, and that child is not "provided for or mentioned," the will is VOID if the child survives for one year after the testator's death unless (i) the surviving spouse is the father or mother of all of the testator's children (not counting adopted children), and (ii) the surviving spouse is the beneficiary of the estate to the entire exclusion (by silence or otherwise) of the testator's other children.

The phrase "mentioned" has been interpreted to mean that the testator had in mind the possibility of afterborn children in that they were not overlooked or forgotten by accident, inadvertence or oversight. *Pearce v. Pearce*, 104 Tex. 73, 134 S.W. 210, 214 (1911).

As an example of the operation of Section 67(b), assume that a person has no children at the time that he signs his will, that his wife has substantial wealth in her own right, and that his brother and sister have substantial financial needs. If the person leaves a significant portion of his estate to his brother and sister (so that his wife is not the "principal beneficiary" of his estate), and if the person has a child after the time that the will is executed, the will would be *void* if the child lived at least one year after the testator's death unless the testator's will made some provision or mention of afterborn children.

(3) *Distinction Between Effect if Testator Has Children Living Versus Effect if Testator Has No Children Living at Time Will Executed.* The circumstances triggering the application of Section 67a and 67b are generally the same, and the provisos that prevent application are also generally the same. (There are some detailed differences in the triggering circumstances and provisos under Sections 67(a) and 67(b).) The primary difference is in the consequences. If children are alive at the time the will is executed, an afterborn takes his *intestate share*. If no child is alive when the will is executed, the will is *void*. For a description of the reason behind the difference in these

two provisions, see 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 34.10 & 34.13 (2d ed. 1992).

(4) *Posthumous Children.* Any of the testator's children born after his death are included within the protection of Section 67 as described above. Section 67(b) specifically refers to the situation in which a testator "shall leave his wife enceinte of a child." Section 41(a) of the Probate Code (which gives inheritance rights to posthumous children and lineal descendants), in conjunction with Section 67(a), makes the provisions of Section 67(a) applicable to posthumous children. Section 66 of the Texas Probate Code previously dealt specifically with posthumous children, but was repealed in 1979 because it was deemed superfluous.

### **b. Law Effective for Persons Dying After September 1, 1989.**

#### (1) *Overview of Prior Law*

##### (a) *Triggering Events.--*

- Afterborn child;
- "Not provided for by settlement"; "not provided for or mentioned."
- Afterborn child lives one year after testator's death (under § 67(b) but not § 67(a)).

##### (b) *Provisos.--*

- Surviving spouse is the parent of all of the testator's children;
- Surviving spouse is the *principal* beneficiary to the exclusion of all of the testator's other children.

##### (c) *Effect.--*

- For § 67(a) (other children alive when will executed): afterborn gets intestate share;
- For § 67(b) (no child alive when will signed): will void.

#### (2) *Perceived Problems Under Prior Law*

(a) *Differences in Triggering Event Number 2.--*There appears to be no reason for the distinction between whether the afterborn child is "not provided for by settlement" or "not provided for or mentioned" based upon whether there were children living when the will was signed. Because of the problems in determining what an appropriate "settlement" is, the new statute utilizes the "not mentioned or provided for" approach.

(b) *Not Give Effect to Testator's Desire to Benefit Spouse.--*One of the provisos under current law to prevent the application of Section 67 is that the surviving spouse be the parent of *all* of the testator's children. This would not seem to give effect to the testator's intention to leave all of his property to the surviving spouse in a split family situation, where the testator has children by a prior marriage. For example, if the testator has children by marriage #1, also has children by marriage #2, but wishes to leave all of his property to spouse #2, that intention would be defeated under the old law if the testator and spouse #2 have an afterborn child. In reality, the afterborn child would likely be treated *more favorably* than the children in existence when the will was signed, because the surviving parent would be more likely to leave assets to that child than to the children by the prior marriage. The new law deletes the requirement that the surviving spouse be the parent of *all* of the testator's children in order to be able to retain bequests left to the surviving spouse.

(c) *Uncertainty of Spouse Being "Principal" Beneficiary.--*There have been no Texas cases discussing what the term "principal" beneficiary means, and how much of the estate could be left to other beneficiaries without causing Section 67 to apply. The new law deletes the requirement that the spouse be the principal beneficiary of the estate.

(d) *Posthumous Children.--*Section 67(b) under the old law specifically refers to posthumous children, but Section 67(a) does not. (However, § 41(a) in connection with old § 67(a) would appear to include posthumous children.) The new statute specifically states that posthumous children will be included under the statute, regardless whether there were children alive at the time that the will was signed.

#### (3) *General Operation of Current Law*

##### (a) *Triggering events.--*

- Afterborn child.
- Not mentioned or "provided for" in the will or otherwise provided for by the testator (the statute contains a special definition of the term "provided for").
- Some of the estate is left to a person other than the parent of the afterborn child.

##### (b) *Provisos.--*None.

##### (c) *Effect.--*

- If there is no provision for existing children (§ 67(a)(1)(A) or no existing children (§ 67(a)(2)):
- Afterborn child gets intestate share of portion of estate not left to parent of afterborn child.

- If there is a provision for existing children:
  - Afterborn child gets a pro rata share of the aggregate amounts left to other children, having as much the same character (life estate v. fee simple, etc.) as possible. (§ 67(a)(1)(B)).

(4) *Posthumous Children.* Posthumous children are specifically included under the new law, regardless of whether there were children living at the time the will was signed. TEX. PROB. CODE ANN. § 67(c) (Vernon Supp. 2005).

(5) *Ratable Abatement From Shares of Others.* When the afterborn child becomes entitled to a portion of the benefits left to other children or to other beneficiaries (except the surviving parent of the afterborn), the assets left to such other beneficiaries will abate ratably. "In abating the interest of such beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible." TEX. PROB. CODE ANN. § 67(b) (Vernon Supp. 2005).

(6) *Contingent Beneficiary.* The 1989 version of Section 67 was unclear as to whether it applied where an existing child is mentioned in the Will but actually receives no bequest and is only a contingent beneficiary. Section 67 was amended in the 1993 legislative session to clarify that the terms "provided for" and "provision is made" mean any disposition of property to or for the benefit of the pretermitted child, whether vested or contingent, including a bequest to a trustee. TEX. PROB. CODE ANN. § 67(d) (Vernon Supp. 2005). Notwithstanding the 1993 clarification, there continued to be confusion when only a contingent provision was made for an existing child. Section 67 was amended again in the 2003 legislative session to specifically provide that a provision made for an existing child benefits a pretermitted child, "whether vested or contingent." TEX. PROB. CODE ANN. § 67(a)(1) (B) (Vernon Supp. 2005).

(7) *Provided for in Non-Probate Dispositions Taking Effect at Death.* Inequities could result where a substantial non-probate disposition of property is made to after-born or after-adopted child and the after-born or after-adopted child also receives a pro rata portion of the probate estate under Section 67. Section 67 was amended in the 1993 legislative session to provide that it will not apply if the pretermitted child receives gifts of non-probate assets that are intended to take effect at the testator's death. TEX. PROB. CODE ANN. § 67(d) (Vernon Supp. 2005); see, *Estate of Gorski v. Welch*, 993 S.W.2d 298 (Tex. App.—San Antonio 1999, pet. denied). Therefore, lifetime transfers from the testator to the pretermitted child will not take the child outside the operation of Section 67. However, by way of example, naming the child as beneficiary under a life insurance policy on the testator's life will make Section 67 inapplicable to the child.

(8) *Expressly Provided for in Will.* In *Ozuna v. Wells Fargo Bank, N.A.*, 123 S.W. 3d 429 (Tex. App.—San Antonio 2003, no pet. h.), an adult child adopted after the execution of a will naming her as a beneficiary of a specific bequest contended that she was a pretermitted child for purposes of Section 67(a) because the will did not provide for her "as a child." Although Ozuna was a pretermitted child, the court held that a child who receives a bequest under a will is "provided for" for purposes of Section 67(a). *Id.* at 431.

**c. Drafting Comment.** The lesson to be learned from Section 67 of the Texas Probate Code is that a testator's will should generally include afterborn children within its provisions (usually done by simply defining the term "children" to include afterborn children). Extreme caution is required if a will does not make any references to children. Texas cases suggest that any language in a will which indicates with reasonable clarity that the testator had in mind the possibility that a child or children *might* be born to him or her in the future would be sufficient to exclude an afterborn child from the benefits afforded under the Texas statute. See *Pearce v. Pearce*, 134 S.W. 210 (Tex. 1911); 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 34.17 (3d ed. 2002).

**3. DIVORCE.** Section 69 indicates that a spouse subsequently divorced and all relatives of such spouse who are not related to the testator are to be treated as having predeceased the testator and provisions in a will in favor of the former spouse or any such relative of the former spouse will be void. TEX. PROB. CODE ANN. § 69 (Vernon 2007). See Part III.C.1 at page 18 of this outline. However, the Texas Supreme Court has held that § 69 "requires that only those provisions in a will that favor a former spouse be read as if [such spouse] predeceased the testator." Thus, the spouse was not deemed to have predeceased the testator for purposes of a contingent gift made in the will. *In re Estate of Nash*, 200 S.W. 3d 914, 918 (Tex. 2007).

#### **4. DEATH OF A CHILD.**

**a. Consider Spouses of Children.** Typically, wills do not make any provisions for the spouse of a deceased child. However, the planner should not automatically assume that the testator does not want to make any provisions for spouses of deceased children.

**b. Per Capita and Per Stirpes.** Bequests to descendants should clearly indicate whether the distribution is per capita or per stirpes. While a gift or bequest to "issue" is generally interpreted to require a per stirpes distribution, courts in several states have reached a contrary conclusion. See 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 370 (1987). Use of the terms "in equal shares" or "share and share alike" may result in an unwanted per capita distribution.

Even if the will specifies that the distribution is to be made per stirpes, various interpretations of that term are possible, and conflicts exist among cases in various

jurisdictions. For example, if a bequest is made to surviving issue per stirpes, possible confusion exists if all of the children are deceased. Is the per stirpes distribution made by considering the deceased children as the "stirpes" or roots, or is the distribution made by considering the generation nearest that of the testator in which one or more members survive (i.e., the grandchildren)? The American jurisdictions have generally split on this issue. See W.W. Allen, Annotation, *Descent and Distribution to Nieces and Nephews as Per Stirpes or Per Capita*, 19 A.L.R.2d 186 (1951); Robert J. Blackwell, *Wills-Construction-Confusion in Division of Gifts to "Descendants,"* 37 MO. L. REV. 168 (1972). The term "per stirpes" should be carefully defined to avoid confusion. E.g., J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS AND ESTATES 1423 (2d ed. 1978) (suggesting the following definition of "per stirpes": "When a distribution is directed to be made to any person's descendants 'per stirpes,' the division into stirpes shall begin at the generation nearest to such person that has a living member.").

For Texas decedents dying *intestate* after September 1, 1991, a "per capita with representation" approach is clearly applicable. So, for example, if a decedent's son and daughter both predecease him but he is survived by 3 grandchildren--one child of the son and two children of the daughter--each grandchild takes one-third. (Under the alternative "strict per stirpes" distribution, the son's child would take one-half and the daughter's two children would share the other one-half that their mother would have taken were she alive, or one-fourth each.) TEX. PROB. CODE ANN. §§ 43 & 45 (Vernon 2003).

Under prior Texas law, community property passed to the decedent's descendants under a strict per stirpes scheme (Section 45) and separate property passed to collateral heirs per capita with representation (Section 43). However, Section 43 was unclear as to which approach would apply to separate property where the decedent's children all predeceased him but other descendants survived him. Commentators disagreed over the proper interpretation of the statute. Compare 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 4.4 (3d ed. 2002) with Joseph J. Finkell, Comment, *Determination of Per Capita and Per Stirpes Distribution Among Grandchildren and More Remote Lineal Descendants in Texas--A Plea For Amendment*, 23 S.TEX. L.J. 187, at 202-203 (1982). The 1991 legislative amendments to the Probate Code resolve the ambiguity of Section 43 in favor of a consistent per capita with representation approach (without regard to whether children survive) and eliminate the distinction between community and separate property. Other American jurisdictions are split on the per capita with representation/strict per stirpes issue.

• **Substantive Law Regarding Extraneous References - Integration, Incorporation by Reference, Facts of Independent Significance**

**1. INTEGRATION.** The doctrine of "integration" recognizes that a will may consist of various pages of paper without signing or attesting each page, but that all of the various pages may be integrated into one will and validated by a single act of execution. Indeed, multiple instruments or writings may be "integrated" as a part of the will if they were present in the room at the time of execution. See *Adams v. Maris*, 213 S.W. 622 (Tex. Comm'n App. 1919, no writ) (writing on outside of envelope and letter inside envelope were both recognized as a part of the holographic will); 10 LEOPOLD & BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 39.1 (3d ed. 2002).

**2. INCORPORATION BY REFERENCE.**

**a. General Rule.** A will may "incorporate by reference" documents that were not present at the time the will was executed if the extrinsic writing was in existence at the date of execution of the will, and is clearly identifiable from the provisions in the will. See *Brooker v. Brooker*, 106 S.W.2d 247, 253 (Tex. 1937) (court expressly declined to rule on whether incorporation by reference would be recognized in Texas); *Welch v. Trustees of the Robert A. Welch Foundation*, 465 S.W.2d 195, 199 and 201 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.) (attempt to incorporate trust created under brother's will invalid because document to be incorporated was not clearly identified, and was not identified as an existing document but rather any will that might be probated as the brother's will; on rehearing, gift to trustees named in brother's will was upheld under the facts of independent significance doctrine); *Taylor v. Republic National Bank*, 452 S.W.2d 560, 563 (Tex. Civ. App.--Dallas 1970, writ ref'd n.r.e.) (document attached to will was not incorporated into the will because a mere reference that a document is attached does not evidence an intent to incorporate it by reference, and because the extrinsic document was not clearly identifiable from the will); *Trim v. Daniels*, 862 S.W.2d 8 (Tex. App.--Houston [1st Dist.] 1992, writ denied) (direction to "[handle] pursuant to the incomplete will that Doris has" was not sufficient to incorporate by reference because incomplete will was not capable of being identified and because words "pursuant to" were not equivalent to "incorporated").

**b. Distinction Between Integration and Incorporation by Reference.** The distinction between "integration" and "incorporation by reference" is whether the extrinsic document in question was present at the time that the will was executed. If so, the question is whether the extrinsic document was "integrated" with the will, and if not, the question is whether the extrinsic document was "incorporated by reference" into the will.

**c. Application to Holographic Wills.** American jurisdictions have differed as to whether holographic wills could incorporate by reference documents that were not entirely in the testator's handwriting.

Texas cases have refused to recognize incorporation by reference of material not in the testator's handwriting into holographic wills. *Adams v. Maris*, 213 S.W. 622 (Tex. Comm'n App. 1919, no writ); see *Hinson v. Hinson*, 280 S.W.2d 731, 736 (Tex. 1955) (dictum).

**d. Pour-Over Wills.** Section 58a of the Texas Probate Code permits devisees to the trustee of any trust (including unfunded life insurance trusts) the terms of which are evidenced by a written instrument in existence before, concurrently with, or after the execution of the will, and which is identified in the will, even though the trust is subject to amendment, modification, revocation, or termination. If the trust is subsequently amended, the property may nevertheless pass to the trust and be administered under its terms, as amended. If the trust is revoked prior to the testator's death, the bequest to the trustee lapses. TEX. PROB. CODE ANN. § 58a (Vernon 2003).

Observe that the pour-over statute is broader than the general incorporation by reference doctrine, because it specifically allows subsequent amendments to the document incorporated.

Under the Uniform Testamentary Additions to Trusts Act, testamentary pour overs are validated "regardless of the existence, size or character of the corpus of the trust." UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 2-511, 8A U.L.A. comment at 114 (Supp. 1990). Although the Texas statute, prior to September 1, 1993, did not include the above quoted language, the San Antonio Court of Appeals has held that Section 58a authorizes unfunded "stand by" revocable trusts so long as the trust is named as a devisee or legatee in a valid will executed after or contemporaneously with the execution of the revocable trust. See *In Re Estate of Canales*, 837 S.W.2d 662, 666-667 (Tex. App.--San Antonio 1992, no writ).

Read broadly, the *Canales* court seems to go even further by holding either (i) that a testamentary designation as a devisee or legatee in a will constitutes "property" in the same sense that a contractual designation as beneficiary of a life insurance policy is property (see, e.g., TEXAS PROB. CODE ANN. § 111.004(12) (Vernon Supp. 2005) defining the term "property" to include a contractual designation as beneficiary of a life insurance policy), or (ii) that, more broadly, there is no difference between a nominal corpus and no corpus and that, therefore, a valid trust can exist without trust property. See *Canales*, 837 S.W.2d at 666 (a standby trust with no corpus and one with a corpus of \$1 "are the same thing").

Read narrowly, *Canales* simply holds that, without regard to whether a trust can exist without trust property, Probate Code § 58a validates a testamentary pour-over to the trustee named in a revocable trust instrument (to be held and disposed of under the terms of such instrument) even if no trust under that instrument was ever funded prior to the testator's death.

Section 58a(a) was amended in the 1993 legislative session to validate a devise or bequest in a Will to any other trust, whether such trust was established before, concurrently with or after the execution of the Will that contains the bequest. TEX. PROB. CODE ANN. § 58a(a) (Vernon 2003). A bequest to an unfunded trust is specifically validated. The 1993 amendment includes language from Section 2-511 of the Uniform Probate Code.

The prudent planner will at least nominally fund his client's revocable trusts (e.g., he will recite an initial property of \$1 and staple a \$1 bill to the Trustee's copy of the governing instrument) to assure that a valid trust is created. Nominal funding is sufficient. *In Re Estate of Canales*, 837 S.W.2d 662, 664 (Tex. App.--San Antonio 1992, no writ).

### 3. FACTS OF INDEPENDENT SIGNIFICANCE.

**a. General Rule.** A uniformly recognized doctrine is that a will may identify (1) the beneficiaries of a bequest or (2) the property bequeathed by making reference to some events outside the will as long as such extrinsic event has some lifetime significance other than providing for the testamentary disposition. The first Texas case to recognize this doctrine by name is *Welch v. Trustees of the Robert A. Welch Foundation*, 465 S.W.2d 195, 202 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.).

**b. Identification of Persons.** A good summary of the application of this doctrine to identification of persons is contained in the *Welch* case:

It has long been the law of this state that property may be devised to a class of persons, such as children living at the date of the death of the testator, or children, including those born after the execution of the will, or first cousins. The names of those who take under the will may be supplied by parol evidence ....

465 S.W.2d at 200-201.

**4. IDENTIFICATION OF PROPERTY--CONTENTS GIFTS.** Two new subsections (c) and (d) were added to Section 58 of the Texas Probate Code, effective for persons dying on or after September 1, 1993. Subsection (c) provides that contents pass with a legacy *only if* the Will directs that the contents are included in the legacy. For gifts of real property, personal property associated with real property and the contents of property located on the real property are included with the real property devise only if the Will directs that the personal property and/or contents are included. TEX. PROB. CODE ANN. § 58(c) (Vernon 2003).

Subsection (d) defines the term "contents." The term "contents" includes only *tangible* personal property other than "titled personal property" that does not require a former transfer of title, and that is located

"inside of or on a specifically bequeathed or devised item." TEX. PROB. CODE ANN. § 58(d) (Vernon 2003). Thus, the statute implicitly provides that a gift which clearly includes contents will not include any such "titled personal property." The term "titled personal property" is defined to include all tangible personal property represented by a certificate of title, written label, marking or designation that signifies ownership. For example, it would include a title certificate for a motor vehicle, motor home, motor boat, or similar property. (Even though it includes *tangible* personal property, the statute gives an example indicating that a stock certificate would also be covered even though it is intangible personal property.) Note that the statute is somewhat ambiguous as to the precise scope of "written label, marking or designation" that will qualify an item of personal property as "titled personal property." See 10 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 40.7 (3d ed. 2002).

There have been many "contents" cases in other jurisdictions, in which the gifts of the contents of a room or house or safe-deposit box have been upheld, on the theory that any shifting of contents would "normally have significance independent of testamentary purpose." ATKINSON, WILLS 394-95 (2d ed. 1953); D.C. Barrett, Annotation, *What Passes Under Legacy or Bequest of Things Found or Contained in Particular Place or Container*, 5 A.L.R.3d 466 (1966). However, mere references to property described in a memorandum or certificates of deposits or deeds that may be attached to the will are invalid because these latter acts do not have lifetime motives independent of the testamentary disposition. See *Ragland v. Wagener*, 180 S.W.2d 435, 438, 152 A.L.R. 1232 (Tex. 1944) (reference to deed that might be attached to will held invalid). However, it is difficult to rationalize one fairly recent case with this general rule. *In re Estate of Brown*, 507 S.W.2d 801 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.) (upheld reference to certificate of deposit enclosed in envelope on which three-line holographic will was written). Compare *Davis v. Shanks*, 898 S.W.2d 285 (Tex. 1995) (essentially holding that, under the law prior to the 1993 amendments, the term "contents" was per se ambiguous).

**5. REFERENCE TO WILL OF ANOTHER PERSON.** A gift to the beneficiaries who may be named as legatees under the will of another person is generally valid, because the other person would presumably dispose of his own estate without regard to the effect of his dispositions upon the will of the testator. *Welch v. Trustees of Robert A. Welch Foundation*, 465 S.W.2d 195, 202 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.); *Wilson v. Phillips*, 459 S.W.2d 212 (Tex. Civ. App.--Fort Worth 1970, no writ).

### • General Considerations Regarding Placing Restrictions on Bequests.

A testator often wants to place restrictions upon bequests of property instead of merely leaving an asset outright to a beneficiary to deal with as he pleases. Of

course, the most common technique for placing restrictions on property is the use of a trust arrangement. However, various other techniques, which are also possible, are considered in this section of the outline. These other techniques are important to the drafter of a "basic will" because the client often desires to impose some restrictions on a bequest but does not want the "complexity" of a trust arrangement. As indicated by the following discussion, a trust arrangement is often the simplest way to accomplish the client's desires.

**1. LIFE ESTATE.** A bequest "to A for life" creates a legal life estate. No specific words are necessary to create a life estate, but the bequest should clearly indicate that the bequest is not of an estate in fee.

#### a. Generally Not Used for Personal Property.

Life estates are generally used only for real property and not for personal property interests. Life estates in personal property are not favored and will be construed as an absolute fee unless the creating language clearly and unequivocally manifests a different intention. See *City of Austin v. Austin National Bank of Austin*, 503 S.W.2d 759, 761 (Tex. 1973); *McNabb v. Cruze*, 125 S.W.2d 288, 289 (Tex. 1939) ("well settled rule that life estates in personal property are not favored"); *In re Estate of Sruhar*, 728 S.W.2d 437, 439 (Tex. App.--Houston [1st Dist.] 1987, no writ) (life estate in personalty will be enforced if intent to grant life estate can be ascertained from the language of the will); *Bridges v. First National Bank*, 430 S.W.2d 376, 382 (Tex. Civ. App.--Dallas 1968, writ ref'd n.r.e.) (life estate in personalty will be recognized if intention to create life estate can be ascertained from language in will).

#### b. Rights and Responsibilities of Life Tenant.

The bequest should clearly spell out the rights and responsibilities of the life tenant.

##### (1) Taxes, Maintenance Expenses, and Repairs.

Absent contrary language, the life tenant has the duty to pay all taxes and maintenance expenses, including the cost of current repairs. *Trimble v. Farmer*, 305 S.W.2d 157, 160-161 (Tex. 1957); *Roberts v. Roberts*, 150 S.W.2d 236, 238 (Tex. 1941); *Dakan v. Dakan*, 83 S.W.2d 620, 625 (Tex. 1935); *Sargeant v. Sargeant*, 15 S.W.2d 589 (Tex. 1929).

(2) *Permanent Improvements.* If a life tenant makes permanent improvements, the remaindermen are not required to reimburse him. *Collett v. Collett*, 217 S.W.2d 60, 65 (Tex. Civ. App.--Amarillo 1948, writ ref'd n.r.e.).

(3) *Right to Use Property.* Generally, a life tenant has the right to all of the ordinary uses of the property, except that he must not commit "waste." Waste includes the opening of new mines or wells by the life tenant to remove minerals, *Clyde v. Hamilton*, 414 S.W.2d 434, 439 (Tex. 1967), and failing to make reasonable repairs for the preservation of the property, see *Barrera v. Barrera*, 294 S.W.2d 865, 867 (Tex. Civ. App.--San Antonio 1956, no writ). However, the life

tenant is not liable for waste arising from an act of God. *Barrera v. Barrera*, 294 S.W.2d 865, 867 (Tex. Civ. App.--San Antonio 1956, no writ) (flood damage).

(4) *Insurance Premiums*. The life tenant is not required to maintain insurance or to repay amounts expended by the estate for property insurance. *Hill v. Hill*, 623 S.W.2d 779, 781 (Tex. App.--Amarillo 1981, writ ref'd n.r.e.).

(5) *Payment of Encumbrances*. The life tenant owes a duty to protect the property from forfeiture by reason of any act or omission on his part. A life tenant is generally required to pay off interest on existing encumbrances to preserve the estate. If the life tenant pays off the principal sum of the debt, the life tenant is entitled to reimbursement or contribution from the remaindermen. See *Brokaw v. Richardson*, 255 S.W. 685, 688 (Tex. Civ. App.--Fort Worth 1923, no writ); E.W.H., Annotation, *Right to Contribution from Remainderman, of Life Tenant Who Pays Off Encumbrance on Property*, 87 A.L.R. 220 (1933).

(6) *Sale and Reinvestment*. Absent authority in the language creating the life estate, a life tenant has no implied power to expand, sell, or dispose of the property. See *Ellis v. Bruce*, 286 S.W.2d 645, 647-48 (Tex. Civ. App.--Eastland 1956, writ ref'd n.r.e.) (life estate "to be used as he may desire so long as he lives" did not confer authority to sell). Granting a power of sale does not enlarge the life estate into a fee interest or otherwise subject the property to the tenant's creditors. See *Quisenberry v. J.B. Watkins Land-Mortgage Co.*, 47 S.W. 708, 709 (Tex. 1898); *Long v. Long*, 252 S.W.2d 235, 243 (Tex. Civ. App.--Texarkana 1952, writ ref'd n.r.e.).

(7) *Lease by Life Tenant*. A life tenant apparently has a right to lease the property and enjoy the rentals from the lease. However, no leasehold estate can be created which will last longer than the life tenant's estate. See *Gibbs v. Barkley*, 242 S.W. 462, 465 (Tex. Comm'n App. 1922, holding approved).

(8) *No Bond Required*. No bond or other security is required from the life tenant for the protection of the remaindermen, although a court may require such a bond in unusual circumstances. See *Ramirez v. Flag Oil Corp.*, 266 S.W.2d 270, 271 (Tex. Civ. App.--San Antonio 1954, no writ).

(9) *Fiduciary Duties of Life Tenant*. Section 5.009 of the Texas Property Code, added in the 1993 legislative session, provides that if a life tenant has the power to sell and reinvest principal, the life tenant has all the duties of a trustee with respect to the remainderman. TEX. PROP. CODE ANN. § 5.009 (Vernon 2004) (The draftsman of this bill stated that it was believed to be a codification of existing common law and case law in Texas.) The section provides that it does not apply if the life tenant originally received real property until such real property is sold.

c. **Vesting of Remainder Interest**. Generally, the bequest should state when the interest of the

remainderman vests. If the will is silent, a devise to one for life with remainder over to another at the life tenant's death conveys a vested, not contingent, remainder to the remainderman that vests absolutely, provided that the remainderman survives the testator. Enjoyment of the property by the remainderman is delayed until the death of the life tenant but the remainder estate vests immediately. *Turner v. Adams*, 855 S.W.2d 735 (Tex. App.--El Paso 1993, no writ). If the remainderman is to take only upon survival of the life tenant, the will should specifically so provide.

**2. CONDITIONAL OR DETERMINABLE FEE INTERESTS.** Under general real property principles, it is possible to create an estate that might terminate upon the happening or failure to happen of some event. Types of defeasible fees include the fee simple determinable ("to X, for so long as the premises are used for the following purposes"), or fee simple subject to a condition subsequent ("to X, provided that if the premises shall ever cease to be used for certain purposes, the grantor shall have the right to reenter and retake the premises"). See generally J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES 699-70 (2d ed. 1978). However, defeasible fee estates are rarely utilized (primarily because of the greater flexibility allowed through the use of trusts.)

**3. CONDITIONAL BEQUEST.** An entire will or certain bequest made in a will may be made conditional upon the occurrence of certain events. *Bagnall v. Bagnall*, 225 S.W.2d 401, 402 (Tex. 1949). Typically, conditional bequests are based upon conditions occurring before the death of the testator. *In re Estate of Perez*, 155 S.W.3d 599 (Tex. App.--San Antonio 2004, no pet.) (will contingent on testator's death during surgery; will never became effective because contingency never occurred). Making bequests conditioned upon post death events may create difficulties. See 1 PAGE, WILLS §§ 9.3, 9.4 (1960).

**4. TESTAMENTARY ANNUITIES.** A will may direct the payment of an annuity to a beneficiary. *Cf. Houston Land & Trust Co. v. Campbell*, 105 S.W.2d 430, 434-36 (Tex. Civ. App.--El Paso 1937, writ ref'd) (bequest of annuity held partially deemed); *Cleveland v. Cleveland*, 30 S.W. 825 (Tex. Civ. App. 1895) (bequest of "yearly income of \$4,000, to be taken out of my estate by my executors" commences at death of testator and extends during beneficiary's natural life; court discusses a number of cases from other jurisdictions involving testamentary annuities), *rev'd*, 35 S.W. 145 (Tex. 1896) (bequest limited to \$4,000 annual annuity during the term of estate administration). The annuity bequest may be established as payable out of the residuary estate, out of a trust, or by direction to the executor to purchase a commercial annuity. An annuity bequest may be helpful in situations where the testator wants a beneficiary to receive a specific annual amount, but specifically does not want to create a trust. However, if the annuity is merely payable out of the residuary estate, the bequest will create complications in delaying complete distribution under the will unless

the executor is authorized to satisfy the annuity requirement by purchasing a commercial annuity.

**5. TESTAMENTARY OPTION.** A will may give an option to particular individuals to purchase assets at a particular price. See *Henneke v. Andreas*, 473 S.W.2d 221, 223 (Tex. Civ. App.--Austin 1971, writ ref'd n.r.e.) (option to purchase farm at a price below market value). See Jay M. Zitter, Annotation, *Determination of Price Under Testamentary Option to Buy Real Estate*, 13 A.L.R.4th 947 (1982).

**a. Time Period for Exercising Option.** The testamentary option may be declared invalid as a violation of the rule against perpetuities or restraint on alienation if the time during which the option may be exercised is not limited to a reasonable period of time. *Mattern v. Herzog*, 367 S.W.2d 312, 318-20 (Tex. 1963) (option construed to last for a reasonable time not extending beyond that allowed by law for due administration of the estate); *Maupin v. Dunn*, 678 S.W.2d 180, 183 (Tex. App.--Waco 1984, no writ) (option contract violated rule against perpetuities because option extended to heirs, successors and assigns of both parties, so option would not necessarily have been exercised within the perpetuities period; court refused reformation of option to comply with perpetuities period, reasoning that the presumed reasonable time for exercising the option had already expired). See J.A. Bryant, Jr., Annotation, *Pre-Emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation*, 40 A.L.R.3d 920 (1971). See also *Mizell v. Greensboro Jaycees*, 105 N.C. App. 284, 412 S.E.2d 904 (N.C. App., 1992) (reservation of 25 year right of first refusal contained in dead held void as violation of rule against perpetuities).

**b. Tax Effects.** A beneficiary who exercises a testamentary option to purchase property at less than fair market value will have a basis in the purchased property determined in part by Section 1014 (which determines the value of the option), and in part by Section 1012 (cost) of the Internal Revenue Code. Rev. Rul. 67-96, 1967-1 C.B. 195. A bargain sale pursuant to a testamentary option does not permit the estate to deduct a loss. *Id.*; cf. *Estate of Minnie Miller v. Comm'r*, 421 F.2d 1405 (4th Cir. 1970). For a general discussion of the general tax effects of testamentary options, see Sheldon F. Kurtz, *Purchase Options Created by Will*, 17th ANN. MIAMI EST. PL. INST., ch. 4 (1983).

**c. Effect of Anti-lapse Statute.** The anti-lapse statute may apply if the beneficiary of the option predeceases the testator. See *Matter of Estate of Niehenke*, 818 P.2d 1324 (Wash. 1991) (option granted in will to A, but if A did not exercise the option, B and C were given option to purchase; held that the anti-lapse statute applied, where A predeceased the testator survived by children of his own).

**6. RESTRAINTS ON ALIENATION.** Restraints on the authority of a transferee to "alienate"

or transfer an interest in real property are invalid. *Loehr v. Kincannon*, 834 S.W.2d 445, 446 (Tex. App.--Houston [14th Dist.] 1992, no writ) (provision restricting sale or encumbrance of land for life, held unenforceable restraint on alienation); *Barrows v. Ezer*, 668 S.W.2d 854, 856 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.) (provisions in bequest of ranch requiring that ranch be held intact and operated as a ranch for 25 years constituted unreasonable restraint on alienation and were not given effect); *Kitchens v. Kitchens*, 372 S.W.2d 249, 252 (Tex. Civ. App.--Waco 1963, writ dismissed) (devise of land subject to its being held by devisees for ten years unless they unanimously agree to earlier sale held invalid as a restraint on alienation); *McGaffey v. Walker*, 379 S.W.2d 390, 395 (Tex. Civ. App.--Eastland 1964, writ ref'd n.r.e.) (restraint on power of devisees to sell devised property until devisee reached twenty-one years of age held invalid as a restraint on alienation); *Pritchett v. Badgett*, 257 S.W.2d 776, 777 (Tex. Civ. App.--El Paso 1953, writ ref'd) (provision in will that devisee could not sell or encumber devised land for twenty years unless joined by testator's executors held void); see generally *Options and Restraint on Alienation*, 42 TEX. L. REV. 257 (1963); 5A POWELL ON REAL PROPERTY ¶ 840-843 (1988). The restraints on alienation doctrine applies to life estates as well as to estates in fee simple. *Frame v. Whitaker*, 36 S.W.2d 149, 151 (Tex. 1931) (dictum); but see *Berry v. Spivey*, 97 S.W. 511 (Tex. Civ. App. 1906, no writ).

If a condition is placed on a contingent remainder based upon the remainderman not disposing of any interest bequeathed to him prior to the time the interest vests, the restraint on alienation doctrine is not applicable. See *Lowrance v. Whitfield*, 752 S.W.2d 129, 134 (Tex. App.--Houston [1st Dist.] 1988, writ denied) (testator made bequest of remainder interest following wife's life estate to his children, provided that if any child should attempt to sell any interest bequeathed to him during the wife's lifetime, the part of the estate bequeathed to the child will pass to the wife in fee simple; court held this to be a contingent remainder that was subject to a condition precedent to its vesting and that the unreasonable restraint or alienation doctrine was not invoked).

The restraint on alienation doctrine often requires that the testator's desires be implemented by resort to trusts rather than by imposing direct restraints on the ability to dispose of property. A direction to a trustee not to alienate particular trust assets may constitute an invalid restraint on alienation. See G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 220, at 374-75 (1979); cf. *Dulin v. Moore*, 70 S.W. 742, 743 (Tex. 1902) (upheld direction that trustee sell only for reinvestment purposes). However, the testator can select a trustee whom he knows will follow his wishes that property not be sold. Various cases have given effect to directions to a trustee not to sell trust assets. E.g., *In re Will of Killian*, 703 P.2d 1323 (Colo. App. 1985) (because grantor directed in trust that ranch not be sold, court refused to order sale of ranch even though ranch generated only nominal income).

## **7. PROVIDING FOR “TUTMA” CUSTODIAL ACCOUNTS FOR BENEFICIARIES UNDER AGE 21.**

### **a. New Law Effective September 1, 1995.**

Effective September 1, 1995, the Texas Uniform Gifts to Minor’s Act (“TUGMA”) was replaced with the new Texas Uniform Transfers to Minors Act (“TUTMA”). TEX. PROP. CODE. ANN. § 141.001 *et seq.* (Vernon Supp. 2005). The new law greatly expands the flexibility and application of custodial accounts to such an extent that commentators have described it as tantamount to having created a statutory trust. *See, e.g.* Richard L. (Lee) Jukes, *The 74th Legislature - Enactments of Interest to Probate, Trusts & Estate Lawyer*, HOUSTON BAR ASSOCIATION PROBATE, TRUSTS & ESTATES SECTION, August 29, 1995. Although a complete discussion of the detailed new TUTMA provisions is beyond the scope of this outline, some of the major changes relevant to will drafting are noted below.

**b. Most Custodial Accounts Now Last Until Age 21.** The most conspicuous change effectuated by the new law is the extension of the duration of most custodial accounts until the “minor” reaches 21 years of age. TEX. PROP. CODE. ANN. § 141.021(1) (Vernon Supp. 2005) (note that § 141.002(11) defines “minor” to mean an individual who is younger than 21 years of age). The addition of 3 years (beyond age 18) should significantly increase the appeal of custodial accounts to many clients.

**c. TUTMA Transfers not Authorized by the Will Still Terminate at Age 18.** Under prior law, it was good practice—but not crucial—for the will to authorize distributions to be made to custodial accounts for the benefit of any minor distributee. This is because, without regard to whether the will addressed the issue (and even if there wasn’t a will), TUGMA allowed personal representatives to create custodial accounts. *See* Acts 1983, 68th Leg., R.S., ch. 576, § 1, 1983 Tex. Gen. Laws 3698 (enacting former TEX. PROP. CODE. ANN. § 141.103(c)), *repealed by* Act of June 17, 1995, 74th Leg., R.S. ch. 1043 §§ 1-3, 1995 Tex. Gen. Laws 5177, 5177-89.

However, effective September 1, 1995, transfers to custodial accounts by, *inter alia*, executors and trustees whose governing instruments do not contain an authorization to do so, terminate when the minor reaches the general age of majority (18 years). TEX. PROP. CODE. ANN. § 141.021(2) (Vernon Supp. 2005). Only if the governing instrument specifically authorizes transfers pursuant to TUTMA (or TUGMA) may an executor or trustee create a custodial account that extends until the beneficiary reaches age 21.

**d. Testator may Designate Custodian.** Under prior law, there was no express authorization for testator to specify who would serve as custodian for any TUGMA transfers his or her personal representative might make. Instead, the statute simply provided that the personal representative was to transfer the property

to “an adult member of the minor’s family or a guardian of the minor.” TEX. PROP. CODE. ANN. § 141.003(d) (repealed 1995). TUTMA specifically provides for binding custodian designations by, *inter alia*, testators. TEX. PROP. CODE. ANN. § 141.006(b) (Vernon Supp. 2005).

**e. Any Type of Property may be Placed in Custodianship.** Under TUTMA, “any interest in property” may be the subject of a custodial arrangement. TEX. PROP. CODE. ANN. § 141.002(5) (Vernon Supp. 2005).

**f. Custodians Have Broad Administrative Powers.** TUTMA provides that a custodian “has all the rights, powers and authority over custodial property that unmarried adult owners have over their own property.” TEX. PROP. CODE. ANN. § 141.014(a) (Vernon Supp. 2005). However, it is clear that this expansion of custodian power remains subject to a general standard of prudent fiduciary conduct. TEX. PROP. CODE. ANN. § 141.013(b) (Vernon Supp. 2005) (“a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another”).

**g. Application to Existing Custodianships.** For obvious constitutional reasons, TUTMA does not extend the duration of custodial accounts created before September 1, 1995 to age 21. However, for all other purposes, TUTMA appears to apply to all custodial accounts, whether created before or after the September 1, 1995 effective date. *See* TEX. PROP. CODE. ANN. § 141.023 (Vernon Supp. 2005) (effect on existing custodianships) and Act of June 17, 1995, 74th Leg., R.S., ch. 1043 § 2(b), 1995 Tex. Gen. Laws 5177 (TUTMA applies to pre September 1, 1995 custodianships except to the extent that application would impair constitutionally vested rights.)

**8. DIRECTION TO SELL PROPERTY.** The will may direct the executor to sell certain assets and to distribute the proceeds to specified beneficiaries. The IRS has indicated in a private ruling that under such a will, the capital gains resulting from such sale would be included in the gross income of the beneficiaries, not in the gross income of the estate. Letter Rul. 8003013. The ruling reasoned that under local (Virginia) law, the property passed directly to the heirs or devisees (similar to Section 37 of the Texas Probate Code).

### **Income During Estate Administration.**

For an excellent summary of the rule regarding allocation of estate income among estate beneficiaries, see *Report of Committee on Probate and Estate Administration*, 102 TR. & EST. 916 (1963).

**1. GENERAL ABSENCE OF TEXAS CASES.** There is very little Texas case law regarding the allocation of income during probate among the estate beneficiaries. Prior to September 1, 1993, Texas had no statute governing allocations of estate income among beneficiaries. For periods prior to the 1993 amendment adding Section 378B of the Texas Probate

Code, Section 32 of the Probate Code provides that in the absence of statutes the powers and duties of executors and administrators "shall be governed by the principles of common law." TEX. PROB. CODE ANN. § 32 (Vernon 2003); *See e.g., Stiff v. Fort Worth National Bank*, 486 S.W.2d 859, 862 (Tex. Civ. App.--Eastland 1972, writ ref'd n.r.e.) (citing authority from other jurisdictions but no Texas authority for the proposition that "income received during administration from the residuary estate goes to the residuary devisees and legatees proportionately"); and *Johnson v. McLaughlin*, 840 S.W.2d 668, 670 (Tex. App.--Austin 1992, no writ) (following *Stiff* and holding further that debts, expenses and taxes may not be charged against such income unless the will reflects a contrary intention).

## 2. STATUTORY PROVISIONS.

**a. Debts and Administration Expenses.** With the adoption of the Texas Uniform Principal and Income Act (TEX. PROP. CODE ANN. § 116.001 *et seq.* (Vernon Supp. 2005)), effective January 1, 2004, Section 378B of the Texas Probate Code was amended. Section 378B, which was effective for persons dying on or after September 1, 1993, provided statutory estate income and principal allocation rules, based on Section 5 of the Revised Uniform Principal and Income Act. As amended, Section 378B(a) provides that debts, funeral expenses, estate taxes and penalties on estate taxes, general administration expenses, and family allowances are charged against principal of the estate. However, executors are allowed to allocate attorney's fees, other professional fees, executor's commissions, court costs and interest relating to estate taxes between income and principal as the executor determines to be just and equitable. (The Will itself could provide for a different allocation.) TEX. PROB. CODE ANN. § 378B (Vernon Supp. 2005). Section 378B(a) under the old law provided that interest on estate taxes was charged against principal of the estate.

**b. Income Determined Under Texas Trust Code.** The amount of income from the estate assets (including income from property used to discharge liabilities) is determined in accordance with the rules applicable to a trustee under the Texas Trust Code. TEX. PROB. CODE ANN. § 378B(b) (Vernon Supp. 2005). After such income is determined, it is allocated among the various estate bequests as described below.

**c. Specific Legatees and Devisees.** Income payable pursuant to a specific bequest is determined after deducting all expenses specifically allocable to the specifically devised property, including interest accrued after the death of the testator and income taxes accrued with respect to the property. TEX. PROB. CODE ANN. § 378B(c) (Vernon Supp. 2005).

**d. Pecuniary Bequests.** Pecuniary bequests (whether or not in trust) receive interest at the legal rate of interest under TEX. FIN. CODE ANN. § 302.002 (Vernon Supp. 2005) (currently providing for 6% interest). The right to receive interest begins one year after the issuance of letters testamentary. TEX. PROB. CODE ANN. § 378B(f) (Vernon Supp. 2005).

**e. Remaining Bequests.** The remaining income (not allocated to specific legatees or the recipients of pecuniary bequests) is distributed after payment of all expenses (including accrued income taxes on that income) to the residuary and general devisees and legatees "in proportion to [their] respective interests in the undistributed assets of the estate". TEX. PROB. CODE ANN. § 378B(d) (Vernon Supp. 2005).

**f. Revaluations for Purposes of Making Pro Rata Allocations of Undistributed Assets.** The Revised Uniform Principal Income Act requires determination of the beneficiaries' "respective interests in the undistributed assets of the estate" based on inventory values. Similar allocation acts in other states require the determination to be based on federal estate tax values. *See, e.g., Ill. Ann. Stat. ch 30, ¶ 506 § 6(b)(2)* (Smith Hurd Supp. 1991). In order to give the executor the maximum amount of flexibility, the Texas statute gives the executor the authority to determine whether assets should be revalued, and how often, for purposes of determining the relative interests of the beneficiaries in the estate's income. Similar discretion is given to the executor in determining how frequently the beneficiaries' relative interests in estate income must be recalculated. Thus, the statute imposes no requirement on the part of the executor to recalculate the beneficiaries' proportionate interest in the undistributed assets of the estate as each expenditure that will alter the proportionate interests is made. Undistributed assets include assets used to discharge liabilities, but only until such assets are actually used to pay debts and expenses. TEX. PROB. CODE ANN. § 378B(h) (Vernon Supp. 2005). The commentary on this provision prepared by the Probate Code Subcommittee of the Texas Bar Real Probate and Trust Law Section indicates that, as long as the executor acts in a manner intending to reach a fair and equitable result, no inference shall be made that the executor has breached a duty to a beneficiary by failing to revalue estate assets for purposes of this provision.

**g. Charities Receive Their Bequests Free of Income Taxes.** To the extent that income passing to a charity is deductible to the estate the charity is entitled to the full amount of the income without reduction for income taxes. TEX. PROB. CODE ANN. § 378B(e) (Vernon Supp. 2005).

**3. SPECIFIC BEQUESTS.** A specific devisee or legatee is generally entitled to the interest, dividends, rents, or other income on or earned by the property bequeathed to him from the date of death. TEX. PROB. CODE ANN. § 378B(c) (Vernon Supp. 2005); *see Hurt v. Smith*, 744 S.W.2d 1, 4-6 (Tex. 1987) (legatees of specified bequests were entitled to income earned by those assets during administration of the estate); *Garmany v. Schulz*, 285 S.W. 911, 912 (Tex. Civ. App.--Amarillo 1926), *rev'd*, 293 S.W. 165 (Tex. Comm'n App. 1927, holding approved) (*rev'd* on the grounds that bequests were not specific bequests of property); P.H., Annotation, *Accretions to Subject of Legacy*, 116 A.L.R. 1129 (1938).

#### 4. GENERAL LEGACY.

**a. General Rule - Interest Allowed from When Legacy Becomes Due and Payable.** A general cash legacy is not entitled to a share of the income earned by the estate, unless the will directs to the contrary. However, interest is allowed on the legacy, commencing at the time when the legacy becomes due and payable. For decedents dying prior to September 1, 1993, see *Williams v. Smith*, 206 S.W.2d 208, 217 (Tex. 1947) (pecuniary legacies bear interest at the legal rate from the dates when they should have been paid); *Geraghty v. Randals*, 224 S.W.2d 327, 331 (Tex. Civ. App.--Waco 1949, no writ) (where will provided that cash legacy was to be paid after debts and funeral expenses were paid, legatee was entitled to 6% interest from the time that debts and funeral expenses were paid). For decedents dying on or after September 1, 1993, Section 378B(f) provides for interest on pecuniary bequests. TEX. PROB. CODE ANN. § 378B(f) (Vernon Supp. 2005).

**b. When Interest Begins to Accrue.** Prior to the adoption of Section 378B, Texas law was unclear as to when interest began to accrue (i.e., when the bequest was due and payable), unless the will specifically discussed the payment of interest. At any time after the expiration of twelve months after the original grant of letters testamentary, a legatee may request a partition and distribution of the estate. TEX. PROB. CODE ANN. § 373 (Vernon 2003). However, the executor may show cause why distribution of the estate should not be made at that time. See TEX. PROB. CODE ANN. §§ 377-78 (Vernon 2003); *Beckham v. Beckham*, 227 S.W. 940, 941 (Tex. Comm'n App. 1921). Many Texas attorneys used one year following the date of death as a general rule of thumb for determining when interest began accruing on general cash legacies.

Section 378B(f) specifically provides that interest accrues beginning one year after the court grants letters of testamentary or letters of administration. TEX. PROB. CODE ANN. § 378B(f) (Vernon Supp. 2005).

**c. Interest Rate Applicable Prior to Section 378B.** A 1949 case indicated that a cash legacy was entitled to 6% interest from the time that debts and funeral expenses were paid. *Geraghty v. Randals*, 224 S.W.2d 327, 331 (Tex. Civ. App.--Waco 1949, no writ).

There is a Texas statute that governs the payment of prejudgment interest for certain types of actions. Section 302.002 of the Texas Finance Code provides as follows:

If a creditor has not agreed with an obligor to charge the obligor any interest, the creditor may charge and receive from the obligor legal interest at the rate of six percent a year on the principal amount of the credit extended beginning on the 30th day after the date on which the amount is due. If an obligor has agreed to pay to a creditor any compensation that constitutes interest, the obligor is considered to have agreed on the rate

produced by the amount of that interest, regardless of whether that rate is stated in the agreement.

TEX. FIN. CODE ANN. § 302.002 (Vernon Supp. 2005).

Various older cases have indicated that prejudgment interest could be awarded as an element of equitable damages, and have suggested that the 6% accrual rate provided in Article 5069-1.03 (current version at Finance Code § 302.002) would apply. *E.g.*, *Miner-Dederick Const. Corp. v. Mid-Cty. Rental*, 603 S.W.2d 193 (Tex. 1980).

Section 304.003 of the Finance Code (original version at Article 5069-1.05) provides the rate of interest for post-judgment interest. TEX. FIN. CODE ANN. § 304.003 (Vernon Supp. 2005). That interest is a floating rate. The Texas Supreme Court in *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), decided that prejudgment interest should be recoverable in personal injury and death cases in accordance with the statutory rates prescribed for post-judgment interest (i.e., 10%). The Court also stated that the interest should be compounded daily. Various cases have suggested that the rule in *Cavnar* regarding prejudgment interest should apply in "all types of cases." *E.g.*, *Allied Bank West Loop, N.A. v. C.B. & Associates, Inc.*, 728 S.W.2d 49, 59 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.) (10% compounded daily allowed in suit based on negligence and conversion).

The Texas Supreme Court has stated, however, that the article 5069-1.03 (current version at Finance Code § 302.002) 6% interest rate will continue to apply in situations that are covered by article 5069-1.03. *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930-31 (Tex. 1988) (damages based on breach of contract for improper installation of a roof were "unascertainable" within the meaning of article 5069-1.03, in that the contract did not fix "a measure by which the sum payable can be ascertained with reasonable certainty"; therefore, article 5069-1.03 could not apply, so 10% interest, compounded daily, was the appropriate interest rate). Several court of appeals cases subsequent to *Perry Roofing* have held that the 6% rate would apply, because the fact situations in those cases involved damages that were ascertainable from the face of the contracts involved. *Wheat v. American Title Ins. Co.*, 751 S.W.2d 943 (Tex. App.--Houston [1st Dist.] 1988, no writ) (payment of commissions to insurance agent on insurance policies); *Allen v. Allen*, 751 S.W.2d 567 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (payment of one-half of royalties pursuant to property settlement incorporated in divorce decree).

Under the Supreme Court's reasoning in *Perry Roofing*, whether the 6% or 10% rate applies depends upon whether article 5069-1.03 (current version at Finance Code § 302.002) applies, and that will depend upon whether the beneficiary's right to the pecuniary legacy is an "account or contract ascertaining the sum payable." A pecuniary legacy would clearly seem to be an ascertainable sum. The beneficiary would be able to

establish that such legacy was payable at least by a particular date certain, satisfying the "date certain" requirement stated by the Supreme Court in *Houze v. Surety Corp. of America*, 584 S.W.2d 263, 268 (Tex. 1979). The major issue is whether the right to receive a pecuniary legacy under a will is an "account or contract." No cases have addressed this issue. Prior to *Cavnar*, courts awarded prejudgment "equitable interest" at a 6% rate. Therefore, whether the interest was being awarded under article 5069-1.03 or was being awarded as "equitable interest" in the discretion of the court made very little difference, so there were very few cases discussing which approach applied. It is conceivable that the Texas courts will ultimately hold that a pecuniary legacy is in effect an "account" and that article 5069-1.03 applies, thus providing a 6% simple interest rate. There can be no certainty regarding that issue until it is resolved by the Texas courts.

**d. Interest Rate Applicable Under Section 378B.** Under Section 378B(f) (applicable for estates of persons dying after September 1, 1993) the Article 5069-1.03 rate (current version at Finance Code § 302.002) (currently 6%) applies.

**e. Income Tax Treatment.** For income tax purposes, interest payments on general legacy could be treated (1) as compensation for the use of money and therefore deductible by the estate and includable in the gross income of the beneficiary, or (2) estate distributions under Sections 661 and 662 of the Internal Revenue Code which would be treated as income to the beneficiary only if the estate had "distributable net income" in the year interest was paid to him. See generally 1 A. JAMES CASNER, ESTATE PLANNING § 4.2.3, at 277-78 n. 14-15 240 (5th ed. 1984). The Fifth Circuit follows the former approach. *U.S. v. Folckemer*, 307 F.2d 171, 173 (5th Cir. 1962).

## 5. DEMONSTRATIVE LEGACIES.

"Demonstrative legacies" of a specific cash amount payable out of particular property are hybrid in nature, and whether a particular bequest carries the right to income depends upon the construction of the particular bequest and no general rule can be formulated. P.H., Annotation, *Accetions to Subject of Legacy*, 116 A.L.R. 1129, 1146 (1938).

**6. RESIDUARY BEQUESTS.** Residuary devisees and legatees are generally entitled proportionately to all income of the general estate not otherwise disposed of (to specific legatees, as interest to general legatees, or to an annuitant). IIIA A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 234.3 (4th ed. 1988); *Stiff v. Fort Worth National Bank*, 486 S.W.2d 859, 862 (Tex. Civ. App.--Eastland 1972, writ ref'd n.r.e.) (citing authority from other jurisdictions but no Texas authority for the proposition that "income received during administration from the residuary estate goes to the residuary devisees and legatees proportionately"); *Johnson v. McLaughlin*, 840 S.W.2d 668, 670 (Tex. App.--Austin 1992, no writ) (following *Stiff* and holding further that debts, expenses and taxes may not be charged against such income). This general

approach is followed in Section 378B(d). For a discussion of the income tax effects of funding residuary bequests, see 1 A. J. CASNER, ESTATE PLANNING § 4.1 (5th ed. 1984).

**7. BEQUEST IN TRUST.** Most jurisdictions recognize that estate income or interest allocable to a specific or residuary bequest paid in trust is received by the trust as income. Therefore, the income beneficiary of the trust is entitled to receive such amounts. See IIIA A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 234.2-234.3 (4th ed. 1988). This generally recognized rule is codified in new Section 116.101 of the Texas Trust Code. TEX. PROP. CODE ANN. § 116.101 (Vernon Supp. 2005). See also TEX. PROB. CODE ANN. § 378B(g) (Vernon Supp. 2005).

## 8. WILL PROVISION CONTROLS.

Allocations of probate income and expense will be governed by specific provisions in a will. See TEX. PROB. CODE ANN. § 378B(a) & (b) (Vernon Supp. 2005) (first clause of each subsection); Revised Uniform Principal and Income Act § 5(a)(1962). The will should specifically discuss income attributable to particular bequests where the allocation of that income is significant or might be uncertain. In particular, consider discussing the allocation of estate income with respect to marital deduction bequests and charitable bequests to assure the availability of the full amount of the respective marital or charitable deduction. See 4 A. J. CASNER, ESTATE PLANNING § 13.14.16 at 222, § 14.6.3 at 342 (5th ed. 1988). In the absence of contrary provisions in the will, specific bequests other than pecuniary bequests to a spouse or charity receive the net income from the specific bequest property (§ 378B(c)), pecuniary bequests bear interest beginning after one year (§ 378B(f)), and residuary bequests to a spouse or charity receive a pro rata amount of the estate income not allocated to specific bequests or pecuniary bequests (§ 378B(d)).

### • Planning for Disclaimers.

With respect to all bequests in the will, the planner should specifically contemplate where the bequeathed assets should go in the event that the primary beneficiary disclaims his or her interest in the bequest. Section 37A of the Texas Probate Code provides that disclaimed property passes as if the person disclaiming predeceased the decedent unless the decedent's will provides otherwise. TEX. PROB. CODE ANN. § 37A (Vernon 2003).

**1. DISCLAIMER BY SPOUSE OF INTEREST IN PROPERTY UNDER ONE TRANSFER BUT NOT UNDER OTHER TRANSFERS.** Section 37A(f), as amended in the 1993 legislative session, clarifies that a surviving spouse may disclaim one transfer, and accept an interest in the same property under another transfer. For example, if a surviving spouse wishes to disclaim a specific devise or bequest so that the asset can become a part of the residuary estate which will pass to a by-pass trust, the

surviving spouse is able to do so. TEX. PROB. CODE ANN. § 37A(f) (Vernon 2003).

**2. DISCLAIMER OF SURVIVORSHIP PROPERTY.** Section 37A, as amended in 1993, clarifies that a disclaimer by a surviving joint tenant, or the surviving spouse under an agreement between spouses that created a right of survivorship in community property, is permitted with respect to such property at the death of the predeceasing joint tenant or spouse. TEX. PROB. CODE ANN. § 37A (Vernon 2003). For purposes of the time period for the survivor's making a disclaimer of an interest in such property, the transfer creating the disclaimed interest occurs as of the date of death of the predeceasing joint tenant or predeceasing spouse, so that the survivor has nine months thereafter to complete a disclaimer.

**3. FUTURE INTEREST ACCELERATED.** Prior to the legislative amendments made in 1993, the statute was unclear as to whether or not a future interest is accelerated by a disclaimer. For example, *Barrows vs. Ezer*, 668 S.W.2d 854 (Tex. Civ. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.), involving an outright bequest, in essence applied the doctrine of acceleration to pass an outright bequest to a secondary devisee where the primary devisees disclaimed. On the other hand, *Aberg vs. First National Bank in Dallas*, 450 S.W.2d 403 (Tex. Civ. App. -- Dallas 1970, writ ref'd n.r.e.), involving a contingent remainder interest in a trust, held that the future remainder interest was not accelerated by disclaimer of a prior beneficial interest. Section 37A was amended in 1993 to make clear that a disclaimer would accelerate future interests. TEX. PROB. CODE ANN. § 37A (Vernon 2003). A corresponding change was made to Section 112.010 of the Texas Trust Code, governing disclaimers of interests under trusts. TEX. PROP. CODE ANN. § 112.010 (Vernon 1995).

**4. DELIVERY OF NOTICE OF DISCLAIMER.** Prior to September 1, 1993, Section 37A(b) provided different provisions regarding the deadline for delivery of notice of disclaimer than the deadline for filing the disclaimer. The statute was amended effective September 1, 1993 to eliminate the inconsistency between the filing and the notice requirements so that both will have the same deadline. TEX. PROB. CODE ANN. § 37A (Vernon 2003).

**5. CREDITOR EFFECTS OF DISCLAIMER.** Prior to the changes made in the 1993 legislative session, Section 37A was unclear as to whether a disclaimer would relate back for all purposes to the death of the decedent and whether the disclaimed property would be subject to the claims of any creditor of the disclaimant. One Texas case, *Dyer vs. Eckols*, 808 S.W. 2d 531 (Tex. App. -- Houston [14th Dist.] 1991, writ dism'd by agreement), addressed this issue, and the court held that the disclaimer related back to the death of the decedent for all purposes. *Id.* at 533. The court implied that the disclaimer was not a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act because the disclaimant never possessed the

property disclaimed. *Id.* at 534. The court also stated that, because the Texas Uniform Fraudulent Transfer Act does not mention disclaimers, a disclaimer is not a transfer under the Act. *Id.* at 535. *But see In re Stevens*, 112 B.R. 175 (Bkrcty. S.D. 1989) (disclaimer is a "transfer" for purposes of the fraudulent transfer provision of the Federal Bankruptcy Code). Section 37A was amended in 1993 to provide that a disclaimer shall relate back for all purposes to the death of the decedent and shall not be subject to the claims of any creditor of disclaimant. TEX. PROB. CODE ANN. § 37A (Vernon 2003). (Corresponding changes were made in 1993 to Section 112.010(d) of the Texas Property Code and Section 24.002(12) of the Texas Business and Commerce Code.) *But see Drye v. United States*, 120 S.Ct. 474 (1999) (disclaimer under Arkansas law did not defeat federal tax lien -- state law determines an individual's rights or interests, but federal law determines whether these rights or interests are property or rights to property within the meaning of the federal tax lien statutes).

## V.

### DISPOSITIVE PROVISIONS FOR SPECIFIC BEQUESTS

#### • Substantive Law Doctrines Affecting Specific Bequests Generally.

##### 1. ADEPTION.

###### a. General Rule.

(1) *Ademption by Extinction.* "Absent a contrary intention expressed in the will, the alienation or disappearance of the subject matter of a specific bequest from the testator's estate adeems the devise or bequest." *Shriner's Hospital, etc. v. Stahl*, 610 S.W.2d 147, 150 (Tex. 1980). Any proceeds received upon the disposition of the property by the testator passes under the residuary clause unless the will provides to the contrary. *Id.* at 152. A bequest may be partially adeemed if a portion of the specifically bequeathed property is disposed of prior to death. *San Antonio Area Fdn. v. Lang*, 35 S.W.3d 636, 642 (Tex. 2000); *Rogers v. Carter*, 385 S.W.2d 563, 565 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.). *See generally* John C. Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH. L. REV. 195 (1971).

(2) *Ademption by Satisfaction.* A specific bequest, general bequest, or residuary bequest is deemed to be satisfied if the testator, after making the will, makes an inter vivos gift of an equal sum to the legatee with the intent to nullify the prior bequest. *See Heirs of Hunsucker v. Hunsucker*, 455 S.W.2d 780, 783 (Tex. Civ. App.--Waco 1970, writ ref'd n.r.e.); 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 25.1 (3d ed. 2002).

**b. Ademption Doctrine Applies Only to Specific Bequests.** The doctrine of ademption applies

only to specific bequests. *Rogers v. Carter*, 385 S.W.2d 563, 566 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.). The doctrine does not apply to general legacies (e.g., a bequest of \$500), or to demonstrative legacies (e.g., a bequest of \$500, to be paid out of the proceeds of sale of IBM stock).

Because of the ademption doctrine (as well as the abatement doctrine), it is important to determine whether a particular bequest is a specific, demonstrative, general or residuary bequest. The distinctions between these different types of bequests were explained by the Texas Supreme Court in *Hurt v. Smith*, 744 S.W.2d 1, 4 (Tex. 1987).

**c. Construction--Ademption Doctrine Not Favored.** Courts generally attempt to construe wills in a manner that will avoid application of the ademption doctrine. See e.g., *Welch v. Straach*, 518 S.W.2d 862, 868 (Tex. Civ. App.--Waco), *rev'd on other grounds*, 531 S.W.2d 319 (1975) (bequest of "homestead" was not adeemed by a purchase of new residence following execution of will).

(1) *Construing Bequest as General or Demonstrative Legacy.* If possible, courts will tend to construe bequests as general or demonstrative legacies rather than specific legacies if the doctrine of ademption is involved. For example, a bequest of "100 shares of IBM stock" is held to be a general bequest for purposes of the ademption doctrine. See *O'Neill v. Alford*, 485 S.W.2d 935, 939 (Tex. Civ. App.--Houston [1st Dist.] 1972, no writ) (dictum). However, a bequest of "my 100 shares of IBM stock" is typically held to be a specific bequest to which the ademption doctrine will apply. See generally *Hurt v. Smith*, 744 S.W.2d 1, 4 (Tex. 1987) (discussion of distinctions between specific, demonstrative, and general bequests); *Opperman v. Anderson, et al.*, 782 S.W.2d 8 (Tex. App.--San Antonio 1989, writ denied); *Jacobs v. Sellers*, 798 S.W.2d 24 (Tex. App.--Beaumont 1990, writ denied) (classification of bequest as general, demonstrative, specific, or residuary depends upon testator's intent as determined from the entire will).

(2) *Form Change.* If the property subject to the bequest undergoes a mere change in form, the ademption doctrine does not apply. The classic example of a mere form change is a specific bequest of securities, which are exchanged for new securities where the corporation has undergone a reorganization, merger, or consolidation. See Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH. L. REV. 195, 199-200 (1971); See *Guy v. Crill*, 654 S.W.2d 813 (Tex. App.--Dallas 1983, no writ) (bequest of stock was made "together with all dividends, rights and benefits declared thereon"; court held the bequest included stock of a bank holding company into which the stock described in the will had been converted). Stock splits and stock dividends generally pass to the specific legatee. *O'Neill v. Alford*, 485 S.W.2d 935, 939-940 (Tex. Civ. App.--Houston [1st Dist.] 1972, no writ); *Morriss v. Pickett*, 503 S.W.2d 344, 349 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.).

(3) *Proceeds.* The mere change of form exception does not apply to proceeds received upon the sale of a specifically bequeathed asset. *Shriner's Hospital, etc. v. Stahl*, 610 S.W.2d 147, 150 (Tex. 1980). However, a beneficiary may have a right to such proceeds under circumstances where the specifically bequeathed item was disposed of other than by the testator's own volition and/or where the testator could not have subsequently revised his will. See *id.*, 610 S.W.2d at 150 (indicating, in dicta, that a specific legatee might be able to trace proceeds where the property was disposed of in an involuntary conversion or by a guardian under circumstances in which the testator had no capacity or opportunity to adjust his will). Compare *Hunter v. NCNB Texas Nat. Bank*, 857 S.W.2d 722 (Tex. App.--Houston [14th Dist.] 1993, writ denied), where a named devisee under the will of the incompetent decedent attempted to prevent a proposed sale of the subject property by the trustee of the decedent's revocable trust. Citing Texas Probate Code § 94 (will not effective until admitted to probate), the court denied the devisee's claim, making it clear that a potential devisee has no right in the decedent's property and therefore no right to prevent a sale merely because the sale would cause an ademption of her devise.

Where the bequest itself, however, is of the proceeds from the sale of certain assets during the estate administration, there is no ademption of proceeds from the sale of such assets before death if such proceeds are traceable to the sale. *Bates v. Fuller*, 663 S.W.2d 512 (Tex. App.--Tyler 1983, no writ).

(4) *Testator's Intent.* Generally, the testator's intent at the time that he subsequently disposes of an asset is not relevant in determining whether the ademption doctrine will apply. However, in determining whether any of the various exceptions to the ademption doctrine might apply, the courts have, as a pragmatic matter, given weight to the testator's intent. See 9 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 24.2 (3d ed. 2002).

No Texas case has addressed the situation where a guardian makes a gift of property specifically bequeathed in the incompetent person's will. Compare *In re Estate of Mason v. Fairbank*, 42 Cal. Rptr. 13 (Cal. 1965) (no ademption); *In re Wrights Will*, 7 N.Y.2d 365 (Ct. App. 1960) (bequest does adeem).

**d. Property Under Contract to Sell at Death.** If the bequeathed property is subject to an enforceable contract of sale at the time of death, the ademption doctrine generally applies, because under the doctrine of equitable conversion, the beneficial ownership and risk of loss of the property passes to the vendee upon the execution of the contract. Therefore, the specific devisee would not receive the purchase price. See ATKINSON, WILLS 744 (2d ed. 1953). But see *Willie v. Waggoner*, 181 S.W.2d 319, 322 (Tex. Civ. App.--Austin 1944, writ ref'd) (ademption doctrine did not apply where contract of sale contained liquidated damages clause giving vendee an election to perform or pay liquidated damages).

**e. Wills Executed on or after September 1, 2003.** Although the common law doctrine of ademption by satisfaction is recognized in Texas, there was no statutory guidance. With the enactment of new Section 37C of the Texas Probate Code by the 2003 Texas Legislature, a lifetime gift will be considered a satisfaction, either in whole or in part, of a bequest only if (i) the testator's will provides for the deduction, (ii) the testator so declares in a contemporaneous writing, or (iii) the devisee so acknowledges in writing. TEX. PROB. CODE ANN. § 37C(a) (Vernon Supp. 2005). Property received in partial satisfaction of a bequest is valued as of the earlier of the date the devisee acquires possession or enjoyment, or the date on which the testator dies. TEX. PROB. CODE ANN. § 37C(b) (Vernon Supp. 2005).

**2. ABATEMENT.** "Abatement" is the reduction of bequests if the estate is insufficient to pay all of the testator's debts and other bequests. *See generally* ATKINSON, WILLS 754 (2d ed. 1953).

**a. Order of Abatement in Absence of Will Provision.** Section 322B of the Texas Probate Code, which became effective September 1, 1987, provides that bequests will abate in the following order (unless the will provides otherwise):

- property not disposed of by the will, but passing by intestacy;
- personal property of the residuary estate;
- real property of the residuary estate;
- general bequests of personal property;
- general devises of real property;
- specific bequests of personal property; and
- specific devises of real property.

TEX. PROB. CODE ANN. § 322B (Vernon 2003).

This order of abatement applies for all debts and expenses of administration other than estate taxes. (The allocation of estate taxes is governed by Section 322A of the Probate Code.)

Texas cases had established the same general order of abatement. *See Thompson v. Thompson*, 236 S.W.2d 779, 789 (Tex. 1951) (personal property should be used before real property for payment for estate debts and taxes); *Avery v. Johnson*, 192 S.W. 542, 545 (Tex. 1917) (specific devise of realty is satisfied before general devise of realty); *McNeill v. Masterson*, 15 S.W. 673, 674 (Tex. 1891) (specific bequests of realty and personal property were satisfied before residuary estate bequest); *Warren v. Smith*, 620 S.W.2d 725, 726-27 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.) (personal property is primary fund for payment of debts and legacies; presumption that charges against the estate should be paid from the residue whether the residue be personal or real property). *See generally* WOODWARD

& SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 952 (1971); 8 TEXAS TRANSACTION GUIDE ¶ 43.23 (2006). See also Part 2VIII at page 90 of this outline regarding apportionment of debts and expenses.

**b. Abatement Provision in Will Controls.** If the will expressly indicates the order of abatement, the abatement provision will be followed. TEX. PROB. CODE ANN. § 322B(d) (Vernon 2003); *see Kennard v. Kennard*, 84 S.W.2d 315, 321 (Tex. Civ. App.--Waco 1935, writ dism'd). The abatement provision may provide for a pro rata abatement among various bequests, or may provide that certain specific bequests shall not abate until all other bequests have been fully abated. If the will contains numerous specific bequests, the abatement provision may be very important to prevent substantial diminution of the residuary estate, which generally passes to the testator's preferred beneficiaries.

### **3. EXONERATION OF ENCUMBRANCES.**

#### **a. Wills Executed before September 1, 2005.**

Unless the terms of a will provide to the contrary, a specific bequest of encumbered property entitles the beneficiary to have the lien paid out of the personal property in the residuary estate. *Currie v. Scott*, 187 S.W.2d 551, 554 (Tex. 1945) (dictum). However, if the personal property in the residuary estate is insufficient to satisfy the encumbrance, real properties or personal property specifically bequeathed to other beneficiaries may not be used to satisfy the encumbrance. *Id.* at 555. (Query whether Section 322B changes this result, in providing that general or specific bequests of personal property abate before specific gifts of real property.) The exoneration doctrine does not apply if the testator had merely acquired the property *subject to* a mortgage and was not personally liable on the underlying obligation. This doctrine may have a very substantial effect upon the amount of net assets received by each beneficiary of the estate. Observe that the amount of encumbrance on a bequest might be substantially greater than the equity interest in that property.

**b. Wills Executed on or after September 1, 2005.** With the enactment of new Section 71A of the Texas Probate Code, the 2005 Texas Legislature reverses the common law exoneration of liens doctrine in Texas. A specific devise of property will pass subject to any existing liens securing the debt as of the testator's date of death. There will be no right to exoneration from the testator's estate for payment of the debt unless the will specifically provides to the contrary. TEX. PROB. CODE ANN. § 71A (Vernon Supp. 2005).

**4. INCOME TAX EFFECTS OF FUNDING SPECIFIC BEQUESTS.** Generally, when a beneficiary of an estate receives a distribution, the estate is entitled to a distribution deduction under Section 661 of the Internal Revenue Code and the beneficiary recognizes gross income under Section 662 of the Internal Revenue Code, up to the extent of the

estate's distributable net income, or "D.N.I." (determined under Section 643). However, Sections 661 and 662 do not apply to specific bequests that are described in Section 663(a)(1) of the Internal Revenue Code. Therefore, satisfaction of a specific bequest typically does not "carry out" estate D.N.I. to the legatee. *See* Rev. Rul. 86-105, 1986-2 C.B. 82 (specific bequest of "assets, in cash or in kind or partly in each, the selection of which shall be in the absolute discretion of my executor, with a fair market value at the date of distribution equal to [\$X]" satisfied the requirements of Section 663(a)(1)); Treas. Reg. § 1.663(a)-1(b) (specific bequest under marital deduction formula clause does not satisfy Section 663(a)(1) because amount of bequest cannot be ascertained at testator's death).

## • Specific Bequest Provisions.

### 1. TANGIBLE PERSONAL PROPERTY.

**a. Income Tax Effect.** Tangible personal property is often disposed of in a specific bequest so that its distribution will not be deemed to carry out estate income to the beneficiary. *See* Part 2V.A.4 at page 50 of this outline.

**b. Description of Bequeathed Property.** The bequest should clearly describe the bequeathed article and the legatee. In particular, substantially valuable types of items should be specifically mentioned or they may be considered as investments and governed by the residuary estate disposition.

(1) *Meaning of "Personal Belongings" Unclear.* Items that will be included in a bequest of "personal belongings" is unclear. *See Goggans v. Simmons*, 319 S.W.2d 442, 445-46 (Tex. Civ. App.--Fort Worth 1958, writ ref'd n.r.e.) (bequest of "furnishings" in a home and "all my personal belongings" did not include stock and bank deposits, but did include automobile); *Erwin v. Steele*, 228 S.W.2d 882 (Tex. Civ. App.--Dallas 1950, writ ref'd n.r.e.) (bequest of "personal belongings" in connection with references to jewelry and family property included articles of "personal nature which had an enduring personal value derived by the deceased from gifts, association and personal use," but did not include automobile). In light of this vagueness, the more common forms of tangible personal property should be specifically described.

(2) *"All Other Tangible Personal Property".* The term "household furnishings" is not defined in any Texas cases, and the term "personal belongings" depends upon the context in which it is used. Therefore, a general description such as "all other tangible personal property" is needed to insure the inclusion of all items of tangible personal property in the bequest.

(3) *Applicability to Cash Deposits.* Cash on deposit is not included within the term "tangible personal property." Similarly, a bequest of "cash on hand" will not include cash on deposit. *Thompson v. Thompson*, 236 S.W.2d 779, 790-91 (Tex. 1951).

However, a bequest of "cash on hand" may include cash collected by an executor as well as cash in the testator's possession at his death. *Summerhill v. Hanner*, 9 S.W. 881, 883 (Tex. 1888). Therefore, it would seem best to exclude "cash on hand" from the tangible personal property bequest.

(4) *Bequest of Contents.* The effect of a gift of an item of personal property which includes contents (i.e., a cedar chest) is unclear under Texas law. *See* Part 2IV.C.4 at page 40 of this outline.

#### **c. Allocation Among Various Beneficiaries.**

If the testator desires to make a bequest of tangible personal property to a group of persons, various alternatives are available, such as (1) giving the executor discretion in allocating the assets, (2) allowing beneficiaries to select items in an order predetermined by either lot, age, or sex, or (3) bequeathing the item to one individual who can be relied upon to follow the testator's general wishes in making subsequent gifts of such items to the intended beneficiaries. The testator could indicate that he may leave a list describing his desired allocation of assets among the group of individuals, and make a precatory request of the executor that such list be followed.

**d. Delivery Expenses.** The will should specifically indicate if expenses incurred in delivering tangible personal property are to be paid from the estate as an administration expense.

**e. Insurance.** A bequest of an item of personal property does *not*, in the absence of a contrary provision in the will, pass policies of insurance covering such items to the beneficiary. *See In Re: Barry's Estate*, 252 P.2d 437 (Okla. 1952); *cf. Springfield Fire & Marine's Co. v. Boon*, 194 S.W. 1006 (Tex. Civ. App.--Texarkana 1917, writ ref'd) (inter vivos transfer of property did not include insurance).

### 2. REAL ESTATE.

#### **a. Description of Devised Property.**

Identification of realty devised by will need not necessarily be as specific as required to satisfy the Statute of Frauds. *Baines v. Ray*, 251 S.W.2d 565, 567 (Tex. Civ. App.--Galveston 1952, writ ref'd n.r.e.). A description of property by street address is sufficient, because it furnishes sufficient information by which the property may be identified and located by a surveyor. *Id.* A reference to "my home" or "my land" may also be sufficient. *See Hedick v. Lone Star Steel Co.*, 277 S.W.2d 925, 930-31 (Tex. Civ. App.--Texarkana 1955, writ ref'd n.r.e.).

The will should identify the devised real property with sufficient certainty so that there can be no confusion as to its identity. Ideally, city property should be located by street address, followed by the lot and block number of the subdivision or addition involved as stated in a recorded map or plat. Rural properties should be described by metes and bounds descriptions.

A bequest of "buildings" or "houses" includes the real estate on which they are situated, unless the general context provides otherwise. See *Gidley v. Lovenberg*, 79 S.W. 831 (Tex. Civ. App. 1904, no writ).

**b. Residence.** If the testator arguably has two residences, the will should specifically identify the intended property. The description should generally refer to the residence at the time of the testator's death. Otherwise, a residence acquired after the execution of the wills would not be substituted for the specific residence referred to in the will. *Wolf v. Hartmangruber*, 162 S.W.2d 112, 116 (Tex. Civ. App.--Fort Worth 1942, no writ); *Edds v. Edds*, 282 S.W. 638, 640 (Tex. Civ. App.--Austin 1926, writ ref'd).

**c. Insurance Policies.** A devise of real estate will not include insurance policies associated therewith unless specifically mentioned in the will. Cf. *Springfield Fire & Marine Ins. Co. v. Boone*, 194 S.W. 1006 (Tex. Civ. App.--Texarkana 1917, writ ref'd).

**d. Encumbrance.** Particularly with respect to real estate, the planner should keep in mind that for wills executed before September 1, 2005, encumbrances against specifically devised property will be exonerated unless the will provides to the contrary. For wills executed on or after September 1, 2005, encumbrances against specifically devised property will not be exonerated unless the will provides to the contrary. See Part 2V.A.3 at page 50 of this outline.

**e. Out-of-State Real Property.** An estate administration in the jurisdiction in which the real property is located may very well be needed in order to pass title to the out-of-state real property to the estate beneficiaries. A procedure should be included for designating an ancillary executor to deal with any such properties.

If out-of-state real property is devised, the will should specifically designate whether any outstanding encumbrances should be exonerated, because the laws of some states do not provide for exoneration of liens. In that event, there would be uncertainty as to whether Texas law (i.e., law of the domicile) or the law of the other state (i.e., law of the situs) would control. See *Higginbotham v. Manchester*, 154 A. 242, 79 A.L.R. 85 (1931) (law of domicile controlled); *Tunis v. Dole*, 89 A.2d 760 (1952) (law of situs controlled).

**f. Cemetery Lots.** Cemetery lots do not pass under a will, unless the will makes an explicit reference to the lot. Otherwise, cemetery lots will be reserved for the decedent's surviving spouse and (if any spaces remain) for the decedent's children. See TEX. HEALTH & SAFETY CODE ANN. § 711.039(e) (Vernon 2003).

### 3. STOCK.

**a. Changes in Capital Structure.** Consider including bequest of any stock attributable to the bequeathed property received through a change in the capital structure, such as a merger or consolidation, or a change of name of the underlying company. See *Guy*

*v. Crill*, 654 S.W.2d 813 (Tex. App.--Dallas 1983, no writ) (bequest of stock "together with all dividends, rights and benefits declared thereon" included stock of bank holding company into which the bequeathed stock had been converted).

**b. Stock Dividends and Splits.** The majority U.S. rule is that stock dividends paid prior to date of death do not pass to the specific legatee. However, some jurisdictions award stock dividends paid prior to date of death to the specific legatee. See J.R. Kemper, Annotation, *Change in Stock or Corporate Structure, or Split or Substitution of Stock of Corporation, as Affecting Bequest of Stock*, 46 A.L.R.3d 7, 64-86 (1972); Note, *Rights to Stock Accretions Which Occur Prior to Testator's Death*, 30 ALBANY L. REV. 182, 188-192 (1971). There is no Texas case on point regarding stock dividends paid before date of death. Presumably, Texas would follow the majority rule.

Dividends declared and paid after the date of death pass to the specific legatee. See *Ruble v. Ruble*, 264 S.W. 1018 (Tex. Civ. App.--Waco 1924, no writ) (income accruing after date of death from bequeathed property passes to specific legatee).

If a will makes a specific bequest of stock, stock splits after the date of execution of the will pass to the specific legatee. *Morriss v. Pickett*, 503 S.W.2d 344, 347-49 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.). For purposes of this rule, a bequest of "100 shares of XYZ stock" is construed to be a specific bequest. *O'Neill v. Alford*, 485 S.W.2d 935, 939-40 (Tex. Civ. App.--Houston [1st Dist.] 1972, no writ). Observe that for purposes of applying the ademption doctrine, "100 shares of XYZ stock" is held not to be a specific bequest.

Prior to September 1, 1993, the Texas Probate Code did not specifically address whether a bequest of securities included securities of the same organization received by the testator after the date of the Will as a result of a stock split, stock dividend, or reorganization. Section 70A, added by the 1993 legislative session, provides that under certain circumstances a bequest of securities includes increases and/or mutations in the securities occurring after the date of the Will, including stock splits, stock dividends, and new issues of stock acquired in a reorganization, redemption, or exchange. TEX. PROB. CODE ANN. § 70A (Vernon 2003). However, securities acquired through the exercise of purchase options or through a plan of reinvestment, would not be included in the bequest. Thus, section 70A appears to codify Texas case law with respect to the treatment of stock splits, and changes the majority rule that Texas presumably would follow with respect to the treatment of stock dividends. Section 70A also codifies the existing case law that cash distributions, such as accrued interest to date of death or cash dividends declared and payable as of a record date before the testator's death, do not pass as a part of the bequest of the security as to which the distribution relates. Section 70A is derived from section 2-605 of the Uniform Probate Code.

#### 4. PECUNIARY LEGACIES.

a. **Description.** The will may make a general legacy of a specified dollar amount (as opposed to a bequest of specific property or of a specified percentage of the estate), which may be payable either in cash or in cash and/or property to be selected by the executor.

A bequest of "cash" generally does not include stocks, bonds, securities or other property, but does include checks and bank deposits on hand at the death of the testator. *Stewart v. Selder*, 473 S.W.2d 3, 8-9 (Tex. 1971); *In Re Estate of Dillard*, 98 S.W.3d 386, 391 (Tex. App.—Amarillo, pet. denied) (the phrase "cash and certificates of deposit, or money in any financial institution" did not encompass stocks, bonds and partnership interests). The term "funds on deposit" has been interpreted to include certificates of deposit. *In re Estate of Srubar*, 728 S.W.2d 437, 439 (Tex. App.—Houston [1st Dist.] 1987, no writ).

However, a bequest of "money" or "funds" should generally be avoided because of the inherent ambiguity and the risk that a court would give those terms a much broader meaning than just including the testator's cash. *See Paul v. Ball*, 31 Tex. 10 (1868) ("money" may be used generally to include personal property such as notes receivable, bonds, mortgages and other claims for property); *Goggans v. Simmons*, 319 S.W.2d 442, 445 (Tex. Civ. App.—Fort Worth, writ ref'd n.r.e.) (the term "funds" may have reference to any kind of property, real as well as personal); *compare West Texas Rehabilitation Center v. Allen*, 810 S.W.2d 870 (Tex. App.—Austin 1991, no writ) (cash bequest of "money to be paid from funds" on deposit "in any and all financial institutions or brokerage houses" did not include that portion of a brokerage cash management account consisting of stocks, bonds and mutual funds).

#### b. **Is Estate Large Enough to Accommodate?**

Caution should be exercised in making substantial dispositions of the estate by way of pecuniary legacies, because the estate may not be large enough to satisfy all of the pecuniary legacies. Pecuniary legacies typically abate after residuary bequests, but before money bequests payable out of specific sources and bequests of specific property. See Part 2V.A.2 at page 50 of this outline.

c. **Effect of Pecuniary Legacies Upon Residuary Estate.** The existence of substantial pecuniary legacies may drastically affect the testator's intentions if the estate is valued at less than he anticipates, or if the debts payable by his estate are greater than anticipated. The residuary legatees are generally the testator's prime concern, but they bear all of the risk of undervaluation or depreciation in the estate, unless the will provides to the contrary. One method of handling the shrinking problem is to provide that cash bequests will be paid only if the estate is valued at more than a specified minimum amount. Alternatively, the cash bequests may be described in terms of specified fractions of the adjusted gross estate, net estate, or other portion of the estate, possibly not to exceed a fixed amount. *See generally* John P.

Ludington, Annotation, *Base for Determining Amount of Bequest of a Specific Percent or Proportion of Estate or Property*, 87 A.L.R.3d 605 (1978).

d. **Use in Connection with Specific Bequests to Avoid Ademption.** One method of avoiding ademption of bequests of specific property is for the will specifically to state that if the bequeathed item is not owned by the testator at his death, the legatee will receive a cash legacy equal to a specified amount, the value of the bequeathed property at the time of its disposition, or the proceeds of the property if it is sold.

e. **Right to Interest on Pecuniary Amount.** See Part 2IV.E.4 at page 457 of this outline.

f. **In-Kind Distributions; Use Date of Distribution Values.** Where a pecuniary bequest is satisfied by the distribution of property in-kind, Texas law is now clear that the property distributed is to be valued at its date of distribution value for purposes of satisfying the gift. TEX. PROB. CODE ANN. § 378A(b) (Vernon 2003). Prior to September 1, 1991, there was no statutory provision in Texas prescribing the valuation for in-kind distributions.

#### 5. FORMULA MARITAL DEDUCTION OR EXEMPTION EQUIVALENT SPECIFIC BEQUESTS.

a. **General Description.** A typical estate tax planning device used in large estates is to leave as much property as possible, without causing an estate tax to be paid at the first spouse's death, into a bypass trust that will not be subject to estate tax at the surviving spouse's subsequent death, and to leave the remainder of the estate at the first spouse's death to the surviving spouse, either in trust or outright, in a manner that will qualify for the federal estate tax marital deduction. This section of the outline briefly describes the three basic types of marital deduction formula clauses. However, a detailed discussion of drafting formula clauses is beyond the scope of this outline. Some of the more recent form books listed in the bibliography contain forms for marital deduction formula clauses.

b. **Specific Bequest of Exemption-Equivalent Amount; Residuary Estate to Marital Deduction Bequest.** If the exemption-equivalent amount (presently \$5,000,000) is less than the marital deduction amount, any adverse income tax consequences of funding specific pecuniary bequests with in-kind distributions would be lessened by using the specific bequest for the exemption-equivalent amount.

Using an exemption-equivalent specific bequest permits the executor to fund the marital deduction bequest with income in respect of a decedent ("IRD") (which is often advantageous because the income tax associated with that income will then be borne by the marital deduction fund rather than by the exemption fund and because it is a type of asset that usually does not appreciate in value); if a pecuniary marital deduction specific bequest were used, funding the

bequest with IRD items would conceivably trigger all of the gain attributable to the IRD.

Finally, this organization often makes the will easier for the client to understand than if a marital deduction specific bequest is used, because the specific bequest is then a specified determinable amount (i.e., approximately \$5,000,000, with "everything left" passing under the residuary estate.

### c. Marital Deduction Specific Bequest.

#### (1) *Fractional Share Marital Deduction Bequest.*

The formula will establish the amount of the marital deduction bequest, and the bequest will direct the executor to satisfy that amount by conveying an equal undivided fractional interest in each estate asset available for distribution. The total value of such fractional interests will equal the formula amount. This type of clause is generally rather inflexible and difficult to administer.

#### (2) *Pecuniary Marital Deduction Bequests.*

Revenue Procedure 64-19 requires that pecuniary marital deduction bequests be one of three types in order to qualify for the marital deduction:

(a) *Use Date of Distribution Values.*--In funding the bequest, the executor would use the date of distribution values of any assets distributed in-kind in satisfaction of the bequest. A disadvantage is that gain will be recognized for income tax purposes if the distribution value of an asset exceeds its estate tax value. Treas. Reg. § 1.1014-4(a)(3).

(b) *Use Estate Tax Values with a "Minimum Worth" Requirement.*--In selecting assets for funding the pecuniary amount, the executor would use the estate tax value of the assets, but the distributed assets must in the aggregate have a date of distribution value equal to the formula amount. This arrangement avoids any taxable gain upon funding and permits the executor to shift maximum appreciation during the administration to the bypass trust by allocating the most highly appreciated assets to the residuary estate. A disadvantage is that the bypass trust will be diminished if the estate depreciates during the administration. Furthermore, the executor would be placed in a difficult position in a hostile family situation in deciding what assets should be used to fund the marital deduction bequest. *See generally* R. COVEY, *THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS*, 113-119, 123 (2d ed. 1978).

(c) *Use Estate Tax Values with a "Fairly Representative" Requirement.*--Estate tax values of assets distributed in-kind would be utilized, but the executor would have to distribute assets that were fairly representative of the appreciation and depreciation of estate assets during administration. This approach would also avoid taxable gain upon funding. The funding process under this approach is more flexible than with a fractional share bequest, but administrative difficulties might still be encountered in determining which assets are "fairly representative" of the estate's appreciation or depreciation. Furthermore, detailed

valuations of all estate assets may be required at the distribution date in order to assure "fairly representative" treatment. *See* 4 A. J. CASNER, *ESTATE PLANNING* § 13.10.2 at 124 n.11 (5th ed. 1988) for an excellent summary of the allocation process.

Section 378A was added to the Texas Probate Code, effective for persons dying on or after September 1, 1987. It indicates that, unless the will provides to the contrary, if the personal representative has the power to fund a pecuniary bequest with assets at their values for estate tax purposes, in satisfaction of a gift intended to qualify for the federal estate tax marital deduction, the personal representative must fund the bequest with assets that are fairly representative of the appreciation or depreciation of all property available for distribution. TEX. PROB. CODE ANN. § 378A (Vernon 2003).

Section 378A was amended effective September 1, 1991 to apply to not only gifts intended to qualify for the marital deduction, but to gifts "that otherwise would qualify" for the marital deduction. The amendment was intended to deal with marital gifts in Texas wills written prior to 1982. Prior to the Economic Recovery Tax Act of 1981 ("ERTA"), gifts of community property could not qualify for the marital deduction so pre-1982 gifts of community property could not logically have been intended to qualify. Additionally, ERTA enabled usage of the Qualified Terminable Interest Property ("QTIP") trust as a receptacle for marital deduction bequests. Many pre-1982 marital bequests were to trusts which, in fact, could qualify as QTIPs, although it is obvious that the testators did not "intend" such bequests to so qualify.

d. Unidentified Asset Rule. Only certain types of assets will qualify for the marital deduction, as described in Section 2056(B)(1) of the Internal Revenue Code. If any assets that would not qualify for the marital deduction *may* be allocated to the bequest intended to qualify for the marital deduction, the amount of marital deduction allowed will be reduced to the extent of the aggregate value of the nonqualifying assets that *could* be used to satisfy the bequest. Accordingly, the will should make clear that the marital deduction bequest may *only* be satisfied out of assets that qualify for the estate tax marital deduction.

e. GST Concerns. Any substantive discussion of the federal Generation-Skipping Transfer Tax ("GST" tax), Chapter 13 of the Internal Revenue Code (§§2601 et. seq.) is well beyond the scope of this outline. Suffice it to say that the regulations create a strong bias in favor of "fairly representative" funding, discussed above, over any other funding technique. *See* Treas. Reg. § 26.2642-2.

## 6. CHARITABLE BEQUESTS.

a. Identification of Charity. The correct title of each charitable beneficiary should be verified. Differentiate between local and national organizations.

b. Verify Exempt Status. The planner should verify that the charity is an exempt organization under

501(c) of the Internal Revenue Code. IRS publication 78 contains a listing of charitable institutions that have requested and that have been granted exempt status by the Internal Revenue Service. However, this list is not all-inclusive of organizations that would qualify for the estate tax charitable deduction. (For example, many churches do not obtain a specific exemption ruling.)

## 7. CANCELLATION OF DEBTS.

### a. Will Provision Canceling Debt Is Valid.

Various Texas cases have recognized the validity of provisions in wills canceling the indebtedness of specific beneficiaries. *McNabb v. Cruze*, 125 S.W.2d 288, 289-90 (Tex. 1939).

### b. Substantive Law Regarding Effect of Outstanding Debt from Beneficiary to Testator.

Merely making a legacy to a debtor does not cancel the debt. A debtor who is a specific devisee need not pay the indebtedness in order to receive his specific devise. *Russell v. Adams*, 299 S.W. 889, 894 (Tex. Comm'n App. 1927, holding approved). However, an intestate beneficiary must have the outstanding indebtedness offset against his share of the estate. *Oxsheer v. Nave*, 40 S.W. 7 (Tex. 1897). There are no Texas cases regarding whether a general or residuary legatee must have his indebtedness offset against his share of the estate.

## . Exercise of Power of Appointment.

### 1. PRESUMPTION THAT WILL DOES NOT EXERCISE POWERS OF APPOINTMENT.

Under Texas law, the residuary clause will not generally be considered to be an exercise of powers of appointment held by the testator. The donee's intent to exercise the power must be so clear that no other reasonable intent can be imputed under the will. *Republic National Bank of Dallas v. Fredericks*, 283 S.W.2d 39, 47 (Tex. 1955). See also *Foster v. Foster*, 884 S.W.2d 497 (Tex. App.--Dallas 1993, no writ) (will granting power of appointment did not specify the manner of exercise; court held that power vested at donor's death and was validly exercised by a written but unrecorded instrument executed prior to the trial court's declaratory judgment that a power of appointment had in fact been created).

A substantial minority of states have adopted the rule that a residuary clause does exercise a general power of appointment unless a contrary intent affirmatively appears in the will. See S.R. Shapiro, Annotation, *Effect of Statute Upon Determination Whether Disposition of All or Residue of Testator's Property, Without Referring to Power of Appointment, Sufficiently Manifests Intention to Exercise Power*, 16 A.L.R.3d 911 (1967).

**2. WILLS EXECUTED ON OR AFTER SEPTEMBER 1, 2003.** Given the lack of statutory guidance under Texas law, the 2003 Texas Legislature enacted new Section 58C of the Texas Probate Code. Section 58C, which codifies the existing case law,

provides that a power of appointment may not be exercised unless (i) the testator makes a specific reference to the power in the will; or (ii) there is some other indication in writing that the testator intended to include property subject to the power in the will. TEX. PROB. CODE ANN. § 58C (Vernon Supp. 2005).

### 3. CONFLICT OF LAWS - WILL SHOULD EXPRESSLY NEGATE EXERCISE.

In most states, the law of the state in which the donor (not the donee) of the power resides governs the exercise of the power. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 275, Reporter's Note; P.H. Vartanian, Annotation, *Conflict of Laws as to Exercise of Power of Appointment*, 150 A.L.R. 519, 531 (1944). Therefore, if the donor resided in one of the minority jurisdictions holding that a residuary clause presumptively exercises a power of appointment, the donee living in Texas may be held to have exercised the general power of appointment under the residuary clause in his will, even though no mention is made of the power of appointment. Cf. *First National Bank of Chicago v. Etlinger*, 465 F.2d 343 (7th Cir. 1972).

In order to avoid inadvertent exercise of a power of appointment, the will generally should contain a provision specifically stating that it is not exercising any powers of appointment held by the testator (unless, of course, the testator specifically wants to exercise the power of appointment).

## VI.

## DISPOSITION OF RESIDUARY ESTATE.

### . Generally.

The residuary estate clause provides for the disposition of all assets of the estate, after providing for debts and administration expenses, that are not specifically bequeathed to other specified individuals or entities.

### . Residuary Clause Important to Prevent Partial Intestacy.

If any part of a decedent's estate is not disposed of by a specific bequest and is not covered by a residuary estate clause, that portion of the estate will pass by intestacy. *Farah v. First National Bank of Fort Worth*, 624 S.W.2d 341, 347 (Tex. App.--Fort Worth 1981, writ ref'd n.r.e.). Accordingly, the planner should assure that the residuary estate clause is worded broadly enough to dispose of the decedent's entire estate not otherwise disposed of by specific bequests.

### 1. PRESUMPTION AGAINST INTESTACY.

There is a general rule of construction which presumes that the testator intended to dispose of his entire estate and not pass any of his property by intestacy. *Haile v. Holtzclaw*, 414 S.W.2d 916, 922 (Tex. 1967). Under this presumption, a residuary clause is typically given rather liberal interpretation to cover all of the testator's

property not otherwise disposed of. *See Urban v. Fossati*, 266 S.W.2d 397, 398 (Tex. Civ. App.--San Antonio 1954, writ ref'd n.r.e.). However, the presumption against intestacy will not be sufficient to create a residuary clause in a will if none exists, *Alexander v. Botsford*, 439 S.W.2d 414, 416-17 (Tex. Civ. App.--Dallas 1969, writ ref'd n.r.e.). *See also Harrington v. Walker*, 829 S.W.2d 935 (Tex. App.--Fort Worth 1992, writ denied) (residuary clause expressly and unambiguously did not apply to a certain portion of the estate--in this case, the property remaining upon termination of a particular trust--held: partial intestacy resulted as to that property notwithstanding the "obvious" intent of the testator to dispose of the entire estate by will).

**2. INTESTATE DISPOSITION OF COMMUNITY PROPERTY.** Section 45 of the Texas Probate Code was revised effective September 1, 1993 to provide that the community property of a married person who dies intestate will pass to the surviving spouse if the decedent is not survived by children (or descendants of deceased children) *or* if all the children and other descendants of the decedent are also the children and descendants of the surviving spouse. TEX. PROB. CODE ANN. § 45 (Vernon 2003). If the decedent is survived by any children or descendants who are not also children or descendants of the surviving spouse, the intestacy law is unchanged. The change recognizes that community property is created during marriage, and should be retained by the surviving spouse of the marriage -- if the children of the deceased spouse are also children of the surviving spouse. In those limited instances, the change will simplify probate administration and, in some cases, will eliminate the need for guardianship proceedings for minors.

• **Property Covered by Residuary Estate Clause.**

A residuary estate clause disposing of "all the rest, residue and remainder of the property which I may own at the time of my death" will include the following properties:

- Property which the testator simply has not expressly mentioned in prior dispositions;
- Property owned by the testator but unknown to or forgotten by him, *Johnson v. Moore*, 223 S.W.2d 325, 329 (Tex. Civ. App.--Austin 1949, writ ref'd);
- Property acquired by the testator after execution of the will, *Haley v. Gatewood*, 12 S.W. 25, 26 (Tex. 1889);
- Remainder or reversion interests owned by the testator, and which pass to the testator's estate because not conditioned upon his survival at the time of vesting;

- Conditional bequests for which the stated condition has not occurred by the time of distribution;
- Real or personal property covered by specific bequests which lapse because the beneficiary predeceased the testator (assuming the antilapse statute does not apply), *Shriner's Hospital for Crippled Children of Texas v. Stahl*, 610 S.W.2d 147, 152 (Tex. 1980);
- Proceeds from the sale of property subject to specific bequests that have been adeemed, *id.*;
- Bequests forfeited by beneficiaries under an *in terrorem* clause, see Part 2X1.F at page 72 of this outline; and
- Specific bequests which are incomplete or indecipherable.

As discussed in Part 2V.C at page 85 of this outline, a residuary clause generally is not interpreted to exercise a power of appointment held by the testator.

• **Provisions for Successor Beneficiaries.**

The residuary clause in particular should provide for as many contingent beneficiaries as are necessary under the particular circumstances to assure that the testator will not die intestate as to the residue. Naming heirs at law or a charity as the final alternate taker will generally accomplish this purpose. For the estates of decedents dying on or after September 1, 1991, any lapsed portion of the residuary estate passes to the other residuary beneficiaries. TEX. PROB. CODE ANN. § 68 (Vernon 2003). Therefore, an intestacy generally will not occur unless all named residuary beneficiaries predecease the testator. Under prior law, the share of a predeceasing residuary beneficiary passed by intestacy (under the rule that there was "no residue of the residue") unless the residuary estate bequest constituted a class gift. *Swearingen v. Giles*, 565 S.W.2d 574, 576-77 (Tex. Civ. App.--Eastland 1978, writ ref'd n.r.e.). See Part 2IV.B.1.c at page 34 of this outline.

• **Pour-Over Disposition.**

In a "pour-over will," the residuary estate will typically be left to the trustee of a trust created during the testator's lifetime. Section 58a of the Texas Probate Code specifically recognizes the validity of such bequests to trustees. TEX. PROB. CODE ANN. § 58a (Vernon 2003). See Part 2IV.C.2.d at page 39 of this outline. However, in order to avoid possible intestacy, the will should provide for a contingent disposition in the event that, for any reason, the trust should not be in existence at the testator's death.

## VII.

## TRUST PLANNING

. **Contingent Trust for Beneficiaries Below Specified Age or Incapacitated.**

The will should avoid leaving substantial property outright to minor or incapacitated beneficiaries, because a cumbersome guardianship proceeding might be required to administer such asset until the beneficiary reaches age eighteen or regains capacity. One alternative is to provide that any bequests to a beneficiary who is incapacitated or under age eighteen or other specified age (age 22 or 25 is often used because the beneficiary would generally have completed his or her college education by that time) would pass to a contingent trust for his or her benefit. Alternatively, the executor could be given the authority to distribute bequests for a minor beneficiary to a custodian under the Texas Uniform Transfers to Minors Act. See Appendix B for forms for making bequests to contingent trusts.

. **Major Trust Provisions.****1. TRUSTEE AND SUCCESSOR TRUSTEES.**

See Part 2III.B at page 26 of this outline.

**2. DISTRIBUTIONS DURING TRUST TERM.**

**a. Beneficiaries.** Each trust may be structured to have only one primary beneficiary, or the trustee may have the flexibility to make distributions among several beneficiaries from a single trust. If the trustee has "sprinkle" powers, the testator should describe his or her priorities, if any, among the trust beneficiaries.

In determining whether to create separate trusts for each minor child or whether to create one trust for the benefit of all children until the youngest living child reaches a specified age, there should be at least enough assets in *each* trust to provide for special medical or other needs of a particular beneficiary. Many attorneys use a rule of thumb that the assets in each trust should be at least \$50,000 to \$100,000. For example, if the testator has three children and has a net estate of \$100,000, one contingent trust would be used for all of the children. If the testator has a net estate of \$300,000, separate trusts could be used for each of the three children. Appendix B contains a form for creating separate trusts for each child of the testator and a separate form for creating a single trust for all of the testator's children.

**b. Income Distributions.** The testator has flexibility to provide for mandatory income distributions, to give the trustee power to sprinkle income among various beneficiaries, to give the trustee discretion to accumulate income, and to give the trustee

particular standards to be used in determining to make income distributions.

**c. Principal Distributions.** The same flexibilities regarding income distributions are also available with respect to distributions of trust corpus. In addition, the testator may provide for mandatory distributions on the occurrence of certain events (such as, for example, marriage), or for particular purposes (such as, for example, purchase of a home). The trustee should be given a standard for determining when to invade trust corpus for the benefit of beneficiaries.

**d. Distribution Considerations.** The trust may provide that resources available to a beneficiary outside the trust (i) are to be considered, (ii) are not to be considered, or (iii) may or may not be considered by the trustee. If the instrument is silent on this issue, the law is not clear as to whether the trustee should consider outside resources. Texas cases have not been consistent on this issue. Compare *First National Bank of Beaumont v. Howard*, 229 S.W.2d 781, 786 (Tex. 1950) (should consider all income available to the beneficiaries from any sources in determining whether to make distributions from principal) with *Lucas v. Lucas*, 365 S.W.2d 372 (Tex. Civ. App.--Beaumont 1962, no writ) (in divorce case, wife was entitled to inquire into income from various trusts of which husband was discretionary beneficiary for the purpose of court's setting amount of husband's temporary alimony and child support); and *Penix v. First National Bank of Paris*, 260 S.W.2d 63, 67 (Tex. Civ. App.--Texarkana 1953, writ ref'd) (trustee required to consider need for distribution "without regard to the financial ability of [the beneficiary's] parents"). The majority rule is that if the trust instrument is silent on this issue, the trustee should *not* consider other resources available to a beneficiary. See *Gatehouse's Will*, 149 Misc. 648, 267 N.Y. Supp. 808 (Surr. Ct. 1933); RESTATEMENT (SECOND) OF TRUSTS § 128, Comment e (1959) (inference that beneficiary is entitled to support out of trust fund even though he has other resources); Richard Covey, PRACTICAL DRAFTING 687-92 (1985); II A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 128.4 at 353-360 (4th ed. 1987); G. BOGERT, LAW OF TRUSTS & TRUSTEES § 811 at 229-238 (1981).

An unpublished opinion by the Austin Court of Civil Appeals addresses this issue. *Urban v. Estate of Henderson*, No. 3-93-128-CV (Tex. App.-- Austin November 24, 1993, unpublished opinion). The testamentary trust in that case provided that the trustee should make distributions to provide for the support and maintenance of the primary beneficiary "taking into consideration any other sources of support she may have from other sources." The opinion approved the trial court's finding, as a matter of law, that this language was construed to mean that the trustee "is obligated and permitted to consider any other payments the primary beneficiary ACTUALLY RECEIVES for her support and maintenance from any other person or entity," and that "the trustee was *not* authorized to consider other income from [the primary beneficiary's] estate, or the fair market value of another trust of which she is beneficiary, except to the extent that she elects to use

those sources for her support." (emphasis added to capitalized words). The opinion contrasted the distribution standard for the primary beneficiary with the standard provided for other beneficiaries--the instrument directed the trustees to consider other beneficiaries' sources of "income." The opinion stated that the term "income" is broader than the term "support," because income "can be used for support but it can also be used for other purposes."

### 3. TERMINATION PROVISIONS.

**a. Time.** The trust may provide for termination distributions to be made all at once, spaced out over several payments at particular times (such as when the beneficiary reaches specified ages), or simply at the discretion of the trustee. In any event, the trust must terminate within the perpetuities period unless the trust is totally for charitable beneficiaries. TEX. PROB. CODE ANN. § 112.036 (Vernon 1995).

**b. Beneficiaries.** The trust must specify who will receive the trust assets upon termination. Alternate beneficiaries should be designated in case a primary beneficiary dies prior to termination date. If the will does not provide for the disposition of the property of a trust upon termination of the trust, the property passes by intestacy. *Harrington v. Walker*, 829 S.W.2d 935 (Tex. App.--Fort Worth 1992, writ denied).

**4. POWERS OF TRUSTEES.** The trust should clearly delineate the trustee's powers in managing and distributing the trust assets. See Part 2X at page 61 of this outline.

## VIII.

### PAYMENT OF DEBTS AND ADMINISTRATION EXPENSES.

#### • **Debts and Expenses That Are Charged to the Estate.**

**1. DEBTS.** Section 37 of the Texas Probate Code requires that devisees and legatees take their respective portions of the estate subject "to the payment of the debts of the testator ..., except such as exempted by law." TEX. PROB. CODE ANN. § 37 (Vernon 2003). Sections 319, 320, and 322 of the Probate Code direct executors and administrators to pay all claims approved by the court. TEX. PROB. CODE ANN. §§ 319, 320 & 322 (Vernon 2003 and Vernon Supp. 2005).

**a. Requirement of Paying "Just Debts."** A specific will clause requiring that the executor pay all of the testator's "just debts" raises the question whether the executor is required to pay debts barred by limitations, and whether the executor is required to pay installments on long-term indebtedness that are not yet due. See TEX. PROB. CODE ANN. § 298(b) (Vernon 2003) (claims barred by limitations should not be allowed by representatives or approved by the court).

**b. Discretion to Pay Just Debts.** A provision in the will authorizing, but not requiring, the executor to pay the testator's "just debts" might give the executor some flexibility in paying debts that are recognized as being "just," but that are, due to some technicality, perhaps not legally enforceable against the testator's estate. To give the executor maximum flexibility, the clause might also give the executor the authority to renew and extend any indebtedness owed by the estate.

**2. COMMUNITY DEBTS.** Community debts are primarily payable out of the community shares of both spouses. See *Nesbitt v. First National Bank of San Angelo*, 108 S.W.2d 318, 320 (Tex. Civ. App.--Austin 1937, no writ); TEX. PROB. CODE ANN. § 156 (Vernon 2003). A direction in a will that "my just debts be paid" does not require that the decedent's one-half interest in the community estate be used to pay the entire community debts. See *Grant v. Marshall*, 280 S.W.2d 559, 562 (Tex. 1955).

**3. FUNERAL EXPENSES.** Funeral expenses and expenses of last illness are charges against both the community property, *Pickens v. Pickens*, 83 S.W.2d 951, 954 (Tex. 1935), and the separate property of the deceased spouse, *Goldberg v. Zellner*, 235 S.W. 870, 873-74 (Tex. Comm'n App. 1921, holding approved). Funeral expenses and expenses of last illness are given first priority under the classification statute of the Texas Probate Code. See TEX. PROB. CODE ANN. §§ 320, 322 (Vernon 2003 and Vernon Supp. 2005).

Section 320A of the Probate Code provides that funeral expenses and items incident thereto, "such as tombstones, grave markers, crypts or burial plots," shall be charged entirely to the decedent's estate and none of these expenses shall be charged against the community interest of the surviving spouse. TEX. PROB. CODE ANN. § 320A (Vernon 2003). (This statute was enacted in response to Rev. Rul. 66-21, 1966-4 C.B. 15 to clarify that the entire amount of the funeral expense would constitute a deduction for federal estate tax purposes.)

**4. CHARITABLE PLEDGE.** In the absence of a specific will provision authorizing payment of outstanding charitable pledges, a charitable pledge may be paid by an executor only if it constitutes a legally enforceable debt, which depends upon whether the pledge can be sustained as a bilateral or unilateral contract, or whether the charitable organization has accepted the pledge offer under the doctrine of promissory estoppel by a substantial change in its position in its reliance upon the pledge. See *Thompson v. McAllen Federated Woman's Bldg. Corp.*, 273 S.W.2d 105, 108-09 (Tex. Civ. App.--San Antonio 1954, writ dismissed).

#### • **Allocation of Debts and Expenses Among Estate Assets.**

Once the executor has determined that a particular debt is payable out of estate assets, he must then determine which particular estate assets (and estate beneficiaries) should bear that debt. For a discussion of

the allocation of debts and expenses between income and principal, see Part 2IV.E.2 at page 44 of this outline.

### 1. ABSENCE OF WILL PROVISION.

**a. Intention of Testator Controls if Ascertainable.** Apportioning the burden of general estate debts is determined by the intention of the testator. TEX. PROB. CODE ANN. § 322B(d) (Vernon 2003); see *Kennard v. Kennard*, 84 S.W.2d 315, 320 (Tex. Civ. App.--Waco 1935, writ dismissed) (testator's intention determined even though there was no specific will provision dealing with apportionment of debts).

**b. Unsecured Debts and Administration Expenses.** If the will contains no manifestation of a contrary intent, the general apportionment list described in Section 322B(a) of the Texas Probate Code controls. See Part 2V.A.2 at page 50 of this outline (regarding abatement). As indicated in the abatement list, intestate property is the first source for payment of debts, and the residuary estate is the next source.

**c. Secured Debts.** Section 306 of the Texas Probate Code gives the holder of a secured claim an election (a) to have the claim treated as matured and to be paid in the due course of administration; or (b) to have the claim continue as a preferred debt and lien against the specific property (but not payable out of other estate assets) and be paid pursuant to the terms of the contract. TEX. PROB. CODE ANN. § 306 (Vernon 2003).

In the event that the first alternative is chosen, the claim is apportioned among the estate assets according to the general abatement list. See TEX. PROB. CODE ANN. § 322B(b) (Vernon 2003) (by inference, indicates that abatement list applies to secured claims that are treated as matured, secured claims); *Wyatt v. Morse*, 102 S.W.2d 396, 398 (Tex. 1937). If the second alternative is chosen by a secured creditor, that creditor cannot collect any deficiency if his security is insufficient to pay the claim. TEX. PROB. CODE ANN. § 306(c) (Vernon 2003); *Wyatt v. Morse*, 102 S.W.2d 396, 399 (Tex. 1937); see *Gross National Bank of San Antonio v. Merchant*, 459 S.W.2d 483, 486 (Tex. Civ. App.--San Antonio 1970, no writ).

As a consequence of the reversal of the common law exoneration of liens doctrine by the enactment of new Section 71A of the Texas Probate Code (see Part 2V.A.3.b at page 50 of this outline), the 2005 Texas Legislature made a corresponding change to Section 306 of the Texas Probate Code. New Section 306 (c-1) sets forth the procedure to use if the claim is treated as mature and to be paid in the due course of administration. TEX. PROB. CODE ANN. § 306(c-1) (Vernon Supp. 2005).

**2. WILL PROVISIONS.** Possible will provisions giving direction regarding the apportionment of debts include (i) simply specifying payment of debts or particular debts (which would have the effect of

invoking the general abatement list described in Part 2V.A.2 at page 76 of this outline, thus ordinarily making the debts payable out of the residuary estate), (ii) specifying payment from a particular source (although if that source was insufficient, the creditor could look to the balance of the estate for payment of the debt, *Dallas Joint Stock Land Bank of Dallas v. Forsyth*, 109 S.W.2d 1046, 1050 (Tex. 1937)), or (iii) directing payment of debts and coordinating with any abatement clause provided for specific bequests.

## IX.

### APPORTIONMENT OF TAXES.

#### . Absence of Tax Apportionment Provision in Will.

**1. PRIOR TO ADOPTION OF SECTION 322A.** There are various provisions in the Internal Revenue Code regarding apportionment among estate assets of estate taxes attributable to certain types of assets. I.R.C. § 2205 (taxes paid out of assets not in possession of executor must generally be reimbursed by the executor out of estate assets in his possession); § 2206 (life insurance); § 2207 (general power of appointment assets); § 2207A (qualified terminable interest property). If none of these sections was applicable (or if the will negated their application), federal estate taxes and Texas estate taxes were apportioned prior to adoption of Section 322A of the Texas Probate Code (effective September 1, 1987) in the same manner as general debts and estate administration expenses (thus invoking the list described in Part 2V.A.2 at page 76 of this outline). *Sinnott v. Gidney*, 322 S.W.2d 507 (Tex. 1959). See generally, *Report of Committee on Planning and Drafting Administrative Provisions*, 19 REAL PROP. PROB. & TR. J. 495 (1984).

Prior to the adoption of Section 322A, Texas law was unclear regarding the apportionment of estate taxes to nonprobate assets. Section 442 of the Texas Probate Code provides that non-probate multi-party accounts are chargeable with debts, taxes, and expenses of administration after probate assets have been exhausted. TEX. PROB. CODE ANN. § 442 (Vernon 2003). However, there was considerable uncertainty for other types of nonprobate assets. The Supreme Court expressly left open the apportionment question with respect to nonprobate assets in *Sinnott v. Gidney*, 322 S.W.2d 507, 513 (Tex. 1959). One Texas court of civil appeals case had concluded that estate taxes should *not be apportioned* to nonprobate assets. *Brenan v. LaMotte*, 441 S.W.2d 626 (Tex. Civ. App.--San Antonio 1969, no writ). However, the *Brenan* case was severely questioned by commentators. See Hammond, *Ancillary Probate*, TEXAS STATE BAR ADVANCED ESTATE PLANNING INSTITUTE, at U-7 (1981).

**2. APPORTIONMENT UNDER SECTION 322A.** The prior approach of paying death taxes out of the probate estate (and particularly the residuary estate)

was changed by Section 322A of the Texas Probate Code, effective September 1, 1987. (Effective September 1, 1991, Section 322A was amended further in various respects.) Absent an apportionment provision in a will or other appropriate instrument to the contrary, federal estate taxes and Texas inheritance taxes are apportioned to the persons receiving assets that are included in the decedent's estate, based upon "taxable value of [each] person's interest in the estate." TEX. PROB. CODE ANN. § 322A(b)(1) (Vernon Supp. 2005). Therefore, tax apportionment is no longer based on distinctions between probate vs. nonprobate property or distinctions between residuary vs. specific, general, or demonstrative legacies. Bequests that qualify for estate tax deductions (marital deduction bequests or charitable bequests) do not have to bear any of the death taxes. The executor has a duty to charge each beneficiary for his pro rata part of the tax; he does not have the discretion to avoid such apportionment. For a discussion of the allocation of taxes between income and principal, see Part 2IV.E.2 at page 44 of this outline.

## • **Tax Apportionment Provision in Will Controls.**

The federal apportionment statutes specifically are prefaced with the phrase "unless the will provides otherwise" and Texas cases have recognized that the general rule announced in *Sinnott v. Gidney*, apportioning taxes in the same manner as the general rules for apportioning debts and expenses of administration, may be overridden by a provision in the will. *E.g., Pipkin v. Hays*, 482 S.W.2d 59, 61-62 (Tex. Civ. App.--Austin 1972, writ ref'd n.r.e.). Section 322A(b)(2) of the Texas Probate Code allows a testator, settlor, or holder of a power of appointment to apportion the estate tax or grant another person the power to apportion estate tax differently than provided in the Texas statute. TEX. PROB. CODE ANN. § 322A(b)(2) (Vernon Supp. 2005).

**1. PRIOR LAW.** For persons dying before September 1, 1991, an instrument could only allocate taxes to property passing under that instrument. For example, a will could not allocate taxes to the assets in a revocable trust; likewise, a revocable trust could not allocate taxes to assets passing under the will. Only language in the revocable trust itself could allocate taxes on probate assets (or any other assets in the taxable estate but not in the trust estate) to trust assets.

Further, an apportionment clause in an instrument would only apportion taxes on property passing under that instrument "unless the instrument [provided] otherwise." For example, if a will provided simply that "all taxes due upon my death shall be paid from my residuary estate," this probably would not have covered death taxes due on nonprobate assets.

**2. LAW EFFECTIVE AFTER SEPTEMBER 1, 1991.** For persons dying on or after September 1, 1991, Section 322A(b)(2) was amended to provide that "[a] direction for the apportionment or

nonapportionment of estate tax is limited to the estate tax on the property passing under the instrument unless the instrument is a will that provides otherwise." TEX. PROB. CODE ANN. § 322A(b)(2) (Vernon Supp. 2005). Therefore, the decedent's will can allocate estate taxes to insurance proceeds, assets in a revocable trust, or other nonprobate assets, but Section 322A(b)(4) provides that the will cannot allocate more than a pro rata share of the tax to an interest passing under an instrument created by another person. TEX. PROB. CODE ANN. § 322A(b)(4) (Vernon Supp. 2005). If there is a conflict in tax apportionment provisions in two or more instruments executed by the same person, "the instrument disposing of or creating an interest in the property to be taxed controls." TEX. PROB. CODE ANN. § 322A(b)(3) (Vernon Supp. 2005).

## 3. **DRAFTING CONSIDERATIONS.**

**a. Generally.** The tax apportionment clause should precisely state (i) what gifts or beneficiaries are freed from the burden of taxes, (ii) what taxes are affected (whether federal estate taxes, state inheritance taxes, etc. with respect to probate assets, revocable trust assets, insurance proceeds, etc. are covered), and (iii) where the tax burden is placed. *See generally* Phillip H. Suter, *Techniques to Apportion Estate Taxes Will Have to Be Reviewed Due to the New Tax Law*, 9 EST. PL. 96 (1982). For examples of a number of different apportionment clauses, *see* McGrath, *Provisions Relating to the Payment of Estate and Inheritance Taxes*, 138 P.L.I. TAX LAW AND ESTATE PLANNING SERIES--ADVANCED WILL DRAFTING 1983, 197, 217-42 (1983).

**b. Typical Approach--Apportioning Taxes to Residuary Estate.** Traditionally, most will tax apportionment clauses have apportioned death taxes to the residuary estate. However, the planner should be wary of the potential inequities that might result, particularly where the beneficiaries of nonprobate assets included in the decedent's taxable estate are not the same as beneficiaries of the residuary estate.

If the testator intends that estate taxes on probate and nonprobate assets be paid out of the residuary estate, the will should specifically say so. For example, the clause might state that "all taxes due upon my death as a result of the inclusion of probate and nonprobate assets in my gross estate shall be paid from my residuary estate."

## • **Conflict of Laws Regarding Apportionment.**

There is a split of authority on the conflict-of-laws question of which jurisdiction's apportionment rule is applied if property subject to tax in a decedent's estate is located outside of the jurisdiction of domicile. *See* E. H. Schopler, Annotation, *What Law Governs Apportionment of Estate Taxes Among Persons Interested in Estate*, 16 A.L.R.2d 1282 (1951). The traditional view has been primarily to apply the apportionment law of the situs (particularly with respect

to real property), but the modern trend has been to give primary emphasis to the apportionment law of the domicile. See *Isaacson v. Boston Safe Deposit & Trust Co.*, 91 N.E.2d 334, 16 A.L.R.2d 1277 (Mass. 1950) (traditional view); *Doetsch v. Doetsch*, 312 F.2d 323 (7th Cir. 1963) (looking to law of the decedent's domicile to resolve tax apportionment). The only Texas case discussing the conflict of laws question with respect to apportionment of estate taxes looked to the law of the situs without an analysis of the conflict of laws issues involved. *Brenan v. LaMotte*, 441 S.W.2d 626 (Tex. Civ. App.--San Antonio 1969, no writ). The conflict of laws issue is uncertain in Texas because of the lack of analysis of the issue in that one Texas case, and the absence of any writ history in that case.

## X.

### GENERAL PROVISIONS REGARDING FIDUCIARIES AND ADMINISTRATION OF TRUSTS AND THE ESTATE.

#### • Relying Upon Fiduciary Powers Granted Under Texas Trust Code.

**1. TEXAS TRUST CODE FIDUCIARY POWERS.** The Texas Trust Code passed by the Texas legislature in 1983 includes many new and expanded administrative powers "so that it would be possible for trust documents to be drafted without unintentional omissions of power provisions." McMahan, *Recent Legislative Developments--Texas Trust Code*, STATE BAR OF TEXAS ADVANCED ESTATE PLANNING AND PROBATE COURSE, Q-7 (1983). Many of the powers of the Texas Trust Code repeat the substance of the paragraphs of Section 25 of the Texas Trust Act, but many of the provisions are entirely new in the Texas Trust Code.

**2. ADVANTAGES OF MERELY INCORPORATING TRUST CODE POWERS.** A will that merely incorporates the fiduciary power provisions of the Texas Trust Code would be shorter and simpler to the typical client. One of the stated purposes of the Texas Trust Code Committee was to adopt complete enough statutory powers so that "in many instances, it will be possible for attorneys to draft brief documents, without repetition of the powers granted to the trustee in [the Texas Trust Code]." Texas Trust Code Committee, Policy Statement and Commentary, at 12 (March 1983).

Unlike the statutory clause legislation adopted in some other states, there is no necessity for the draftsman to incorporate the Texas statutory powers by reference in order for them to apply. See Report of Subcommittee of Committee on Estate and Tax Planning, *Administrative Clauses: Incorporation by Reference*, 3 REAL PROP., PROB. & TR. J. 524 (1967). However, if the draftsman does want to rely primarily upon the fiduciary powers stated in the Texas Trust Code, an express provision in the will should (i) incorporate the powers of fiduciaries provided in the Texas Trust Code as then

in effect and as the powers may be broadened by subsequent amendment and (ii) grant all additional powers that are necessary or appropriate to carry out the terms of the will. See TEX. PROP. CODE ANN. §§ 113.002 & 113.024 (Vernon 1995) (allowing a trustee to exercise any powers in addition to the stated Texas Trust Code powers that are necessary or appropriate to carry out the purpose of the trust) and *In Re: Church & Inst. Facilities Development Corp. v. First Nat'l Bank of Amarillo*, 122 B.R. 958, 961-62 (N.D. Tex. 1991) (upholding trustee's subordination of lien by reference to Texas Trust Code Sections 113.002 & 113.024).

### **3. DISADVANTAGES OF MERELY INCORPORATING TRUST CODE POWERS.**

Some draftsmen may be unwilling to merely rely upon an incorporation of the powers of the Texas Trust Code for the following reasons: (i) uncertainty as to the effect of the legislature's amendment to or deletion of a previously granted power; (ii) a written list of the powers allows the testator and his intended beneficiaries to more clearly understand how the trust operates; (iii) the trustee may be able to act more confidently and efficiently if powers are expressly stated; (iv) third parties dealing with the trustee may be more readily satisfied as to the trustee's authority if specific powers are listed; (v) the testator may own property in states other than Texas, and the desired powers may be unavailable unless provided in the will, or may not be known to third parties or lawyers acting in other jurisdictions; (vi) specifically stating the powers allows the testator to read exactly what powers he is giving to his trustee. See generally Joel A. Levin, *Sufficient Administrative Authority May Require Special Provisions Beyond State Fiduciary Powers*, 11 EST. PL 336 (1984); Lacovara, *"Unless Otherwise Provided"--Statutory Will Clauses and Other Drafting Opportunities*, 103 TR. & EST. 741, 743 (1964); J. FARR & J. WRIGHT, AN ESTATE PLANNER'S HANDBOOK 449 (4th ed. 1979) ("We continue to believe that good drafting will spell out in the instrument the desirable [fiduciary power] provisions for each client").

### **4. APPLICABILITY OF TRUST CODE**

**PROVISIONS.** The Texas Trust Code is effective January 1, 1984, and applies to all Texas trusts created after that date and to all transactions occurring subsequent to that date with respect to trusts already in existence on January 1, 1984. TEX. PROP. CODE ANN. § 111.006 (Vernon 1995). The Texas Trust Code provisions will automatically apply unless the trust instrument provides otherwise. TEX. PROP. CODE ANN. § 113.001 (Vernon 1995). The Texas Trust Code is considered an amendment of the Texas Trust Act, and references in trusts to the Texas Trust Act will be deemed to refer to the Texas Trust Code. TEX. PROP. CODE ANN. § 111.002(b) (Vernon 1995).

**5. ADOPTION OF UNIFORM PRUDENT INVESTOR ACT AND UNIFORM PRINCIPAL AND INCOME ACT.** The 2003 Texas Legislature made significant changes to the Texas Trust Code with

the adoption of the Uniform Prudent Investor Act and the Uniform Principal and Income Act. Like the Texas Trust Code generally, both impose default rules. In the event the governing instrument is silent, the rules will apply. The Uniform Prudent Investor Act (TEX. PROP. CODE ANN. § 117.001 *et seq.* (Vernon Supp. 2005)), and the Uniform Principal and Income Act (TEX. PROP. CODE ANN. § 116.001 *et seq.* (Vernon Supp. 2005)), were effective January 1, 2004, and apply to all Texas trusts created after that date and to all transactions occurring subsequent to that date with respect to trusts already in existence on January 1, 2004. Although references will be made below to the Uniform Prudent Investor Act and the Uniform Principal and Income Act, a detailed discussion thereof is beyond the scope of this outline.

## Additional Fiduciary Provisions Not Included in Texas Trust Code.

**1. OVERVIEW.** If the will merely incorporates provisions of the Texas Trust Code with respect to the powers of trustees and executors, various additional provisions, which are not automatically provided under the Texas Trust Code, should be included in the will. This section of the outline briefly summarizes those additional administrative provisions that should be included. The additional provisions have been separated into trust provisions, general fiduciary provisions, and executor provisions.

### 2. GENERAL TRUST PROVISIONS.

**a. Perpetuities Savings Clause.** Section 112.036 of the Texas Trust Code codifies the Texas rule against perpetuities. TEX. PROP. CODE ANN. § 112.036 (Vernon 1995). Section 5.043 of the Texas Property Code permits a reformation or construction of trust instruments to the extent necessary to satisfy the rule against perpetuities. TEX. PROP. CODE ANN. § 5.043(a) (Vernon 2004). *See also Sellers v. Powers*, 426 S.W.2d 533, 536 (Tex. 1968) (portions of trust instrument violating the rule against perpetuities are excised). Several Texas cases held that the reform statute only applied to charitable trusts. *Foshee v. Republic National Bank*, 617 S.W.2d 675 (Tex. 1981); *Ball v. Knox*, 768 S.W.2d 829 (Tex. App.--Houston [14th Dist.] 1989, no writ) (dictum). Effective September 1, 1991, Section 5.043 is specifically applicable to legal and equitable interests, "including noncharitable gifts and trusts." TEX. PROP. CODE ANN. § 5.043(d) (Vernon 2004).

In order to avoid the necessity of a judicial proceeding to correct an inadvertent violation of the rule against perpetuities, the will should contain a clause specifically stating that no trusts will continue beyond twenty-one years after the death of the last to die of specified beneficiaries or other specified individuals living at the date of the testator's death. The clause should also specifically indicate where the trust assets will pass in the event of a termination under the perpetuities provision. For a discussion of planning strategies to avoid a perpetuities violation, see Ronald C. Link,

*Revised Provisions of Restatement of Property Provide Important Lessons for Estate Planners*, 13 EST. PL. 20 (1986).

**b. Spendthrift Provision.** Section 112.035 of the Texas Trust Code indicates that a settlor may provide in a trust instrument that a beneficiary's interest in the trust may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. TEX. PROP. CODE ANN. § 112.035(a) (Vernon Supp. 2005). A mere reference to the fact that the trust is a "spendthrift trust" is sufficient to achieve that result under Section 112.035(b) of the Texas Trust Code. TEX. PROP. CODE ANN. § 112.035(b) (Vernon Supp. 2005). Prior law had also recognized the validity of spendthrift provisions. *E.g., Hines v. Sands*, 312 S.W.2d 275 (Tex. Civ. App.--Fort Worth 1958, no writ). However, unless the will includes a spendthrift provision, beneficiaries will be entitled to assign their beneficial interests in the trust.

The Texas statute provides that declaring a trust to be a spendthrift trust automatically incorporates restraints against assignment and alienation to the maximum extent provided by law. However, valid spendthrift restraints do not prevent certain types of involuntary invasions. For example, TEX. FAM. CODE ANN. § 154.005 (Vernon 2002) allows a court to order a trustee to provide support for a child of a parent-beneficiary of the trust. *See Kolpack v. Torres*, 829 S.W.2d 913 (Tex. App.--Corpus Christi 1992, writ denied) (distributions from discretionary trust to support beneficiary's child may be ordered only if the parent-beneficiary is first obligated to the particular amount of child support being sought from the trust); *First City Nat'l Bank of Beaumont v. Phelan*, 718 S.W.2d 402 (Tex. App.--Beaumont 1986, writ ref'd n.r.e.) (net income from spendthrift trust can be collected for payment of beneficiary's arrearages in child support, even though collection may take place after child has reached age 18); *Lucas v. Lucas*, 365 S.W.2d 372, 376 (Tex. Civ. App.--Beaumont 1962, no writ) (trustee may consider needs of dependents of trust beneficiary in determining amounts of discretionary distributions); and Comment, *The Trust in Marital Law: Divisibility of a Beneficiary Spouse's Interest on Divorce*, 64 TEX. L. REV. 1301, 1334-1336 (1986) (discussing accessibility of trust benefits for child and spousal support). TEX. HEALTH & SAFETY CODE ANN. §§ 552.018 & 593.081 (Vernon 2003) grants rights of invasion to pay the support costs of an institutionalized beneficiary as to trust principal exceeding \$250,000 and income attributable to such excess principal. In addition, courts from other jurisdictions continue to allow invasions for special classes of claimants (such as governmental or tort claims and claims for payment for necessities).

If the testator wishes to clarify that the trust may not be reached by special classes of claimants against a trust beneficiary, consider specifying in the spendthrift clause that the beneficiary's interest may not be involuntarily attached by any claimant, including governmental or tort claims, and any person or agency seeking spousal or child support or payment for services or goods deemed to be necessities.

Note that a spendthrift provision limits the beneficiaries' powers to dispose of their interests in the trust, but does not limit the trustee's power to make dispositions of trust assets. *Dierschke v. Central Nat'l Branch of First Nat'l Bank at Lubbock*, 876 S.W.2d 377 (Tex. App. -- Austin January 12, 1994, no writ) (trustee had power to enter into partition agreement regarding undivided interest in land owned by trust despite existence of spendthrift provision).

Effective January 1, 2006, the 2005 Texas Legislature amended Section 112.035 to clarify that spendthrift trust protection is not lost merely because the trustee is also a beneficiary of the trust if the trustee's authority to make distributions is subject to the consent of an adverse party or is limited by an ascertainable standard, including health, education, support, or maintenance of the beneficiary. TEX. PROP. CODE ANN. § 112.035(f) (Vernon Supp. 2005).

**c. Small Trust Termination Provision.** The will should include a provision authorizing the termination of trusts anytime that the assets of the trust become so small as to make the ongoing administration of the trust economically unfeasible. If a beneficiary is also serving as trustee, the drafter should exercise caution to assure that the trustee is not given a general power of appointment. Without such a provision, the trustee would not be authorized to distribute the trust assets and terminate the trust unless distributions were authorized under the standards for making distributions of principal and income or unless a court would judicially terminate the trust because of changed circumstances. See TEX. PROP. CODE ANN. § 112.054 (Vernon 1995). See generally Rept. of Committee on Formation, Administration and Distribution of Trusts, *Procedures for Terminating Small Trusts*, 19 REAL PROP., PROB. & TR. L.J. 988 (1984).

**d. Consolidation of Trust Funds.** The trustee should be authorized to consolidate assets of various trusts created by the will at the trustee's discretion. This power may allow a greater return on investments and reduce accounting and related costs. Without such an explicit trust provision, the trustee would not be permitted to mingle the properties of the various trusts, even though they were created under the same will. IIA A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 179.2 (4th ed. 1987).

**e. Merger Provision and Trust Division.** Effective September 1, 1991, the Texas Trust Code authorizes the merger of two or more identical trusts into a single trust "if the trustee reasonably determines that merging the trusts could result in a significant decrease in current or future federal income, gift, estate, generation-skipping transfer taxes, or any other tax imposed on trust property." TEX. PROP. CODE ANN. § 112.057(c) (Vernon 1995). To facilitate (i) merger of substantially identical trusts (instead of completely identical trusts), and (i) merger for administrative convenience or other purposes (other than federal tax savings), express merger authority (broader than the Texas Trust Code authority) should be included.

Effective September 1, 1991, the Texas Trust Code authorizes the division of a single trust into two or more identical trusts "if the trustee reasonably determines that the division of the trust could result in a significant decrease in current or future federal income, gift, estate, generation-skipping transfer taxes, or any other tax imposed on trust property." TEX. PROP. CODE ANN. § 112.057(a) (Vernon 1995). This authority facilitates estate tax planning (e.g., instead of making a partial QTIP election, a marital deduction QTIP trust can be divided into two trusts and the QTIP election can be made with respect to only one of the trusts) and generation-skipping transfer tax planning (See PLR 9002014). To facilitate division for administrative convenience or other purposes (other than federal tax savings), express division authority (broader than the Texas Trust Code authority) should be included.

Effective January 1, 2006, the 2005 Texas Legislature amended Section 112.057 to permit the merger or the division of trusts without a judicial proceeding for any reason if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust. TEX. PROP. CODE ANN. § 112.057 (Vernon Supp. 2005).

**f. Trust Situs, Changing Trust Situs, and Choice of Law.** The trust situs and governing law is typically controlled by the trust instrument. The ability to change the situs of the trust could be helpful in the event of a change of trustees, change of location of beneficiaries, change of the location of trust assets, or for other miscellaneous reasons. The law regarding change of the situs of a trust is somewhat uncertain, and a specific provision authorizing such a change and detailing the mechanics for such a change is beneficial. See generally Hendrickson, *Change of Situs of a Trust*, 118 TR. & EST. (January-July, 1979).

If the trust has some "points of contact" with the governing law selected by the testator (such as where the trustee is domiciled in that state or the situs of the property is located in that state), the selection of law in the will be honored. The choice of governing law, however, would probably not be honored if no other "points of contact" exist. See 5 A. SCOTT, LAW OF TRUSTS §§ 591, 592, 606, 607 (1967).

**g. Receipt and Allocation of Employee Benefits and Insurance Proceeds.** The trustee is authorized under the Texas Trust Code to receive additions to the trust assets in Section 113.004. TEX. PROP. CODE ANN. § 113.004 (Vernon 1995). However, if the will creates several trusts, merely designating the testamentary trustee as the beneficiary of employee death benefits or insurance proceeds would leave the trustee in a quandary as to how the assets should be allocated among the various trusts. The will should specifically cover this contingency.

**3. GENERAL FIDUCIARY POWERS.** This section of the outline discusses powers important for both trustees and executors. Typically, the will details these powers for the trustees, and states that the executors have all of the powers of the trustees. Where

appropriate, the outline discusses the effect of certain power provisions upon executors under Texas law.

**a. Investment Powers.**

(1) *Prudent Man Rule.* Prior to January 1, 2004, the investment standard under the Texas Trust Code was set forth in Section 113.056(a), which was the Texas version of the prudent man rule. Although given relatively broad powers with respect to investments, the trustee was still restricted from investing in speculative or extra hazardous investments, and had a general duty of reasonable diversification of investments. See TEX. PROP. CODE ANN. § 113.056(a) (Vernon 1995) ("not in regard to speculation"), amended by Acts 2003, 78th Leg., Ch. 1103, §§ 6 & 7; RESTATEMENT (SECOND) OF TRUSTS § 228 (1959) (reasonable diversification of investments to distribute risk of loss); *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.) (unless trust provides otherwise, trustee must distribute risk of loss by reasonable diversification of investments).

(2) *Prudent Investor Rule.* Effective January 1, 2004, the 2003 Texas Legislature adopted its version of the Uniform Prudent Investor Act as the default investment standard applicable to Texas trusts. TEX. PROP. CODE ANN. § 117.001 *et seq.* (Vernon Supp. 2005). With its adoption, the prudent investor rule, which imposes a much greater burden on trustees, replaced the prudent man rule. In the case of existing instruments specifically providing for the prudent man rule, the use of such term or comparable language will invoke the prudent investor rule under the Uniform Prudent Investor Act. TEX. PROP. CODE ANN. § 117.012 (Vernon Supp. 2005).

If the trustor has implicit confidence in the trustee's ability to manage the trust assets, the testator might want to remove any question regarding the trustee or executor's authority to invest in specific assets. However, such an enlargement of the fiduciary's investment powers should be carefully considered by the testator to assure that he or she does not want the safeguards otherwise imposed upon fiduciaries under the Uniform Prudent Investor Act.

(3) *Delegation of Investment Powers.* Effective September 1, 1999, Section 113.060 authorized a trustee to delegate investment decisions. However, the trustee remained responsible for the investment agent's decisions unless the trustee complied with the statutory criteria. Acts 1999, 76th Leg., Ch. 794, § 2, repealed by Acts 2003, 78th Leg., Ch. 1103, § 17. With the adoption of the Uniform Prudent Investor Act, the uniform act's delegation standard was adopted (TEX. PROP. CODE ANN. § 117.011(a) (Vernon Supp. 2005)), although three additional requirements for avoidance of liability by the trustee were added. Specifically, if the agent is an affiliate of the trustee, or if the terms of the delegation require arbitration or shorten the applicable statute of limitations, the trustee cannot avoid liability for the actions of the agent. TEX. PROP. CODE ANN. § 117.011(c) (Vernon Supp. 2005).

**b. Retention of Assets.**

(1) *Law Effective Prior to January 1, 2004.* Under prior law, Section 113.003 of the Texas Trust Code authorized the trustee to retain assets initially contributed to the trust or added to the trust, without regard to diversification or liability for any depreciation or loss resulting from the retention. Acts 1983, 68th Leg., Ch. 576, § 2, repealed by Acts 2003, 78th Leg., Ch. 1103, § 17. This statute appeared to negate certain duties otherwise imposed upon trustees, as described in the following sections of the RESTATEMENT (SECOND) OF TRUSTS: (i) the duty to distribute the risk of loss by a reasonable diversification of investments, § 228; (ii) the duty to dispose of assets initially put in a trust which would not be a proper investment, § 230; (iii) the duty to dispose of property which, though a proper investment when initially acquired, subsequently becomes an improper investment, § 231; and (iv) the duty to make trust property productive, § 181. See Howell Ward, *The Texas Trust Act: Discretionary Power of a Trustee*, 40 TEX. L. REV. 356, 357-61 (1962). Note that there was a potential conflict between this power and the general duty set forth in Sections 113.056(a) and (c) of the Texas Trust Code.

A relatively recent Texas case addressed the effect of Section 113.003 upon the fiduciary's liability for retaining trust assets. *Neuhaus v. Richards*, 846 S.W.2d 70 (Tex. App.--Corpus Christi 1992), set aside without reference to merits, 871 S.W.2d 182 (Tex. 1994). In that case, McAllen State Bank stock was part of the original trust corpus. That bank was acquired by First City, and the trustee substituted First City stock for the McAllen State Bank stock.

The *Neuhaus* case suggested that Section 113.003 "appears to statutorily relieve the trustee of any liability for retention of either (1) initial trust corpus, or (2) property that is added to the trust." *Id.* at 77-78. The court indicated that this protection would be construed as narrowly as possible, however, in light of the fact that the legislative history regarding the adoption of Texas Trust Code (which first enacted Section 113.003) indicated that the bill was intended merely to update existing law and not to impair traditional principles of equity and common law. The court observed that Section 113.003 appears to be a substantial departure from the provisions of the prior Texas Trust Act, and Section 113.003 should be construed as narrowly as possible.

In light of that background, the court held that Section 113.003 would not apply to substituted or exchanged shares of stock. In addition, the court determined that the substituted stock is not stock that has been "added" to the trust under Section 113.003, but that the "added" provision is interpreted narrowly to apply only to newly acquired trust assets added by gift rather than assets purchased or received in exchange for other trust funds or assets. However, the *Neuhaus* decision, having been set aside by the Supreme Court, has limited value as precedent.

(2) *Law Effective January 1, 2004.* Under the Uniform Prudent Investor Act, trustees have an affirmative duty to diversify the investments of the trust. TEX. PROP. CODE ANN. § 117.005 (Vernon Supp. 2005). Furthermore, trustees have an affirmative duty to review the trust assets and make and implement decisions concerning the retention and disposition of assets within a reasonable period after appointment or receipt of trust assets. TEX. PROP. CODE ANN. § 117.006 (Vernon Supp. 2005).

(3) *Executors.* With respect to executors, the courts have imposed an even greater duty upon the executor to conserve the estate assets and not speculate with estate assets. See *Humane Society of Austin and Travis County v. Austin National Bank*, 531 S.W.2d 574, 580 (Tex. 1976) (primary duty of executor to preserve estate for distribution); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Bockock*, 247 F. Supp. 373, 379 (S.D. Tex. 1965) (emphasizing importance that trustee not speculate with trust assets). If the assets are perishable or extremely likely to deteriorate in value, the executor is under a duty to sell them under Section 333 of the Texas Probate Code unless the will relieves him of such duty. TEX. PROB. CODE ANN. § 333 (Vernon 2003). This power, if applicable to the executor, would avoid the forced sale requirements with respect to personal property provided in Section 333. Section 238 of the Texas Probate Code authorizes the retention of a business interest unless the will directs otherwise. TEX. PROB. CODE ANN. § 238 (Vernon 2003).

**c. Power of Sale.** Section 113.010 of the Texas Trust Code authorizes a trustee to sell or enter into options to sell real or personal property for cash or credit, with or without security, either publicly or privately. TEX. PROP. CODE ANN. § 113.010 (Vernon 1995). Prior to enactment of the Texas Trust Act, a trustee had no power to sell trust property unless such power was given by the trust instrument or unless all beneficiaries consented to the sale. See *Gahagan v. Texas & Pacific Railway Co.*, 231 S.W.2d 762, 768 (Tex. Civ. App.--Dallas 1950, writ ref'd n.r.e.).

An express power of sale is particularly important for executors. Section 332 of the Texas Probate Code authorizes sales of real and personal property by an executor without court order where the will confers a power of sale. TEX. PROB. CODE ANN. § 332 (Vernon 2003). If no power of sale is included in the will, independent executors may only sell assets without court approval for the purpose of paying debts and expenses. See *Buckner Orphans Home v. Maben*, 252 S.W.2d 726, 728 (Tex. Civ. App.--Eastland 1952, no writ).

**d. Leases.** Section 113.011 of the Texas Trust Code gives trustees the authority to lease personal property. TEX. PROP. CODE ANN. § 113.011 (Vernon 1995). This Section reverses the general common law prohibition against entering into leases beyond the trust term. See III A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 189.2, at 76-77 (4th ed. 1988).

Incorporating this provision for executors is very important, because it is questionable whether a lease by an executor is binding beyond the close of the estate (except in the case of mineral leases which are specifically authorized under Section 367(7) of the Probate Code). See *Miles v. Amerada Petroleum Corp.*, 241 S.W.2d 822, 825-27 (Tex. Civ. App.--El Paso 1951, writ ref'd n.r.e.); see generally WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES §§ 1011-22 (1971).

In *Gatesville Redi-Mix, Inc. v. Jones*, 787 S.W.2d 443 (Tex. App.--Waco 1990, writ denied), a long-term lease by an independent executor was held to be invalid. The court reasoned that the will did not authorize the independent executor to lease the property, and the lessee who attempted to uphold the validity of the lease could not sustain its burden of showing that the lease was to the interest of the estate under court's interpretation of Section 361 of the Probate Code.

**e. Power to Give Guarantee.** The Texas Trust Code authorizes the trustee to "encumber" trust assets, but does not specifically authorize the trustee to give guaranties binding upon the trust estate. TEX. PROP. CODE ANN. § 113.015 (Vernon 1995); See *Transamerica Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472, 475 (Tex. 1979) (power to invest in a lease implicitly authorized the trustee to guarantee performance of an interested party's obligations under a lease).

**f. Power to Retain and Rely on Investment Advisor.** Effective September 1, 1999, the authority to employ agents under Section 113.018 of the Texas Trust Code now includes investment advisors. TEX. PROP. CODE ANN. § 113.018 (Vernon Supp. 2005). Under prior law, Section 113.060 of the Texas Trust Code authorized a trustee to delegate investment decisions. With the adoption of the Uniform Prudent Investor Act, Section 113.060 was repealed, and the uniform act's delegation standard was adopted in new Section 117.011 was enacted. TEX. PROP. CODE ANN. § 117.011(c) (Vernon Supp. 2005). See Part 2X.B.3.a.(3) at page 64 of this outline. See generally *Responsibility of Trustee Where Investment Power Is Shared or Exercised by Others*, 9 REAL PROP., PROB. & TR. J. 517 (1974); RESTATEMENT (SECOND) OF TRUSTS §§ 170, 171, 186, 225 (1959). In order to give protection to the trustee and executor, the testator might want specifically to exonerate them from any liability for investments made on the advice of reasonably competent investment advisors.

**g. Power to Lend to Beneficiaries or Others.** Section 113.052(b)(1) provides that the Texas Trust Code does not prohibit a loan from a trustee to a beneficiary (presumably, even if the beneficiary is also the trustee) if the loan is expressly authorized or directed by the trust instrument. TEX. PROP. CODE ANN. § 113.052(b)(1) (Vernon 1995). No other provision of the Texas Trust Code specifically authorizes loans to beneficiaries, and, absent a specific trust provision authorizing loans, one commentator suggests that it is doubtful whether a trustee has authority to lend trust

funds to anyone. See INTERFIRST BANK DALLAS, TEXAS WILL MANUAL SERVICE XII-6 n.3 (Galvin ed. (1980)). The will should contain a provision authorizing loans to beneficiaries on such terms as the trustee may determine. Such a provision might allow the trustee to make cash available to beneficiaries without making actual distributions for federal income tax purposes.

**h. Authority to Borrow.** Section 113.015 of the Texas Trust Code authorizes the trustee to borrow and to mortgage, pledge, or otherwise encumber all or any part of the trust assets. TEX. PROP. CODE ANN. § 113.015 (Vernon 1995). However, an executor generally cannot borrow funds without court order unless the administration is independent or unless express authority is given in the will. See TEX. PROB. CODE ANN. § 329 (Vernon 2003) (describing valid reasons for an procedure governing borrowing by personal representatives); William I. Marschall, Jr., *Independent Admin. of Decedent's Estates*, 33 TEX. L. REV. 95, 111-12 (1954). Therefore, incorporating this provision for the executor is important.

**i. Delegation Powers.** A trustee or a co-trustee generally does not have the authority to delegate his discretionary power to another. *Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472, 476 (Tex. 1979); RESTATEMENT (SECOND) OF TRUSTS § 225(2) (1959). A delegation power may be helpful particularly among co-trustees during temporary periods of absence, or to allow delegation of specific duties to individual co-trustees who have particular expertise with respect to those particular duties. See generally J. FARR & J. WRIGHT, AN ESTATE PLANNER'S HANDBOOK § 34, at 203-205 (4th ed. 1979). With the adoption of the Uniform Prudent Investor Act, Section 113.060 of the Texas Trust Code was repealed, and a new standard authorizing a trustee to delegate investment decisions was adopted. TEX. PROP. CODE ANN. § 117.011 (Vernon Supp. 2005). See Part 2X.B.3.a at page 64 of this outline.

**j. Power to Hold Assets in Nominee Form.** A trustee is generally prohibited from taking title to any trust assets in the name of a third party. IIA A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 179.5 (4th ed. 1987). Section 113.017 of the Texas Trust Code authorizes a trustee to hold stock in the name of a nominee, but does not authorize acquisition of assets in nominee form for any other types of assets. TEX. PROP. CODE ANN. § 113.017 (Vernon 1995). The trustee might desire, for a variety of reasons, to purchase other types of assets in nominee form.

Section 398A of the Texas Probate Code authorizes a personal representative to hold stock and other personal property in nominee form, but explicitly makes the personal representative liable for acts of the nominee with respect to such property. TEX. PROB. CODE ANN. § 398A (Vernon 2003). Furthermore, Section 398A of the Texas Probate Code, unlike Section 113.017, requires that property held nominally must remain in the possession and control of the personal representative. At least one commentator has argued that the provisions of Section 398A may not be changed

by terms in the will to the contrary. See INTERFIRST BANK DALLAS, TEXAS WILL MANUAL SERVICE X-11-4 n.3 (Galvin ed. 1980).

**k. Principal and Income Apportionment; Power to Retain Underproductive Property.**

(1) *Law Effective Prior to January 1, 2004.* Under prior law, Sections 113.101--113.111 of the Texas Trust Code set forth extremely detailed provisions regarding principal-income allocations for income and expense items. The will might contain a provision giving the trustee authority to allocate items of income and expense between principal and income in a reasonable manner. This would permit the trustee to be guided by provisions in the Texas Trust Code, but give flexibility in deviating from those provisions where reasonable to do so. In particular, the trustee might determine to set aside a reserve depletion for natural resource income analogous to the federal income tax depletion rules, rather than using the 27-1/2% depletion allowance provided in Section 113.107(d) of the Texas Trust Code, so that the principal and income allocation for state law purposes would coincide with the allocation for federal tax purposes. If a trust instrument gives the trustee discretion in making principal-income allocations for income and expense items, no inference arose from the fact that the trustee made an allocation contrary to provisions in the Texas Trust Code.

By a 5-to-3 decision (and over the dissenting opinion of Justice Wallace), the Texas Supreme Court concluded in a 1988 decision, that under Section 113.110, a duty to sell underproductive property arises one year after the property becomes underproductive. Under the court's holding, the trustee had no discretion in determining whether to sell underproductive property; if the trust property is underproductive, it must be sold and the proceeds must be divided between the income beneficiary and the remainder beneficiary in accordance with Section 113.110(a). *Perfect Union Lodge v. InterFirst Bank of San Antonio*, 748 S.W.2d 218, 221 (Tex. 1988). Neither the Texas Trust Code provisions nor general rules of common law clearly supported the holding in *Perfect Union Lodge*. Rather, the relevant code provisions and rules of common law were both inconclusive.

The Texas Legislature made various amendments to Section 113.110 in 1989 in response to the *Perfect Union Lodge* case. Section 113.110(a) was amended to state more clearly that the underproductive property statute (which contains provisions for the division of net proceeds upon the eventual sale of underproductive property) will apply only if the trustee is required to sell or otherwise dispose of such property. Section 113.110(e) was amended to state more specifically the statute should not be construed as requiring a trustee to sell or dispose of trust property. "The determination as to whether the trustee is required to sell or dispose of property shall be made in accordance with the requirements set out in the governing instruments, other provisions of this Code, and the common law." The amendments became effective September 1, 1989.

(2) *Law Effective January 1, 2004.* With the adoption of the Uniform Prudent Investor Act, an update of the principal and income allocation rules was determined to be necessary because the risk return analysis of the Uniform Prudent Investor Act may create inequities between income and principal beneficiaries. The Uniform Principal and Income Act authorizes the trustee to make adjustments between principal and income if certain conditions are met. TEX. PROP. CODE ANN. § 116.005(a) (Vernon Supp. 2005). In deciding whether and to what extent to exercise this power to adjust, the trustee is required to consider various factors. TEX. PROP. CODE ANN. § 116.005(b) (Vernon Supp. 2005). There are also certain situations where the trustee may not make any adjustments between principal and income, including if the trustee is a beneficiary of the trust. TEX. PROP. CODE ANN. § 116.005(c) (Vernon Supp. 2005). However, in such situations, a judicial modification of the trust may provide a remedy. See TEX. PROP. CODE ANN. § 112.054 (Vernon 1995).

The trustee's decision to exercise or not exercise the power to adjust under Section 116.005 is subject to an abuse of discretion standard. TEX. PROP. CODE ANN. § 116.006(a) (Vernon Supp. 2005). If a trustee reasonably believes that one or more beneficiaries will object to the manner in which the trustee intends to exercise or not exercise the power to adjust, a procedure is established by which the trustee may petition a court of competent jurisdiction for a determination of whether the exercise or non-exercise will result in an abuse of the trustee's discretion. TEX. PROP. CODE ANN. § 116.006(d) (Vernon Supp. 2005).

A detailed discussion of the new rules for allocating receipts and disbursements between principal and income is beyond the scope of this outline. See TEX. PROP. CODE ANN. §§ 116.151 - 116.206 (Vernon Supp. 2005). However, some allocation rules have been changed, some are new, and others now set forth more detailed guidelines than former Texas Trust Code provisions.

The Uniform Principal and Income Act is effective January 1, 2004, and applies to all Texas trusts created after that date and to all transactions occurring subsequent to that date with respect to trusts already in existence on January 1, 2004.

### **I. Partition and Division Power.**

(1) *Law Effective Prior to January 1, 2006.* The Texas Trust Code presently contains no provision authorizing a partition of trust assets other than the real property management provisions in Section 113.009. TEX. PROP. CODE ANN. § 113.009 (Vernon 1995). This power would not appear to extend to making distributions among trust beneficiaries. Similarly, an independent executor has no power to partition assets among estate beneficiaries unless the will so provides. *Clark v. Posey*, 329 S.W.2d 516, 519 (Tex. Civ. App.--Austin 1959, writ ref'd n.r.e.); WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 510 (1971); TEX. PROB. CODE ANN. § 373-387 (Vernon 2003 and Vernon Supp. 2005) (general

provisions for court-ordered partitions) and § 150 (Vernon 2003) (partition by independent executors). The will should give the fiduciaries the power to make non-pro-rata distributions of estate and trust assets.

Note that under Texas Probate Code Section 150, if (i) the estate contains assets that are not capable of a fair and equitable partition and distribution and (ii) the will does not provide a means for partition of the estate, then an independent executor (who normally would make the determination on his own) may seek court approval of a proposed partition and distribution of the estate assets. TEX. PROB. CODE ANN. § 150 (Vernon 2003); See *In Re Estate of Spindor*, 840 S.W.2d 665 (Tex. App.--Eastland 1992, no writ) (if residuary beneficiaries are unable to agree upon property division with executor, executor is authorized to have the court resolve the matter).

(2) *Law Effective January 1, 2006.* Effective January 1, 2006, the 2005 Texas Legislature enacted new Section 113.027 of the Texas Trust Code, which permits a trustee to make non-pro-rata distributions. TEX. PROP. CODE ANN. § 113.027 (Vernon Supp. 2005).

**m. Powers Regarding Business Interests.** If the testator owns a substantial interest in a closely held business or businesses, he might want to give specific instructions to his fiduciaries regarding his wishes with respect to those interests. The testator may want to make specific directions regarding the voting of stock, see III A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 193.1 (4th ed. 1987), or regarding dividend policy, see Paul N. Frimmer, *Beneficiaries' Rights to Distributions When Business Interests Are Held in Trust*, 16 REAL PROP., PROB. & TR. J. 359 (1981). The Texas Trust Code authorizes investments in business entities, including sole proprietorships, partnerships, limited partnerships, and corporations. TEX. PROP. CODE ANN. § 113.008 (Vernon 1995). If the fiduciary is personally involved in the business (as an owner, officer, or director), the will should specifically authorize the trustee to retain that business interest and to take actions with respect to that interest, despite the fact that the trustee is also interested in the business. Otherwise, the trustee's duty of loyalty and general prohibition against self-dealing transactions might present problems with respect to anticipated actions regarding that business interest. For example, questions might arise as to the fiduciary's taking advantage of various investment opportunities individually where the particular business entity also makes similar investments or has similar business activities. See IIA A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 170.23 (4th ed. 1987); TEX. PROP. CODE ANN. § 114.001(c)(2) (Vernon Supp. 2004) (trustee liable for any profit made by trustee through a breach of trust).

This provision is important for executors. Section 238 of the Texas Probate Code authorizes an executor to continue a business under order of the court. TEX. PROB. CODE ANN. § 238 (Vernon 2003). Section 238A discusses the executor's becoming a partner in a partnership in which the decedent owned an interest.

TEX. PROB. CODE ANN. § 238A (Vernon 2003). No other section of the Texas Probate Code discusses or explicitly authorizes investments by executors in business entities other than the authority in Section 238 to *retain* business interests. Such investments would seemingly not be allowed in light of the executor's general primary duty to preserve and settle the estate. See WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES §§ 692, 699 & 700 (1971).

**n. Resignation of Fiduciary.** Executors must obtain Probate Court approval before resigning. TEX. PROB. CODE ANN. § 221 (Vernon 2003). Section 113.081 of the Texas Trust Code specifically permits a trustee to resign in accordance with the terms of the trust instrument. TEX. PROP. CODE ANN. § 113.081 (Vernon 1995). The will should generally contain specific provisions authorizing the procedure by which a trustee may resign without first securing court approval. A similar provision could be inserted for executors, but it is not clear that such a provision would override Section 221 of the Texas Probate Code.

**o. Exoneration of Successor Fiduciaries.** A successor trustee may be liable for a breach of trust committed by the predecessor trustee if the successor fails to take proper steps to compel the predecessor to redress the breach of trust. TEX. PROP. CODE ANN. § 114.002 (Vernon 1995) (making successor trustee liable for a breach of trust by a predecessor trustee if successor trustee knows or *should have known* of such a breach of trust); III A. SCOTT & W. FRATCHER, LAW OF TRUSTS § 223.3 (4th ed. 1988); see *InterFirst Bank-Houston, N.A. v. Quintana Petroleum Corporation*, 699 S.W.2d 864, 879 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.) (beneficiary released and indemnified successor trustees from any liability for investigate or review administration by former trustees; held that successor trustee was protected by such release and indemnity). Unless the will exonerates a successor fiduciary from acts or omissions of the prior fiduciary, the successor fiduciary may have no alternative but to require an independent audit, thereby taking reasonable steps to assure that there were no breaches of trust by the predecessor fiduciary. Such an audit could be expensive and would be charged to the trust estate.

**p. Exculpatory Clause.** There is no provision in either the Texas Trust Act or the Texas Trust Code specifically authorizing exculpatory provisions. However, Section 22 of the Texas Trust Act and Section 113.059 of the Texas Trust Code do permit a trustor to relieve the trustee from any duty, liability, or restriction imposed by statute. Effective January 1, 2006, Section 113.059 was moved to Section 114.007.

(1) *Texas Cases Construe Exculpatory Clauses Strictly.* Various Texas cases have recognized the validity of exculpatory clauses, but have construed them strictly against the trustee. See *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.--Waco 1981, writ ref'd n.r.e.) (exculpatory clauses should be strictly construed against trustee); *Burnett v. First National Bank of Waco*, 567 S.W.2d 873, 876 (Tex. Civ. App. 1978--Tyler, writ ref'd n.r.e.)

(clause stating that the trustee would not be liable "for any honest mistake in judgment" held not to relieve trustee from negligent actions short of dishonesty); *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521, 524 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.) (exculpatory clause providing that no trustee should "be liable for any mistake or error of judgment or negligence but shall be liable only for her or its own dishonesty" held to be valid; court distinguished the *Langford* case).

The *Risser* case states that an exculpatory clause will not protect a trustee who uses the trustee position to obtain an advantage by action inconsistent with the trustee's duties and detrimental to the trust, or who takes actions in bad faith or acts "intentionally adverse or with reckless indifference to the interests of the beneficiary." *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App.--Texarkana 1987, no writ). In addressing whether the trustee acted in "bad faith," the court focused on the following facts regarding a purportedly improper sale: (1) that the trustee sold the asset without notifying trust beneficiaries, (2) that the trustee did not obtain an outside appraisal, (3) that the trustee did not seek competitive bidding, (4) that the trustee sold the asset to a creditor of the corporate trustee, and (5) that the sale price was approximately one-third of market value. *Id.*, at 891, 895-905. See also the discussion of the *Neuhaus* case at Part 2X.B.3.b.(1) at page 100 of this outline.

Notwithstanding the general rule of narrow construction of exculpatory clauses, they are still enforceable. In *Jochev v. Clayburne*, 863 S.W.2d 516 (Tex. App.--Austin 1993, writ denied), the trust instrument authorized the trustee to engage in transactions with "any person, firm, corporation or any trustee under any other trust." Holding that the quoted language was ambiguous and not sufficient in and of itself to authorize self dealing, the court turned to extraneous evidence. Because the settlor was aware of the trustee's conflict of interest generally and the complained of self dealing transaction specifically, and did not complain, the court concluded that "he intended the language in the trust instrument to modify the duty of fidelity." *Id.* at 520. The court acknowledged the general rule requiring strict construction of exculpatory clauses but concluded that "this strict construction rule should be applied only in circumstances where the intention the parties cannot be discerned from the parties' actions or conduct." *Id.* The court reversed the trial court's judgment in favor of the beneficiaries because the court's charge failed to instruct the jury that when an instrument contains an exculpatory clause, the trustee's duties are governed by the terms of the instrument.

(2) *Possible Public Policy Limitations Regarding Self-Dealing.* Various cases have suggested that "the language of a trust instrument cannot authorize self-dealing by a trustee, because that would be contrary to public policy." *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App.--Texarkana 1987, no writ); *Blieden v. Greenspan*, 742 S.W.2d 93 (Tex. App.--Beaumont 1987), *rev'd on other grounds*,

751 S.W.2d 858 (Tex. 1988); *Langford v. Shamburger*, 417 S.W.2d 438, 444, 447 (Tex. Civ. App.--Fort Worth 1967, writ ref'd n.r.e.). See *Three Bears, Inc. v. Transamerica Leasing Co.*, 574 S.W.2d 193, 197 (Tex. Civ. App.--El Paso 1978) (citing *Langford* for proposition that it is against public policy for a trust instrument to authorize self-dealing, and court invalidated guaranty given by trust which also benefitted trustees in other capacities), *rev'd*, 586 S.W.2d 472, 475 (Tex. 1979) (trust instrument authorized trustee to give guaranty, and court did not discuss the self-dealing issue); *Langford v. Shamburger*, 392 F.2d 939, 946 (5th Cir. 1968) (intentional omission cannot be excused by an exculpatory clause limiting the liability of a trustee to matters of gross negligence).

However, in *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 251 (Tex. 2002), the Texas Supreme Court disapproved *Langford* and its progeny to the extent they suggest public policy precludes a trust instrument from authorizing self-dealing by a trustee. In *Grizzle*, Frost National Bank ("Frost") transferred its Dallas bank to Texas Commerce Bank, N.A. ("TCB") and TCB transferred its Corpus Christi bank to Frost, resulting in the exchange of all assets of the two banks, including their fiduciary appointments. In compliance with Federal law, each bank liquidated stock and income funds of the other trustee. Due to market conditions, the Grizzle Trust incurred a capital loss.

Grizzle sued individually and on behalf of a putative class of trust beneficiaries against TCB and Frost asserting claims including breach of fiduciary duty, deceptive trade practices, negligence, gross negligence, fraud, conspiracy and breach of contract. The Grizzle Trust (a court created trust) contained an exculpatory clause which stated that "[t]his instrument shall always be construed in favor of the validity of any act or omission of any Trustee, and a Trustee shall not be liable for any act or omission except in the case of gross negligence, bad faith, or fraud." *Id.* at 243. The court of appeals "concluded that the Grizzle Trust's exculpatory clause could not, as a matter of public policy, vitiate a claim for, among other things, self-dealing." *Id.* at 246.

In reversing, the Texas Supreme Court stated that the State's public policy is reflected in its statutes. *Id.* at 250. Section 113.059 of the Texas Trust Code provides that a settlor "may relieve the trustee from a duty, liability, or restriction imposed by this subtitle," except that, prior to September 1, 2007, a settlor could not relieve a corporate trustee from those imposed by Section 113.052 (lending trust funds to itself) and Section 113.053 (buying or selling trust property from or to itself). TEX. PROP. CODE ANN. § 113.059 (Vernon 1995). "The Trust Code contains no other limitations on relieving a corporate trustee from liability for self-dealing in a trust instrument." *Grizzle*, 96 S.W.3d at 249. Therefore, the Court concluded "that public policy, as expressed by the Legislature in the Trust Code, does not preclude a settlor from relieving a corporate trustee from liability for self-dealing, except for what is specified in sections 113.052 and 113.053," thereby holding that a trust instrument exculpatory

clause can relieve a trustee of liability for self-dealing defined as the misapplication or mishandling of trust funds, including failing to promptly reinvest trust monies. *Id.* at 250-51.

(3) *Legislative Response to Grizzle*. The *Grizzle* opinion raised a question regarding the limits of exculpatory clauses. In response thereto, Section 113.059 of the Texas Trust Code was amended by the Legislature to also provide that a settlor may not relieve any trustee of liability for a breach of trust committed in bad faith, intentionally or with reckless indifference to the interest of the beneficiary. TEX. PROP. CODE ANN. § 113.059(c) (Vernon Supp. 2005). See Part 2III.B.1.c.(3) at page 27 of this outline. The Legislature also amended the statutory provisions governing Section 142 Trusts and Section 867 Trusts to provide that any exculpatory clause in such court created trusts will only be enforceable if it is limited to specific facts and circumstances unique to property of the trust and there is a specific finding by the court that there is clear and convincing evidence that such a provision is in the best interests of the beneficiary of the trust. TEX. PROP. CODE ANN. § 142.005(j) (Vernon Supp. 2005); TEX. PROP. CODE ANN. § 868(c) (Vernon Supp. 2005).

#### q. Compensation of Fiduciaries.

(1) *Trustee Compensation*. The Texas Trust Code authorizes reasonable compensation for trustees. TEX. PROP. CODE ANN. § 114.061 (Vernon 1995). However, the testator may have specific wishes regarding compensation of trustees, and in particular, bank trust departments may want specific language in the will regarding trustee compensation to make clear that the bank will be compensated according to its standard trustee fee schedule and according to the amount of time and work involved.

(2) *Executor Compensation*. Section 241(a) of the Texas Probate Code provides a statutory fee for executors. TEX. PROB. CODE ANN. § 241(a) (Vernon 2003). In practice, the statutory fee is unsatisfactory, resulting in commissions that may have very little relation to the actual amount of work involved. However, a provision in a will regarding the executor's compensation will override Section 241(a). See *Lipstreu v. Hagan*, 571 S.W.2d 36, 38 (Tex. Civ. App.--San Antonio 1978, writ ref'd n.r.e.). Even if a clause provides specified compensation to an executor, the compensation will be payable only if the person actually serves as executor. *In re Estate of Hodges*, 725 S.W.2d 265, 268-269 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.) (no executor appointed because of family settlement agreement).

(3) *Compensation Rate Specified in Will Controls*. If the will specifies the method or rate for compensating fiduciaries, such amount is conclusive and the fiduciary cannot later complain that the sum is inadequate if he accepts the office as fiduciary. See *Allen v. Berrey*, 645 S.W.2d 550, 553 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.) (independent executor compensation); *Stanley v. Henderson*, 162 S.W.2d 95, 97 (Tex. 1942) (discussing trustee compensation).

(4) *Tax Issues.* Reasonable fiduciary compensation will be deductible as an administrative expense for either income tax purposes or estate tax purposes. See I.R.C. § 642(g). The fiduciary will generally include such compensation in his taxable income; however, so long as the fiduciary is not a professional fiduciary and does not actively participate in the conduct of trade or business included in the assets of the estate, his compensation will not be subject to the FICA self-employment tax. Rev. Rul. 58-5, 1958-1 C.B. 322.

**r. Removal of Fiduciary.** Section 113.082 of the Texas Trust Code authorizes removal of trustees for particular causes, and Sections 149C and 222 of the Texas Probate Code authorize removal of independent executors and personal representatives, respectively, for specified causes. TEX. PROP. CODE ANN. § 113.082 (Vernon Supp. 2005); TEX. PROB. CODE ANN. §§149C & 222 (Vernon 2003). If the testator wishes to give some individual the authority to remove a fiduciary without cause, there should be a specific provision in the will to that effect. The Texas Trust Code specifically recognizes removal of trustees in accordance with the terms of a trust instrument. TEX. PROP. CODE ANN. § 113.082 (Vernon Supp. 2005). In particular, an individual or individuals may be authorized to remove corporate fiduciaries without cause. Such a provision may give the testator comfort in knowing that someone will have leverage to persuade a corporate trustee to be cooperative with the needs of the estate beneficiaries.

**s. Environmental Law Issues.** Section 113.025(a) of the Texas Trust Code, added effective September 1, 1993, clarifies the powers of the trustee to manage environmental risks. Section 113.025(a) would enable (but not require) the trustee or a potential trustee to inspect trust property or property that the trustee has been asked to hold in trust to determine if the property complies with environmental laws. The statute clarifies that a potential trustee who exercises this power is not presumed to have accepted the trust property pursuant to Section 112.009. Section 113.025(b) enables the trustee to take any action that the trustee believes necessary to prevent, abate, or otherwise remedy an actual or potential violation of an environmental law affecting property held in trust. TEX. PROP. CODE ANN. § 113.025 (Vernon 1995). Section 114.001(d) generally limits a trustee's liability to a gross negligence or bad faith standard for any action taken or not taken pursuant to Section 113.025 or other actions taken to comply with environmental law requirements. TEX. PROP. CODE ANN. § 114.001(d) (Vernon Supp. 2005).

#### **4. SPECIAL PROVISIONS REGARDING EXECUTORS.**

**a. Incorporate Powers of Trustee.** The will should specifically incorporate for the executor all of the powers given to the trustee under the provisions of the will and under the provisions of the Texas Trust Code. This is especially important because, as noted above, the executor will lack many powers that are

useful in administering an estate unless those powers are expressly granted.

**b. Relationship of Estate to Testamentary Trusts.** For administrative convenience, the executor should be authorized to make immediate distributions of properties directly to trust beneficiaries rather than making distributions to testamentary trusts if events have occurred which would require the trustee to make immediate distributions from such trusts. In addition, some draftsmen explicitly authorize the trustee to make loans and advancements to the estate, or to purchase assets from the estate, in order to furnish liquidity (particularly where the testamentary trust is named the beneficiary of life insurance policies or employee death benefits) in order to supply cash for the payment of debts, taxes, and general administration expenses.

**c. Tax Elections.** Under the Internal Revenue Code, fiduciaries generally have all of the tax rights and privileges of the person whom they represent. I.R.C. § 6903(a). Some tax elections are specifically made applicable to executors. *E.g.*, I.R.C. § 6013(a)(3) (election to file joint return for decedent and surviving spouse). However, draftsmen often particularly authorize the executor, in its sole discretion, to exercise tax elections available to the executor.

(1) *Reminder.* One of the advantages of including such a clause is merely to serve as a reminder to the executor of some of the specific tax elections available to the executor.

(2) *Equitable Adjustments Attributable to Tax Elections.* The clause should specifically state whether or not the executor should make compensating adjustments between income and principal or among beneficiaries as the result of tax elections. For an excellent discussion of the potential inequities that might arise as a result of various tax elections and of the law regarding adjustments among beneficiaries' interest as a result of such elections, see Reed Quilliam, Jr., *Rights and Conflicts of Beneficiaries During Administration*, 1980 S.W. LEGAL FOUNDATION WILLS AND PROBATE INSTITUTE H-273 (1980); *see also* Moore, *Conflicting Interests in Post Mortem Estate Planning*, 9th ANN. U. OF MIAMI INST. ON EST. PL. 19-1 (1975); and Taggart, *Adjustments Required with Tax Elections Alter Interests Among Beneficiaries*, 128 P.L.I. TAX LAW AND ESTATE PLANNING SERIES--POST MORTEM ESTATE PLANNING 219 (1981).

## **XI.**

### **MISCELLANEOUS PROVISIONS.**

#### **. Will Not Contractual.**

For wills made after September 1, 1979, Section 59A has been amended to provide that a contract to make the will or not revoke the will can be established only by provisions of a written agreement that is binding and enforceable, as well as by provisions of a will specifically stating that a contract does exist and

stating the material provisions of the contract. The execution of reciprocal wills does not by itself suffice as evidence of the existence of a contract. TEX. PROB. CODE ANN. § 59A (Vernon Supp. 2005). One Texas case interpreting Section 59A has stated that it "does not require the word 'contract' or a phrase reciting 'this will is a contract' to appear in the body of the document." *Coffman v. Woods*, 696 S.W.2d 386, 387 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) (joint will provision stating that spouses agree the will cannot be changed without the consent in writing of the other constitutes a contractual will).

Prior to the passage of Section 59A, determining whether a contract existed regarding the making or not revoking of a will was a fact issue. See generally *Meyer v. Texas National Bank of Commerce of Houston*, 424 S.W.2d 417 (Tex. 1968); *Kirk v. Beard*, 345 S.W.2d 267 (Tex. 1961); *Pearce v. Meek*, 780 S.W.2d 291-294 (Tex. App.--Tyler 1989, no writ); and *Kilpatrick v. Estate of Harris*, 848 S.W.2d 849 (Tex. App.--Corpus Christi 1998, no writ). A specific statement in the will that it was not contractual would resolve any doubt. Even after the passage of Section 59A of the Texas Probate Code, such a statement is helpful in making clear to both spouses that either of them may change their wills at any time that they wish to do so. But see *Stephens v. Stephens*, 877 S.W.2d 801, 804 (Tex. App.--Waco 1994, writ denied) ("Making a contractual will does not take away the right of either party to revoke it").

## • Definition of Issue and Children.

**1. DEFINE "ISSUE" TO INCLUDE ALL DESCENDANTS.** The term "issue" should specifically be defined to refer to all descendants of the person indicated, and not just children of the person indicated, because some courts have construed the terms "issue" and "children" interchangeably. See *Guilliams v. Koonsman*, 279 S.W.2d 579, 583 (Tex. 1955); E.S.O., Annotation, "Issue" Used as Word of Purchase, 2 A.L.R. 930 (1919). However, Texas courts have generally established that the word "issue" interpreted in its ordinary sense embraces all descendants when there is nothing in the language of the instrument to show that a narrower interpretation was intended. *Atkinson v. Kettler*, 372 S.W.2d 704, 711-12 (Tex. Civ. App.--Dallas 1963), *rev'd on other grounds*, 383 S.W.2d 557 (Tex. 1964).

**2. LIMITED TO LEGITIMATE ISSUE UNLESS OTHERWISE PROVIDED.** The terms "issue" and "children" are generally limited to legitimate issue and children, respectively, to remove the incentive from beneficiaries "popping out of the woodwork" claiming that they are long-lost illegitimate children of the testator. Texas cases have generally recognized that references to a "child," "issue," or "children," without more, does not include illegitimate children. *Hayworth v. Williams*, 116 S.W. 43, 45 (Tex. 1909); *Tindol v. McCoy*, 535 S.W.2d 745, 751 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.).

## 3. INCLUDE AFTERBORN CHILDREN.

The definition of children should specifically include afterborn children. Otherwise, Section 67 of the Texas Probate Code might apply to invalidate the will. See Part 2IV.B.2 at page 35 of this outline.

## 4. SPECIFICALLY INDICATE WHETHER ADOPTED ISSUE AND CHILDREN INCLUDED.

The terms "issue" and "children" should specifically be defined to indicate whether adopted children are included in order to avoid possible confusion. Section 162.017(c) of the Texas Family Code provides that "the terms 'child,' 'descendant,' 'issue,' and other terms indicating the relationship of parent and child include an adopted child unless the context or express language clearly indicates otherwise." TEX. FAM. CODE ANN. § 162.017(c) (Vernon 2002). One court of appeals case stated, however, that this adoption statute (the predecessor section) "is no more than an aid to be employed in the construction of the will, and is not controlling." *Sharp et. al. v. Broadway Natl. Bank*, 761 S.W.2d 141, 145 (Tex. App.--San Antonio 1988, no writ) (court relied primarily on the following provision in will to conclude that testator's intent was not to include adopted children of his brother as beneficiaries: "so that my relatives of the whole blood and/or their issue shall receive the greatest benefit therefrom and not any strangers, relatives of the half blood, or their issue"). See *Ortega v. First Republic Bank Fort Worth, N.A., Trustee*, 792 S.W.2d 452 (Tex. 1990) (trust beneficiaries included "any other great-grandchildren who may be born after my death"; such language indicates intent to exclude adopted children). See generally, TEX. PROB. CODE ANN. § 3(b) (Vernon 2003); 10 BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS §§ 47.10-47.13 (3d ed. 2002).

The Texas Supreme Court has held that an adopted adult is included under a bequest to "descendants" in a will specifically defining descendants to include adopted children and issue. *Lehman v. Corpus Christi Nat'l Bank*, 668 S.W.2d 687 (Tex. 1984). Some courts from other jurisdictions have reached opposite results. E.g., *First Nat'l Bank of Dubuque v. Mackay*, 338 N.W.2d 361 (Iowa 1983) (the phrase "legally adopted child" carries an expectation of a parental relationship, requiring the adopted child to have been a minor reared in the adopted home). See O. Webster & C.C. Marvel, Annotation, *Adopted Child as Within Class in Testamentary Gift*, 86 A.L.R.2d 12 (1962).

One Texas court of appeals decision suggests that the term "issue" carries a greater connotation of blood relationship than the term "descendants." *Diemer v. Diemer*, 717 S.W.2d 160, 162 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

## • Definition of Survival.

Section 47 of the Texas Probate Code includes a 120-hour survival requirement of devisees and beneficiaries, and the statute was amended effective September 1, 1993 to provide that it applies to real property joint tenancies and to community property held

by spouses with right of survivorship. TEX. PROB. CODE ANN. § 47 (Vernon 2003). Despite the existence of Section 47, the testator will generally want to condition a bequest upon a greater period of survival, such as 30 or 60 days, to avoid the necessity of administering the same property in successive estates. However, because any such express survival provision will supplant the general rule of Section 47, the draftsman must be careful to prepare a provision that thoroughly addresses the survival issue. TEX. PROB. CODE ANN. § 47(f) (Vernon 2003); *See Acord Estate v. Commissioner*, 946 F.2d 1473, 91-2 USTC ¶ 60,090 (9th Cir., 1991) (will survival provision rendered Arizona's 120-hour survival statute inapplicable, resulting in distribution to spouse who survived by only 38 hours); and *Thomasson v. Kirk*, 859 S.W.2d 493 (Tex. App.--Houston [14th Dist.] 1993, writ denied) (upholding as valid a requirement that beneficiaries survive until "the administration of my estate is complete and divided," with result that beneficiary who died five years after decedent did not take).

### • Definition of Per Stirpes.

The will should contain an explicit definition of per stirpes, to clarify where the determination of the "stirpes," or family lines, should begin. See Part 2IV.B.4.b at page 38 of this outline for such a definition.

### • Headings Not Used in Construing Will.

The basic principle of the construction of wills is to ascertain the testator's intentions. A will is generally construed so as to give effect to every part of the instrument. *Republic National Bank of Dallas v. Fredricks*, 283 S.W.2d 39, 42-43 (Tex. 1955). Therefore, unless the will provides otherwise, any headings in the will would apparently be taken into consideration in construing the will. Because the headings are necessarily extremely brief and cannot possibly accurately describe the entire subject matter covered in the particular provision, draftsmen typically provide that any headings used in the will shall not be used in construing the will.

### • In Terrorem Clause.

A forfeiture or a no-contest provision may be inserted specifying that a beneficiary who contests a will shall receive no benefits under the will. *See generally*, Jo Ann Engelhardt, *In Terrorem Inter Vivos: Terra Incognita*, 26 REAL PROP., PROB. & TR. J. 3 (Fall 1991).

**1. TEXAS CASES GENERALLY RECOGNIZE VALIDITY.** Various Texas cases have recognized the validity of forfeiture clauses. *Hodge v. Ellis*, 268 S.W.2d 275, 287 (Tex. Civ. App.--Fort Worth 1954), *aff'd in part*, 277 S.W.2d 900 (1955) (forfeiture clause would be applicable if a contest is brought to thwart a testator's will); *McLendor v. Mandel*, No. 0S-90-01329-CV (Tex. App.--Dallas 1991, no writ) (validity of forfeiture clause in inter vivos trust upheld).

## **2. FORFEITURE CLAUSES GENERALLY NOT ENFORCED WHERE BENEFICIARY CONTESTS WILL FOR REASONABLE CAUSE.**

Texas apparently follows the majority view in holding that although forfeiture clauses are valid and enforceable, a forfeiture of rights under the terms of the Will will not be enforced where the contestant pleads and proves that his contest of the will was made in good faith and upon reasonable cause. *Hammer v. Powers*, 819 S.W.2d 669 (Tex. App.--Fort Worth 1991, no writ); *Calvery v. Calvery*, 55 S.W.2d 527, 530 (Tex. Comm'n App. 1932, opinion adopted 1932) (apparently dictum, because court held the action was not a will contest). *See also Gunter v. Pogue*, 672 S.W.2d 840, 842-45 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.) (court stated that no Texas cases have clearly held that a good faith and probable cause exception exists in a case involving a will contest where there was a forfeiture provision in the will, but concluded after reviewing the various Texas cases that have discussed the exception that "given the proper circumstances, Texas would and probably should adopt the good faith and probable cause exception"; upheld forfeiture because contestants did not request a good faith and probable cause finding, and they had burden to establish that contest was brought in good faith and upon probable cause in order to defeat the forfeiture provision); *First Methodist Episcopal Church South v. Anderson*, 110 S.W.2d 1177, 1184 (Tex. Civ. App.--Dallas 1937, writ dis'm'd); *W. Harry Jack, No Contest or In Terrorem Clauses in Wills--Construction and Enforcement*, 19 S.W.L.J. 722 (1965).

## **3. ACTIONS NOT CAUSING FORFEITURE.**

The forfeiture clause will not be given effect if a suit is merely brought to construe a will as opposed to contesting it. *Calvery v. Calvery*, 55 S.W.2d 527, 530 (Tex. Comm'n App. 1932, opinion adopted); *Upham v. Upham*, 200 S.W.2d 880, 883 (Tex. Civ. App.--Eastland 1947, writ ref'd n.r.e.). Furthermore, a request for accounting, petition, and distribution under a will is not a contest within the terms of a forfeiture clause. *In Matter of Minnick*, 653 S.W.2d 503, 507-508 (Tex. App.--Amarillo 1983, no writ). A beneficiary's/judgment creditor's application for a turnover order requesting that any proceeds another beneficiary receives from the estate be used to satisfy the judgment does not come within the scope of a forfeiture clause. *Badouh v. Hale*, 22 S.W.3d 392, 397 (Tex. 2000). *See generally* Claudia G. Catalano, Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary*, 3 A.L.R.5th 590 (1992).

The mere filing of a petition to determine the testator's intent does not invoke an *in terrorem* clause unless the clause specifically states that "merely filing" a petition will cause a forfeiture under the *in terrorem* clause. *Sheffield v. Scott*, 662 S.W.2d 674 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.); *In re Estate of Hamill*, 866 S.W.2d 339 (Tex. App.--Amarillo 1993, no writ) ("mere filing" of will contest not sufficient to trigger forfeiture if contest is later dismissed "prior to any legal proceedings being held on the contest and if

the action is not dismissed pursuant to an agreement settling the suit"). Filing a declaratory judgment suit requesting a court to decide if entering into a family settlement agreement would cause forfeiture does not activate a forfeiture provision that applied if a devisee were to "question or contest any provision of this will." *In re Estate of Hodges*, 725 S.W.2d 265, 268 (Tex. App.--Amarillo 1986, writ ref'd n.r.e.).

If the clause provides that a beneficiary will forfeit his or her interest in the estate if he or she aids the contest of another (even though he or she does not personally contest the will), it appears that the clause could be valid, but only to a limited extent. Public policy "dictates that a will cannot require beneficiaries to lie, misrepresent the facts, or decline to answer questions posed while giving sworn testimony on the witness stand" and "courts need not enforce a disposition under a will if it violates the law or public policy." Thus, a forfeiture clause should not be enforceable solely on the ground that the beneficiary voluntarily rendered damaging yet truthful testimony. *See Hazen v. Cooper*, 786 S.W.2d 519, 520-521 (Tex. App.--Houston [14th Dist.] 1990, no writ) (material issue as to the truthfulness of the beneficiary's damaging, voluntarily rendered testimony precluded summary judgment enforcing forfeiture clause against her). Likewise, public policy should prohibit a forfeiture triggered solely by the filing of a suit for breach of fiduciary duty. *McLendon v. McLendon*, 862 S.W.2d 662 (Tex. App.--Dallas 1993, writ denied) ("The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship").

**4. CLAUSE SHOULD BE BAITED.** The testator should leave a sufficient amount to relatives intended to be discouraged from contesting the will so that the forfeiture clause will serve as a real disincentive from contesting the will. Otherwise, the beneficiary has nothing to lose from contesting the will, and the forfeiture clause is basically meaningless.

**5. EFFECT ON AVAILABILITY OF MARITAL DEDUCTION.** One might argue that the existence of an in terrorem clause might cause the value of a bequest to a surviving spouse to be reduced. However, the IRS has ruled in a Technical Advice Memorandum that a conditional bequest subject to the condition that the spouse agree not to contest the will did not affect the availability of the estate tax marital deduction for the full value of the bequest. Technical Advice Memorandum 8727002.

• **Stating Reasons Why Particular Beneficiaries Receive Nothing; Testamentary Libel.**

The testator may leave out or expressly disinherit a particular relative. (See Part 2IV.A.2 at page 31 of this outline). In such a case and in other situations, the testator may wish to specify the reasons for his actions. The testator may desire to specify the reason that a particular relative has not received any benefit under the will. In certain circumstances, specifying such a reason

could prevent hurt feelings on the part of that beneficiary, particularly in situations where the omission is simply because there were other beneficiaries who were more needy. *See Ellsworth v. Ellsworth*, 151 S.W.2d 628 (Tex. Civ. App.--El Paso 1941, writ ref'd). However, the clause should be stated carefully so that it cannot be construed as making the will conditional upon the facts stated.

Be very wary about allowing the testator to use his or her will as a chance to take a parting blow at anyone. An increasing number of testamentary libel cases have arisen in recent years. Some cases suggest that it does not take an overly provocative statement to induce a finding of testamentary libel, because in such cases juries tend to determine whether the will is fair rather than whether the statement is libelous. *See Brown v. DuFrey*, 134 N.E.2d 469 (N.Y. 1956) (jury found that the following statement was libelous, granting damages equal to approximately one-half of the estate: "I am mindful of the fact that I have made no provision for John H. Brown, my husband. I do so intentionally because of the fact that during my lifetime he abandoned me, made no provision for my support, treated me with complete indifference, and did not display any affection or regard for me."). *See Leona M. Hudak, The Sleeping Tort: Testamentary Libel*, 12 CAL. W.L. REV. 491 (1976); Osborne M. Reynolds, Jr., *Defamation from the Grave: Testamentary Libel*, 7 CAL. W.L. REV. 91 (1971); A.L. Schwartz, Annotation, *Libel by Will*, 21 A.L.R.3d 754 (1968).

• **Designation of Attorney for Estate.**

The will may attempt to include a provision directing the personal representative to retain a specified attorney to represent the estate. However, such a provision does not bind the personal representative and may be disregarded. *Mason & Mason v. Brown*, 182 S.W.2d 729, 733-34 (Tex. Civ. App.--Dallas 1944, writ ref'd w.o.m.). *But see Kelly v. Marlin*, 714 S.W.2d 303 (Tex. 1986) (designation of real estate agent treated as conditional bequest to the agent). However, in some cases the fiduciary may welcome a precatory suggestion by the testator as an expression of his preference.

• **Attestation Clause.**

The attestation clause appears directly above the witnesses' signatures, restates the basic execution requirements, and specifically states that the witnesses are "attesting" the will. See TEX. PROB. CODE ANN. § 59 (Vernon 2003) (requirement that the will "be attested by two ... witnesses ... who shall subscribe their names thereto"). The attestation clause is not essential to the validity of the will, but can assist in making out a prima facie case that the will was duly executed, even though the witnesses predeceased the testator or cannot recall the events of execution. *Matter of Estate of Page*, 544 S.W.2d 757, 760 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.); see R.D. Hursh, Annotation, *Weight and Effect of Presumption or Inference of Due Execution of Will*, 40 A.L.R.2d 1223 (1955). However,

the prima facie case of valid execution by an attestation clause and self-proving affidavit may be rebutted by contradictory testimony. See *Jimmy Swaggart Ministries v. Tex. Commerce Bank Nat'l Ass'n*, 662 S.W.2d 774 (Tex. App.--Houston [14th Dist.] 1983, no writ hist.).

### • Self-Proving Affidavit.

Section 59 of the Texas Probate Code provides a procedure for making a will "self-proved" by attaching a notarized certificate as described in Section 59. TEX. PROB. CODE ANN. § 59 (Vernon 2003). The self-proved will may be admitted to probate without the testimony of any of the subscribing witnesses. Because this greatly simplifies and quickens the process of admitting a will to probate, every will should be made self-proved.

Effective as of September 1, 1991, the self-proving affidavit must state that it has been "sworn to" by both the testator and the witnesses. Under prior law, the affidavit had to be "sworn to" by the witnesses and "acknowledged" by the testator; if the witnesses merely "acknowledged" the affidavit, the will would not be self-proved. *Cutler v. Ament*, 726 S.W.2d 605, 607 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). As amended, Section 59 provides that substantial compliance with the prescribed form is sufficient and specifically provides that self-proving affidavits that are "sworn to" by the witnesses and "acknowledged" by the testator will suffice. See also *Bank One, Texas v. Ikard*, 885 S.W.2d 183, 187 (Tex. App.--Austin 1994, writ denied) (self proving affidavit held to substantially comply with statutory form where the words "that said instrument is his last will and testament, and" were left out).

In executing the will, the testator and witnesses should be careful to sign both the will itself and the self-proving affidavit. Effective as of September 1, 1991, if the testator or a witness fails to sign the will a signature on the self-proving affidavit may be treated as a signature on the will, although in such a case the will will not be treated as self-proved. (See Parts 11.D.2.h and 11.D.3.f at pages 6 and 9 of this outline.) Thus, if a signature is missing from either the will or the affidavit, the advantages of the self-proving affidavit will be lost. Under prior law where the will lacked a necessary signature, it was invalid. See *Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1985); *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966) (witnesses did not sign immediately after the will but only signed the attached self-proving affidavit; will held not validly executed); *Wich v. Fleming*, 652 S.W.2d 353, 354 (Tex. 1983) (testator signed at end of will, but witnesses only signed self-proving affidavit; will denied probate).

### • Significance.

Nonprobate assets pass pursuant to directions other than under the owner's will. Examples of nonprobate assets include life insurance proceeds payable to a designated beneficiary, death proceeds from employee benefit plans payable to a designated beneficiary, annuities, joint tenancy properties passing by right of survivorship (including nontestamentary transfers provided for in Chapter XI of the Texas Probate Code), Series "E" federal savings bonds, and certain government benefits made payable directly to specified persons (such as the social security death benefit for a surviving spouse).

These nonprobate assets may, in many cases, comprise a very significant part of the client's total assets. Coordinating the beneficiaries of these benefits with the last will and testament is therefore critical.

### • Drafting Considerations.

Ordinarily, these benefits are made payable directly to the client's spouse if the spouse is surviving. A 10-day, 30-day or 60-day survival requirement is often stated to avoid multiple administration problems if the spouse dies in a common accident or soon after the owner spouse. See TEXAS PROBATE CODE ANN. § 47(e) (Vernon 2003) (120-hour survival requirement for life insurance proceeds). If there is no surviving spouse, and if contingent trusts are established under the will for minor beneficiaries, the proceeds should ordinarily be made payable to the trustee of those trusts under the person's will or to the person's estate (in which event the proceeds would pass under the will with other probate assets). Naming the person's estate as the beneficiary, however, may subject the proceeds to debts of the estate (including, for example, tort claims that may arise if the person dies in an accident in which he negligently causes damage to others).

### • Buy-Sell Agreements.

If the client owns an interest in any closely held partnership or corporation, the client's interest may be subject to being purchased at his death under a buy-sell agreement. Any such agreements should be reviewed to assure that the purchase price under the agreement is still valid, and to coordinate the effects of such a purchase with the will provisions. See Part 2III.A.3 at page 24 of this outline regarding self-dealing limitations on executors that may affect implementing sales under buy-sell agreements.

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## PART 3.

### COORDINATING NONPROBATE ASSETS

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## PART 4.

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### APPENDICES

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#### Appendix A Checklist for Will Review.

The following checklist summarizes this outline into a brief checklist for reviewing wills.

1. Preamble
  - a. State name and domicile
  - b. Revoke prior wills
2. Identification of Family and Property
  - a. Identify spouse and children
  - b. Make sure afterborn children are provided for or mentioned to avoid Section 67b
  - c. Identify stepchildren and discuss whether included as beneficiaries
  - d. Identify property being disposed of and whether any election intended
  - e. Negate exercise of any powers of appointment (if no exercise intended)
3. Appointment of Fiduciaries
  - a. Executor
    - Appoint independent executor(s), tracking Section 145(b) of Probate Code
    - Appoint successor independent executor(s)
    - Waive executor's bond
  - b. Trustee
    - Appoint trustee(s)
    - Appoint successor trustee(s)
    - Consider income and estate tax effects to appointed trustees
    - Waive trustee's bond
  - c. Guardian -- appoint guardian(s) -- (co-guardians must be spouses, joint managing conservators or co-guardians under the laws of another state)
4. Specific Bequests
  - a. Furnishings and personal effects
    - Include to qualify for Section 663(a)(1) treatment
  - b. Refer to large items if any possible confusion
  - Include casualty insurance
  - Any large outstanding encumbrances?
  - Alternate beneficiaries
  - Mechanics for allocating among multiple beneficiaries
  - Effect of reference to a separate list
  - b. Specific tangible property items
    - Identify sufficiently
    - Alternate beneficiaries
  - c. Residence or Other Real Estate
    - Identify sufficiently
    - Apply to replacement residence
    - Subject to existing encumbrance
    - Include insurance
    - Alternate beneficiaries
    - Consider backup bequest of sales proceeds or pecuniary legacy to avoid effect of ademption
  - d. Pecuniary Legacies
    - Is estate large enough to accommodate
    - Right to interest or pecuniary amount
  - e. Specific exemption equivalent bequest or marital deduction bequest
    - Consider tax effect of choice of exemption equivalent versus marital deduction specific bequest
    - In formula, exclude consideration of state death tax credit to the extent it increases the federal estate tax
    - Direct that only assets qualifying for marital deduction may be allocated to marital deduction specific bequest, or direct that nonqualifying assets be allocated to exemption equivalent specific bequest
    - For marital deduction specific bequest, assure Rev. Proc. 64-19 is satisfied (i.e., use fractional share, or use date of distribution values or minimum worth clause for pecuniary bequest)
    - Provide for disclaimer of marital deduction specific bequest
    - If a QTIP Trust is used (1) give directions or guidance and exonerate executor re: election, and (2) provide mechanics for payment of estate tax at spouse's subsequent death
  - f. Charitable Bequests
    - Verify identity of beneficiaries and tax-exempt status
    - Tax allocation

- g. Abatement clause if many specific bequests
- 5. Residuary Estate
  - a. Dispose of all property
  - b. Provide contingent trusts for minors or beneficiaries under specified age
  - c. Provide for alternate beneficiaries, ultimately to heirs or permanent organizations (any lapse may cause partial or total intestacy)
- 6. Apportionment of Debts, Expenses, and Taxes
  - a. Do not *require* payment of debts
  - b. Allocate away from marital deduction bequest or charitable bequest
  - c. Except out any taxes payable under Section 2044 attributable to QTIP Trusts
  - d. Except out generation-skipping transfer taxes
  - e. Specifically state whether taxes on nonprobate assets should be paid out of probate estate
- 7. Trust Provisions
  - a. Identify name of trust(s)
  - b. Identify beneficiaries
  - c. Standards for distributing income and principal; consider estate tax effects of distributional provisions
  - d. Discretionary powers workable and trustee exonerated (if desired) regarding distributions
  - e. Special distributions (to buy home, etc.)
  - f. Limited power of appointment
  - g. Termination provisions well-defined
  - h. Amounts passing on termination to alternate beneficiaries who are beneficiaries of another trust under the will pass to that trust
- 8. Trust and Executor Powers
 

*Trust Code Powers -- Trust Code gives these powers unless negated:*

  - a. Retain assets
  - b. Receive additional assets
  - c. Acquire remainder of undivided interests
  - d. Broad management and investment power
  - e. Investment in business entities
  - f. Power to sell -- including for credit
  - g. Lease real or personal property
  - h. Mineral investments (including exploration and development activities)
  - i. Power to borrow
  - j. Management of securities
  - k. Holding securities in nominee form
  - l. Employ agents
  - m. Compromise and settle claims
  - n. Abandon worthless property
  - o. Distribution for minor or incapacitated beneficiary
  - p. Provide residence for beneficiaries and pay funeral expenses
  - q. Ancillary trustee
  - r. Prudent man standard for investments
  - s. Principal-income allocations
  - t. Accountings
  - u. Liability of trustee
  - v. Compensation of trustee

*Additional Trust Provisions*

  - a. Perpetuities savings clause
  - b. Spendthrift provision (consider negating application to QTIP Trust)
  - c. Small trust termination
  - d. Consolidation of trust funds
  - e. Merger of trusts
  - f. Situs, changing trust situs, choice of law
  - g. Receipt and allocation of employee benefits and insurance proceeds

*Additional Fiduciary Powers*

- a. Broadened investment powers; negate duty to diversity (if desired)
- b. Power to give guarantee
- c. Employ and rely on investment advisor
- d. Power to lend
- e. Delegation powers, especially for temporary absence
- f. Hold assets (other than just securities) in nominee form
- g. Broadened principal-income apportionment authority
- h. Partition and division power
- i. Business interests (exculpatory language, extra compensation, trustee can transact similar business individually)
- j. Procedure for resignation
- k. Exoneration of successor fiduciaries for breach by predecessor
- l. Liability; exculpatory clause if desired
- m. Compensation (especially, provide reasonable compensation for executors)
- n. Removal provisions
- o. Remove self-dealing restrictions (sales between trusts, sales or purchases to or by trustees and executors)

*Special Executor Powers*

- a. Incorporate trustee powers
- b. Authorize direct distributions to beneficiaries if trust terminated; loans or purchases by trust to estate
- c. Give discretion re tax elections, consider equitable adjustments for tax elections

## 9. Miscellaneous Provisions

- a. Definitions
  - Issue and children (include afterborn and adopted children)
  - Survival requirement or other simultaneous death provision
  - *Per stirpes*
- b. Will not contractual

- c. Headings not used in construction
- d. *In terrorem* clause if desired
10. Attestation clause and self-proving affidavit
11. Will appears to be properly executed

## Appendix B Will Forms

THE FOLLOWING FORMS ARE FOR ILLUSTRATIVE PURPOSES ONLY. THE PRACTITIONER SHOULD MAKE HIS OR HER OWN INDEPENDENT EVALUATION AND DETERMINATION AS TO WHETHER AND TO WHAT EXTENT THEY MAY BE APPROPRIATE IN ANY GIVEN SITUATION AND AS TO WHETHER AND TO WHAT EXTENT THEY SHOULD BE REVISED FOR USE IN A GIVEN SITUATION. THE AUTHORS AND THE PUBLISHER ARE NOT RESPONSIBLE FOR THE TAX OR OTHER CONSEQUENCES OF USING THESE FORMS IN ANY PARTICULAR SITUATION. USE THEM AT YOUR OWN RISK.

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### 1. SIMPLE "SWEETHEART" WILL

#### **WILL OF WARD M. CLEAVER**

I am WARD M. CLEAVER of Harris County, Texas. This is my Will. I revoke all earlier wills and codicils.

I am married to June A. Cleaver. I have two children: Wallace Cleaver, born March 21, 1977, and Theodore Cleaver, born May 31, 1983. Every reference in this Will to a "child" or "children" of mine is to them and all other children who may be born to or adopted by me in the future.

#### ARTICLE 1 - FIDUCIARY APPOINTMENTS

- 1.1. Executors. I name the following, in the following order, as sole Independent Executor of this Will, without bond: June A. Cleaver, otherwise Wallace Cleaver, otherwise Theodore Cleaver.
- 1.2. Trustees. I appoint the following, in the following order, as sole Trustee of every trust created under this Will: June A. Cleaver, otherwise Wallace Cleaver, otherwise Theodore Cleaver. If all of the above (and any successors) fail or cease to serve as Trustee of any trust, the Trustee Appointer (designated in Section 5.2) shall appoint a Trustee of that trust in accordance with the provisions of Section 5.3.

#### ARTICLE 2 - SPECIFIC TESTAMENTARY GIFTS

- 2.1. Personal Effects. I give all of my jewelry, pictures, photographs, works of art, books, household furniture and furnishings, clothing, automobiles, boats, recreational vehicles and equipment, club memberships, burial plots, and articles of household or personal use or ornament of all kinds (collectively, my "personal effects"), as follows, subject to the provisions of Section 6.10.
  - A. Memorandum On Personal Effects. I may leave a memorandum making one or more personal effects gifts. If the memorandum is wholly in my own handwriting, signed by me, and dated on or after the date of this Will: (i) it shall be deemed to be a codicil to this Will; (ii) all gifts specified in the memorandum shall be made prior to making any of the following gifts; and (iii) if the memorandum conflicts with any of the following gifts, the memorandum shall control.
  - B. Gift Of Remaining Personal Effects. To the extent not disposed of by the above, I give all of my remaining personal effects to my wife, if she survives me. If my wife does not survive me, I give my remaining personal effects to my children who survive me, in equal shares.
  - C. Division Of Personal Effects. Any personal effects given to two or more individuals shall be divided among them as they may agree among themselves. If they cannot agree on a division within a reasonable time following my death, the Executor shall make the division for them.
- 2.2. My Wife's Retirement Accounts. If my wife survives me, I give all of my interest, if any, in my wife's employee or self-employed benefit plans and individual retirement accounts to my wife.

#### ARTICLE 3 - REMAINING PROPERTY

After providing for payment of Debts, Expenses and Death Taxes as directed by Article 7, my Remaining Property (meaning the residue of my probate estate, including lapsed legacies and devises, but net of Debts and Expenses) shall be disposed of as provided in this Article.

- 3.1. Disposition If My Wife Survives Me. If my wife survives me, I give my Remaining Property to my wife.
- 3.2. Disposition If My Wife Does Not Survive Me But Descendants Survive Me. If my wife does not survive me but at least one child or other descendant of mine survives me, I give my Remaining Property to my children who survive me, in equal shares. However, if any child who fails to survive me leaves one or more descendants who survive me, the share that child would have received (if he or she had survived) shall be distributed per stirpes to his or her descendants who survive me. All of the preceding distributions are subject to the provisions of Article 4 (providing for Contingent Trusts for beneficiaries who are under age twenty-five or Incapacitated).
- 3.3. Contingent Disposition. Any part of my Remaining Property not effectively disposed of by the above provisions shall be distributed one-half to my then living Heirs (defined in Section 8.5) and one-half to the then living Heirs of my wife, subject to the provisions of Article 4 (providing for Contingent Trusts for beneficiaries who are under age twenty-five or Incapacitated).

#### ARTICLE 4 - CONTINGENT TRUSTS

- 4.1. Creation Of Trusts. All property that passes subject to the provisions of this Article that otherwise would be distributable by the Executor or Trustee to any beneficiary (other than my wife) who has not reached the age of twenty-five years or who, in the discretion of the Executor or Trustee, respectively, is Incapacitated (defined in Section 8.4), may instead be distributed to the Trustee as a separate Contingent Trust named for the beneficiary, to be administered as provided in this Article. When used in this Article, the words "the trust," "the beneficiary's trust," or "his or her trust" mean the Contingent Trust named for a particular beneficiary and the words "the beneficiary" mean that beneficiary.
- 4.2. Distributions During The Beneficiary's Life. During the life of the beneficiary, the beneficiary's trust shall be administered as follows.
  - A. General Discretionary Distributions. The Trustee shall distribute to the beneficiary so much or all of the income and principal of the beneficiary's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for the beneficiary's continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).
  - B. Mandatory Terminating Distribution To Beneficiary At Age Twenty-Five. Whenever the beneficiary (i) reaches the age of twenty-five years and, (ii) in the Trustee's discretion, is not Incapacitated (defined in Section 8.4), the Trustee shall distribute to the beneficiary the remaining property of his or her trust.
- 4.3. Termination And Final Distribution Upon The Beneficiary's Death. If the beneficiary dies before the complete distribution of his or her trust, the trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.
  - A. Distribution To Descendants. The remaining property of the beneficiary's trust shall be distributed per stirpes to the following individuals who survive the beneficiary: (i) the beneficiary's descendants, if any, otherwise, (ii) the descendants of the beneficiary's parent who is a child of mine, if any, otherwise, (iii) the descendants of the nearest ancestor of the beneficiary who is a descendant of mine and who has surviving descendants, if any, otherwise, (iv) the descendants of the beneficiary's parent who is more closely related to me, if any, otherwise, (v) my descendants, if any. All of the preceding distributions are subject to the provisions of this Article.
  - B. Contingent Disposition. Any property of the beneficiary's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Section 3.3 as if it were my Remaining Property and as if I had died on the termination date of the beneficiary's trust.

#### ARTICLE 5 - EXECUTOR AND TRUSTEE PROVISIONS

The provisions of this Article govern the fiduciary relationship of the Executor and the Trustee. When used in this Will, where the context permits, the term Executor means the executor from time to time serving; the term Trustee means the trustee or co-trustees from time to time serving; the term Fiduciary, means

any Executor or Trustee; and the "estate" of a Fiduciary means the particular probate or trust estate being administered by the Fiduciary.

5.1. Executor Succession.

- A. Executor Resignation. An Executor may resign at any time with or without cause by filing a resignation notice in the probate proceedings pertaining to my estate and by delivering a copy of the resignation notice (i) to the next successor Executor named in this Will, if any, and (ii) to each adult individual, corporation, trustee, or other beneficiary then entitled to or permitted to receive a distribution from my estate as of the date the resignation notice is given.
- B. Failure Or Cessation Of Every Named Executor. If every named Executor fails or ceases to serve, I desire that the successor administrator appointed by the court serve as independent administrator without bond or other security and with all the powers of the named Executors.

5.2. Trustee Succession.

- A. Trustee Appointer. I name the following persons, in the following order, to serve as the Trustee Appointer: (i) June A. Cleaver, otherwise (ii) as to any Contingent Trust, the named beneficiary, if legally competent, otherwise the parent or guardian of the named beneficiary, if any, otherwise (iii) my oldest then living adult descendant, if any.
- B. Resignation. A Trustee may resign as Trustee of any one or more trusts created under this Will at any time, with or without cause, by delivering a resignation notice in recordable form (i) to each adult beneficiary of the trust who is then permitted to receive distributions from the trust and (ii) to the next successor Trustee named in this Will, if any, otherwise, to the Trustee Appointer (but only if the Trustee Appointer's action is required to fill the resulting vacancy). The Trustee's resignation shall be effective only upon the acceptance and qualification of the successor.

5.3. Trustee Appointment Procedures.

- A. Generally. Every appointment of a Trustee must be evidenced by a written instrument in recordable form, signed by the person (or the requisite number of persons) required to approve the appointment, and delivered to the appointee. The instrument must identify the appointee, state the effective time and date of appointment, and contain an acceptance by the appointee. Except as otherwise provided, every Trustee appointed under this Will must be either a Qualified Corporation or one or more Qualified Individuals.
- B. Qualified Individual. The term Qualified Individual means any legally competent individual who has attained the age of thirty years and who is willing to serve under this Will.
- C. Qualified Corporation. The term Qualified Corporation means any corporation having trust powers that is qualified and willing to serve under this Will and that has, as of the relevant time, either (i) a minimum capital and surplus of at least five million dollars (\$5,000,000 U.S.), or (ii) at least one hundred million dollars (\$100,000,000 U.S.) in trust assets under administration.

5.4. Fiduciary Compensation.

- A. Expense Reimbursement And Reasonable Compensation. Each Fiduciary shall be reimbursed from its estate for the reasonable costs and expenses incurred in connection with the administration of its estate and also shall be entitled to receive fair and reasonable compensation from its estate (payable at convenient intervals selected by the Fiduciary) considering: (i) the duties, responsibilities, risks, and potential liabilities undertaken; (ii) the nature of its estate; (iii) the time and effort involved; and (iv) the customary and prevailing charges for services of a similar character at the time and at the place the services are performed.
- B. Waiver Of Right To Compensation. Any Fiduciary may at any time waive a right to receive compensation for services rendered or to be rendered as Fiduciary.

5.5. Fiduciary Liability.

- A. Generally. A Fiduciary who has made a reasonable, good faith effort to exercise the standard of care and other fundamental duties applicable to the Fiduciary in Section 6.2 and the other provisions of this Will shall not be liable: (i) for any loss that may occur as a result of any actions taken or not taken by the Fiduciary; (ii) for the acts, omissions or defaults of any other individual or entity serving as Fiduciary or as ancillary fiduciary; nor (iii) to any person dealing with the Fiduciary in the administration of its estate, unless the Fiduciary expressly contracts and binds itself personally. For purposes of the preceding, a Fiduciary's conduct shall be judged in light of the facts and circumstances existing at the time and not by hindsight.
- B. Uncompensated Individual Fiduciary. In addition, an individual serving as Fiduciary without compensation, including an individual who has at all relevant times waived his or her right to compensation, shall never be liable to any person for any consequences of any action (or inaction) unless he or she takes the action (or inaction) in bad faith, with gross negligence, or with intentional or reckless disregard for his or her duties as Fiduciary.
- C. Reimbursement. An individual or entity serving as Fiduciary shall be entitled to reimbursement from its estate for any liability or expense, whether in contract, tort or otherwise, reasonably incurred by the Fiduciary in the administration of its estate.

5.6. Transactions In Which The Fiduciary Has An Interest. Notwithstanding any contrary provisions of the Texas Probate Code, the Texas Trust Code or other applicable law: (i) any individual or entity serving as Fiduciary under this Will may engage his or her estate in transactions with himself or herself personally (or otherwise), so long as the Fiduciary establishes that the consideration exchanged in the transaction is fair and reasonable to his or her estate; and (ii) any Fiduciary may engage its estate in transactions with itself personally (or otherwise) pursuant to the terms of any valid and enforceable executory contract signed by me. Whenever the office of Trustee is filled by more than one person, any transaction in which a Trustee has a personal interest must be approved by all Trustees.

5.7. Independent Administration Without Bond. No action shall be required in any court in relation to the settlement of my estate other than the probating and recording of this Will and the return of an inventory, appraisal and list of claims of my estate. So far as can be legally provided, all of the powers and discretions granted to a Fiduciary shall be exercised without the supervision of any court. No bond or other security shall be required of any primary or successor Fiduciary in any jurisdiction, whether acting independently or under court supervision.

5.8. Ancillary Fiduciary. If at any time and for any reason a Fiduciary is unwilling or unable to act as Fiduciary as to any property subject to administration in any jurisdiction (other than the jurisdiction in which the Fiduciary is serving), then, to the extent permitted by applicable law, the Fiduciary may appoint (and remove) any one or more Qualified Individuals or a Qualified Corporation (both terms defined in Section 5.3) to act as ancillary fiduciary on such terms as the Fiduciary may deem appropriate.

5.9. Restrictions On Beneficially Interested Trustee; Independent Trustee. No Trustee shall ever possess or exercise any powers with respect to, or authorize or participate in any decision as to: (i) any discretionary distribution or any loan to or for the benefit of himself or herself, except to the extent that the distributions or loans are limited by an ascertainable standard relating to his or her health, maintenance, support, or education; (ii) any discretionary distribution to any other beneficiary in discharge of any of his or her legal obligations; (iii) the termination of the trust because of its small size, if the termination would result in a distribution to himself or herself or if the distribution would discharge any of his or her legal obligations; nor (iv) the treatment of any estimated income tax payment as a payment by him or her, except to the extent that the payment is limited by an ascertainable standard relating to his or her health, maintenance, support, or education. Each such decision shall be made solely by the "Independent Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: the next successor Trustee(s) designated under this Will, if any, otherwise, a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Independent Co-Trustee is appointed under these circumstances, the sole power and responsibility of the Independent Co-Trustee shall be to make decisions reserved to the Independent Trustee under this Section.

- 5.10. Restrictions On Insured Trustee; Insurance Trustee. No Trustee who is an "Insured Person" (meaning a person who is an insured under a life insurance policy with respect to which the trust owns any interest or holds any rights or powers) shall ever possess or exercise any rights or powers with respect to the policy, nor authorize or participate in any decision as to the policy, except as specifically authorized by this Section. Every such Trustee who serves as sole Trustee must: (i) designate the Trustee of the trust as the beneficiary of the policy to the extent of the trust's interest in the policy; (ii) continue to pay the premiums on the policy without using policy loans; (iii) allow any policy dividends to reduce premiums; and (iv) upon termination of the trust, distribute the policy pro rata to the remainder beneficiaries of the trust. All decisions whether to take any different or additional actions with respect to the policy shall be made solely by the "Insurance Trustee", meaning the first of the following who is not an Insured Person with respect to the policy: the next successor Trustee(s) designated under this Will, if any, otherwise, a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Insurance Trustee is appointed under these circumstances, the sole power and responsibility of the Insurance Trustee shall be the exclusive authority to make discretionary decisions as to the policy.

#### ARTICLE 6 - ADMINISTRATIVE PROVISIONS

- 6.1. Duties At Inception Of Estate. Within a reasonable time after accepting a fiduciary appointment or receiving assets as a part of its estate, a Fiduciary shall (i) review the records, assets, beneficiaries, purposes, terms, distribution requirements, and all other relevant circumstances of its estate, and (ii) make and implement a distribution plan and an investment plan that are consistent with the purposes of its estate generally and that bring the estate portfolio into compliance with Sections 6.3 and 6.4.
- 6.2. Fundamental Fiduciary Duties. A Fiduciary shall administer its estate in good faith and in accordance with the terms of this Will and the law. Except as otherwise provided, the following fundamental provisions apply to all aspects of a Fiduciary's investment, management and administration of its estate.
- A. General Standard Of Care. A Fiduciary shall exercise the standard of care, skill, and caution generally exercised by compensated fiduciaries with respect to comparable estates in the same geographic area. A Fiduciary who has special skills or expertise, or is selected as a Fiduciary in reliance upon the Fiduciary's representation that the Fiduciary has special skills or expertise, has a duty to use those special skills or expertise.
- B. Loyalty And Impartiality; Primary And Secondary Beneficiaries. A Fiduciary shall act solely in the interest of the beneficiaries of its estate, not in the interest of the Fiduciary personally. If a Fiduciary's estate has two or more beneficiaries, the Fiduciary shall act impartially, taking into account any differing interests of the beneficiaries. However, a Fiduciary (i) may favor present income beneficiaries over future beneficiaries and (ii) shall favor "primary" beneficiaries over other beneficiaries and "secondary" beneficiaries over beneficiaries who are neither primary nor secondary.
- C. Conflict Resolution. A Fiduciary shall make a reasonable effort to resolve any conflicts (including conflicts as to favorable or adverse tax consequences) between or among the Fiduciary and those persons who are beneficially interested in its estate by mutual agreement. If after reasonable efforts the Fiduciary, in the Fiduciary's discretion, determines that a mutual agreement is not likely to be reached, the Fiduciary shall resolve the conflicts in the Fiduciary's discretion.
- D. Duty To Verify Facts. A Fiduciary shall make a reasonable effort to verify relevant facts. However, a Fiduciary may rely on (and need not independently verify): (i) the advice of any professional (including an agent, attorney, advisor, accountant, fiduciary, or other professional or representative) who was hired (or to whom duties were delegated) in accordance with this Will and with reasonable care; and (ii) any written instrument or other evidence that the Fiduciary reasonably believes to be accurate. (But a corporate Fiduciary shall always be liable for the acts, omissions and defaults of its affiliates, officers and regular employees.)
- E. Reliance On Predecessor Fiduciary. A Fiduciary may rely on the records and other representations of a Predecessor Fiduciary (meaning a predecessor Fiduciary under this Will or a personal representative or trustee of any estate or trust from which distributions

may be made to the Fiduciary), and need not request an accounting from or contest any accounting provided by a Predecessor Fiduciary. However, the preceding shall not apply to any Fiduciary to the extent that the Fiduciary (i) has received a request from a beneficiary having a vested material interest in its estate to secure an accounting or to conduct an investigation, or (ii) has actual knowledge of facts that would lead a reasonable person to believe that, as a consequence of any act or omission of a Predecessor Fiduciary, a material loss has occurred or will occur.

F. Special Rule For Uncompensated Individual Fiduciaries. Notwithstanding any contrary provision, whenever an uncompensated individual is serving as Fiduciary (meaning an individual serving with no right to compensation or who, at all relevant times, has waived his or her right to compensation), he or she: (i) may continue any style of investing that is consistent with the style of investing I undertook during my lifetime; and (ii) shall exercise that standard of care which is commensurate with his or her particular skills and expertise, or, to the extent lower, the general standard of care required of Fiduciaries without special skills or expertise.

6.3. Prudent Investor Rule. Except as otherwise provided, the prudent investor rule, as set forth in the following provisions, governs all aspects of a Fiduciary's investments.

A. Generally. A Fiduciary shall invest and manage the assets of its estate as a prudent investor would, by considering the purposes, terms, distribution requirements, and other relevant circumstances of its estate.

B. Investment And Management Authority. A Fiduciary may invest its estate in any kind of property or type of investment, and exercise the broadest managerial discretion over its estate, that is consistent with the other provisions of this Will.

C. Portfolio Theory. A Fiduciary shall make investment and management decisions respecting individual assets not in isolation but in the context of its estate portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to its estate.

D. Diversification. Generally, a Fiduciary shall diversify the investments of its estate unless the Fiduciary reasonably determines that, because of special circumstances, the purposes of its estate are better served without diversifying.

E. Originally Contributed Properties. Notwithstanding the preceding, a Fiduciary may continue to hold and maintain all assets originally contributed to its estate and all transmutations of those assets, without liability for any depreciation or loss that may result.

F. Unproductive Or Wasting Assets. A Fiduciary may receive, acquire and maintain unproductive or underproductive assets.

G. Speculative Investments. A Fiduciary may receive, acquire and maintain assets that may be categorized as speculative or hazardous.

6.4. Specific Management And Investment Authority. A Fiduciary's management and investment authority includes, but is not limited to, the following.

A. Securities And Business Interests. A Fiduciary may acquire securities, whether traded on a public securities exchange or offered through a private placement, and may trade on margin. A Fiduciary may form, reorganize or dissolve corporations, give proxies to vote securities, enter into voting trusts, and generally exercise all rights of a stockholder. A Fiduciary may continue, initially form, expand, and carry on business activities, whether in proprietary, general or limited partnership, joint venture, corporate, or other form, with any persons and entities.

B. Real Estate. A Fiduciary may purchase, sell, exchange, partition, subdivide, develop, manage, and improve real property.

C. Mineral Properties. A Fiduciary may acquire, maintain, manage, or sell mineral interests, and make oil, gas and mineral leases covering any lands or mineral interests forming a part of its estate, including leases for periods extending beyond the duration of its estate.

- D. Life Insurance. A Fiduciary may acquire, maintain in force, and exercise all rights of a policyholder under policies of life insurance insuring the life of a beneficiary of its estate, or an individual in whom such beneficiary has an insurable interest.
  - E. Joint Investments. A Fiduciary may invest its estate in undivided interests in any otherwise appropriate investment and may hold separate estates under this or any other instrument in one or more common accounts in undivided interests.
  - F. Manage, Sell And Lease. A Fiduciary may manage, sell, lease (for any term, even if beyond the anticipated term of its estate), partition, improve, repair, insure, and otherwise deal with all property of its estate.
  - G. Nominee Title. A Fiduciary may hold title to any property in the name of one or more nominees without disclosing the fiduciary relationship.
  - H. Loans And Guarantees. A Fiduciary may lend money to any individual or entity and may endorse, guarantee, become the surety of, provide security for, or otherwise become obligated for or with respect to the debts or other obligations of any individual or entity. All these transactions (except those for the benefit of any current beneficiaries of the particular estate involved) shall be on commercially reasonable terms, including adequate interest and security.
  - I. Borrow. A Fiduciary may assume, renew and extend any indebtedness previously created, and borrow for any purpose (including the purchase of investments or the payment of taxes) from any source (including a Fiduciary individually) at the then usual and customary rate of interest, and mortgage or pledge any property of its estate to any lender.
  - J. Pay Expenses. A Fiduciary may pay all taxes and all reasonable expenses, including reasonable compensation to the agents and counsel (including investment counsel) of the Fiduciary.
  - K. Claims. A Fiduciary may institute and defend suits and release, compromise or abandon claims.
  - L. Environmental Hazards. A Fiduciary may take all appropriate action to deal with any environmental hazard and comply with any environmental law, regulation or order, and may institute, contest or settle legal proceedings concerning environmental hazards.
- 6.5. Agents And Attorneys. A Fiduciary may employ and compensate agents, attorneys, advisors, accountants, and other professionals (including the Fiduciary individually and any professional organization with which the Fiduciary is affiliated) and may rely on their advice and delegate to them any authorities (including discretionary authorities).
- 6.6. Principal And Income. A Fiduciary shall allocate receipts and disbursements between principal and income in a reasonable manner and may establish a reasonable reserve for depreciation or depletion and fund this reserve by appropriate charges against the income of its estate. For purposes of determining income from a partnership or proprietorship, a Fiduciary may (but need not) utilize the partnership's or proprietorship's income as reported for federal income tax purposes.
- 6.7. Records, Books Of Account, And Reports. A Fiduciary shall maintain proper books of account which shall at all reasonable times be open for inspection or audit by all current permissible beneficiaries of its estate who are not Incapacitated. A Fiduciary shall make a written financial report of its estate, at least annually, to each current permissible beneficiary of its estate who is not Incapacitated and who has not waived the right to receive a report. Whenever my wife is serving as Fiduciary she may provide copies of bank, brokerage and other financial statements and that shall constitute a sufficient report of all assets and transactions disclosed on the statements.
- 6.8. Discretionary Distribution Considerations. Except as otherwise provided, in making discretionary distributions under this Will, the Trustee making the distribution decision may consider all circumstances and factors the Trustee deems pertinent, including: (i) the beneficiaries' accustomed standard of living and station in life; (ii) all other income and resources reasonably available to the beneficiaries and the advisability of supplementing their income or resources; (iii) the beneficiaries' respective character and habits, their diligence, progress and aptitudes in acquiring an education, and their ability to handle money usefully and prudently, and to assume

the responsibilities of adult life and self-support in light of their particular abilities and disabilities; and (iv) the tax consequences of the Trustee's decision to make (or not to make) the distributions and out of which trust any distributions should be made. The Trustee shall not allow a beneficiary who reasonably should be expected to assist in securing his or her own economic support to become so financially dependent upon distributions from any trust that he or she loses an incentive to become productive in a manner that is reasonably commensurate with any other individual having the ability and being in the circumstances of the beneficiary. Whenever this Will provides that the Trustee "may" make a distribution, the Trustee may, but need not, make the distribution.

- 6.9. Form Of Payment To Beneficiaries. Distributions to a beneficiary may be made: (i) directly to the beneficiary; (ii) to the guardian or other similar representative (including the Fiduciary) of an Incapacitated beneficiary; (iii) to a Custodian (including the Fiduciary) for a minor beneficiary under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any State; (iv) by expending the same directly for the benefit of the beneficiary or by reimbursing a person who has advanced funds for the benefit of the beneficiary; (v) by offsetting the same against any amount owed by the beneficiary to the trust; or (vi) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution. The Fiduciary shall not be responsible for a distribution after it has been made to any person in accordance with this Section.
- 6.10. Personal Effects; Personal Residence.
- A. Division And Distribution Of Personal Effects. As to any personal effects item distributable to a minor or other Incapacitated person, the Executor may: (i) hold the item for future distribution to the distributee; (ii) sell the item and distribute the proceeds to the distributee or any trust named for him or her, or (iii) distribute the item (or sales proceeds) in any manner authorized by Section 6.9. In exercising this discretion, the Executor shall consider the age of the distributee, the practical utility of the item to him or her, and any sentimental or family significance of the item. In dividing personal effects among multiple distributees, each distributee who is a minor or Incapacitated person shall be represented by his or her parent or guardian, if any, otherwise by the Executor.
- B. Personal Effects Expenses. All reasonable expenses of packing, insuring and shipping any personal effects to a distributee, or storing personal effects for later distribution, shall be paid by the Executor as an administration expense.
- C. Insurance Proceeds And Liens. Except as otherwise provided, all gifts of personal effects or residential or other real property (i) include the proceeds of any insurance policies on the property and (ii) are subject to all liens other than liens for real property taxes or assessments.
- 6.11. Character Of Beneficial Interests. All interests provided under this Will (whether principal or income, and whether distributed or held in trust): (i) shall belong solely to the particular estate (not any beneficiary) prior to actual distribution, and (ii) upon distribution, shall be received as a gift from me and shall not be the community property of the beneficiary and his or her spouse.
- 6.12. Spendthrift Trust. Each trust created under this Will shall be a "spendthrift trust," as defined by the Texas Trust Code. Prior to actual receipt by any beneficiary, no income or principal distributable from a trust created under this Will shall be subject to anticipation or assignment by any beneficiary or to attachment by any creditor of, person seeking support from, person furnishing necessary services to, or assignee of any beneficiary.
- 6.13. Early Trust Termination. Subject to Section 5.9, if, in the Trustee's discretion, the property of any trust becomes so depleted as to be uneconomical to be administered as a trust, the Trustee may terminate the trust and distribute the property of the trust as follows: (i) if the trust is named for or identified by reference to a single then living beneficiary, to the named beneficiary; otherwise, (ii) to the then living beneficiaries of the trust in proportion to their then respective presumptive interests in the trust.
- 6.14. Maximum Duration Of Trusts. Despite any other provision of this Will, to the extent that any trust created under this Will has not previously vested in a beneficiary, the trust shall terminate upon the expiration of the period of the applicable Rule Against Perpetuities (determined using as measuring lives my wife, all of the descendants of my parents and my wife's parents, and all persons who are mentioned by name or as a class as beneficiaries of any trust created by or pursuant to this Will

who are living on the date of my death), and the Trustee shall distribute any property then held in the trust (i) to the beneficiary for whom the trust is named, if any; otherwise, (ii) per stirpes to the then living descendants of the named beneficiary, if any; otherwise (iii) the trust estate shall be distributed as provided in Section 3.3 as if it were my Remaining Property and as if I had died on the termination date of the trust.

- 6.15. Combination Of Trusts. A Fiduciary may terminate (or decline to fund) any trust created by this Will and transfer the trust assets to any other trust (created by this Will or otherwise) having substantially the same beneficiaries, terms and conditions, regardless of whether the Trustee under this Will also is serving as the trustee of the other trust and without liability for delegation of its duties nor for defeating or impairing the interests of remote, unknown or contingent beneficiaries. Similarly, the Trustee of any trust created by this Will may receive and administer as a part of its trust the assets of any other substantially similar trust.
- 6.16. Creation Of Multiple Trusts. A Fiduciary may divide any trust created under this Will into two or more separate identical trusts (in any proportion) if the Fiduciary deems it advisable. The Trustee may exercise discretionary powers held with respect to the new trusts independently. Where the original trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount shall not change but the Trustee may distribute the amount from any new trust or partly from one or more in any ratio.
- 6.17. Division And Distribution Of Trust Estate. A Fiduciary may divide, allocate or distribute property of its estate in divided or undivided interests, pro rata or non pro rata, and either wholly or partly in kind. Except as otherwise provided, all required distributions shall be made on the basis of the fair market value of the assets to be distributed at the time of distribution.
- 6.18. Successive Distributions Not Required. To the extent that a Fiduciary is authorized to distribute property to any trust (created under this Will or otherwise) and under the terms of that trust (or by virtue of the exercise of a discretionary power or for any other reason), the property would be immediately distributable to or among any one or more persons or other trusts, the Fiduciary may distribute the property directly to those persons or trusts in lieu of the directed distribution.
- 6.19. Additional Contributions. The Trustee may receive (or refuse to receive for tax or other reasons) contributions of additional property to its estate from any source and in any manner.
- 6.20. Collection Of Nonprobate Assets. A Fiduciary may receive (or refuse to receive for tax or other reasons) the proceeds of life insurance policies, employee benefit plans and other contractual rights that are payable to the Fiduciary (collectively, "Nonprobate Assets"). A Fiduciary may take whatever action, if any, the Fiduciary considers best to collect Nonprobate Assets. Subject to the other provisions in this Will, any Nonprobate Assets shall be allocated: in accordance with the directions contained in the beneficiary designation or other instrument of transfer, if any; otherwise, in satisfaction of any specific pecuniary gift for which the available properties are insufficient, if any; otherwise, to or among the trusts or individuals receiving my Remaining Property.
- 6.21. Plan Benefits Trusts. To the extent that a Fiduciary is designated as the beneficiary of any qualified benefit plan or individual retirement account or other Nonprobate Asset subject to the Minimum Required Distribution Rules (the "MRD Rules") (collectively "Plan Benefits"), the following provisions apply: (i) a Plan Benefits Trust corresponding to each trust provided for in this Will is created; (ii) all Plan Benefits shall be allocated (A) in accordance with the directions, if any, contained in the beneficiary designation or other instrument of transfer; otherwise, (B) to or among the trusts or individuals receiving my Remaining Property, substituting Plan Benefits Trusts for their corresponding trusts; (iii) each Plan Benefits Trust shall be irrevocable; (iv) each Plan Benefits Trust shall be identical to its corresponding trust except that all of the following persons, if any, who would otherwise be beneficially interested in the trust (other than those whose interests are contingent solely upon the death of a prior beneficiary living at the DB Determination Date, defined below), are completely excluded as beneficiaries and permissible appointees of the trust: (A) individuals having a shorter life expectancy than the measuring beneficiary and (B) entities not having a life expectancy; and (v) the Trustee shall deliver a copy of this Will or alternate descriptive information to the plan administrator in the form and content and within the time limits required by applicable statute and treasury regulations. For purposes of this Section, the "measuring beneficiary" of a Plan Benefits Trust means the oldest individual who is both living and ascertainably specified in this Will (by name or by class) as a current permissible beneficiary of the trust as of the date for determination of the "Designated Beneficiary" under applicable statute and treasury regulations (the "DB Determination Date"). I intend that, except for persons whose

interests are contingent solely upon the death of a prior beneficiary living at the DB Determination Date, only individuals eligible as designated beneficiaries (as defined in Code Section 401(a)(9) and applicable treasury regulations) for purposes of the MRD Rules shall ever be permissible distributees or appointees of Plan Benefits Trusts. This Will shall be administered and interpreted in a manner consistent with this intent. Any provision of this Will which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

- 6.22. Creation Of S Trusts. If: (i) any trust created under this Will (an "Original Trust") holds or is to receive any stock in a corporation eligible to be an S Corporation ("S Stock"); (ii) the Original Trust has a Current Beneficiary; (iii) the Current Beneficiary is a U.S. citizen or resident; and (iv) the Current Beneficiary elects or intends to elect to qualify the trust as a Qualified Subchapter S Trust ("QSST") under Code Section 1361(d), then, the Trustee is authorized to allocate the S Stock to a separate "S Trust" to be administered as provided in this Section. In addition to any distributions provided for in the Original Trust, whenever an S Trust holds any S Stock the Trustee shall distribute all the income of the S Trust to the Current Beneficiary in quarterly or more frequent installments. During the life of the Current Beneficiary: (i) the Current Beneficiary shall be the sole beneficiary of the S Trust; (ii) no distributions shall be made to anyone other than the Current Beneficiary; and (iii) if the S Trust terminates during the Current Beneficiary's life, the remaining property of the S Trust, if any, shall be distributed to the Current Beneficiary. If the Current Beneficiary dies before the complete distribution of the S Trust: (i) the trust shall terminate upon his or her death; (ii) the Trustee shall distribute any undistributed income of the trust to his or her estate; and (iii) the remaining property of the trust shall be disposed of pursuant to the terms of the Original Trust. In the case of any Contingent Trust, the term "Current Beneficiary" means the child or other beneficiary for whom the trust is named. The Trustee may amend an S Trust in any manner necessary for the sole purpose of ensuring that the S Trust qualifies and continues to qualify as a QSST. Each amendment must be in writing and must be filed among the trust records. I intend that every S Trust qualify as a QSST within the meaning of Code Section 1361(d)(3). This Will shall be interpreted in a manner consistent with this intent and any inconsistent provisions shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.
- 6.23. Applicability Of Texas Trust Code. To the extent consistent with the other provisions of this Will, and to the maximum extent allowed by law, (i) a Fiduciary shall have the powers, duties, and liabilities of trustees set forth in the Texas Trust Code, as amended and in effect from time to time, and (ii) the construction, validity and administration of every trust created under this Will shall be governed by Texas law.

#### ARTICLE 7 - DEBTS, EXPENSES AND TAXES

- 7.1. Payment Of Debts. The Executor shall provide for the payment, when due, of: (i) all debts and obligations (other than Death Taxes, defined below) that are legally enforceable against my estate; and (ii) any other debts and obligations (other than Death Taxes) the payment of which, in the Executor's discretion, is in the best interests of my estate (collectively, "Debts"). If any property of my estate is directed to be distributed subject to any Debt, the Executor shall make payments on that Debt only as necessary to avoid default pending distribution of the property. Debts payable on a periodic basis may be paid as the payments become due. The Executor may extend or renew any Debt, in whole or in part, for any period (including periods extending beyond the duration of the administration of my estate).
- 7.2. Payment Of Expenses. The Executor shall provide for the payment of the expenses incident to my last illness and funeral, and the expenses incident to the administration of my estate (collectively, "Expenses").
- 7.3. Payment Of Death Taxes. Except as otherwise provided, the Executor shall provide for the payment of all estate, inheritance, succession, capital gains at death, and other death taxes (including interest and penalties and also including generation-skipping transfer taxes on direct skips from my estate) imposed under the laws of any jurisdiction by reason of my death on or with respect to any property, or the transfer or receipt of any property, passing or which has passed under or outside this Will or any codicil to this Will, by beneficiary designation, by operation of law, or any other form of transfer (collectively, "Death Taxes"). Any Death Taxes may be deferred. Notwithstanding the preceding, the term Death Taxes does not include (and the Executor shall not pay) taxes imposed directly upon the recipient of property, including (i) generation-skipping transfer taxes on taxable terminations, taxable distributions or direct skips from a trust, and (ii) recapture of estate taxes under Section 2032A of the Code.

7.4. Source Of Payment.

- A. Generally. Except as otherwise provided: (i) Debts and Expenses shall be charged against my Remaining Property; (ii) Death Taxes shall be charged against that portion of my Remaining Property that does not qualify for the marital or charitable deduction, until exhausted, then against the balance of my Remaining Property; and (iii) interest concerning any tax (including Death Taxes) shall be charged in the same manner as the tax.
- B. Certain Management Expenses. Management Expenses attributable to any marital or charitable share shall be charged against that share. For this purpose: "Management Expenses" means Expenses incurred in connection with the investment of assets or their preservation or maintenance during a reasonable period of administration; and "marital share" or "charitable share" means a property interest passing from me to my wife or to any charity, respectively.
- C. Disclaimer By My Wife. In the event of a qualified disclaimer by my wife of any interest in any property, any resulting increase in Death Taxes shall be charged against the disclaimed interest.
- D. Principal And Income Apportionment. Debts, Expenses and Death Taxes shall be apportioned between principal and income in accordance with Section 378B of the Texas Probate Code; however, no Debts, Expenses or Death Taxes shall be charged against the income of any marital or charitable share (both terms defined above) to the extent it would result in a material limitation on the share's right to income.

7.5. Death Tax Recovery. The Executor shall enforce all rights to recovery of any Death Taxes with respect to assets not passing under my Will to the maximum extent authorized by Sections 2206, 2207, 2207A, and 2207B of the Code, Section 322A of the Texas Probate Code, or otherwise.

7.6. Charges Against Exempt Assets. Notwithstanding any contrary provision, and to the maximum extent allowed by law, no Debts, Expenses or Death Taxes shall be charged against or satisfied out of any interest in any Exempt Assets, including: (i) insurance and annuities protected under Chapter 1108 of the Texas Insurance Code or otherwise; (ii) any stock bonus, pension, profit sharing or similar plan (including any individual retirement account or retirement plan for self employed individuals) protected under Texas Property Code Section 42.0021 or otherwise; and (iii) any other property or interest in property that is not chargeable with the claims of the creditors of my estate (collectively, "Exempt Assets"). However, the following may be charged against a particular Exempt Asset: (i) Debts secured by a lien or other security interest in that Exempt Asset, (ii) administrative expenses properly and fairly allocable to the administration of that Exempt Asset, and (iii) Death Taxes imposed with respect to that Exempt Asset.

7.7. Tax Elections. A Fiduciary shall make elections under tax laws solely in fiduciary capacity and in the manner as appears advisable to the Fiduciary to minimize taxes and expenses payable out of my estate, the trust property of trusts created by me, and by the beneficiaries of each. For example: (i) the Executor may join in the filing of a joint income tax return with my wife or her estate; (ii) the Trustee, in its discretion, may elect or not elect to treat all or any portion of federal estimated taxes paid by any trust to be treated as a payment made by any one or more beneficiaries of that trust who are entitled to receive current distributions of income or principal from that trust (the election need not be made in a pro rata manner among all trust beneficiaries); and (iii) equitable adjustments may (but need not) be made to compensate for the effect of tax elections on the interests of beneficiaries or the amount of recovery of Death Taxes as directed above.

#### ARTICLE 8 - GENERAL PROVISIONS

8.1. Property Disposed Of By This Will. I intend by this Will to dispose only of my separate property and my share of community property. I confirm to my wife her share of our community property. Whenever (i) a Fiduciary possesses any property which is my wife's separate property, or which represents her interest in our community property, including, but not limited to, interests in or the proceeds of life insurance policies, qualified employee benefit plans or trusts, or other employment related compensation agreements or individual retirement accounts, and (ii) the Fiduciary determines that it no longer needs to administer such property, the Fiduciary shall deliver such property to my wife, if she is then living, otherwise, to her estate. Notwithstanding the preceding, a Fiduciary may make non pro rata divisions of any community property with my wife's consent.

- 8.2. Disclaimers. Except as otherwise provided, if a beneficiary under this Will is surviving but is deemed to be deceased by virtue of a qualified disclaimer (as defined under Code Section 2518), then the beneficiary shall only be deemed to be deceased with respect to the specific interest in property specified in the qualified disclaimer and the qualified disclaimer shall not affect any other rights or interests granted under this Will, including but not limited to rights or interests in trusts to which the disclaimed interest passes as a result of the qualified disclaimer. If the qualified disclaimer is of a life estate or the disclaimant's entire interest in property (or an undivided portion of such property) in trust, the termination provisions of such estate or trust with respect to the disclaimed interest shall be applied as if the disclaimant failed to survive.
- 8.3. Powers Of Appointment Not Exercised. I do not intend by this Will to exercise any power of appointment that I may possess or may come to possess.
- 8.4. Determination Of Incapacity. Except as otherwise provided, an adult individual generally shall be considered to have full legal capacity absent a presently existing adjudication of incapacity or insanity by a court or other judicial tribunal having jurisdiction to make such a determination.
- A. Fiduciaries. For purposes of qualification to serve as a Fiduciary or in any other fiduciary capacity under this Will, an adult individual shall be considered legally incapacitated to act when two physicians who have examined such person within the prior two years have certified that in their judgment such person does not have the physical or mental capacity to effectively manage his or her financial affairs.
- B. Beneficiaries. An adult individual beneficiary under this Will shall be considered Incapacitated upon a good faith determination made by the fiduciary charged with making such evaluation that such individual lacks the physical or mental capacity, personal or emotional stability or maturity of judgment needed to effectively manage his or her personal or financial affairs (whether because of injury, mental or medical condition, substance abuse or dependency, or any other reason). Individuals under the age of majority shall be considered legally incapacitated.
- 8.5. Definitions. In connection with the construction and interpretation of this Will the following definitions apply, unless otherwise expressly provided.
- A. Children And Descendants. Except as otherwise provided, a "child" of another individual means a child determined in accordance with Section 160.201 of the Texas Family Code. An adopted person shall be a child of the adopting parent(s) but only if legally adopted before attaining age eighteen. A posthumous child who survives birth shall be treated as living at the death of his or her parent. An individual's "descendants" means the individual's children, the children of those children, and so on, determined in accordance with the preceding.
- B. Spouse And My Wife. A "spouse" of a person does not include any individual who, at the relevant time, is divorced or legally separated from the person, or engaged in pending divorce proceedings with the person. A "surviving spouse" of a person means the individual, if any, who was the person's "spouse" at the time of his or her death. References in this Will to June A. Cleaver or "my wife" mean her; provided that we are not divorced, legally separated, nor engaged in pending divorce proceedings as of the date of my death (or her death, if she predeceases me), in which case all provisions in this Will in favor of my wife or appointing her in any fiduciary capacity shall be void and this Will shall be construed as if she predeceased me.
- C. Heirs. A person's Heirs or then living Heirs means those individuals who would be that person's heirs at law as to separate personal property if that person were to die single, intestate and domiciled in Texas at the referenced time.
- D. Per Stirpes. Whenever a distribution (or allocation) of property is to be made "per stirpes" to (or to trusts for) the descendants of any person, the property shall be divided into as many shares as there are then living children of the person and deceased children of the person who left descendants who are then living. One share shall be distributed to (or to the trust for) each living child and the share for each deceased child shall be divided among his or her then living descendants in the same manner.

- E. Pronouns. Pronouns, nouns and terms as used in this Will shall include the masculine, feminine, neuter, singular, and plural forms wherever appropriate to the context.
- F. Survive. If my wife survives me by any period of time or if we have both died and the order of our deaths cannot be determined, she shall be presumed to have survived me for all purposes. In all other cases a requirement that an individual "survive" a specified person or event or be "surviving" or "living" means survival by at least ninety days; however, the Fiduciary may make advance distributions within that period of any gift to any beneficiary to the extent necessary to provide for his or her health, maintenance, and support.
- G. Code. References to the Code or any Section of the Code mean the Internal Revenue Code of 1986, or the Section, as amended and in effect from time to time, or the appropriate successor provision.
- 8.6. Notice. Any notice required to be given or delivered under this Will shall be deemed given or delivered when an acknowledged written notice is actually delivered to the person or organization entitled to notice or mailed certified mail, return receipt requested, to the address then appearing on the Fiduciary's records for the person or organization.
- 8.7. Actions By And Notice To Incapacitated Persons. Any action permitted to be taken by a minor or other incapacitated person shall be taken by the person's parents or guardian. Any notice or report required to be delivered to a minor or other incapacitated person shall be delivered to such person's parents or guardian. If both parents of a minor are living, any such action shall be taken by, and any such notice shall be given to, the parent to whom I am more closely related.
- 8.8. Headings. The headings employed in this Will are for reference purposes only and shall not in any way affect the meaning or interpretation of the provisions of this Will.

I have signed this Will this \_\_\_\_ day of \_\_\_\_\_, 2009.

*[here insert appropriate testator signature block, attestation clause, witness signature block, and self proving affidavit]*

## 2. DISCLAIMER WILL

### WILL OF WARD M. CLEAVER

I am WARD M. CLEAVER of Harris County, Texas. This is my Will. I revoke all earlier wills and codicils.

I am married to June A. Cleaver. I have two children: Wallace Cleaver, born March 21, 1977, and Theodore Cleaver, born May 31, 1983. Every reference in this Will to a "child" or "children" of mine is to them and all other children who may be born to or adopted by me in the future.

#### ARTICLE 1 - FIDUCIARY APPOINTMENTS

- 1.1. Executors.** I name the following, in the following order, as sole Independent Executor of this Will, without bond: June A. Cleaver, otherwise Michael S. Cleaver, otherwise Charles S. Cleaver, otherwise Big Trust Company.
- 1.2. Trustees.** I appoint the following, in the following order, as sole Trustee of every trust created under this Will: June A. Cleaver, otherwise Michael S. Cleaver, otherwise Charles S. Cleaver, otherwise Big Trust Company. If all of the above (and any successors) fail or cease to serve as Trustee of any trust and the resulting vacancy is not filled under the provisions of Section 6.2, the Trustee Appointer (designated in Section 6.2) shall appoint a Trustee of that trust in accordance with the provisions of Section 6.3.

#### ARTICLE 2 - SPECIFIC TESTAMENTARY GIFTS

- 2.1. Personal Effects.** I give all of my jewelry, pictures, photographs, works of art, books, household furniture and furnishings, clothing, automobiles, boats, recreational vehicles and equipment, club memberships, burial plots, and articles of household or personal use or ornament of all kinds (collectively, my "personal effects"), as follows, subject to the provisions of Section 7.10.
- A. Memorandum On Personal Effects.** I may leave a memorandum making one or more personal effects gifts. If the memorandum is wholly in my own handwriting, signed by me, and dated on or after the date of this Will: (i) it shall be deemed to be a codicil to this Will; (ii) all gifts specified in the memorandum shall be made prior to making any of the following gifts; and (iii) if the memorandum conflicts with any of the following gifts, the memorandum shall control.
- B. Gift Of Remaining Personal Effects.** To the extent not disposed of by the above, I give all of my remaining personal effects to my wife, if she survives me. If my wife does not survive me, I give my remaining personal effects to my children who survive me, in equal shares. However, if any child fails to survive me but leaves one or more descendants who survive me, I give the share that child would have received (if he or she had survived) per stirpes to his or her descendants who survive me.
- C. Division Of Personal Effects.** Any personal effects given to two or more individuals shall be divided among them as they may agree among themselves. If they cannot agree on a division within a reasonable time following my death, the Executor shall make the division for them.
- 2.2. My Wife's Retirement Accounts.** If my wife survives me, I give all of my interest, if any, in my wife's employee or self-employed benefit plans and individual retirement accounts to my wife.

#### ARTICLE 3 - REMAINING PROPERTY

After providing for payment of Debts, Expenses and Death Taxes as directed by Article 8, my Remaining Property (meaning the residue of my probate estate, including lapsed legacies and devises, but net of Debts and Expenses) shall be disposed of as provided in this Article.

- 3.1. Disposition If My Wife Survives Me.** If my wife survives me, I give my Remaining Property to my wife.

- 3.2. Disposition If My Wife Survives Me And Disclaims.** If my wife survives me but she disclaims all or any portion of my Remaining Property, I give the disclaimed portion to the Trustee of the Family Trust, to be administered as provided in Article 4.
- 3.3. Disposition If My Wife Does Not Survive Me But Descendants Survive Me.** If my wife does not survive me but at least one child or other descendant of mine survives me, I give my Remaining Property as follows.
- A. Distribution To Family Trust.** If at least one child of mine who survives me is under the age of twenty-eight years, my Remaining Property shall be distributed to the Trustee of the Family Trust, to be administered as provided in Article 4.
- B. Distribution To Children And Descendants.** If (i) no child of mine who survives me is under the age of twenty-eight years but (ii) at least one child or other descendant of mine survives me, my Remaining Property shall be distributed to my children who survive me, in equal shares. However, if any child who fails to survive me leaves one or more descendants who survive me, the share that child would have received (if he or she had survived) shall be distributed per stirpes to his or her descendants who survive me. All of the preceding distributions are subject to the provisions of Article 5 (providing for Contingent Trusts for beneficiaries who are under age twenty-five or Incapacitated).
- 3.4. Contingent Disposition.** Any part of my Remaining Property not effectively disposed of by the above provisions shall be distributed one-half to my then living Heirs (defined in Section 9.6) and one-half to the then living Heirs of my wife, subject to the provisions of Article 5 (providing for Contingent Trusts for beneficiaries who are under age twenty-five or Incapacitated).

#### ARTICLE 4 - FAMILY TRUST

- 4.1. Distributions During The Trust Term.** During the term of the Family Trust, it shall be administered as follows.
- A. General Discretionary Distributions To My Wife And My Children.** The Trustee shall distribute to my wife, as primary beneficiary, and may distribute to my children, as secondary beneficiaries, so much or all of the trust income and principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).
- B. Distributions To Guardians.** To the extent the Trustee believes the above distributions will not be unduly jeopardized, the Trustee may distribute to the court appointed guardian of the person of any minor child of mine so much of the trust income and principal as the Trustee determines to be appropriate to provide for a reasonable proportion of any additional housing costs or other expenses of the guardian incurred as a result of caring for the child.
- C. Special Additional Distributions To Children.** To the extent the Trustee believes the above distributions will not be unduly jeopardized, the Trustee may distribute to any child of mine who has reached the age of twenty-five years so much of the trust income and principal as the Trustee determines to be appropriate:
- 1. Business Or Profession.** To enable the child to enter into or continue a business or profession in which the Trustee believes there are reasonable prospects for success; or
  - 2. Home Purchase.** To provide a down payment on a home for the child and his or her family, the value of which would be reasonably related to the type of home the child might be expected to own, occupy and support.

Any payments made under this Subsection shall be charged without interest as an advancement against the share of the trust property, if any, otherwise distributable to the child (or his or her descendants) on the termination of the trust.

- 4.2. Termination And Final Distribution.** On the death of my wife, or, if later, the date that no then living child of mine is under the age of twenty-eight years, the Family Trust shall terminate and the remaining trust property, if any, shall be distributed as provided in Section 3.3 or 3.4, whichever applies, as if it were my Remaining Property and as if I had died on the termination date of the trust.

## ARTICLE 5 - CONTINGENT TRUSTS

- 5.1. Creation Of Trusts.** All property that passes subject to the provisions of this Article that otherwise would be distributable by the Executor or Trustee to any beneficiary (other than my wife) who has not reached the age of twenty-five years or who, in the discretion of the Executor or Trustee, respectively, is Incapacitated (defined in Section 9.5), may instead be distributed to the Trustee as a separate Contingent Trust named for the beneficiary, to be administered as provided in this Article. When used in this Article, the words "the trust," "the beneficiary's trust," or "his or her trust" mean the Contingent Trust named for a particular beneficiary and the words "the beneficiary" mean that beneficiary.
- 5.2. Distributions During The Beneficiary's Life.** During the life of the beneficiary, the beneficiary's trust shall be administered as follows.
- A. General Discretionary Distributions.** The Trustee shall distribute to the beneficiary so much or all of the income and principal of the beneficiary's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for the beneficiary's continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).
- B. Mandatory Terminating Distribution To Beneficiary At Age Twenty-Five.** Whenever the beneficiary (i) reaches the age of twenty-five years and, (ii) in the Trustee's discretion, is not Incapacitated (defined in Section 9.5), the Trustee shall distribute to the beneficiary the remaining property of his or her trust.
- 5.3. Termination And Final Distribution Upon The Beneficiary's Death.** If the beneficiary dies before the complete distribution of his or her trust, the trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.
- A. Distribution To Descendants.** The remaining property of the beneficiary's trust shall be distributed per stirpes to the following individuals who survive the beneficiary: (i) the beneficiary's descendants, if any, otherwise, (ii) the descendants of the beneficiary's parent who is a child of mine, if any, otherwise, (iii) the descendants of the nearest ancestor of the beneficiary who is a descendant of mine and who has surviving descendants, if any, otherwise, (iv) the descendants of the beneficiary's parent who is more closely related to me, if any, otherwise, (v) my descendants, if any. All of the preceding distributions are subject to the provisions of this Article.
- B. Contingent Disposition.** Any property of the beneficiary's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Section 3.4 as if it were my Remaining Property and as if I had died on the termination date of the beneficiary's trust.

## ARTICLE 6 - EXECUTOR AND TRUSTEE PROVISIONS

The provisions of this Article govern the fiduciary relationship of the Executor and the Trustee. When used in this Will, where the context permits, the term Executor means the executor or co-executors from time to time serving; the term Trustee means the trustee or co-trustees from time to time serving; the term Fiduciary, means any Executor or Trustee; and the "estate" of a Fiduciary means the particular probate or trust estate being administered by the Fiduciary.

- 6.1. Executor Succession.**
- A. Executor Resignation.** An Executor may resign at any time with or without cause by filing a resignation notice in the probate proceedings pertaining to my estate and by delivering a copy of the resignation notice (i) to each then serving Co-Executor, if any, (ii) to the next successor Executor named in this Will, if any, and (iii) to each adult

individual, corporation, trustee, or other beneficiary then entitled to or permitted to receive a distribution from my estate as of the date the resignation notice is given.

- B. Failure Or Cessation Of Every Named Executor.** If every named Executor fails or ceases to serve, I desire that the successor administrator appointed by the court serve as independent administrator without bond or other security and with all the powers of the named Executors.

## 6.2. Trustee Succession.

- A. Wife's Appointment Of Co-Trustee.** Whenever my wife is serving as sole Trustee of any trust created under this Will, she may appoint a Co-Trustee to serve with her. If my wife subsequently ceases to act as Trustee while her appointed Co-Trustee is still serving, then the appointed Co-Trustee shall also cease serving as a Trustee (unless otherwise eligible to continue to serve as a Trustee in accordance with the provisions of this Will). Each Co-Trustee appointment must comply with the general provisions of Section 6.3.
- B. Trustee Appointer.** I name the following persons, in the following order, to serve as the Trustee Appointer: (i) June A. Cleaver, otherwise (ii) Michael S. Cleaver, otherwise (iii) Charles S. Cleaver, otherwise (iv) as to any Contingent Trust, the named beneficiary, if legally competent, otherwise the parent or guardian of the named beneficiary, if any, otherwise (v) my oldest then living adult descendant, if any.
- C. Resignation.** A Trustee may resign as Trustee of any one or more trusts created under this Will at any time, with or without cause, by delivering a resignation notice in recordable form (i) to each adult beneficiary of the trust who is then permitted to receive distributions from the trust; (ii) to each serving Co-Trustee, if any; and (iii) to the next successor Trustee named in this Will, if any, otherwise, to the Trustee Appointer (but only if the Trustee Appointer's action is required to fill the resulting vacancy). The Trustee's resignation shall be effective only upon the acceptance and qualification of the successor.

## 6.3. Trustee Appointment Procedures.

- A. Generally.** Every appointment of a Trustee must be evidenced by a written instrument in recordable form, signed by the person (or the requisite number of persons) required to approve the appointment, and delivered to the appointee. The instrument must identify the appointee, state the effective time and date of appointment, and contain an acceptance by the appointee. Except as otherwise provided, every Trustee appointed under this Will must be either a Qualified Corporation or one or more Qualified Individuals.
- B. Qualified Individual.** The term Qualified Individual means any legally competent individual who has attained the age of thirty years and who is willing to serve under this Will.
- C. Qualified Corporation.** The term Qualified Corporation means any corporation having trust powers that is qualified and willing to serve under this Will and that has, as of the relevant time, either (i) a minimum capital and surplus of at least five million dollars (\$5,000,000 U.S.), or (ii) at least one hundred million dollars (\$100,000,000 U.S.) in trust assets under administration.

## 6.4. Fiduciary Compensation.

- A. Expense Reimbursement And Reasonable Compensation.** Each Fiduciary shall be reimbursed from its estate for the reasonable costs and expenses incurred in connection with the administration of its estate and also shall be entitled to receive fair and reasonable compensation from its estate (payable at convenient intervals selected by the Fiduciary) considering: (i) the duties, responsibilities, risks, and potential liabilities undertaken; (ii) the nature of its estate; (iii) the time and effort involved; and (iv) the customary and prevailing charges for services of a similar character at the time and at the place the services are performed.

- B. Professional Serving As Fiduciary.** A professional individual serving as Fiduciary may receive compensation for Fiduciary services based on his or her customary hourly rates (or other customary charges for professional services). If the professional has hired himself or herself (or any professional organization with which he or she is affiliated) in a professional capacity with respect to his or her estate, Fiduciary compensation shall be in addition to compensation for professional services; however, each service shall be compensated for only once (as either a Fiduciary service or professional service but not both).
- C. Corporate Co-Fiduciary.** Where appropriate and customary, a bank or other corporate Co-Fiduciary may receive compensation in amounts not exceeding the customary and prevailing charges for services of a similar character at the time and at the place the services are performed as if it were serving as sole Fiduciary.
- D. Waiver Of Right To Compensation.** Any Fiduciary may at any time waive a right to receive compensation for services rendered or to be rendered as Fiduciary.

#### 6.5. Fiduciary Liability.

- A. Generally.** A Fiduciary who has made a reasonable, good faith effort to exercise the standard of care and other fundamental duties applicable to the Fiduciary in Section 7.2 and the other provisions of this Will shall not be liable: (i) for any loss that may occur as a result of any actions taken or not taken by the Fiduciary; (ii) for the acts, omissions or defaults of any other individual or entity serving as Fiduciary or as ancillary fiduciary; nor (iii) to any person dealing with the Fiduciary in the administration of its estate, unless the Fiduciary expressly contracts and binds itself personally. For purposes of the preceding, a Fiduciary's conduct shall be judged in light of the facts and circumstances existing at the time and not by hindsight.
- B. Uncompensated Individual Fiduciary.** In addition, an individual serving as Fiduciary without compensation, including an individual who has at all relevant times waived his or her right to compensation, shall never be liable to any person for any consequences of any action (or inaction) unless he or she takes the action (or inaction) in bad faith, with gross negligence, or with intentional or reckless disregard for his or her duties as Fiduciary.
- C. Reimbursement.** An individual or entity serving as Fiduciary shall be entitled to reimbursement from its estate for any liability or expense, whether in contract, tort or otherwise, reasonably incurred by the Fiduciary in the administration of its estate.

**6.6. Transactions In Which The Fiduciary Has An Interest.** Notwithstanding any contrary provisions of the Texas Probate Code, the Texas Trust Code or other applicable law: (i) any individual or entity serving as Fiduciary under this Will may engage his or her estate in transactions with himself or herself personally (or otherwise), so long as the Fiduciary establishes that the consideration exchanged in the transaction is fair and reasonable to his or her estate; and (ii) any Fiduciary may engage its estate in transactions with itself personally (or otherwise) pursuant to the terms of any valid and enforceable executory contract signed by me. Whenever the office of Executor or Trustee is filled by more than one person, any transaction in which an Executor or Trustee has a personal interest must be approved by all Executors or Trustees, respectively.

**6.7. Independent Administration Without Bond.** No action shall be required in any court in relation to the settlement of my estate other than the probating and recording of this Will and the return of an inventory, appraisal and list of claims of my estate. So far as can be legally provided, all of the powers and discretions granted to a Fiduciary shall be exercised without the supervision of any court. No bond or other security shall be required of any primary or successor Fiduciary in any jurisdiction, whether acting independently or under court supervision.

**6.8. Ancillary Fiduciary.** If at any time and for any reason a Fiduciary is unwilling or unable to act as Fiduciary as to any property subject to administration in any jurisdiction (other than the jurisdiction in which the Fiduciary is serving), then, to the extent permitted by applicable law, the Fiduciary may appoint (and remove) any one or more Qualified Individuals or a Qualified

Corporation (both terms defined in Section 6.3) to act as ancillary fiduciary on such terms as the Fiduciary may deem appropriate.

#### 6.9. Restrictions On Beneficially Interested Trustee; Independent Trustee.

- A. Scope.** This Section applies to every Trustee of any trust created under this Will (1) who is an "Interested Person" (meaning a person with any direct or indirect beneficial interest in the trust) or (2) who is related or subordinate to an Interested Person with respect to such trust, and was appointed as Trustee by the Interested Person after the Interested Person's exercise of a power to remove a prior Trustee.
- B. General Rule.** No Trustee to whom this Section applies shall ever possess or exercise any powers with respect to, or authorize or participate in any decision as to: (i) any discretionary distribution or any loan to or for the benefit of the Interested Person, except to the extent that the distributions or loans are limited by an ascertainable standard relating to the Interested Person's health, maintenance, support, or education; (ii) any discretionary distribution to any other beneficiary in discharge of any of the Interested Person's legal obligations; (iii) the termination of the trust because of its small size, if the termination would result in a distribution to the Interested Person or if the distribution would discharge any of the Interested Person's legal obligations; nor (iv) the treatment of any estimated income tax payment as a payment by the Interested Person, except to the extent that the payment is limited by an ascertainable standard relating to the Interested Person's health, maintenance, support, or education.
- C. Independent Trustee.** Each such decision shall be made solely by the "Independent Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: (i) the currently acting Co-Trustee(s), if any, otherwise, (ii) the next successor Trustee(s) designated under this Will, if any, otherwise, (iii) a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Independent Co-Trustee is appointed under these circumstances, the sole power and responsibility of the Independent Co-Trustee shall be to make decisions reserved to the Independent Trustee under this Section.

#### 6.10. Restrictions On Insured Trustee; Insurance Trustee.

- A. Scope.** This Section applies to every Trustee of any trust created under this Will (i) who is an "Insured Person" (meaning a person who is an insured under a life insurance policy with respect to which the trust owns any interest or holds any rights or powers) or (ii) who is related or subordinate to an Insured Person with respect to such trust, and was appointed as Trustee by the Insured Person after the Insured Person's exercise of a power to remove a prior Trustee.
- B. General Rule.** No Trustee to whom this Section applies shall ever possess or exercise any rights or powers with respect to the policy, nor authorize or participate in any decision as to the policy, except as specifically authorized by this Section.
- C. When Trustee Serves As Sole Trustee.** Every Trustee to whom this Section applies who serves as sole Trustee must: (i) designate the Trustee of the trust as the beneficiary of the policy to the extent of the trust's interest in the policy; (ii) continue to pay the premiums on the policy without using policy loans; (iii) allow any policy dividends to reduce premiums; and (iv) upon termination of the trust, distribute the policy pro rata to the remainder beneficiaries of the trust.
- D. Insurance Trustee.** All decisions whether to take any different or additional actions with respect to the policy shall be made solely by the "Insurance Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: (i) the currently acting Co-Trustee(s), if any, otherwise, (ii) the next successor Trustee(s) designated under this Will, if any, otherwise, (iii) a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Insurance Trustee is appointed under these circumstances, the sole power and responsibility of the Insurance Trustee shall be the exclusive authority to make discretionary decisions as to the policy.

- 6.11. Co-Fiduciary Provisions.** Except as otherwise provided, Co-Executors and Co-Trustees shall act (i) by unanimous consent if two are serving, and (ii) by majority vote if three or more are serving. Any individual Co-Executor or Co-Trustee may revocably delegate to any other Co-Executor or Co-Trustee, respectively, any or all of his or her rights, powers and discretions as a Co-Executor or Co-Trustee. Any delegation shall be by written instrument specifying the extent and duration of the delegation. Whenever a corporate Co-Executor or Co-Trustee is serving, it shall have custody of all investments and records of its estate to the exclusion of all individual Co-Executors or Co-Trustees, respectively (but it may revocably waive this right in whole or in part from time to time), and it shall have the primary responsibility for preparing and distributing accountings.
- 6.12. Reorganization Or Insolvency Of Corporate Fiduciary.** Except as otherwise provided, if a corporation nominated to serve or serving as Fiduciary ever changes its name, or merges or consolidates with or into any other bank or trust company, the corporation or successor entity shall be deemed to be a continuing entity and shall continue to be eligible for appointment, or shall continue to act as a Fiduciary. Notwithstanding the preceding, if a corporation serving or designated to serve as a Fiduciary becomes insolvent and its assets are sold, transferred to, or otherwise acquired by another entity by any form of governmental or regulatory process, the successor entity shall not succeed to appointment as Fiduciary, and if it does so succeed by operation of law, I direct the Fiduciary to resign from its office as Fiduciary unless the Trustee Appointer agrees that it may continue to serve.

## ARTICLE 7 - ADMINISTRATIVE PROVISIONS

- 7.1. Duties At Inception Of Estate.** Within a reasonable time after accepting a fiduciary appointment or receiving assets as a part of its estate, a Fiduciary shall (i) review the records, assets, beneficiaries, purposes, terms, distribution requirements, and all other relevant circumstances of its estate, and (ii) make and implement a distribution plan and an investment plan that are consistent with the purposes of its estate generally and that bring the estate portfolio into compliance with Sections 7.3 and 7.4.
- 7.2. Fundamental Fiduciary Duties.** A Fiduciary shall administer its estate in good faith and in accordance with the terms of this Will and the law. Except as otherwise provided, the following fundamental provisions apply to all aspects of a Fiduciary's investment, management and administration of its estate.
- A. General Standard Of Care.** A Fiduciary shall exercise the standard of care, skill, and caution generally exercised by compensated fiduciaries with respect to comparable estates in the same geographic area. A Fiduciary who has special skills or expertise, or is selected as a Fiduciary in reliance upon the Fiduciary's representation that the Fiduciary has special skills or expertise, has a duty to use those special skills or expertise.
- B. Loyalty And Impartiality; Primary And Secondary Beneficiaries.** A Fiduciary shall act solely in the interest of the beneficiaries of its estate, not in the interest of the Fiduciary personally. If a Fiduciary's estate has two or more beneficiaries, the Fiduciary shall act impartially, taking into account any differing interests of the beneficiaries. However, a Fiduciary (i) may favor present income beneficiaries over future beneficiaries and (ii) shall favor "primary" beneficiaries over other beneficiaries and "secondary" beneficiaries over beneficiaries who are neither primary nor secondary.
- C. Conflict Resolution.** A Fiduciary shall make a reasonable effort to resolve any conflicts (including conflicts as to favorable or adverse tax consequences) between or among the Fiduciary and those persons who are beneficially interested in its estate by mutual agreement. If after reasonable efforts the Fiduciary, in the Fiduciary's discretion, determines that a mutual agreement is not likely to be reached, the Fiduciary shall resolve the conflicts in the Fiduciary's discretion.
- D. Duty To Verify Facts.** A Fiduciary shall make a reasonable effort to verify relevant facts. However, a Fiduciary may rely on (and need not independently verify): (i) the advice of any professional (including an agent, attorney, advisor, accountant, fiduciary, or other professional or representative) who was hired (or to whom duties were delegated) in accordance with this Will and with reasonable care; and (ii) any written instrument or other evidence that the Fiduciary reasonably believes to be accurate. (But

a corporate Fiduciary shall always be liable for the acts, omissions and defaults of its affiliates, officers and regular employees.)

- E. Reliance On Predecessor Fiduciary.** A Fiduciary may rely on the records and other representations of a Predecessor Fiduciary (meaning a predecessor Fiduciary under this Will or a personal representative or trustee of any estate or trust from which distributions may be made to the Fiduciary), and need not request an accounting from or contest any accounting provided by a Predecessor Fiduciary. However, the preceding shall not apply to any Fiduciary to the extent that the Fiduciary (i) has received a request from a beneficiary having a vested material interest in its estate to secure an accounting or to conduct an investigation, or (ii) has actual knowledge of facts that would lead a reasonable person to believe that, as a consequence of any act or omission of a Predecessor Fiduciary, a material loss has occurred or will occur.
- F. Special Rule For Uncompensated Individual Fiduciaries.** Notwithstanding any contrary provision, whenever an uncompensated individual is serving as Fiduciary (meaning an individual serving with no right to compensation or who, at all relevant times, has waived his or her right to compensation), he or she: (i) may continue any style of investing that is consistent with the style of investing I undertook during my lifetime; and (ii) shall exercise that standard of care which is commensurate with his or her particular skills and expertise, or, to the extent lower, the general standard of care required of Fiduciaries without special skills or expertise.

**7.3. Prudent Investor Rule.** Except as otherwise provided, the prudent investor rule, as set forth in the following provisions, governs all aspects of a Fiduciary's investments.

- A. Generally.** A Fiduciary shall invest and manage the assets of its estate as a prudent investor would, by considering the purposes, terms, distribution requirements, and other relevant circumstances of its estate.
- B. Investment And Management Authority.** A Fiduciary may invest its estate in any kind of property or type of investment, and exercise the broadest managerial discretion over its estate, that is consistent with the other provisions of this Will.
- C. Portfolio Theory.** A Fiduciary shall make investment and management decisions respecting individual assets not in isolation but in the context of its estate portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to its estate.
- D. Diversification.** Generally, a Fiduciary shall diversify the investments of its estate unless the Fiduciary reasonably determines that, because of special circumstances, the purposes of its estate are better served without diversifying.
- E. Originally Contributed Properties.** Notwithstanding the preceding, a Fiduciary may continue to hold and maintain all assets originally contributed to its estate and all transmigrations of those assets, without liability for any depreciation or loss that may result.
- F. Unproductive Or Wasting Assets.** A Fiduciary may receive, acquire and maintain unproductive or underproductive assets.
- G. Speculative Investments.** A Fiduciary may receive, acquire and maintain assets that may be categorized as speculative or hazardous.

**7.4. Specific Management And Investment Authority.** A Fiduciary's management and investment authority includes, but is not limited to, the following.

- A. Securities And Business Interests.** A Fiduciary may acquire securities, whether traded on a public securities exchange or offered through a private placement, and may trade on margin. A Fiduciary may form, reorganize or dissolve corporations, give proxies to vote securities, enter into voting trusts, and generally exercise all rights of a stockholder. A Fiduciary may continue, initially form, expand, and carry on business activities, whether in proprietary, general or limited partnership, joint venture, corporate, or other form, with any persons and entities.

- B. Real Estate.** A Fiduciary may purchase, sell, exchange, partition, subdivide, develop, manage, and improve real property.
  - C. Mineral Properties.** A Fiduciary may acquire, maintain, manage, or sell mineral interests, and make oil, gas and mineral leases covering any lands or mineral interests forming a part of its estate, including leases for periods extending beyond the duration of its estate.
  - D. Life Insurance.** A Fiduciary may acquire, maintain in force, and exercise all rights of a policyholder under policies of life insurance insuring the life of a beneficiary of its estate, or an individual in whom such beneficiary has an insurable interest.
  - E. Joint Investments; Accounts With The Fiduciary.** A Fiduciary may invest its estate in undivided interests in any otherwise appropriate investment and may hold separate estates under this or any other instrument in one or more common accounts in undivided interests. A corporate Fiduciary may deposit the cash portion of its estate with itself and may invest its estate in its common trust funds.
  - F. Manage, Sell And Lease.** A Fiduciary may manage, sell, lease (for any term, even if beyond the anticipated term of its estate), partition, improve, repair, insure, and otherwise deal with all property of its estate.
  - G. Nominee Title.** A Fiduciary may hold title to any property in the name of one or more nominees without disclosing the fiduciary relationship.
  - H. Loans And Guarantees.** A Fiduciary may lend money to any individual or entity and may endorse, guarantee, become the surety of, provide security for, or otherwise become obligated for or with respect to the debts or other obligations of any individual or entity. All these transactions (except those for the benefit of any current beneficiaries of the particular estate involved) shall be on commercially reasonable terms, including adequate interest and security.
  - I. Borrow.** A Fiduciary may assume, renew and extend any indebtedness previously created, and borrow for any purpose (including the purchase of investments or the payment of taxes) from any source (including a Fiduciary individually) at the then usual and customary rate of interest, and mortgage or pledge any property of its estate to any lender.
  - J. Pay Expenses.** A Fiduciary may pay all taxes and all reasonable expenses, including reasonable compensation to the agents and counsel (including investment counsel) of the Fiduciary.
  - K. Claims.** A Fiduciary may institute and defend suits and release, compromise or abandon claims.
  - L. Environmental Hazards.** A Fiduciary may take all appropriate action to deal with any environmental hazard and comply with any environmental law, regulation or order, and may institute, contest or settle legal proceedings concerning environmental hazards.
- 7.5. Agents And Attorneys.** A Fiduciary may employ and compensate agents, attorneys, advisors, accountants, and other professionals (including the Fiduciary individually and any professional organization with which the Fiduciary is affiliated) and may rely on their advice and delegate to them any authorities (including discretionary authorities).
- 7.6. Principal And Income.** A Fiduciary shall allocate receipts and disbursements between principal and income in a reasonable manner and may establish a reasonable reserve for depreciation or depletion and fund this reserve by appropriate charges against the income of its estate. For purposes of determining income from a partnership or proprietorship, a Fiduciary may (but need not) utilize the partnership's or proprietorship's income as reported for federal income tax purposes.
- 7.7. Records, Books Of Account, And Reports.** A Fiduciary shall maintain proper books of account which shall at all reasonable times be open for inspection or audit by all current permissible beneficiaries of its estate who are not Incapacitated. Within a reasonable time after

receiving written request from a beneficiary entitled to inspect books of account, a Fiduciary shall make a written financial report of its estate to the beneficiary. The natural or court appointed guardian of an Incapacitated beneficiary otherwise entitled to request a report may request (and receive) a report on the beneficiary's behalf. No Fiduciary shall ever be required to deliver reports of its estate more frequently than quarterly. Whenever my wife is serving as Fiduciary she may provide copies of bank, brokerage and other financial statements and that shall constitute a sufficient report of all assets and transactions disclosed on the statements.

- 7.8. Discretionary Distribution Considerations.** Except as otherwise provided, in making discretionary distributions under this Will, the Trustee making the distribution decision may consider all circumstances and factors the Trustee deems pertinent, including: (i) the beneficiaries' accustomed standard of living and station in life; (ii) all other income and resources reasonably available to the beneficiaries and the advisability of supplementing their income or resources; (iii) the beneficiaries' respective character and habits, their diligence, progress and aptitudes in acquiring an education, and their ability to handle money usefully and prudently, and to assume the responsibilities of adult life and self-support in light of their particular abilities and disabilities; and (iv) the tax consequences of the Trustee's decision to make (or not to make) the distributions and out of which trust any distributions should be made. Except as otherwise provided, as to any trust with more than one beneficiary, the Trustee may make discretionary distributions in equal or unequal proportions and to the exclusion of any beneficiary. The Trustee shall not allow a beneficiary who reasonably should be expected to assist in securing his or her own economic support to become so financially dependent upon distributions from any trust that he or she loses an incentive to become productive in a manner that is reasonably commensurate with any other individual having the ability and being in the circumstances of the beneficiary. Whenever this Will provides that the Trustee "may" make a distribution, the Trustee may, but need not, make the distribution.
- 7.9. Form Of Payment To Beneficiaries.** Distributions to a beneficiary may be made: (i) directly to the beneficiary; (ii) to the guardian or other similar representative (including the Fiduciary) of an Incapacitated beneficiary; (iii) to a Custodian (including the Fiduciary) for a minor beneficiary under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any State; (iv) by expending the same directly for the benefit of the beneficiary or by reimbursing a person who has advanced funds for the benefit of the beneficiary; (v) by offsetting the same against any amount owed by the beneficiary to the trust; or (vi) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution. The Fiduciary shall not be responsible for a distribution after it has been made to any person in accordance with this Section.
- 7.10. Personal Effects; Personal Residence.**
- A. Division And Distribution Of Personal Effects.** As to any personal effects item distributable to a minor or other Incapacitated person, the Executor may: (i) hold the item for future distribution to the distributee; (ii) sell the item and distribute the proceeds to the distributee or any trust named for him or her, or (iii) distribute the item (or sales proceeds) in any manner authorized by Section 7.9. In exercising this discretion, the Executor shall consider the age of the distributee, the practical utility of the item to him or her, and any sentimental or family significance of the item. In dividing personal effects among multiple distributees, each distributee who is a minor or Incapacitated person shall be represented by his or her parent or guardian, if any, otherwise by the Executor.
- B. Personal Effects Expenses.** All reasonable expenses of packing, insuring and shipping any personal effects to a distributee, or storing personal effects for later distribution, shall be paid by the Executor as an administration expense.
- C. Insurance Proceeds And Liens.** Except as otherwise provided, all gifts of personal effects or residential or other real property (i) include the proceeds of any insurance policies on the property and (ii) are subject to all liens other than liens for real property taxes or assessments.
- D. Homestead Occupancy Right.** My wife shall have the right to use and occupy as a principal residence (rent free and without charge except for taxes and other costs and expenses as may be specified elsewhere in this Will) any residential property held in any trust of which she is a current beneficiary. This right lasts for life or until the trust

terminates or is revoked (as to the property) in compliance with Section 11.13 of the Texas Tax Code.

**E. Homestead Maintenance And Expenses.** At any time that my wife occupies residential property held in a trust as her principal residence she shall be responsible for maintaining the property at her expense; however, in making discretionary distributions to my wife from that (or any other) trust, the Trustee may consider those expenses and shall provide for them to the same extent, if any, as would be proper if the property were not held in the trust. For this purpose, "maintaining the property" means: (i) keeping the property in good repair and in compliance with all applicable ordinances, deed restrictions and other applicable rules, if any; (ii) paying the interest on any "mortgage" (meaning any purchase money or home improvement debt secured by a lien on the property); (iii) keeping the property properly insured; and (iv) paying all utilities and other ordinary expenses of maintaining and preserving the property. All other costs of the property shall be paid by the owners of the residence in proportion to their respective ownership interests. This includes, for example, all principal payments on any mortgage and the cost of all improvements and extraordinary repairs (those necessitated by fire, flood or other casualty) in excess of any available insurance proceeds.

- 7.11. Character Of Beneficial Interests.** All interests provided under this Will (whether principal or income, and whether distributed or held in trust): (i) shall belong solely to the particular estate (not any beneficiary) prior to actual distribution, and (ii) upon distribution, shall be received as a gift from me and shall not be the community property of the beneficiary and his or her spouse.
- 7.12. Distributions Not Treated As Advancements.** Except as otherwise provided, no discretionary distribution to a beneficiary of any trust created under this Will shall be treated as an advancement.
- 7.13. Spendthrift Trust.** Each trust created under this Will shall be a "spendthrift trust," as defined by the Texas Trust Code. Prior to actual receipt by any beneficiary, no income or principal distributable from a trust created under this Will shall be subject to anticipation or assignment by any beneficiary or to attachment by any creditor of, person seeking support from, person furnishing necessary services to, or assignee of any beneficiary.
- 7.14. Early Trust Termination.** Subject to Section 6.9, if, in the Trustee's discretion, the property of any trust becomes so depleted as to be uneconomical to be administered as a trust, the Trustee may terminate the trust and distribute the property of the trust as follows: (i) if the trust is named for or identified by reference to a single then living beneficiary, to the named beneficiary; otherwise, (ii) if my wife is then living and a beneficiary of the trust, to my wife; otherwise, (iii) to the then living beneficiaries of the trust in proportion to their then respective presumptive interests in the trust.
- 7.15. Maximum Duration Of Trusts.** Despite any other provision of this Will, to the extent that any trust created under this Will has not previously vested in a beneficiary, the trust shall terminate upon the expiration of the period of the applicable Rule Against Perpetuities (determined using as measuring lives my wife, all of the descendants of my parents and my wife's parents, and all persons who are mentioned by name or as a class as beneficiaries of any trust created by or pursuant to this Will who are living on the date of my death), and the Trustee shall distribute any property then held in the trust (i) to the beneficiary for whom the trust is named, if any; otherwise, (ii) per stirpes to the then living descendants of the named beneficiary, if any; otherwise (iii) the trust estate shall be distributed as provided in Section 3.4 as if it were my Remaining Property and as if I had died on the termination date of the trust.
- 7.16. Combination Of Trusts.** A Fiduciary may terminate (or decline to fund) any trust created by this Will and transfer the trust assets to any other trust (created by this Will or otherwise) having substantially the same beneficiaries, terms and conditions, regardless of whether the Trustee under this Will also is serving as the trustee of the other trust and without liability for delegation of its duties nor for defeating or impairing the interests of remote, unknown or contingent beneficiaries. Similarly, the Trustee of any trust created by this Will may receive and administer as a part of its trust the assets of any other substantially similar trust.
- 7.17. Creation Of Multiple Trusts.** A Fiduciary may divide any trust created under this Will into two or more separate identical trusts (in any proportion) if the Fiduciary deems it advisable. The Trustee may exercise discretionary powers held with respect to the new trusts independently.

Where the original trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount shall not change but the Trustee may distribute the amount from any new trust or partly from one or more in any ratio.

- 7.18. Division And Distribution Of Trust Estate.** A Fiduciary may divide, allocate or distribute property of its estate in divided or undivided interests, pro rata or non pro rata, and either wholly or partly in kind. Except as otherwise provided, all required distributions shall be made on the basis of the fair market value of the assets to be distributed at the time of distribution.
- 7.19. Successive Distributions Not Required.** To the extent that a Fiduciary is authorized to distribute property to any trust (created under this Will or otherwise) and under the terms of that trust (or by virtue of the exercise of a discretionary power or for any other reason), the property would be immediately distributable to or among any one or more persons or other trusts, the Fiduciary may distribute the property directly to those persons or trusts in lieu of the directed distribution.
- 7.20. Additional Contributions.** The Trustee may receive (or refuse to receive for tax or other reasons) contributions of additional property to its estate from any source and in any manner.
- 7.21. Collection Of Nonprobate Assets.** A Fiduciary may receive (or refuse to receive for tax or other reasons) the proceeds of life insurance policies, employee benefit plans and other contractual rights that are payable to the Fiduciary (collectively, "Nonprobate Assets"). A Fiduciary may take whatever action, if any, the Fiduciary considers best to collect Nonprobate Assets. Subject to the other provisions in this Will, any Nonprobate Assets shall be allocated: in accordance with the directions contained in the beneficiary designation or other instrument of transfer, if any; otherwise, in satisfaction of any specific pecuniary gift for which the available properties are insufficient, if any; otherwise, to or among the trusts or individuals receiving my Remaining Property.
- 7.22. Plan Benefits Trusts.** To the extent that a Fiduciary is designated as the beneficiary of any qualified benefit plan or individual retirement account or other Nonprobate Asset subject to the Minimum Required Distribution Rules (the "MRD Rules") (collectively "Plan Benefits"), the following provisions apply: (i) a Plan Benefits Trust corresponding to each trust provided for in this Will is created; (ii) all Plan Benefits shall be allocated (A) in accordance with the directions, if any, contained in the beneficiary designation or other instrument of transfer; otherwise, (B) to or among the trusts or individuals receiving my Remaining Property, substituting Plan Benefits Trusts for their corresponding trusts; (iii) each Plan Benefits Trust shall be irrevocable; (iv) each Plan Benefits Trust shall be identical to its corresponding trust except that all of the following persons, if any, who would otherwise be beneficially interested in the trust (other than those whose interests are contingent solely upon the death of a prior beneficiary living at the DB Determination Date, defined below), are completely excluded as beneficiaries and permissible appointees of the trust: (A) individuals having a shorter life expectancy than the measuring beneficiary and (B) entities not having a life expectancy; and (v) the Trustee shall deliver a copy of this Will or alternate descriptive information to the plan administrator in the form and content and within the time limits required by applicable statute and treasury regulations. For purposes of this Section, the "measuring beneficiary" of a Plan Benefits Trust means the oldest individual who is both living and ascertainably specified in this Will (by name or by class) as a current permissible beneficiary of the trust as of the date for determination of the "Designated Beneficiary" under applicable statute and treasury regulations (the "DB Determination Date"). I intend that, except for persons whose interests are contingent solely upon the death of a prior beneficiary living at the DB Determination Date, only individuals eligible as designated beneficiaries (as defined in Code Section 401(a)(9) and applicable treasury regulations) for purposes of the MRD Rules shall ever be permissible distributees or appointees of Plan Benefits Trusts. This Will shall be administered and interpreted in a manner consistent with this intent. Any provision of this Will which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.
- 7.23. Creation Of S Trusts.** If: (i) any trust created under this Will (an "Original Trust") holds or is to receive any stock in a corporation eligible to be an S Corporation ("S Stock"); (ii) the Original Trust has a Current Beneficiary; (iii) the Current Beneficiary is a U.S. citizen or resident; and (iv) the Current Beneficiary elects or intends to elect to qualify the trust as a Qualified Subchapter S Trust ("QSST") under Code Section 1361(d), then, the Trustee is authorized to allocate the S Stock to a separate "S Trust" to be administered as provided in this Section. In addition to any distributions provided for in the Original Trust, whenever an S Trust holds any S Stock the

Trustee shall distribute all the income of the S Trust to the Current Beneficiary in quarterly or more frequent installments. During the life of the Current Beneficiary: (i) the Current Beneficiary shall be the sole beneficiary of the S Trust; (ii) no distributions shall be made to anyone other than the Current Beneficiary; and (iii) if the S Trust terminates during the Current Beneficiary's life, the remaining property of the S Trust, if any, shall be distributed to the Current Beneficiary. If the Current Beneficiary dies before the complete distribution of the S Trust: (i) the trust shall terminate upon his or her death; (ii) the Trustee shall distribute any undistributed income of the trust to his or her estate; and (iii) the remaining property of the trust shall be disposed of pursuant to the terms of the Original Trust. In the case of any Contingent Trust, the term "Current Beneficiary" means the child or other beneficiary for whom the trust is named. In the case of the Family Trust, the term "Current Beneficiary" means my wife. The Trustee may amend an S Trust in any manner necessary for the sole purpose of ensuring that the S Trust qualifies and continues to qualify as a QSST. Each amendment must be in writing and must be filed among the trust records. I intend that every S Trust qualify as a QSST within the meaning of Code Section 1361(d)(3). This Will shall be interpreted in a manner consistent with this intent and any inconsistent provisions shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

- 7.24. Applicability Of Texas Trust Code.** To the extent consistent with the other provisions of this Will, and to the maximum extent allowed by law, (i) a Fiduciary shall have the powers, duties, and liabilities of trustees set forth in the Texas Trust Code, as amended and in effect from time to time, and (ii) the construction, validity and administration of every trust created under this Will shall be governed by Texas law.

## ARTICLE 8 - DEBTS, EXPENSES AND TAXES

- 8.1. Payment Of Debts.** The Executor shall provide for the payment, when due, of: (i) all debts and obligations (other than Death Taxes, defined below) that are legally enforceable against my estate; and (ii) any other debts and obligations (other than Death Taxes) the payment of which, in the Executor's discretion, is in the best interests of my estate (collectively, "Debts"). If any property of my estate is directed to be distributed subject to any Debt, the Executor shall make payments on that Debt only as necessary to avoid default pending distribution of the property. Debts payable on a periodic basis may be paid as the payments become due. The Executor may extend or renew any Debt, in whole or in part, for any period (including periods extending beyond the duration of the administration of my estate).
- 8.2. Payment Of Expenses.** The Executor shall provide for the payment of the expenses incident to my last illness and funeral, and the expenses incident to the administration of my estate (collectively, "Expenses").
- 8.3. Payment Of Death Taxes.** Except as otherwise provided, the Executor shall provide for the payment of all estate, inheritance, succession, capital gains at death, and other death taxes (including interest and penalties and also including generation-skipping transfer taxes on direct skips from my estate) imposed under the laws of any jurisdiction by reason of my death on or with respect to any property, or the transfer or receipt of any property, passing or which has passed under or outside this Will or any codicil to this Will, by beneficiary designation, by operation of law, or any other form of transfer (collectively, "Death Taxes"). Any Death Taxes may be deferred. Notwithstanding the preceding, the term Death Taxes does not include (and the Executor shall not pay) taxes imposed directly upon the recipient of property, including (i) generation-skipping transfer taxes on taxable terminations, taxable distributions or direct skips from a trust, and (ii) recapture of estate taxes under Section 2032A of the Code.
- 8.4. Source Of Payment.**
- A. Generally.** Except as otherwise provided: (i) Debts and Expenses shall be charged against my Remaining Property; (ii) Death Taxes shall be charged against that portion of my Remaining Property that does not qualify for the marital or charitable deduction, until exhausted, then against the balance of my Remaining Property; and (iii) interest concerning any tax (including Death Taxes) shall be charged in the same manner as the tax.
- B. Certain Management Expenses.** Management Expenses attributable to any marital or charitable share shall be charged against that share. For this purpose: "Management Expenses" means Expenses incurred in connection with the investment of assets or

their preservation or maintenance during a reasonable period of administration; and "marital share" or "charitable share" means a property interest passing from me to my wife or to any charity, respectively.

**C. Disclaimer By My Wife.** In the event of a qualified disclaimer by my wife of any interest in any property, any resulting increase in Death Taxes shall be charged against the disclaimed interest.

**D. Principal And Income Apportionment.** Debts, Expenses and Death Taxes shall be apportioned between principal and income in accordance with Section 378B of the Texas Probate Code; however, no Debts, Expenses or Death Taxes shall be charged against the income of any marital or charitable share (both terms defined above) to the extent it would result in a material limitation on the share's right to income.

**8.5. Death Tax Recovery.** The Executor shall enforce all rights to recovery of any Death Taxes with respect to assets not passing under my Will to the maximum extent authorized by Sections 2206, 2207, 2207A, and 2207B of the Code, Section 322A of the Texas Probate Code, or otherwise.

**8.6. Charges Against Exempt Assets.** Notwithstanding any contrary provision, and to the maximum extent allowed by law, no Debts, Expenses or Death Taxes shall be charged against or satisfied out of any interest in any Exempt Assets, including: (i) insurance and annuities protected under Chapter 1108 of the Texas Insurance Code or otherwise; (ii) any stock bonus, pension, profit sharing or similar plan (including any individual retirement account or retirement plan for self employed individuals) protected under Texas Property Code Section 42.0021 or otherwise; and (iii) any other property or interest in property that is not chargeable with the claims of the creditors of my estate (collectively, "Exempt Assets"). However, the following may be charged against a particular Exempt Asset: (i) Debts secured by a lien or other security interest in that Exempt Asset, (ii) administrative expenses properly and fairly allocable to the administration of that Exempt Asset, and (iii) Death Taxes imposed with respect to that Exempt Asset.

**8.7. Tax Elections.** A Fiduciary shall make elections under tax laws solely in fiduciary capacity and in the manner as appears advisable to the Fiduciary to minimize taxes and expenses payable out of my estate, the trust property of trusts created by me, and by the beneficiaries of each. For example: (i) the Executor may join in the filing of a joint income tax return with my wife or her estate; (ii) the Trustee, in its discretion, may elect or not elect to treat all or any portion of federal estimated taxes paid by any trust to be treated as a payment made by any one or more beneficiaries of that trust who are entitled to receive current distributions of income or principal from that trust (the election need not be made in a pro rata manner among all trust beneficiaries); and (iii) equitable adjustments may (but need not) be made to compensate for the effect of tax elections on the interests of beneficiaries or the amount of recovery of Death Taxes as directed above.

## ARTICLE 9 - GENERAL PROVISIONS

**9.1. Property Disposed Of By This Will.** I intend by this Will to dispose only of my separate property and my share of community property. I confirm to my wife her share of our community property. Whenever (i) a Fiduciary possesses any property which is my wife's separate property, or which represents her interest in our community property, including, but not limited to, interests in or the proceeds of life insurance policies, qualified employee benefit plans or trusts, or other employment related compensation agreements or individual retirement accounts, and (ii) the Fiduciary determines that it no longer needs to administer such property, the Fiduciary shall deliver such property to my wife, if she is then living, otherwise, to her estate. Notwithstanding the preceding, a Fiduciary may make non pro rata divisions of any community property with my wife's consent.

**9.2. Disclaimers.** Except as otherwise provided, if a beneficiary under this Will is surviving but is deemed to be deceased by virtue of a qualified disclaimer (as defined under Code Section 2518), then the beneficiary shall only be deemed to be deceased with respect to the specific interest in property specified in the qualified disclaimer and the qualified disclaimer shall not affect any other rights or interests granted under this Will, including but not limited to rights or interests in trusts to which the disclaimed interest passes as a result of the qualified disclaimer. If the qualified disclaimer is of a life estate or the disclaimant's entire interest in property (or an

undivided portion of such property) in trust, the termination provisions of such estate or trust with respect to the disclaimed interest shall be applied as if the disclaimant failed to survive.

- 9.3. Disclaimer Trusts.** This Section applies whenever an individual (the "Disclaimant") files a qualified disclaimer with respect to any property that passes to (or remains in) a trust under this Will (the "Recipient Trust") by virtue of such qualified disclaimer, but only if the Disclaimant: (i) is a Trustee (or named successor Trustee) of the Recipient Trust; (ii) has any beneficial interest in the Recipient Trust; or (iii) has any power to direct the beneficial enjoyment of the Recipient Trust. Notwithstanding any contrary provision of this Will, unless the Disclaimant disclaims all of his or her rights, powers and interests with respect to the Recipient Trust as described above, the property which would otherwise pass to (or remain in) the Recipient Trust shall instead be distributed to a separate Disclaimer Trust on terms identical to the terms of the Recipient Trust except as follows.
- A. Ascertainable Limitation On Discretionary Powers.** The Disclaimant shall not possess or exercise any powers with respect to, or be authorized to participate in any decision as to, any discretionary distribution or any loan to or for the benefit of any beneficiary of the Disclaimer Trust, except to the extent that such distributions or loans are limited to amounts necessary for the beneficiary's health, maintenance, and support.
  - B. Discretionary Termination.** The Disclaimant shall have no authority to terminate the Disclaimer Trust because of its small size.
  - C. Estimated Tax Payments.** The Disclaimant shall have no authority to treat any estimated income tax payment by the Disclaimer Trust as an estimated income tax payment by a beneficiary.
  - D. Beneficial Interest.** If the Disclaimant is not my wife, the Disclaimant shall have no beneficial interest in the Disclaimer Trust.
  - E. Independent Trust Administration.** As to persons who remain as beneficiaries of both the Disclaimer Trust and the Recipient Trust, the Trustee may exercise discretionary powers held with respect to the Disclaimer Trust and the Recipient Trust (including discretionary distributional powers) on an independent basis, and where the Recipient Trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount so specified shall not change but the Trustee may distribute such amount from either the Recipient Trust or the Disclaimer Trust or partly from each in any ratio.
- 9.4. Powers Of Appointment Not Exercised.** I do not intend by this Will to exercise any power of appointment that I may possess or may come to possess.
- 9.5. Determination Of Incapacity.** Except as otherwise provided, an adult individual generally shall be considered to have full legal capacity absent a presently existing adjudication of incapacity or insanity by a court or other judicial tribunal having jurisdiction to make such a determination.
- A. Fiduciaries.** For purposes of qualification to serve as a Fiduciary or in any other fiduciary capacity under this Will, an adult individual shall be considered legally incapacitated to act when two physicians who have examined such person within the prior two years have certified that in their judgment such person does not have the physical or mental capacity to effectively manage his or her financial affairs.
  - B. Beneficiaries.** An adult individual beneficiary under this Will shall be considered Incapacitated upon a good faith determination made by the fiduciary charged with making such evaluation that such individual lacks the physical or mental capacity, personal or emotional stability or maturity of judgment needed to effectively manage his or her personal or financial affairs (whether because of injury, mental or medical condition, substance abuse or dependency, or any other reason). Individuals under the age of majority shall be considered legally incapacitated.
- 9.6. Definitions.** In connection with the construction and interpretation of this Will the following definitions apply, unless otherwise expressly provided.
- A. Children And Descendants.** Except as otherwise provided, a "child" of another individual means a child determined in accordance with Section 160.201 of the Texas

Family Code. An adopted person shall be a child of the adopting parent(s) but only if legally adopted before attaining age eighteen. A posthumous child who survives birth shall be treated as living at the death of his or her parent. An individual's "descendants" means the individual's children, the children of those children, and so on, determined in accordance with the preceding.

- B. Spouse And My Wife.** A "spouse" of a person does not include any individual who, at the relevant time, is divorced or legally separated from the person, or engaged in pending divorce proceedings with the person. A "surviving spouse" of a person means the individual, if any, who was the person's "spouse" at the time of his or her death. References in this Will to June A. Cleaver or "my wife" mean her; provided that we are not divorced, legally separated, nor engaged in pending divorce proceedings as of the date of my death (or her death, if she predeceases me), in which case all provisions in this Will in favor of my wife or appointing her in any fiduciary capacity shall be void and this Will shall be construed as if she predeceased me.
- C. Heirs.** A person's Heirs or then living Heirs means those individuals who would be that person's heirs at law as to separate personal property if that person were to die single, intestate and domiciled in Texas at the referenced time.
- D. Per Stirpes.** Whenever a distribution (or allocation) of property is to be made "per stirpes" to (or to trusts for) the descendants of any person, the property shall be divided into as many shares as there are then living children of the person and deceased children of the person who left descendants who are then living. One share shall be distributed to (or to the trust for) each living child and the share for each deceased child shall be divided among his or her then living descendants in the same manner.
- E. Pronouns.** Pronouns, nouns and terms as used in this Will shall include the masculine, feminine, neuter, singular, and plural forms wherever appropriate to the context.
- F. Survive.** If my wife survives me by any period of time or if we have both died and the order of our deaths cannot be determined, she shall be presumed to have survived me for all purposes. In all other cases a requirement that an individual "survive" a specified person or event or be "surviving" or "living" means survival by at least ninety days; however, the Fiduciary may make advance distributions within that period of any gift to any beneficiary to the extent necessary to provide for his or her health, maintenance, and support.
- G. Code.** References to the Code or any Section of the Code mean the Internal Revenue Code of 1986, or the Section, as amended and in effect from time to time, or the appropriate successor provision.
- 9.7. Notice.** Any notice required to be given or delivered under this Will shall be deemed given or delivered when an acknowledged written notice is actually delivered to the person or organization entitled to notice or mailed certified mail, return receipt requested, to the address then appearing on the Fiduciary's records for the person or organization.
- 9.8. Actions By And Notice To Incapacitated Persons.** Any action permitted to be taken by a minor or other incapacitated person shall be taken by the person's parents or guardian. Any notice or report required to be delivered to a minor or other incapacitated person shall be delivered to such person's parents or guardian. If both parents of a minor are living, any such action shall be taken by, and any such notice shall be given to, the parent to whom I am more closely related.
- 9.9. Headings.** The headings employed in this Will are for reference purposes only and shall not in any way affect the meaning or interpretation of the provisions of this Will.

I have signed this Will this \_\_\_\_ day of \_\_\_\_\_, 2009.

*[here insert appropriate testator signature block, attestation clause, witness signature block, and self proving affidavit]*

### 3. MARITAL DEDUCTION WILL

#### **WILL OF WARD M. CLEAVER**

I am WARD M. CLEAVER of Harris County, Texas. This is my Will. I revoke all earlier wills and codicils.

I am married to June A. Cleaver. I have two children: Wallace Cleaver, born March 21, 1977, and Theodore Cleaver, born May 31, 1983. Every reference in this Will to a "child" or "children" of mine is to them and all other children who may be born to or adopted by me in the future.

#### ARTICLE 1 - FIDUCIARY APPOINTMENTS

1.1. Executors. I name the following, in the following order, as sole Independent Executor of this Will, without bond: June A. Cleaver, otherwise Wallace Cleaver, otherwise Theodore Cleaver, otherwise Big Trust Company.

1.2. Trustees. I appoint the following, in the following order, as sole Trustee of every trust created under this Will: June A. Cleaver, otherwise Wallace Cleaver, otherwise Theodore Cleaver, otherwise Big Trust Company. If all of the above (and any successors) fail or cease to serve as Trustee of any trust and the resulting vacancy is not filled under the provisions of Section 8.2, the Trustee Appointer (designated in Section 8.2) shall appoint a Trustee of that trust in accordance with the provisions of Section 8.3.

#### ARTICLE 2 - SPECIFIC TESTAMENTARY GIFTS

2.1. Personal Effects. I give all of my jewelry, pictures, photographs, works of art, books, household furniture and furnishings, clothing, automobiles, boats, recreational vehicles and equipment, club memberships, burial plots, and articles of household or personal use or ornament of all kinds (collectively, my "personal effects"), as follows, subject to the provisions of Section 9.10.

A. Memorandum On Personal Effects. I may leave a memorandum making one or more personal effects gifts. If the memorandum is wholly in my own handwriting, signed by me, and dated on or after the date of this Will: (i) it shall be deemed to be a codicil to this Will; (ii) all gifts specified in the memorandum shall be made prior to making any of the following gifts; and (iii) if the memorandum conflicts with any of the following gifts, the memorandum shall control.

B. Gift Of Remaining Personal Effects. To the extent not disposed of by the above, I give all of my remaining personal effects to my wife, if she survives me. If my wife does not survive me, I give my remaining personal effects to my children who survive me, in equal shares. However, if any child fails to survive me but leaves one or more descendants who survive me, I give the share that child would have received (if he or she had survived) per stirpes to his or her descendants who survive me.

C. Division Of Personal Effects. Any personal effects given to two or more individuals shall be divided among them as they may agree among themselves. If they cannot agree on a division within a reasonable time following my death, the Executor shall make the division for them.

2.2. My Wife's Retirement Accounts. If my wife survives me, I give all of my interest, if any, in my wife's employee or self-employed benefit plans and individual retirement accounts to my wife.

2.3. Marital Deduction Amount. If my wife survives me, I give a Marital Deduction Amount (defined in Article 11) to the Trustee of the Marital Trust, to be administered as provided in Article 4.

#### ARTICLE 3 - REMAINING PROPERTY

After providing for payment of Debts, Expenses and Death Taxes as directed by Article 10, my Remaining Property (meaning the residue of my probate estate, including lapsed legacies and devises, but net of Debts and Expenses) shall be disposed of as provided in this Article.

3.1. Disposition If My Wife Survives Me. If my wife survives me, I give my Remaining Property to the Trustee of the Bypass Trust, to be administered as provided in Article 5.

3.2. Disposition If My Wife Does Not Survive Me But Descendants Survive Me. If my wife does not survive me but at least one child or other descendant of mine survives me, I give my Remaining Property as follows.

A. Distribution To Bypass Trust. If at least one child of mine who survives me is under the age of twenty-three years, my Remaining Property shall be distributed to the Trustee of the Bypass Trust, to be administered as provided in Article 5.

B. Distribution To Children And Descendants. If (i) no child of mine who survives me is under the age of twenty-three years but (ii) at least one child or other descendant of mine survives me, my Remaining Property shall be distributed to my children who survive me, in equal shares, subject to the provisions of Article 6 (providing for Child's Trusts for my children who are under age thirty or Incapacitated). However, if any child who fails to survive me leaves one or more descendants who survive me, the share that child would have received (if he or she had survived) shall be distributed per stirpes to his or her descendants who survive me, subject to the provisions of Article 7 (providing for Contingent Trusts for other beneficiaries who are under age twenty-five or Incapacitated).

C. Distribution To Children And Descendants. If at least one child or other descendant of mine survives me, my Remaining Property shall be distributed to my children who survive me, in equal shares, subject to the provisions of Article 6 (providing for Child's Trusts for my children who are under age thirty or Incapacitated). However, if any child who fails to survive me leaves one or more descendants who survive me, the share that child would have received (if he or she had survived) shall be distributed per stirpes to his or her descendants who survive me, subject to the provisions of Article 7 (providing for Contingent Trusts for other beneficiaries who are under age twenty-five or Incapacitated).

3.3. Contingent Disposition. Any part of my Remaining Property not effectively disposed of by the above provisions shall be distributed one-half to my then living Heirs (defined in Section 12.7) and one-half to the then living Heirs of my wife, subject to the provisions of Article 7 (providing for Contingent Trusts for beneficiaries who are under age twenty-five or Incapacitated).

#### ARTICLE 4 - MARITAL TRUST

4.1. Distributions During The Life Of My Wife. Beginning at my death, and during the life of my wife, the Trustee shall distribute to my wife the income of the Marital Trust, at least quarterly, plus so much or all of the trust principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for her continued health, maintenance, and support.

4.2. Termination And Final Distribution Upon The Death Of My Wife. Upon the death of my wife, the Marital Trust shall terminate. The Trustee shall distribute any income accumulated but remaining undistributed at my wife's death to my wife's estate, and shall provide for payment of taxes attributable to the trust as provided in Section 10.8. The remaining trust property, if any, shall be disposed of as follows.

A. Testamentary Limited Power Of Appointment. My wife shall have a Testamentary Limited Power of Appointment (defined in Section 12.4) over all the remaining trust property, exercisable in favor of any one or more of the following: my descendants, the spouses of my descendants, the surviving spouses of any deceased descendants of mine, and any public, charitable and religious organizations. If my wife does not fully exercise this Power of Appointment, the remaining unappointed trust property shall be disposed of as follows.

B. Alternate Distribution. The remaining unappointed trust property, if any, shall be distributed as provided in Section 3.2 or 3.3, whichever applies, as if it were my Remaining Property and as if I had died on the termination date of the trust.

#### ARTICLE 5 - BYPASS TRUST

5.1. Distributions During The Trust Term To My Wife, My Children And My Descendants. During the term of the Bypass Trust, the Trustee shall distribute to my wife, as primary beneficiary, and may distribute to my children and the descendants of any deceased child of mine, as secondary beneficiaries,

so much or all of the trust income and principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

5.2. Testamentary Limited Power Of Appointment. If my wife survives me, she shall have a Testamentary Limited Power of Appointment (defined in Section 12.4) over all the remaining trust property, exercisable in favor of any one or more of the following: my descendants, the spouses of my descendants, the surviving spouses of any deceased descendants of mine, and any public, charitable and religious organizations. To the extent that my wife exercises this Power of Appointment, the trust shall terminate upon her death. Otherwise the trust shall terminate (and the remaining unappointed trust property shall be disposed of) as provided in the following Section.

5.3. Termination And Final Distribution. On the death of my wife, or, if later, the date that no then living child of mine is under the age of twenty-three years, the Bypass Trust shall terminate and the remaining unappointed trust property, if any, shall be distributed as provided in Section 3.2 or 3.3, whichever applies, as if it were my Remaining Property and as if I had died on the termination date of the trust.

## ARTICLE 6 - CHILD'S TRUSTS

6.1. Creation Of Trusts. All property that passes subject to the provisions of this Article that otherwise would be distributable by the Executor or Trustee to a child of mine who has not reached the age of thirty years or who, in the discretion of the Executor or Trustee, respectively, is "Incapacitated" (defined in Section 12.6), shall instead be distributed to the Trustee as a separate Child's Trust named for the child, to be administered as provided in this Article. When used in this Article, the words "the trust," "the child's trust," or "his or her trust" mean the Child's Trust named for a particular child and the words "the child" mean that child.

6.2. Distributions During Child's Life. During the life of the child, the child's trust shall be administered as follows.

A. General Discretionary Distributions To Child And Descendants. The Trustee shall distribute to the child, as primary beneficiary, and may distribute to his or her descendants (if any), as secondary beneficiaries, so much or all of the income and principal of the child's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

B. Special Additional Distributions To Child. At any time after the child has reached the age of twenty-five years, and to the extent the Trustee believes the above distributions will not be unduly jeopardized, the Trustee may distribute to the child so much of the income and principal of the child's trust as the Trustee determines to be appropriate:

1. Business Or Profession. To enable the child to enter into or continue a business or profession in which the Trustee believes there are reasonable prospects for success; or

2. Home Purchase. To provide a down payment on a home for the child and his or her family, the value of which would be reasonably related to the type of home the child might be expected to own, occupy and support.

C. Mandatory Terminating Distributions To Child. The child's trust shall terminate in stages as follows, except that the Trustee shall withhold all of the following distributions for so long as the Trustee, in the Trustee's discretion, determines that the child is Incapacitated (defined in Section 12.6).

1. One-Half At Age Twenty-Five. On the child's twenty-fifth birthday or, if later, upon creation of the child's trust, the Trustee shall distribute to the child one-half of the then remaining assets of his or her trust.

2. Final Distribution At Age Thirty. On the child's thirtieth birthday, the child's trust shall terminate and the Trustee shall distribute to the child all of the then remaining assets of his or her trust.

6.3. Termination And Final Distribution Upon Child's Death. If the child dies before the complete distribution of his or her trust, the trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.

A. Testamentary Limited Power Of Appointment. The child shall have a Testamentary Limited Power of Appointment (defined in Section 12.4) over all the remaining property of his or her trust, exercisable in favor of any one or more individuals or entities.

B. Distribution To Descendants. If the child does not fully exercise his or her Power of Appointment, the remaining unappointed property of the trust, if any, shall be distributed per stirpes: (i) to the child's descendants who survive the child, if any, otherwise, (ii) to my descendants who survive the child, if any. The preceding distributions are subject to the provisions of this Article and Article 7 (providing for Contingent Trusts for other beneficiaries who are under age twenty-five or Incapacitated).

C. Contingent Disposition. Any property of the child's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Section 3.3 as if it were my Remaining Property and as if I had died on the termination date of the child's trust.

#### ARTICLE 7 - CONTINGENT TRUSTS

7.1. Creation Of Trusts. All property that passes subject to the provisions of this Article that otherwise would be distributable by the Executor or Trustee to any beneficiary (other than my wife or a child of mine) who has not reached the age of twenty-five years or who, in the discretion of the Executor or Trustee, respectively, is Incapacitated (defined in Section 12.6), may instead be distributed to the Trustee as a separate Contingent Trust named for the beneficiary, to be administered as provided in this Article. When used in this Article, the words "the trust," "the beneficiary's trust," or "his or her trust" mean the Contingent Trust named for a particular beneficiary and the words "the beneficiary" mean that beneficiary.

7.2. Distributions During The Beneficiary's Life. During the life of the beneficiary, the beneficiary's trust shall be administered as follows.

A. General Discretionary Distributions. The Trustee shall distribute to the beneficiary so much or all of the income and principal of the beneficiary's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for the beneficiary's continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

B. Mandatory Terminating Distribution To Beneficiary At Age Twenty-Five. Whenever the beneficiary (i) reaches the age of twenty-five years and, (ii) in the Trustee's discretion, is not Incapacitated (defined in Section 12.6), the Trustee shall distribute to the beneficiary the remaining property of his or her trust.

7.3. Termination And Final Distribution Upon The Beneficiary's Death. If the beneficiary dies before the complete distribution of his or her trust, the trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.

A. Distribution To Descendants. The remaining property of the beneficiary's trust shall be distributed per stirpes to the following individuals who survive the beneficiary: (i) the beneficiary's descendants, if any, otherwise, (ii) the descendants of the beneficiary's parent who is a child of mine, if any, otherwise, (iii) the descendants of the nearest ancestor of the beneficiary who is a descendant of mine and who has surviving descendants, if any, otherwise, (iv) the descendants of the beneficiary's parent who is more closely related to me, if any, otherwise, (v) my descendants, if any. All of the preceding distributions are subject to the provisions of this Article and Article 6 (providing for Child's Trusts for my children who are under age thirty or Incapacitated).

B. Contingent Disposition. Any property of the beneficiary's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Section 3.3 as if it were my Remaining Property and as if I had died on the termination date of the beneficiary's trust.

ARTICLE 8 - EXECUTOR AND TRUSTEE PROVISIONS

The provisions of this Article govern the fiduciary relationship of the Executor and the Trustee. When used in this Will, where the context permits, the term Executor means the executor or co-executors from time to time serving; the term Trustee means the trustee or co-trustees from time to time serving; the term Fiduciary, means any Executor or Trustee; and the "estate" of a Fiduciary means the particular probate or trust estate being administered by the Fiduciary.

8.1. Executor Succession.

A. Executor Resignation. An Executor may resign at any time with or without cause by filing a resignation notice in the probate proceedings pertaining to my estate and by delivering a copy of the resignation notice (i) to each then serving Co-Executor, if any, (ii) to the next successor Executor named in this Will, if any, and (iii) to each adult individual, corporation, trustee, or other beneficiary then entitled to or permitted to receive a distribution from my estate as of the date the resignation notice is given.

B. Failure Or Cessation Of Every Named Executor. If every named Executor fails or ceases to serve, I desire that the successor administrator appointed by the court serve as independent administrator without bond or other security and with all the powers of the named Executors.

8.2. Trustee Succession.

A. Wife's Appointment Of Co-Trustee. Whenever my wife is serving as sole Trustee of any trust created under this Will, she may appoint a Co-Trustee to serve with her. If my wife subsequently ceases to act as Trustee while her appointed Co-Trustee is still serving, then the appointed Co-Trustee shall also cease serving as a Trustee (unless otherwise eligible to continue to serve as a Trustee in accordance with the provisions of this Will). Each Co-Trustee appointment must comply with the general provisions of Section 8.3.

B. Trustee Appointer. I name the following persons, in the following order, to serve as the Trustee Appointer: (i) June A. Cleaver, otherwise (ii) as to any Child's Trust or Contingent Trust, the named beneficiary, if legally competent, otherwise the parent or guardian of the named beneficiary, if any, otherwise (iii) my oldest then living adult descendant, if any.

C. Resignation. A Trustee may resign as Trustee of any one or more trusts created under this Will at any time, with or without cause, by delivering a resignation notice in recordable form (i) to each adult beneficiary of the trust who is then permitted to receive distributions from the trust; (ii) to each serving Co-Trustee, if any; and (iii) to the next successor Trustee named in this Will, if any, otherwise, to the Trustee Appointer (but only if the Trustee Appointer's action is required to fill the resulting vacancy). The Trustee's resignation shall be effective only upon the acceptance and qualification of the successor.

8.3. Trustee Appointment Procedures.

A. Generally. Every appointment of a Trustee must be evidenced by a written instrument in recordable form, signed by the person (or the requisite number of persons) required to approve the appointment, and delivered to the appointee. The instrument must identify the appointee, state the effective time and date of appointment, and contain an acceptance by the appointee. Except as otherwise provided, every Trustee appointed under this Will must be either a Qualified Corporation or one or more Qualified Individuals.

B. Qualified Individual. The term Qualified Individual means any legally competent individual who has attained the age of thirty years and who is willing to serve under this Will.

C. Qualified Corporation. The term Qualified Corporation means any corporation having trust powers that is qualified and willing to serve under this Will and that has, as of the relevant time, either (i) a minimum capital and surplus of at least five million dollars (\$5,000,000 U.S.), or (ii) at least one hundred million dollars (\$100,000,000 U.S.) in trust assets under administration.

#### 8.4. Fiduciary Compensation.

A. Expense Reimbursement And Reasonable Compensation. Each Fiduciary shall be reimbursed from its estate for the reasonable costs and expenses incurred in connection with the administration of its estate and also shall be entitled to receive fair and reasonable compensation from its estate (payable at convenient intervals selected by the Fiduciary) considering: (i) the duties, responsibilities, risks, and potential liabilities undertaken; (ii) the nature of its estate; (iii) the time and effort involved; and (iv) the customary and prevailing charges for services of a similar character at the time and at the place the services are performed.

B. Professional Serving As Fiduciary. A professional individual serving as Fiduciary may receive compensation for Fiduciary services based on his or her customary hourly rates (or other customary charges for professional services). If the professional has hired himself or herself (or any professional organization with which he or she is affiliated) in a professional capacity with respect to his or her estate, Fiduciary compensation shall be in addition to compensation for professional services; however, each service shall be compensated for only once (as either a Fiduciary service or professional service but not both).

C. Corporate Co-Fiduciary. Where appropriate and customary, a bank or other corporate Co-Fiduciary may receive compensation in amounts not exceeding the customary and prevailing charges for services of a similar character at the time and at the place the services are performed as if it were serving as sole Fiduciary.

D. Waiver Of Right To Compensation. Any Fiduciary may at any time waive a right to receive compensation for services rendered or to be rendered as Fiduciary.

#### 8.5. Fiduciary Liability.

A. Generally. A Fiduciary who has made a reasonable, good faith effort to exercise the standard of care and other fundamental duties applicable to the Fiduciary in Section 9.2 and the other provisions of this Will shall not be liable: (i) for any loss that may occur as a result of any actions taken or not taken by the Fiduciary; (ii) for the acts, omissions or defaults of any other individual or entity serving as Fiduciary or as ancillary fiduciary; nor (iii) to any person dealing with the Fiduciary in the administration of its estate, unless the Fiduciary expressly contracts and binds itself personally. For purposes of the preceding, a Fiduciary's conduct shall be judged in light of the facts and circumstances existing at the time and not by hindsight.

B. Uncompensated Individual Fiduciary. In addition, an individual serving as Fiduciary without compensation, including an individual who has at all relevant times waived his or her right to compensation, shall never be liable to any person for any consequences of any action (or inaction) unless he or she takes the action (or inaction) in bad faith, with gross negligence, or with intentional or reckless disregard for his or her duties as Fiduciary.

C. Reimbursement. An individual or entity serving as Fiduciary shall be entitled to reimbursement from its estate for any liability or expense, whether in contract, tort or otherwise, reasonably incurred by the Fiduciary in the administration of its estate.

8.6. Transactions In Which The Fiduciary Has An Interest. Notwithstanding any contrary provisions of the Texas Probate Code, the Texas Trust Code or other applicable law: (i) any individual or entity serving as Fiduciary under this Will may engage his or her estate in transactions with himself or herself personally (or otherwise), so long as the Fiduciary establishes that the consideration exchanged in the transaction is fair and reasonable to his or her estate; and (ii) any Fiduciary may engage its estate in transactions with itself personally (or otherwise) pursuant to the terms of any valid and enforceable executory contract signed by me. Whenever the office of Executor or Trustee is filled by more than one person, any transaction in which an Executor or Trustee has a personal interest must be approved by all Executors or Trustees, respectively.

8.7. Independent Administration Without Bond. No action shall be required in any court in relation to the settlement of my estate other than the probating and recording of this Will and the return of an inventory, appraisal and list of claims of my estate. So far as can be legally provided, all of the powers and discretions granted to a Fiduciary shall be exercised without the supervision of any court. No bond

or other security shall be required of any primary or successor Fiduciary in any jurisdiction, whether acting independently or under court supervision.

8.8. Ancillary Fiduciary. If at any time and for any reason a Fiduciary is unwilling or unable to act as Fiduciary as to any property subject to administration in any jurisdiction (other than the jurisdiction in which the Fiduciary is serving), then, to the extent permitted by applicable law, the Fiduciary may appoint (and remove) any one or more Qualified Individuals or a Qualified Corporation (both terms defined in Section 8.3) to act as ancillary fiduciary on such terms as the Fiduciary may deem appropriate.

8.9. Restrictions On Beneficially Interested Trustee; Independent Trustee.

A. Scope. This Section applies to every Trustee of any trust created under this Will (1) who is an "Interested Person" (meaning a person with any direct or indirect beneficial interest in the trust) or (2) who is related or subordinate to an Interested Person with respect to such trust, and was appointed as Trustee by the Interested Person after the Interested Person's exercise of a power to remove a prior Trustee.

B. General Rule. No Trustee to whom this Section applies shall ever possess or exercise any powers with respect to, or authorize or participate in any decision as to: (i) any discretionary distribution or any loan to or for the benefit of the Interested Person, except to the extent that the distributions or loans are limited by an ascertainable standard relating to the Interested Person's health, maintenance, support, or education; (ii) any discretionary distribution to any other beneficiary in discharge of any of the Interested Person's legal obligations; (iii) the termination of the trust because of its small size, if the termination would result in a distribution to the Interested Person or if the distribution would discharge any of the Interested Person's legal obligations; nor (iv) the treatment of any estimated income tax payment as a payment by the Interested Person, except to the extent that the payment is limited by an ascertainable standard relating to the Interested Person's health, maintenance, support, or education.

C. Independent Trustee. Each such decision shall be made solely by the "Independent Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: (i) the currently acting Co-Trustee(s), if any, otherwise, (ii) the next successor Trustee(s) designated under this Will, if any, otherwise, (iii) a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Independent Co-Trustee is appointed under these circumstances, the sole power and responsibility of the Independent Co-Trustee shall be to make decisions reserved to the Independent Trustee under this Section.

8.10. Restrictions On Insured Trustee; Insurance Trustee.

A. Scope. This Section applies to every Trustee of any trust created under this Will (i) who is an "Insured Person" (meaning a person who is an insured under a life insurance policy with respect to which the trust owns any interest or holds any rights or powers) or (ii) who is related or subordinate to an Insured Person with respect to such trust, and was appointed as Trustee by the Insured Person after the Insured Person's exercise of a power to remove a prior Trustee.

B. General Rule. No Trustee to whom this Section applies shall ever possess or exercise any rights or powers with respect to the policy, nor authorize or participate in any decision as to the policy, except as specifically authorized by this Section.

C. When Trustee Serves As Sole Trustee. Every Trustee to whom this Section applies who serves as sole Trustee must: (i) designate the Trustee of the trust as the beneficiary of the policy to the extent of the trust's interest in the policy; (ii) continue to pay the premiums on the policy without using policy loans; (iii) allow any policy dividends to reduce premiums; and (iv) upon termination of the trust, distribute the policy pro rata to the remainder beneficiaries of the trust.

D. Insurance Trustee. All decisions whether to take any different or additional actions with respect to the policy shall be made solely by the "Insurance Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: (i) the currently acting Co-Trustee(s), if any, otherwise, (ii) the next successor Trustee(s) designated under this Will, if any, otherwise, (iii) a Trustee appointed by the Trustee

Appointer upon written request of any Trustee to whom this Section applies. If an Insurance Trustee is appointed under these circumstances, the sole power and responsibility of the Insurance Trustee shall be the exclusive authority to make discretionary decisions as to the policy.

8.11. Co-Fiduciary Provisions. Except as otherwise provided, Co-Executors and Co-Trustees shall act (i) by unanimous consent if two are serving, and (ii) by majority vote if three or more are serving. Any individual Co-Executor or Co-Trustee may revocably delegate to any other Co-Executor or Co-Trustee, respectively, any or all of his or her rights, powers and discretions as a Co-Executor or Co-Trustee. Any delegation shall be by written instrument specifying the extent and duration of the delegation. Whenever a corporate Co-Executor or Co-Trustee is serving, it shall have custody of all investments and records of its estate to the exclusion of all individual Co-Executors or Co-Trustees, respectively (but it may revocably waive this right in whole or in part from time to time), and it shall have the primary responsibility for preparing and distributing accountings.

8.12. Reorganization Or Insolvency Of Corporate Fiduciary. Except as otherwise provided, if a corporation nominated to serve or serving as Fiduciary ever changes its name, or merges or consolidates with or into any other bank or trust company, the corporation or successor entity shall be deemed to be a continuing entity and shall continue to be eligible for appointment, or shall continue to act as a Fiduciary. Notwithstanding the preceding, if a corporation serving or designated to serve as a Fiduciary becomes insolvent and its assets are sold, transferred to, or otherwise acquired by another entity by any form of governmental or regulatory process, the successor entity shall not succeed to appointment as Fiduciary, and if it does so succeed by operation of law, I direct the Fiduciary to resign from its office as Fiduciary unless the Trustee Appointer agrees that it may continue to serve.

## ARTICLE 9 - ADMINISTRATIVE PROVISIONS

9.1. Duties At Inception Of Estate. Within a reasonable time after accepting a fiduciary appointment or receiving assets as a part of its estate, a Fiduciary shall (i) review the records, assets, beneficiaries, purposes, terms, distribution requirements, and all other relevant circumstances of its estate, and (ii) make and implement a distribution plan and an investment plan that are consistent with the purposes of its estate generally and that bring the estate portfolio into compliance with Sections 9.3 and 9.4.

9.2. Fundamental Fiduciary Duties. A Fiduciary shall administer its estate in good faith and in accordance with the terms of this Will and the law. Except as otherwise provided, the following fundamental provisions apply to all aspects of a Fiduciary's investment, management and administration of its estate.

A. General Standard Of Care. A Fiduciary shall exercise the standard of care, skill, and caution generally exercised by compensated fiduciaries with respect to comparable estates in the same geographic area. A Fiduciary who has special skills or expertise, or is selected as a Fiduciary in reliance upon the Fiduciary's representation that the Fiduciary has special skills or expertise, has a duty to use those special skills or expertise.

B. Loyalty And Impartiality; Primary And Secondary Beneficiaries. A Fiduciary shall act solely in the interest of the beneficiaries of its estate, not in the interest of the Fiduciary personally. If a Fiduciary's estate has two or more beneficiaries, the Fiduciary shall act impartially, taking into account any differing interests of the beneficiaries. However, a Fiduciary (i) may favor present income beneficiaries over future beneficiaries and (ii) shall favor "primary" beneficiaries over other beneficiaries and "secondary" beneficiaries over beneficiaries who are neither primary nor secondary.

C. Conflict Resolution. A Fiduciary shall make a reasonable effort to resolve any conflicts (including conflicts as to favorable or adverse tax consequences) between or among the Fiduciary and those persons who are beneficially interested in its estate by mutual agreement. If after reasonable efforts the Fiduciary, in the Fiduciary's discretion, determines that a mutual agreement is not likely to be reached, the Fiduciary shall resolve the conflicts in the Fiduciary's discretion.

D. Duty To Verify Facts. A Fiduciary shall make a reasonable effort to verify relevant facts. However, a Fiduciary may rely on (and need not independently verify): (i) the advice of any professional (including an agent, attorney, advisor, accountant, fiduciary, or other professional or representative) who was hired (or to whom duties were delegated)

in accordance with this Will and with reasonable care; and (ii) any written instrument or other evidence that the Fiduciary reasonably believes to be accurate. (But a corporate Fiduciary shall always be liable for the acts, omissions and defaults of its affiliates, officers and regular employees.)

E. Reliance On Predecessor Fiduciary. A Fiduciary may rely on the records and other representations of a Predecessor Fiduciary (meaning a predecessor Fiduciary under this Will or a personal representative or trustee of any estate or trust from which distributions may be made to the Fiduciary), and need not request an accounting from or contest any accounting provided by a Predecessor Fiduciary. However, the preceding shall not apply to any Fiduciary to the extent that the Fiduciary (i) has received a request from a beneficiary having a vested material interest in its estate to secure an accounting or to conduct an investigation, or (ii) has actual knowledge of facts that would lead a reasonable person to believe that, as a consequence of any act or omission of a Predecessor Fiduciary, a material loss has occurred or will occur.

F. Special Rule For Uncompensated Individual Fiduciaries. Notwithstanding any contrary provision, whenever an uncompensated individual is serving as Fiduciary (meaning an individual serving with no right to compensation or who, at all relevant times, has waived his or her right to compensation), he or she: (i) may continue any style of investing that is consistent with the style of investing I undertook during my lifetime; and (ii) shall exercise that standard of care which is commensurate with his or her particular skills and expertise, or, to the extent lower, the general standard of care required of Fiduciaries without special skills or expertise.

9.3. Prudent Investor Rule. Except as otherwise provided, the prudent investor rule, as set forth in the following provisions, governs all aspects of a Fiduciary's investments.

A. Generally. A Fiduciary shall invest and manage the assets of its estate as a prudent investor would, by considering the purposes, terms, distribution requirements, and other relevant circumstances of its estate.

B. Investment And Management Authority. A Fiduciary may invest its estate in any kind of property or type of investment, and exercise the broadest managerial discretion over its estate, that is consistent with the other provisions of this Will.

C. Portfolio Theory. A Fiduciary shall make investment and management decisions respecting individual assets not in isolation but in the context of its estate portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to its estate.

D. Diversification. Generally, a Fiduciary shall diversify the investments of its estate unless the Fiduciary reasonably determines that, because of special circumstances, the purposes of its estate are better served without diversifying.

E. Originally Contributed Properties. Notwithstanding the preceding (but subject to Section 11.6), a Fiduciary may continue to hold and maintain all assets originally contributed to its estate and all transmigrations of those assets, without liability for any depreciation or loss that may result.

F. Unproductive Or Wasting Assets. Except as otherwise provided in Section 11.6, a Fiduciary may receive, acquire and maintain unproductive or underproductive assets.

G. Speculative Investments. A Fiduciary may receive, acquire and maintain assets that may be categorized as speculative or hazardous.

9.4. Specific Management And Investment Authority. A Fiduciary's management and investment authority includes, but is not limited to, the following.

A. Securities And Business Interests. A Fiduciary may acquire securities, whether traded on a public securities exchange or offered through a private placement, and may trade on margin. A Fiduciary may form, reorganize or dissolve corporations, give proxies to vote securities, enter into voting trusts, and generally exercise all rights of a stockholder. A Fiduciary may continue, initially form, expand, and carry on business activities, whether

in proprietary, general or limited partnership, joint venture, corporate, or other form, with any persons and entities.

B. Real Estate. A Fiduciary may purchase, sell, exchange, partition, subdivide, develop, manage, and improve real property.

C. Mineral Properties. A Fiduciary may acquire, maintain, manage, or sell mineral interests, and make oil, gas and mineral leases covering any lands or mineral interests forming a part of its estate, including leases for periods extending beyond the duration of its estate.

D. Life Insurance. A Fiduciary may acquire, maintain in force, and exercise all rights of a policyholder under policies of life insurance insuring the life of a beneficiary of its estate, or an individual in whom such beneficiary has an insurable interest.

E. Joint Investments; Accounts With The Fiduciary. A Fiduciary may invest its estate in undivided interests in any otherwise appropriate investment and may hold separate estates under this or any other instrument in one or more common accounts in undivided interests. A corporate Fiduciary may deposit the cash portion of its estate with itself and may invest its estate in its common trust funds.

F. Manage, Sell And Lease. A Fiduciary may manage, sell, lease (for any term, even if beyond the anticipated term of its estate), partition, improve, repair, insure, and otherwise deal with all property of its estate.

G. Nominee Title. A Fiduciary may hold title to any property in the name of one or more nominees without disclosing the fiduciary relationship.

H. Loans And Guarantees. A Fiduciary may lend money to any individual or entity and may endorse, guarantee, become the surety of, provide security for, or otherwise become obligated for or with respect to the debts or other obligations of any individual or entity. All these transactions (except those for the benefit of any current beneficiaries of the particular estate involved) shall be on commercially reasonable terms, including adequate interest and security.

I. Borrow. A Fiduciary may assume, renew and extend any indebtedness previously created, and borrow for any purpose (including the purchase of investments or the payment of taxes) from any source (including a Fiduciary individually) at the then usual and customary rate of interest, and mortgage or pledge any property of its estate to any lender.

J. Pay Expenses. A Fiduciary may pay all taxes and all reasonable expenses, including reasonable compensation to the agents and counsel (including investment counsel) of the Fiduciary.

K. Claims. A Fiduciary may institute and defend suits and release, compromise or abandon claims.

L. Environmental Hazards. A Fiduciary may take all appropriate action to deal with any environmental hazard and comply with any environmental law, regulation or order, and may institute, contest or settle legal proceedings concerning environmental hazards.

9.5. Agents And Attorneys. A Fiduciary may employ and compensate agents, attorneys, advisors, accountants, and other professionals (including the Fiduciary individually and any professional organization with which the Fiduciary is affiliated) and may rely on their advice and delegate to them any authorities (including discretionary authorities).

9.6. Principal And Income. Subject to Section 11.6, a Fiduciary shall allocate receipts and disbursements between principal and income in a reasonable manner and may establish a reasonable reserve for depreciation or depletion and fund this reserve by appropriate charges against the income of its estate. For purposes of determining income from a partnership or proprietorship, a Fiduciary may (but need not) utilize the partnership's or proprietorship's income as reported for federal income tax purposes.

9.7. Records, Books Of Account, And Reports. A Fiduciary shall maintain proper books of account which shall at all reasonable times be open for inspection or audit by all current permissible beneficiaries

of its estate who are not Incapacitated. Within a reasonable time after receiving written request from a beneficiary entitled to inspect books of account, a Fiduciary shall make a written financial report of its estate to the beneficiary. The natural or court appointed guardian of an Incapacitated beneficiary otherwise entitled to request a report may request (and receive) a report on the beneficiary's behalf. No Fiduciary shall ever be required to deliver reports of its estate more frequently than quarterly. Whenever my wife is serving as Fiduciary she may provide copies of bank, brokerage and other financial statements and that shall constitute a sufficient report of all assets and transactions disclosed on the statements.

9.8. Discretionary Distribution Considerations. Except as otherwise provided, in making discretionary distributions under this Will, the Trustee making the distribution decision may consider all circumstances and factors the Trustee deems pertinent, including: (i) the beneficiaries' accustomed standard of living and station in life; (ii) all other income and resources reasonably available to the beneficiaries and the advisability of supplementing their income or resources; (iii) the beneficiaries' respective character and habits, their diligence, progress and aptitudes in acquiring an education, and their ability to handle money usefully and prudently, and to assume the responsibilities of adult life and self-support in light of their particular abilities and disabilities; and (iv) the tax consequences of the Trustee's decision to make (or not to make) the distributions and out of which trust any distributions should be made. Except as otherwise provided, as to any trust with more than one beneficiary, the Trustee may make discretionary distributions in equal or unequal proportions and to the exclusion of any beneficiary. The Trustee shall not allow a beneficiary who reasonably should be expected to assist in securing his or her own economic support to become so financially dependent upon distributions from any trust that he or she loses an incentive to become productive in a manner that is reasonably commensurate with any other individual having the ability and being in the circumstances of the beneficiary. Whenever this Will provides that the Trustee "may" make a distribution, the Trustee may, but need not, make the distribution.

9.9. Form Of Payment To Beneficiaries. Distributions to a beneficiary may be made: (i) directly to the beneficiary; (ii) to the guardian or other similar representative (including the Fiduciary) of an Incapacitated beneficiary; (iii) to a Custodian (including the Fiduciary) for a minor beneficiary under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any State; (iv) by expending the same directly for the benefit of the beneficiary or by reimbursing a person who has advanced funds for the benefit of the beneficiary; (v) by offsetting the same against any amount owed by the beneficiary to the trust; or (vi) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution. The Fiduciary shall not be responsible for a distribution after it has been made to any person in accordance with this Section.

9.10. Personal Effects; Personal Residence.

A. Division And Distribution Of Personal Effects. As to any personal effects item distributable to a minor or other Incapacitated person, the Executor may: (i) hold the item for future distribution to the distributee; (ii) sell the item and distribute the proceeds to the distributee or any trust named for him or her, or (iii) distribute the item (or sales proceeds) in any manner authorized by Section 9.9. In exercising this discretion, the Executor shall consider the age of the distributee, the practical utility of the item to him or her, and any sentimental or family significance of the item. In dividing personal effects among multiple distributees, each distributee who is a minor or Incapacitated person shall be represented by his or her parent or guardian, if any, otherwise by the Executor.

B. Personal Effects Expenses. All reasonable expenses of packing, insuring and shipping any personal effects to a distributee, or storing personal effects for later distribution, shall be paid by the Executor as an administration expense.

C. Insurance Proceeds And Liens. Except as otherwise provided, all gifts of personal effects or residential or other real property (i) include the proceeds of any insurance policies on the property and (ii) are subject to all liens other than liens for real property taxes or assessments.

D. Homestead Occupancy Right. My wife shall have the right to use and occupy as a principal residence (rent free and without charge except for taxes and other costs and expenses as may be specified elsewhere in this Will) any residential property held in any trust of which she is a current beneficiary. This right lasts for life or until the trust terminates or is revoked (as to the property) in compliance with Section 11.13 of the Texas Tax Code.

E. Homestead Maintenance And Expenses. At any time that my wife occupies residential property held in a trust as her principal residence she shall be responsible for

maintaining the property at her expense; however, in making discretionary distributions to my wife from that (or any other) trust, the Trustee may consider those expenses and shall provide for them to the same extent, if any, as would be proper if the property were not held in the trust. For this purpose, "maintaining the property" means: (i) keeping the property in good repair and in compliance with all applicable ordinances, deed restrictions and other applicable rules, if any; (ii) paying the interest on any "mortgage" (meaning any purchase money or home improvement debt secured by a lien on the property); (iii) keeping the property properly insured; and (iv) paying all utilities and other ordinary expenses of maintaining and preserving the property. All other costs of the property shall be paid by the owners of the residence in proportion to their respective ownership interests. This includes, for example, all principal payments on any mortgage and the cost of all improvements and extraordinary repairs (those necessitated by fire, flood or other casualty) in excess of any available insurance proceeds.

9.11. Character Of Beneficial Interests. All interests provided under this Will (whether principal or income, and whether distributed or held in trust): (i) shall belong solely to the particular estate (not any beneficiary) prior to actual distribution, and (ii) upon distribution, shall be received as a gift from me and shall not be the community property of the beneficiary and his or her spouse.

9.12. Distributions Not Treated As Advancements. Except as otherwise provided, no discretionary distribution to a beneficiary of any trust created under this Will shall be treated as an advancement.

9.13. Spendthrift Trust. Each trust created under this Will shall be a "spendthrift trust," as defined by the Texas Trust Code. Prior to actual receipt by any beneficiary, no income or principal distributable from a trust created under this Will shall be subject to anticipation or assignment by any beneficiary or to attachment by any creditor of, person seeking support from, person furnishing necessary services to, or assignee of any beneficiary.

9.14. Early Trust Termination. Subject to Section 8.9, if, in the Trustee's discretion, the property of any trust becomes so depleted as to be uneconomical to be administered as a trust, the Trustee may terminate the trust and distribute the property of the trust as follows: (i) if the trust is named for or identified by reference to a single then living beneficiary, to the named beneficiary; otherwise, (ii) if my wife is then living and a beneficiary of the trust, to my wife; otherwise, (iii) to the then living beneficiaries of the trust in proportion to their then respective presumptive interests in the trust.

9.15. Maximum Duration Of Trusts. Despite any other provision of this Will, to the extent that any trust created under this Will has not previously vested in a beneficiary, the trust shall terminate upon the expiration of the period of the applicable Rule Against Perpetuities (determined using as measuring lives my wife, all of the descendants of my parents and my wife's parents, and all persons who are mentioned by name or as a class as beneficiaries of any trust created by or pursuant to this Will who are living on the date of my death), and the Trustee shall distribute any property then held in the trust (i) to the beneficiary for whom the trust is named, if any; otherwise, (ii) per stirpes to the then living descendants of the named beneficiary, if any; otherwise (iii) the trust estate shall be distributed as provided in Section 3.3 as if it were my Remaining Property and as if I had died on the termination date of the trust.

9.16. Combination Of Trusts. A Fiduciary may terminate (or decline to fund) any trust created by this Will and transfer the trust assets to any other trust (created by this Will or otherwise) having substantially the same beneficiaries, terms and conditions, regardless of whether the Trustee under this Will also is serving as the trustee of the other trust and without liability for delegation of its duties nor for defeating or impairing the interests of remote, unknown or contingent beneficiaries. Similarly, the Trustee of any trust created by this Will may receive and administer as a part of its trust the assets of any other substantially similar trust.

9.17. Creation Of Multiple Trusts. A Fiduciary may divide any trust created under this Will into two or more separate identical trusts (in any proportion) if the Fiduciary deems it advisable. The Trustee may exercise discretionary powers held with respect to the new trusts independently. Where the original trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount shall not change but the Trustee may distribute the amount from any new trust or partly from one or more in any ratio.

9.18. Division And Distribution Of Trust Estate. A Fiduciary may divide, allocate or distribute property of its estate in divided or undivided interests, pro rata or non pro rata, and either wholly or partly in kind. Except as otherwise provided, all required distributions shall be made on the basis of the fair market value of the assets to be distributed at the time of distribution.

9.19. Successive Distributions Not Required. To the extent that a Fiduciary is authorized to distribute property to any trust (created under this Will or otherwise) and under the terms of that trust (or by virtue of the exercise of a discretionary power or for any other reason), the property would be immediately distributable to or among any one or more persons or other trusts, the Fiduciary may distribute the property directly to those persons or trusts in lieu of the directed distribution.

9.20. Additional Contributions. The Trustee may receive (or refuse to receive for tax or other reasons) contributions of additional property to its estate from any source and in any manner.

9.21. Collection Of Nonprobate Assets. A Fiduciary may receive (or refuse to receive for tax or other reasons) the proceeds of life insurance policies, employee benefit plans and other contractual rights that are payable to the Fiduciary (collectively, "Nonprobate Assets"). A Fiduciary may take whatever action, if any, the Fiduciary considers best to collect Nonprobate Assets. Subject to the other provisions in this Will, any Nonprobate Assets shall be allocated: in accordance with the directions contained in the beneficiary designation or other instrument of transfer, if any; otherwise, in satisfaction of any specific pecuniary gift for which the available properties are insufficient, if any; otherwise, to or among the trusts or individuals receiving my Remaining Property.

9.22. Plan Benefits Trusts. To the extent that a Fiduciary is designated as the beneficiary of any qualified benefit plan or individual retirement account or other Nonprobate Asset subject to the Minimum Required Distribution Rules (the "MRD Rules") (collectively "Plan Benefits"), the following provisions apply: (i) a Plan Benefits Trust corresponding to each trust provided for in this Will is created; (ii) all Plan Benefits shall be allocated (A) in accordance with the directions, if any, contained in the beneficiary designation or other instrument of transfer; otherwise, (B) subject to Section 11.1 (allocating all income in respect of a decedent to the Marital Deduction Amount if my wife survives me), to or among the trusts or individuals receiving my Remaining Property, substituting Plan Benefits Trusts for their corresponding trusts; (iii) each Plan Benefits Trust shall be irrevocable; (iv) each Plan Benefits Trust shall be identical to its corresponding trust except that all of the following persons, if any, who would otherwise be beneficially interested in the trust (other than those whose interests are contingent solely upon the death of a prior beneficiary living at the DB Determination Date, defined below), are completely excluded as beneficiaries and permissible appointees of the trust: (A) individuals having a shorter life expectancy than the measuring beneficiary and (B) entities not having a life expectancy; and (v) the Trustee shall deliver a copy of this Will or alternate descriptive information to the plan administrator in the form and content and within the time limits required by applicable statute and treasury regulations. For purposes of this Section, the "measuring beneficiary" of a Plan Benefits Trust means the oldest individual who is both living and ascertainably specified in this Will (by name or by class) as a current permissible beneficiary of the trust as of the date for determination of the "Designated Beneficiary" under applicable statute and treasury regulations (the "DB Determination Date"). I intend that, except for persons whose interests are contingent solely upon the death of a prior beneficiary living at the DB Determination Date, only individuals eligible as designated beneficiaries (as defined in Code Section 401(a)(9) and applicable treasury regulations) for purposes of the MRD Rules shall ever be permissible distributees or appointees of Plan Benefits Trusts. This Will shall be administered and interpreted in a manner consistent with this intent. Any provision of this Will which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

9.23. Creation Of S Trusts. If: (i) any trust created under this Will (an "Original Trust") holds or is to receive any stock in a corporation eligible to be an S Corporation ("S Stock"); (ii) the Original Trust has a Current Beneficiary; (iii) the Current Beneficiary is a U.S. citizen or resident; and (iv) the Current Beneficiary elects or intends to elect to qualify the trust as a Qualified Subchapter S Trust ("QSST") under Code Section 1361(d), then, the Trustee is authorized to allocate the S Stock to a separate "S Trust" to be administered as provided in this Section. In addition to any distributions provided for in the Original Trust, whenever an S Trust holds any S Stock the Trustee shall distribute all the income of the S Trust to the Current Beneficiary in quarterly or more frequent installments. During the life of the Current Beneficiary: (i) the Current Beneficiary shall be the sole beneficiary of the S Trust; (ii) no distributions shall be made to anyone other than the Current Beneficiary; and (iii) if the S Trust terminates during the Current Beneficiary's life, the remaining property of the S Trust, if any, shall be distributed to the Current Beneficiary. If the Current Beneficiary dies before the complete distribution of the S Trust: (i) the trust shall terminate upon his or her death; (ii) the Trustee shall distribute any undistributed income of the trust to his or her estate; and (iii) the remaining property of the trust shall be disposed of pursuant to the terms of the Original Trust. In the case of any Child's Trust or Contingent Trust, the term "Current Beneficiary" means the child or other beneficiary for whom the trust is named. In the case of the Marital Trust or the Bypass Trust, the term "Current Beneficiary" means my wife. The Trustee may amend an S Trust in any manner necessary for the sole purpose of ensuring that the S Trust qualifies and continues to qualify as a QSST. Each amendment must be in writing and must be filed among the trust records. I intend that every S Trust

qualify as a QSST within the meaning of Code Section 1361(d)(3). This Will shall be interpreted in a manner consistent with this intent and any inconsistent provisions shall be construed, amplified, reconciled, or ignored as needed to achieve this intent.

#### 9.24. Governing Law.

A. Generally. To the extent consistent with the other provisions of this Will, and to the maximum extent allowed by law, (i) a Fiduciary shall have the powers, duties, and liabilities of trustees set forth in the Texas Trust Code, as amended and in effect from time to time, and (ii) the construction, validity and administration of every trust created under this Will shall be governed by Texas law.

B. Change Of Governing Law. The Trustee of any trust may designate any other jurisdiction's law as the governing law with respect to the administration of that trust, on the following conditions: (i) The change of governing law must be in the best interests of the trust's beneficiaries and must not jeopardize any otherwise allowable estate tax deduction or generation-skipping transfer tax exemption. (ii) The Trustee (or at least one Co-Trustee) of the trust must be domiciled (in the case of an individual Trustee) or have its principal place of business (in the case of a bank or other corporate trustee) in the designated jurisdiction. (iii) The designated jurisdiction may be any nation, state, district, territory, political subdivision, or similar jurisdiction. (iv) The designation must be by signed, acknowledged declaration which states the effective date of the designation and is filed among the trust records. (v) There is no limit on the number of successive designations of governing law for any trust. (vi) Notwithstanding any designation, Texas law shall continue to apply to the extent that the powers of the Trustee are broader under Texas law than under the designated jurisdiction's law.

C. Advance Notice And Consent. Unless waived, the Trustee desiring to change the governing law of a trust must give thirty days' advance written notice in recordable form: (i) to my wife, if she is then living, otherwise to the beneficiary for whom the trust is named, if any, otherwise to each adult beneficiary of the trust who is then permitted to receive distributions from the trust, if any, and (ii) to the Trustee Appointer. The Trustee may not change the governing law of any trust without the prior written consent of the Trustee Appointer.

### ARTICLE 10 - DEBTS, EXPENSES AND TAXES

10.1. Payment Of Debts. The Executor shall provide for the payment, when due, of: (i) all debts and obligations (other than Death Taxes, defined below) that are legally enforceable against my estate; and (ii) any other debts and obligations (other than Death Taxes) the payment of which, in the Executor's discretion, is in the best interests of my estate (collectively, "Debts"). If any property of my estate is directed to be distributed subject to any Debt, the Executor shall make payments on that Debt only as necessary to avoid default pending distribution of the property. Debts payable on a periodic basis may be paid as the payments become due. The Executor may extend or renew any Debt, in whole or in part, for any period (including periods extending beyond the duration of the administration of my estate).

10.2. Payment Of Expenses. The Executor shall provide for the payment of the expenses incident to my last illness and funeral, and the expenses incident to the administration of my estate (collectively, "Expenses").

10.3. Payment Of Death Taxes. Except as otherwise provided, the Executor shall provide for the payment of all estate, inheritance, succession, capital gains at death, and other death taxes (including interest and penalties and also including generation-skipping transfer taxes on direct skips from my estate) imposed under the laws of any jurisdiction by reason of my death on or with respect to any property, or the transfer or receipt of any property, passing or which has passed under or outside this Will or any codicil to this Will, by beneficiary designation, by operation of law, or any other form of transfer (collectively, "Death Taxes"). Any Death Taxes may be deferred. Notwithstanding the preceding, the term Death Taxes does not include (and the Executor shall not pay) taxes imposed directly upon the recipient of property, including (i) generation-skipping transfer taxes on taxable terminations, taxable distributions or direct skips from a trust, and (ii) recapture of estate taxes under Section 2032A of the Code.

#### 10.4. Source Of Payment.

A. Generally. Except as otherwise provided: (i) Debts and Expenses shall be charged against my Remaining Property; (ii) Death Taxes shall be charged against that portion of my Remaining Property that does not qualify for the marital or charitable deduction, until exhausted, then against the balance of my Remaining Property; and (iii) interest concerning any tax (including Death Taxes) shall be charged in the same manner as the tax.

B. Certain Management Expenses. Management Expenses attributable to any marital or charitable share may be charged against that share. For this purpose: "Management Expenses" means Expenses incurred in connection with the investment of assets or their preservation or maintenance during a reasonable period of administration; and "marital share" or "charitable share" means a property interest passing from me to my wife or to the Marital Trust, or to any charity, respectively.

C. Disclaimer By My Wife. In the event of a qualified disclaimer by my wife of any interest in any property, any resulting increase in Death Taxes shall be charged against the disclaimed interest.

D. Non-Elected Marital Trust. In the event of the nonelection under Code Section 2056(b)(7) of the Code to qualify all (or any portion) of the Marital Trust for the marital deduction, any resulting increase in Death Taxes shall be charged against that trust (or portion).

E. Principal And Income Apportionment. Debts, Expenses and Death Taxes shall be apportioned between principal and income in accordance with Section 378B of the Texas Probate Code; however, no Debts, Expenses or Death Taxes shall be charged against the income of any marital or charitable share (both terms defined above) to the extent it would result in a material limitation on the share's right to income.

#### 10.5. Death Tax Recovery.

A. Generally. Except as otherwise provided, the Executor shall enforce all rights to recovery of any Death Taxes with respect to assets not passing under my Will to the maximum extent authorized by Sections 2206, 2207, 2207A, and 2207B of the Code, Section 322A of the Texas Probate Code, or otherwise.

B. Marital Deduction Property. If any property is included in my gross estate under Code Section 2044 ("Marital Deduction Property"), the Executor shall limit the recovery of Death Taxes with respect to Marital Deduction Property to the amount that bears the same ratio to the total of those Death Taxes as the taxable value of Marital Deduction Property bears to the total taxable value of all property in my taxable estate. For this purpose, the "taxable value" of any property (including Marital Deduction Property) shall be determined in accordance with Texas Probate Code Section 322A with appropriate adjustments under Subsections (c) and following of Section 322A.

10.6. Charges Against Exempt Assets. Notwithstanding any contrary provision, and to the maximum extent allowed by law, no Debts, Expenses or Death Taxes shall be charged against or satisfied out of any interest in any Exempt Assets, including: (i) insurance and annuities protected under Chapter 1108 of the Texas Insurance Code or otherwise; (ii) any stock bonus, pension, profit sharing or similar plan (including any individual retirement account or retirement plan for self employed individuals) protected under Texas Property Code Section 42.0021 or otherwise; and (iii) any other property or interest in property that is not chargeable with the claims of the creditors of my estate (collectively, "Exempt Assets"). However, the following may be charged against a particular Exempt Asset: (i) Debts secured by a lien or other security interest in that Exempt Asset, (ii) administrative expenses properly and fairly allocable to the administration of that Exempt Asset, and (iii) Death Taxes imposed with respect to that Exempt Asset.

10.7. Tax Elections. A Fiduciary shall make elections under tax laws solely in fiduciary capacity and in the manner as appears advisable to the Fiduciary to minimize taxes and expenses payable out of my estate, the trust property of trusts created by me, and by the beneficiaries of each. For example: (i) the Executor may join in the filing of a joint income tax return with my wife or her estate; (ii) the Trustee, in its discretion, may elect or not elect to treat all or any portion of federal estimated taxes paid by any trust to be treated as a payment made by any one or more beneficiaries of that trust who are entitled to receive

current distributions of income or principal from that trust (the election need not be made in a pro rata manner among all trust beneficiaries); and (iii) equitable adjustments may (but need not) be made to compensate for the effect of tax elections on the interests of beneficiaries or the amount of recovery of Death Taxes as directed above.

10.8. Taxes In My Wife's Estate. Upon termination of any trust created under this Will that results in any Increased Death Taxes in my wife's estate, unless my wife provides to the contrary by specific reference to marital deduction property in her Will, the Trustee shall pay from the trust, either directly or to my wife's estate, the amount of the Increased Death Taxes imposed with respect to the trust.

A. Increased Death Taxes. In this Section, Increased Death Taxes means that amount of the total estate, inheritance, succession, capital gains at death, and other death taxes (including interest and penalties), imposed under the laws of any jurisdiction with respect to my wife's estate that the personal representative of my wife's estate shall rightfully request in accordance with her Will or applicable law giving due regard to the "taxable value" of all property determined in accordance with Texas Probate Code Section 322A with appropriate adjustments under Subsections (c) and following of Section 322A.

B. Multiple Trusts. If there is more than one such trust that results in any Increased Death Taxes in my wife's estate, all Increased Death Taxes shall be paid pro-rata out of all such trusts based on relative taxable values (as determined above).

C. Estimated Payments. The Trustee may make payment based upon a good faith estimate of Increased Death Taxes provided by my wife's legal representative, but only if my wife's legal representative agrees to refund any excess payment. The final amount of Increased Death Taxes shall be determined after the final audit of my wife's federal estate tax return has been completed. The Trustee may make distributions of the remaining assets of any such trust to the ultimate beneficiaries of such trust only after setting aside sufficient cash or properties to assure payment of all Increased Death Taxes.

#### ARTICLE 11 - MARITAL DEDUCTION AMOUNT

11.1. Marital Deduction Amount. The Marital Deduction Amount is the sum of (i) all income in respect of a decedent and rights to income in respect of a decedent included in Eligible Marital Deduction Property (defined below), if any, plus (ii) the smallest additional pecuniary amount of Eligible Marital Deduction Property, if any, which, if allowed as a federal estate tax marital deduction, would result in the lowest possible total of federal estate tax and state death taxes (but only those state death taxes which are estate taxes computed by reference to the credit allowable under Code Section 2011, or successor provisions) payable from all sources by reason of my death.

11.2. Pre Distribution Income. The distribution of the Marital Deduction Amount shall entitle the recipient to the net income of my estate, without material limitation, that is attributable to the Marital Deduction Amount from the date of my death to the date or dates of distribution.

11.3. Eligible Marital Deduction Property. The term Eligible Marital Deduction Property means property (including any Nonprobate Assets payable to the Trustee) or the proceeds of property, the value of which is included in my gross estate for federal estate tax purposes, that is available for distribution in satisfaction of the Marital Deduction Amount, and as to which (if distributed in satisfaction of the Marital Deduction Amount) it is possible (by election or otherwise) to obtain a federal estate tax marital deduction. The gift of the Marital Deduction Amount shall abate to the extent that it cannot be fully satisfied with Eligible Marital Deduction Property. To the extent that there is an excess of Eligible Marital Deduction Property, assets for which a foreign tax credit is available under Section 2014 of the Code shall not be distributed in satisfaction of the Marital Deduction Amount gift.

11.4. Computational Guidelines. The Marital Deduction Amount shall be determined: (i) as if a federal estate tax marital deduction is allowed for property distributed to the Marital Trust; (ii) without regard to any qualified disclaimer that my wife may file with respect to the gift of the Marital Deduction Amount or any other interest passing from me to my wife under this Will or otherwise; and (iii) in all other respects, after accounting for all other deductions and credits allowed to my estate and after giving effect to the exercise or proposed exercise of tax elections. However, except as expressly provided, nothing in this Article requires any particular exercise of any tax election.

11.5. Valuation Of Distributed Property. Each item of property distributed in kind in satisfaction of the Marital Deduction Amount shall be valued for purposes of satisfying the gift at its value as finally

determined for federal estate tax purposes in my gross estate, or, if such item is an investment or reinvestment of property included in my gross estate for federal estate tax purposes or the proceeds of any sale or other disposition of property so included or of any such investment or reinvestment, the item shall be valued at its federal income tax basis at the actual date or dates of distribution. Notwithstanding any contrary provision, the total of all property distributed in satisfaction of the Marital Deduction Amount shall have an aggregate fair market value at the date or dates of distribution which is fairly representative of the appreciation and depreciation in value from my death to the date or dates of such distribution of all such property then available for distribution. In estimating the date of distribution values of assets distributed in kind, the Executor may use its best judgment; the Executor need not obtain an independent distribution date appraisal.

11.6. Statement Of Intent. I intend that the distribution of the Marital Deduction Amount to the Marital Trust qualify in full for the federal estate tax marital deduction and any similar state death tax marital deduction. My wife may require the Trustee to make property held in the Marital Trust productive of income within a reasonable time. For each calendar year in which an interest is held by the Marital Trust in any Plan Benefits (defined in Section 9.22): (i) the Trustee shall allocate distributions from each Plan Benefits interest (A) to trust income, to the extent of the income earned that year by the interest, and (B) to trust principal, to the extent of any excess distributions; and (ii) to the extent that distributions from a Plan Benefits interest are less than the income earned by the interest, my wife may require the Trustee to remedy the shortfall by demanding additional distributions, allocating principal receipts from other assets to trust income, or taking other appropriate measures, at the Trustee's option. This Will shall be administered and interpreted in a manner consistent with this intent. Any provision of this Will which conflicts with this intent shall be deemed ambiguous and shall be construed, amplified, reconciled, or ignored as needed to achieve this intent. However, this Section shall not require that the election provided for in Code Section 2056(b)(7) be made in whole or in part with respect to the Marital Trust.

## ARTICLE 12 - GENERAL PROVISIONS

12.1. Property Disposed Of By This Will. I intend by this Will to dispose only of my separate property and my share of community property. I confirm to my wife her share of our community property. Whenever (i) a Fiduciary possesses any property which is my wife's separate property, or which represents her interest in our community property, including, but not limited to, interests in or the proceeds of life insurance policies, qualified employee benefit plans or trusts, or other employment related compensation agreements or individual retirement accounts, and (ii) the Fiduciary determines that it no longer needs to administer such property, the Fiduciary shall deliver such property to my wife, if she is then living, otherwise, to her estate. Notwithstanding the preceding, a Fiduciary may make non pro rata divisions of any community property with my wife's consent.

12.2. Disclaimers. Except as otherwise provided, if a beneficiary under this Will is surviving but is deemed to be deceased by virtue of a qualified disclaimer (as defined under Code Section 2518), then the beneficiary shall only be deemed to be deceased with respect to the specific interest in property specified in the qualified disclaimer and the qualified disclaimer shall not affect any other rights or interests granted under this Will, including but not limited to rights or interests in trusts to which the disclaimed interest passes as a result of the qualified disclaimer. If the qualified disclaimer is of a life estate or the disclaimant's entire interest in property (or an undivided portion of such property) in trust, the termination provisions of such estate or trust with respect to the disclaimed interest shall be applied as if the disclaimant failed to survive.

12.3. Disclaimer Trusts. This Section applies whenever an individual (the "Disclaimant") files a qualified disclaimer with respect to any property that passes to (or remains in) a trust under this Will (the "Recipient Trust") by virtue of such qualified disclaimer, but only if the Disclaimant: (i) is a Trustee (or named successor Trustee) of the Recipient Trust; (ii) holds any Power of Appointment (defined in Section 12.4) over the Recipient Trust; (iii) has any beneficial interest in the Recipient Trust; or (iv) has any power to direct the beneficial enjoyment of the Recipient Trust. Notwithstanding any contrary provision of this Will, unless the Disclaimant disclaims all of his or her rights, powers and interests with respect to the Recipient Trust as described above, the property which would otherwise pass to (or remain in) the Recipient Trust shall instead be distributed to a separate Disclaimer Trust on terms identical to the terms of the Recipient Trust except as follows.

A. Power Of Appointment. The Disclaimant shall possess no Power of Appointment over the Disclaimer Trust.

B. Ascertainable Limitation On Discretionary Powers. The Disclaimant shall not possess or exercise any powers with respect to, or be authorized to participate in any

decision as to, any discretionary distribution or any loan to or for the benefit of any beneficiary of the Disclaimer Trust, except to the extent that such distributions or loans are limited to amounts necessary for the beneficiary's health, maintenance, and support.

C. Discretionary Termination. The Disclaimant shall have no authority to terminate the Disclaimer Trust because of its small size.

D. Estimated Tax Payments. The Disclaimant shall have no authority to treat any estimated income tax payment by the Disclaimer Trust as an estimated income tax payment by a beneficiary.

E. Beneficial Interest. If the Disclaimant is not my wife, the Disclaimant shall have no beneficial interest in the Disclaimer Trust.

F. Independent Trust Administration. As to persons who remain as beneficiaries of both the Disclaimer Trust and the Recipient Trust, the Trustee may exercise discretionary powers held with respect to the Disclaimer Trust and the Recipient Trust (including discretionary distributional powers) on an independent basis, and where the Recipient Trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount so specified shall not change but the Trustee may distribute such amount from either the Recipient Trust or the Disclaimer Trust or partly from each in any ratio.

12.4. Testamentary Limited Powers Of Appointment Created In This Will. Except as otherwise provided, the following provisions shall apply to every Testamentary Limited Power of Appointment ("Limited Power") created in this Will which may be exercisable at any particular time by any person (the "Donee").

A. Exercise Of Limited Powers. Every exercise of a Limited Power must specifically refer to the Section in this Will creating the Limited Power. A Limited Power may be exercised solely by language in the duly probated Will of the Donee. A Fiduciary may assume the Donee had no Will if, six months after the Donee's death, the Trustee has no actual knowledge of the existence of a Will.

B. Permissible Appointees Of Limited Powers. The Donee may exercise a Limited Power only in favor of any one or more then living or subsequently born individuals and other entities who are members of the group or class specified, in such proportions among them (even to the complete exclusion of any one or more of them) and subject to such trusts and such other conditions as the Donee may choose. Notwithstanding any contrary provision, the Donee of a Limited Power shall never have the power to exercise the Limited Power in favor of himself or herself, his or her creditors, his or her estate, or the creditors of his or her estate, nor may he or she appoint trust property in discharge of his or her legal obligations.

12.5. Powers Of Appointment Not Exercised. I do not intend by this Will to exercise any power of appointment that I may possess or may come to possess.

12.6. Determination Of Incapacity. Except as otherwise provided, an adult individual generally shall be considered to have full legal capacity absent a presently existing adjudication of incapacity or insanity by a court or other judicial tribunal having jurisdiction to make such a determination.

A. Fiduciaries. For purposes of qualification to serve as a Fiduciary or in any other fiduciary capacity under this Will, an adult individual shall be considered legally incapacitated to act when two physicians who have examined such person within the prior two years have certified that in their judgment such person does not have the physical or mental capacity to effectively manage his or her financial affairs.

B. Beneficiaries. An adult individual beneficiary under this Will shall be considered Incapacitated upon a good faith determination made by the fiduciary charged with making such evaluation that such individual lacks the physical or mental capacity, personal or emotional stability or maturity of judgment needed to effectively manage his or her personal or financial affairs (whether because of injury, mental or medical condition, substance abuse or dependency, or any other reason). Individuals under the age of majority shall be considered legally incapacitated.

12.7. Definitions. In connection with the construction and interpretation of this Will the following definitions apply, unless otherwise expressly provided.

A. Children And Descendants. Except as otherwise provided, a "child" of another individual means a child determined in accordance with Section 160.201 of the Texas Family Code. An adopted person shall be a child of the adopting parent(s) but only if legally adopted before attaining age eighteen. A posthumous child who survives birth shall be treated as living at the death of his or her parent. An individual's "descendants" means the individual's children, the children of those children, and so on, determined in accordance with the preceding.

B. Spouse And My Wife. A "spouse" of a person does not include any individual who, at the relevant time, is divorced or legally separated from the person, or engaged in pending divorce proceedings with the person. A "surviving spouse" of a person means the individual, if any, who was the person's "spouse" at the time of his or her death. References in this Will to June A. Cleaver or "my wife" mean her; provided that we are not divorced, legally separated, nor engaged in pending divorce proceedings as of the date of my death (or her death, if she predeceases me), in which case all provisions in this Will in favor of my wife or appointing her in any fiduciary capacity shall be void and this Will shall be construed as if she predeceased me.

C. Heirs. A person's Heirs or then living Heirs means those individuals who would be that person's heirs at law as to separate personal property if that person were to die single, intestate and domiciled in Texas at the referenced time.

D. Per Stirpes. Whenever a distribution (or allocation) of property is to be made "per stirpes" to (or to trusts for) the descendants of any person, the property shall be divided into as many shares as there are then living children of the person and deceased children of the person who left descendants who are then living. One share shall be distributed to (or to the trust for) each living child and the share for each deceased child shall be divided among his or her then living descendants in the same manner.

E. Pronouns. Pronouns, nouns and terms as used in this Will shall include the masculine, feminine, neuter, singular, and plural forms wherever appropriate to the context.

F. Survive. If my wife survives me by any period of time or if we have both died and the order of our deaths cannot be determined, she shall be presumed to have survived me for all purposes. In all other cases a requirement that an individual "survive" a specified person or event or be "surviving" or "living" means survival by at least ninety days; however, the Fiduciary may make advance distributions within that period of any gift to any beneficiary to the extent necessary to provide for his or her health, maintenance, and support.

G. Code. References to the Code or any Section of the Code mean the Internal Revenue Code of 1986, or the Section, as amended and in effect from time to time, or the appropriate successor provision.

12.8. Notice. Any notice required to be given or delivered under this Will shall be deemed given or delivered when an acknowledged written notice is actually delivered to the person or organization entitled to notice or mailed certified mail, return receipt requested, to the address then appearing on the Fiduciary's records for the person or organization.

12.9. Actions By And Notice To Incapacitated Persons. Any action permitted to be taken by a minor or other incapacitated person shall be taken by the person's parents or guardian. Any notice or report required to be delivered to a minor or other incapacitated person shall be delivered to such person's parents or guardian. If both parents of a minor are living, any such action shall be taken by, and any such notice shall be given to, the parent to whom I am more closely related.

12.10. Headings. The headings employed in this Will are for reference purposes only and shall not in any way affect the meaning or interpretation of the provisions of this Will.

I have signed this Will this \_\_\_\_ day of \_\_\_\_\_, 2009.

*[here insert appropriate testator signature block, attestation clause, witness signature block, and self proving affidavit]*

**Appendix C *FlexDraft* Brochure.**

