

## **Texas Wills Outlined**

*This outline is provided to give clients a general understanding of the processes and issues that may be involved in the clients case. This is an outline that may not be up to date and the outline is far from comprehensive. It is not a substitute for legal advice and is not intended to assist in the prosecution of any case. It is offered solely as information to make the litigation process more decipherable to the client. It is not intended and should not be used as a substitute for legal advice.*

### INTESTATE SUCCESSION

#### 1. INTRODUCTION

You should be familiar with the distributive scheme in commonly encountered family situations. Knowledge of the intestacy laws may be directly examined upon or may be indirectly involved in a question on another subject. For example, such knowledge will enable you to give a complete answer to a question in which a will is not admissible to probate or where the question involves operation of the interested witness statute or the pretermitted child statute.

#### 1. Different Intestate Distribution for Separate and Community Property

##### 1. Separate Property Defined

Separate property is defined as a property owned by a spouse before marriage; property acquired during marriage by gift, will, or inheritance; and a spouse's tort recovered for personal injury. All other property acquired during marriage is community property. (Thus, accumulations from a husband's or wife's salary and wages are community property.) In Texas, the income from separate property is community property.

##### 2. Community Property Presumption

The presumption is that all property on hand on dissolution of the marriage, whether by divorce or death, is community property; and the burden of establishing an asset's separate character is on the party so contending. (The community presumption is strong; it can be overcome only by clear and convincing evidence.)

#### 2. Qualifications to Definition of Separate Property

Keep in mind these qualifications to the definition of separate property.

##### 1. Partition

Existing community property or community property to be acquired in the future can be partitioned into the separate property of the spouses by written agreement.

##### 2. Tracing Principle

Assets purchased with separate funds (or with the proceeds from the sale of separate assets) are themselves separate property.

##### 3. Conflict of Law Separate Property

In all common law states, property acquired from a spouse's salary during marriage is that spouse's property. If the couple thereafter moves to Texas, the ownership of such

property is not affected by the move; the assets are that spouse's separate property. While property brought from another state is treated as Aquasi-community property for divorce purposes (see Community Property outline), it is separate property for purposes of testamentary disposition and intestate succession.

## II. COMMUNITY PROPERTY

### A. Survived by Descendants, Some of Whom are Not Descendants of Surviving Spouse - One-Half to Spouse and One-Half to Descendants

If the decedent was survived by children or other descendants, at least one of whom was not the surviving spouse's descendant (e.g., decedent's child by his first marriage), the decedent's one-half community interest passes to his descendants, who take per capita with representation. The surviving spouse retains her one-half community interest. [Tex. Prob. Code Ann. ' 45(b)]

### 2. Survived by Descendants, All of Whom are Descendants of Surviving Spouse - All to Spouse

If the decedent was survived by descendants all of whom were descendants of the surviving spouse (e.g., a one marriage situation), the surviving spouse retains her one-half community interest and inherits the decedent's one-half interest. Thus, the surviving spouse takes all of the community property. [Tex. Prob. Code Ann '45(a)]

### 3. Not Survived by Descendants - All to Spouse

If the decedent is not survived by children or other descendants, the surviving spouse takes all of the community property. [Tex. Prob. Code Ann. ' 45(a)]

## III. SEPARATE PROPERTY

### 1. Survived by Spouse and Descendants

When the intestate is survived by a spouse and by children (or descendants of deceased children), the spouse's share of the intestate's separate property depends on whether the property is real or personal. [Tex. Prob. Code Ann. ' 38(b)] Unlike the distribution rules applicable to community property, the rules governing separate property apply whether the decedent's descendants were from this marriage or an earlier marriage.

### 1. Separate Personal Property - One-Third to Spouse

An intestate's separate personal property passes one-third to the surviving spouse; two-thirds to the children or their descendants. (The surviving spouse never takes more than that one-third, whether there is one child or 10 children.)

### 2. Separate Real Property - Life Estate in One-third to Spouse

The surviving spouse's share of the intestate's separate real property is a life estate in an undivided one-third; remainder in that one-third and outright ownership of the other two-thirds passes to the children (or their descendants). Stated another way, separate real

property passes to the intestate's children (and descendants of deceased children), subject to a life estate in an undivided one-third in favor of the spouse.

## 2. Survived by Spouse But Not by Descendants

When the intestate is survived by a spouse but not by children (or descendants of deceased children), the spouse's share again depends on whether the property is real or personal.

### 1. Separate Personal Property - All to Surviving Spouse

Parents and collateral kin never inherit separate personal property if the intestate was survived by a spouse. If the intestate is survived by a spouse but no descendants, all of the intestate's separate personal property passes to the surviving spouse.

### 2. Separate Real Property - One-Half to Surviving Spouse, One-Half to Parents or Descendants of Parents

If the intestate is survived by a spouse but not by children or other descendants, one-half of the intestate's separate real property is inherited by the spouse. The other one-half passes to parents, or to brothers and sisters or the descendants of deceased brothers and sisters, under the rules set out in section 38a. But if the decedent is not survived by either parent or by the descendants of parents (i.e., brothers and sisters or their descendants), all separate real property is inherited by the surviving spouse.

## 3. Not Survived by Spouse

When the intestate is not survived by a spouse, her property passes as set forth below. [Tex. Prob. Code Ann. ' 38a]

### 1. All to Children or Descendants of Deceased Children

When the intestate is not survived by her spouse but is survived by descendants, her entire estate passes to her children or their descendants.

### 2. No Descendants But Parents - One-Half to Each Parent

If no children or their descendants survive the intestate, one-half passes to her father and the other one-half passes to her mother. If only one parent survives the intestate, one-half passes to that parent and the other one-half passes to the intestate's brothers and sisters or their descendants.

### 3. No Descendants or Parents - to Brothers and Sisters or Their Descendants

If the decedent left no surviving children or their descendants and no surviving parents, his estate passes to the descendants of parents: brothers and sisters or their descendants.

### 4. No Parents or Descendants of Parents - One-Half to maternal Kin and One-Half to Paternal Kin

If the intestate is not survived by either parent or by any first-line collaterals (descendants of parents), the estate is divided into two Amoieties or halves: one-half to maternal grandparents or their descendants and one-half to paternal grandparents or their descendants.

### 5. Texas has No ALaughing Heir Statute

In some states and under the Uniform Probate Code, the intestacy statutes provide that there is no inheritance by persons more remotely related than grandparents or the issue of grandparents; instead, the intestate's property escheats to the state. These are commonly referred to as ALaughing heir statutes. (A ALaughing heir is a person so remotely related to the intestate as to suffer no sense of bereavement at his passing.) Texas has no such statute. No matter how remotely related to the intestate, a person can qualify as an heir. If, for example, the intestate is survived by maternal grandparents but not by paternal grandparents or their descendants, that one-half goes to the paternal great-grandparents or their descendants, etc., Aand so on without end until we find an heir on the paternal side.

### 6. Escheat

If no heirs of an intestate are found, the decedent's property escheats to the state of Texas. Human nature being what it is, escheats are rare. The more property there is, the more Aheirs that pop up to claim it.

### 3. Descendants Take Per Capita With Representation

When separate property passes to the intestate's descendants, or when the property of a single person passes to brothers, sisters, and other collateral kin, the distribution is per capita with representation. (This rule also applies to distribution of community property when some of the decedent's descendants are not descendants of the surviving spouse.) Under this pattern of distribution, the property is divided into equal shares at the first generational level at which there are living takers. Each living person at that level takes a share, and the share of each deceased person at that level passes to her descendants by right of representation.

## IV. ADOPTED CHILDREN, CHILDREN BORN OUT OF WEDLOCK, HALF BLOODS

### 1. Adopted Children

#### 1. Adopted Child Treated Same as Natural Child for All Purposes of Code

The term Achild includes an adopted child for all purposes of the Probate Code. This would include inheritance, lapse statute, pretermitted child statute, etc. [Tex. Prob. Code Ann. ' 3b]

#### 2. Regarding Adoptive Family - Adopted Child Treated Same as Natural Child

An adopted child and her issue inherit from or through her adoptive parents in the same manner as a natural child. The adoptive parents and their kin inherit from or through the adopted child the same as though she were a natural child. [Tex. Prob. Code Ann. ' 40]

#### 3. Adopted Child Inherits from Natural Parents But Not Vice Versa

The natural parents of an adopted child and their kin cannot inherit from or through the child, but the child may inherit from and through her natural parent or parents. [Tex. Prob. Code Ann. ' 40] In a court decree terminating the parent-child relationship (which

is a necessary predicate for adoption of a child who has a living parent), the child retains the right to inherit from her natural parent unless the court otherwise provides. [Tex. Fam. Code Ann. ' 15.07]

## 2. Child Born Out of Wedlock

The Texas legislature has eliminated all statutory references to legitimate and illegitimate children. The latter are now called children without a presumed father, and the term Abiological mother and Abiological father are used without regard to the marital relationship. (See Family Law outline.)

### 1. Paternity Presumed Under Texas Family Code

A child has inheritance rights if the man is presumed to be the biological father under the Family Code. This presumption arises if:

1. The child was born during (or within 300 days after) the marriage (including attempted but void or voidable marriage) of the man and the child's mother;
2. The parties married after the child's birth and the man (i) signed a voluntary paternity statement or (ii) is under an obligation to support the child;
3. The man consented to be named as father on the birth certificate; or
4. The man held out the child as his biological child before the child reached the age of majority.

### 2. Sworn Statement Acknowledging Paternity

Inheritance rights are established if the father executed a statement of paternity as provided by section 13.22, Family Code, or a like statement properly executed in another jurisdiction. This statement, used in voluntary paternity proceedings, must acknowledge the child as his child and must be sworn to before a notary public.

### 3. Paternity Established in Paternity Suit

Inheritance rights are established if the decedent had been adjudicated the child's father in a paternity suit.

### 4. Paternity Established in Probate Proceedings by Clear and Convincing Evidence

A person claiming to be the biological child of the decedent may petition the probate court for a determination of inheritance rights. Under this procedure, proof that the decedent was the biological father must be by clear and convincing evidence.

### 5. Bona Fide Purchasers Unaware of Child's Claim Are Protected

A person who in good faith purchases property from an heir acquires good title if he relied on declarations in an affidavit of heirship that makes no mention of a child. The child's remedy is to sue the other heirs for recovery of his share of the sale proceeds. Caveat: Bona fide purchasers are protected only if the child is not presumed to be or had not been adjudicated to be the decedent's child at the time of the purchase.

### 3. Half Bloods Take Half as Much as Whole Bloods

Collateral kin of the half blood (i.e., with only one common parent) inherit only half as much as relatives of the whole blood. [Tex. Prob. Code Ann. ' 41(b)]

### 4. Stepchildren Do Not Inherit from Stepparents

Generally, stepchildren do not inherit from their stepparents.

#### 1. General Rule Illustrated

Suppose, in the half blood example given above, it is H-2 who dies intestate. W and C predeceased H-2; he is survived by his natural child, B, and his stepchild, A. B inherits H-2's entire estate. Unless H-2 adopted A (which he did not), A was not legally related to him and was not an heir.)

#### 2. Exception - Adoption by Estoppel If Unperformed Agreement to Adopt

Under the right facts, A might be able to show adoption by estoppel. This doctrine permits a stepchild to inherit from or through her stepparents as though she were adopted. The doctrine is invoked when the foster parents take custody of the child under an agreement with the natural parents that they will adopt the child, and never carry out the agreement. In this situation, adoption by estoppel (sometimes called equitable adoption) comes into play. The foster parents or their other heirs are estopped from denying the existence of a valid adoption.

##### 1. Must Be Evidence

To support a finding of adoption by estoppel, there must be evidence of an agreement (written or oral) to adopt.

##### 2. Adoption by Estoppel Is a One-Way Street

Suppose H and W promise C's mother (M) that they will adopt C, and they take custody of C on the basis of that agreement. They never adopt C. Many years down the road, it is C who dies intestate and very wealthy. C is survived by M, H, and W. H and W cannot claim adoption by estoppel for it was their conduct that created the problem. Since no conduct on the part of the child gave rise to an estoppel, the foster parents have no inheritance rights. [Heien v. Crabtree, 369 W.W.2d 28 (Tex. 1963)] Instead, the child's natural mother inherits, because an equitable adoption (unlike a true adoption) does not terminate the natural parents' inheritance rights. [Curry v. Williman, 834 S.W.2d 443 (Tex. App. 1992)]

##### 3. Permits Inheritance from Foster Parents Only, Not from Their Kin

A finding of adoption by estoppel permits a stepchild or foster child to inherit from or through her stepparents or foster parents, but not from their kin.

## 22. SUCCESSION TO PROPERTY RIGHTS IN USE OF DECEDENT'S NAME, VOICE, LIKENESS

Suppose that, after the death of a rock star or sports personality, the person's name or likeness is used in a TV commercial without anyone's consent. By a statute enacted in

1987, an unauthorized commercial use of the person's name or likeness give rise to an action for damages. Under the statute, an individual has a property right in the use of his name, voice, signature, photograph, or likeness (hereafter, Aindividual's property right) if the right has commercial value before or after the individual's death. [Tex. Prob. Code Ann. ' 26.003] Special succession rules apply to this property right. The statute sets out a procedure for registering a claim to an individual's property right, but the right is protected even if not registered.

#### 1. Unauthorized Commerce Use Prohibited

The statute prohibits unauthorized use of an individual's property right for commercial advertising purposes. Unauthorized use results in liability for the amount of any damages sustained, profits obtained from the unauthorized use, exemplary damages, and attorneys' fees.

#### 2. Artistic, Literary, Political, Newsworthy Use Permitted

Not all uses of an individual's property right are prohibited. The individual's name, etc., may be used in: a play, book, film, radio or television program; a magazine or newspaper article; material that is primarily of political or newsworthy value; an original work of fine art; or advertising promoting any of the foregoing.

#### 3. Special Succession Rules If Individual Does Not Transfer Property Right

An individual can transfer the property right by contract, by trust, or by will to anyone, whether or not related to the individual. If the individual's property right is not transferred during lifetime or by will, the property right does not pass under the intestate succession rules that apply to other assets. Instead, the property right passes as follows:

##### 1. One-Half to Spouse, One-Half to Descendants

If the individual is survived by a spouse and children (or grandchildren by deceased children), the property right passes one-half to the spouse and one-half to the children and grandchildren by representation.

##### 2. All to Spouse If No Descendants

If the individual is survived by a spouse but not any children or grandchildren, the property right passes to the spouse.

##### 3. All to Descendants If No Spouse

If the individual is survived by children (or grandchildren by deceased children) but not by a spouse, the property right passes to the children and grandchildren, per stirpes.

##### 4. All to Parents If No Spouse or Descendants

If the individual is not survived by a spouse, children or grandchildren, the property right passes to the individual's parents or surviving parent.

5. If No Spouse, Descendants, or Parents, Property Right Expires After One Year  
If the individual has not transferred the property right and is not survived by any of the above parties, the property right expires one year after the individual's death.

## SUCCESSION PROBLEMS COMMON TO INHERITANCE AND WILLS

### 1. MUST SURVIVE BY 120 HOURS TO TAKE AS HEIR OR BENEFICIARY

Texas has adopted the Uniform Probation Code provision requiring survival by 120 hours in order to take as an heir. As with the Uniform Probate Code provision, the statute also applies to joint and survivor estates of real and personal property, wills, life insurance contracts, deeds, and trusts (absent a contrary provision in the instrument). [Tex. Prob. Code Ann. ' 47]

1. Failure to Survive Decedent by 120 Hours - Treated as Having Predeceased Decedent  
A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of intestate succession, homestead allowance, and exempt personal property set aside.

#### 1. Exception If Result Would Be an Escheat

The above 120-hour rule does not apply where its application would result in an escheat to the state of Texas.

#### 2. No Evidence - Person Deemed Not to Have Survived by 120 Hours

If the time of death of the decedent or of the person who otherwise would be an heir or beneficiary cannot be determined, and it cannot be established that the person did survive the decedent by 120 hours, it is deemed that the person failed to survive for the required period.

### 2. Application of 120-Hour Rule to Community Property

If a husband and wife die within 120 hours of each other, one-half of all community property, including community property with right of survivorship, is distributed as if the husband had survived by 120 hours, and the other one-half as though the wife had survived by 120 hours. This provision applies to proceeds of life or accident insurance while are community property and become payable to the estate of either the husband or the wife, as well as to other kinds of community property.

### 3. Rule Applies to Wills (Absent a Contrary Provision)

A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will contains some language dealing explicitly with simultaneous death or deaths in a common disaster, or requiring that the devisee survive the testator...in order to take.

### 4. Rule Applies When Beneficiary Must Survive Someone Other than Testator

If property is so disposed of that the right of a beneficiary to succeed to any interest is conditioned on his surviving another person, the beneficiary shall be deemed not to have survived unless he survives the person by 120 hours.

### 5. Rule Applies to Joint Bank Accounts, Survivorship Estates of Real and Personal Property

If stocks, bonds, bank deposits, or other real or personal property, including community property with right of survivorship arrangements, are held under an arrangement whereby one of two joint owners is entitled to the whole on the death of the other, and if neither survives the other by 120 hours, one-half passes as though the one joint owner survived, and the other one-half passes as though the other joint owner survived. (The statute also applies if there are three or more joint owners; but it would take a triple-header catastrophe to trigger this rule!)

### 6. Rule Applies to Life Insurance Policies

When the insured and a beneficiary under a life or accident insurance policy die within 120 hours of each other, the insured is deemed to have survived the beneficiary (subject to the rule applicable to community property outlined in 2., above).

### 7. Remainders Are Accelerated When Life Tenant Disclaims

If a beneficiary disclaims a life estate, remainders that were to take on termination of the life estate (whether the remainders were vested or contingent) are accelerated and take a possessory estate.

### 8. Instrument May Make Contrary Provision

When provision has been made in the case of wills, trusts, deeds, insurance contracts, or any other situation for disposition of property different from the provisions of section 47, the 120-hour rule does not apply.

## II. ALIENS CAN INHERIT

Aliens can inherit property. [Tex. Prob. Code Ann. ' 41c] No special rules or restrictions govern rights of aliens.

## III. MURDER BY HEIR OR BENEFICIARY

### 1. Beneficiary Who Kills Insured Forfeits Proceeds of Life Insurance Policy

A beneficiary forfeits his interest in the insurance policy proceeds if he is the principal or an accomplice in willfully bringing about the death of the insured. The proceeds are instead paid to the contingent beneficiary named in the policy or, if no contingent beneficiary is named, to the insured's nearest relative. [Tex. Ins. Code Ann. ' 21.23]

### 2. Constructive Trust Imposed to Prevent Killer's Unjust Enrichment

Interestingly, the above insurance statute is the only Texas statute dealing with the problem of a beneficiary killing the decedent. Indeed, Texas probate Code section 41(d) says that a conviction shall work corruption of blood or forfeiture of estate. Does this mean that if a wife kills her husband, she cannot take as beneficiary under a life insurance policy, but can take by will or inheritance from the victim? The statute says yes - but pay no attention to the statute. In *Pritchett v. Henry*, 287 S.W.2d 546 (Tex. Civ. App. 1955, writ dismissed), the court invoked the equitable remedy of constructive trust in holding that

the mother and father of a murdered woman were entitled to recover from the slayer-husband who claimed the victim's estate as sole heir. A constructive trust was imposed to prevent unjust enrichment, on the ground that no one should be allowed to profit from his wrongful conduct. Thus, a constructive trust will be imposed where an heir or will beneficiary kills an intestate or testator.

#### IV. ADVANCEMENTS

##### 1. Common Law: Gift to Child Presumed Advancement of Intestate Share

At common law, it was presumed that a parent always would intend to treat all of his children equally. Consequently, any lifetime gift to a child (or other descendant) was presumed to be an advancement (advance payment) of the child's intestate share, to be taken into account in making distribution of the intestate's property.

##### 2. Texas: Proof of Advancement Must Be in Writing

By statute in Texas, a lifetime gift or nontestamentary transfer (e.g., a joint bank account) is to be considered an advancement against an heir's intestate share only if the intention to have it so treated is declared in a contemporaneous writing by the donor or acknowledged in writing by the donee-heir. [Tex. Prob. Code Ann. ' 44(a)]

##### 3. Procedure If Advancement Found

Once it has been determined that an advancement was made, the amount advanced is added to the net value of the estate for purposes of computing the intestate shares. If an heir who has received an advancement wants to share in the distribution of the decedent's estate, his share is reduced by the amount of the advancement. If, however, the advancement is greater than the heir's intestate share, he is not responsible to return the excess.

##### 4. Effects of Advancee's Next of Kin

If the donee fails to survive the decedent, the gift to the donee is not taken into account in distributing the decedent's estate unless the writing or acknowledgment required by the statute provides otherwise. [Tex. Prob. Code Ann. ' 44(c)]

##### 5. Satisfaction of Legacies

Related to the doctrine of advancements is the doctrine of satisfaction of legacies. Suppose that T executes a will making various bequests and thereafter makes a gift to one of the will beneficiaries. Should the lifetime gift be deemed to have been in partial (or total) satisfaction of the bequest made in the will? At common law, a lifetime gift to a beneficiary was presumed intended to be in satisfaction of the legacy to the extent of the gift. The Texas courts have reversed the common law presumption. A lifetime gift is presumptively not in satisfaction of the legacy unless it is shown to have been intended as such. [Bailey v. Bailey, 212 S.W.2d 189 (Tex. Civ. App. 1948)]

#### V. DISCLAIMER BY HEIR, WILL BENEFICIARY, OR LIFE INSURANCE BENEFICIARY

1. The Texas disclaimer statute [Tex. Prob. Code Ann.' 37A] recognizes that no one can be compelled to be a beneficiary of a gift or an intestate heir against his will. A beneficiary or heir may disclaim (i.e., refuse to accept) an interest that otherwise would pass the person from the decedent's estate, with the result that the disclaimed interest passes as though the disclaiming party predeceased the decedent. If a party disclaims a lifetime gift (e.g., as beneficiary of an inter vivos trust), the situation is treated as though the disclaimant had died at the time the transfer was made. Disclaimers are made primarily for tax reasons.

## 2. Disclaimer Must Be Notarized and Filed Within Nine Months of Receiving Notice of Gift

An heir, legatee, surviving joint tenant, or beneficiary under a life insurance policy, employee pension, profit-sharing, or deferred compensation plan may partially or totally disclaim the interest within nine months after the decedent's death. The written, notarized instrument of disclaimer must be filed with the probate court, and a copy thereof must be delivered to the decedent's personal representative (or, in the case of a life insurance policy or employee benefit plan, to the insurance company or plan carrier). A disclaimer, once made, is irrevocable.

## 1. Charitable Beneficiary Must File Disclaimer Within Nine Months of Receiving Notice of Gift

If a will makes a gift to a charitable beneficiary, the executor must give notice to the charity within 30 days after the will is admitted to probate. (See Estate Administration outline.) The charity has nine months after receiving such notice (not nine months after the testator's death) to disclaim the gift or any part thereof. This provision would, for example, give the charity an opportunity to inspect any real property bequeathed to it, to see whether the property has environmental problems (e.g., hazardous waste) before accepting the bequest.

## 3. Timely Disclaimer Avoids Gift Tax Liability

The federal gift tax statutes provide that when an heir or beneficiary disclaims the interest within nine months after the decedent's death, the property is deemed to pass from the decedent to the person who takes as a result of the disclaimer. The disclaimant is treated as never having owned the property and, thus, has not made a taxable gift. [I.R.C.' 2518] The Texas statute secures the benefits of this federal tax statute and confirms to the nine-month period for a timely disclaimer required by federal law.

## 4. Disclaimer Valid Against Creditors

Although most disclaimers are tax-motivated, a disclaimer can be used to defeat creditors' claims.

## 5. Beneficiary May Be Estopped to Disclaim After Accepting Benefits

No disclaimer is effective after the acceptance of the property by the heir, legatee, or beneficiary. Acceptance occurs if the disclaiming party has previously taken possession

or exercised dominion and control of the property in the capacity of heir, legatee, devisee, or beneficiary.

#### 6. May Be Made on Behalf of Deceased, Minor, Unborn, or Incompetent Person

A personal representative, guardian, or guardian ad litem may disclaim a gift on behalf of a deceased, minor, unborn, unascertained, or incompetent person.

#### 7. Tax Rule: Must Disclaim Future Interest Within Nine Months of Its Creation

Under the Texas statute, the holder of a future interest does not have to disclaim within nine months after the decedent's death. A disclaimer is valid if it is made within nine months after the date the person who will receive the property is finally ascertained and the remainder is indefeasibly vested. However, in *Jewett v. Commissioner*, 455 U.S. 305 (1982), the Supreme Court held that, to be effective for federal estate and gift tax purposes, disclaimer of a future interest (even a contingent future interest) must be made within nine months after the interest is created. Thus, while the Texas statute permits the disclaimer of a future interest years after the interest was created, there is no tax advantage in doing so.

## FORMAL REQUISITES OF WILLS

### 1. IN GENERAL

#### 1. Must Be Eighteen Years Old (or Married or in Armed Forces) to Make a Will

In Texas, a person of sound mind who has attained age 18, or is married, or is in the armed forces of the United States, has the right and power to make a will. [Tex. Prob. Code Ann.' 57]

#### 2. What Constitutes a Will?

A will is an instrument that is testamentary in character, revocable during the lifetime of the testator, and operative at the testator's death. Thus, an instrument that is irrevocable cannot be a will.

#### 1. Instrument Need Not Dispose of Property to Be a Will

Although many layperson believe that an instrument cannot be a will unless it directs how property shall be disposed of at death, this is not a legal requisite of a will. The term Awill includes codicils and testamentary instruments that merely appoint an executor or guardian or revoke another will. [Tex. Prob. Code Ann.' 3]

#### 2. Instrument Cannot be Operative During Lifetime

An instrument that is operative during the maker's lifetime (as by presently transferring an interest in property) cannot be a will.

#### 3. Codicil

A codicil is a later testamentary instrument that alters, amends, or modifies a previously executed will. A codicil must be executed with the same testamentary formalities as a will. In Texas, it is possible to have a holographic codicil to an attested will, and it is

possible to have an attested codicil to a holographic will

#### 4. Negative Bequest Rule--Will or Trust May Disinherit Heir

Suppose that T's will, after making various gifts, provides: AI intentionally disinherit my daughter Monica, and I do not want her to share in any part of my estate. However, the will does not make a complete disposition of T's estate, resulting in a partial intestacy. At common law (and in Texas until 1991), the language of disinheritance in the will was ineffective, and Monica would take a share of T's estate as an intestate heir. The rationale was that any property passing by intestate succession is governed by the statutes of descent and distribution and not by the testator's will.

This anomalous result has been eliminated by the so-called negative bequest statute, enacted in 1991. A provision in a will directing how property shall not be disposed of is valid. [Tex. Prob. Code Ann.' 3(ff)(2)] A person who makes a will may disinherit an heir and direct the disposition of property passing by intestacy. [Tex. Prob. Code Ann.' 58(b)] Along the same lines, a trust may contain a direction as to how property shall not be distributed in the event of the failure, termination or revocation of the trust. [Tex. Prob. Code ' 112.053] Thus, in the example above, Monica would not take a share of T's estate. Instead, the portion of T's estate passing by partial intestacy would be distributed as though Monica had predeceased T.

#### 3. Conditional Will Cases--Argue Both Ways

A conditional will is one that provides that it shall be operative only if some condition stated in the will is satisfied. However, language that reads like a condition may be interpreted by the court as merely expressing the motive or inducement for making the will. Suppose, for example, that Mary signs a will that reads, AI am going on a safari to Africa. If anything happens to me on the trip, here is how I want my property disposed of, . . . Mary returns from the trip and dies five years later. Should her will be probated? As indicated by the examples set out below, the Texas cases have gone both ways on this issue. Several cases have held that this language merely reflects that Mary was thinking generally about the possibility of death and the need for a will, which at that moment took the specific shape of not returning from Africa. Other cases have held that the will was conditional and should have denied probate. If a bar exam question raises this issue, you should argue both ways.

#### D. Types of Wills

Texas recognizes three types of wills: attested wills, holographic wills (handwritten, signed, but not witnessed), and oral wills (for personal property only, and valid only if made during last illness).

## II. ATTESTED WILLS

The Texas will execution statute for witnessed and attested wills is the most liberal of any state. [Tex. Prob. Code Ann.' 59] There are only three formal requirements for such a will:

### 1. Must Be Signed by Testator

A will must be signed by the testator (or by another person for him at his direction and in his presence). The testator's signature may be by an X mark. In one case, a typewritten signature was held sufficient, but the case has no writ history and is of dubious authority. [Zaruba v. Schumaker, 178 S.W.2d 542 (Tex. Civ. App. 1944)]

### 2. Must Be Two Witnesses

A will must be attested by two witnesses above the age of 14 who are credible, i.e., not non compos mentis.

### 3. Witnesses Must Sign in Testator's Presence

The witnesses who subscribe their names to the will must do so in the presence of the testator.

#### 1. Some States Apply Strict A Line of Sight Test

Under this test, a witness signs in the testator's presence only if the testator can actually see the witness sign the will. (An exception is made for blind testators.)

#### 2. Texas Applies Liberal A Conscious Presence Test

As for when the witness has signed in the testator's presence, the Texas courts follow the more liberal A conscious presence rule.

#### 3. Order of Signing Not Critical as Long as One Contemporaneous Transaction

The exact order of signing is not critical as long as the signing is done as part of one contemporaneous transaction. Suppose one of the attesting witnesses signs before the testator signs. No problem, if the testator and witnesses all signed in one contemporaneous transaction. [James v. Haupt, 573 S.W.2d 285 (Tex. Civ. App. 1978, n.r.e)]

#### 4. Texas Rules Contrasted with Requirements Elsewhere

The will execution statutes of a number of states require one or more of the following steps that are not required in Texas. This list is not set out for purposes of erudition. In a bar exam question on will execution, one or more of these steps would be missing. It would be appropriate for the candidate to point out that while \_\_\_\_\_ is required in some states, it is not a requisite of due execution in Texas.

##### 1. Texas Does Not Require A Publication of Will

In Texas, a will need not be published; i.e., the testator need not declare to witnesses that this is my last will and testament. A number of Texas cases have held that the witnesses do not need to know that they are witnessing a will. [Davis v. Davis, 45 S.W.2d 240 (Tex. Civ. App. 1931)]

##### 2. Texas Will Need Not Be Signed At Foot or End

In Texas, a will need not be signed at the foot or end thereof. In one case involving a holograph, the document began, AI, P.J. Lawson, being of sound mind, . . . and it was not signed at the end. It was held that the will was signed by the testator; his written name at

the beginning of the will satisfied the signature requirement.

For an attested will, the only question that could arise would be if additional provisions appeared after the signature of the testator and witnesses; this would simply raise a fact question on whether the provisions were there and part of the will at the time of execution and attestation.

### 3. Witnesses Need Not Sign in Each Other's Presence in Texas

In Texas, the witnesses need not sign in each other's presence; the only requirement is that each signs in the testator's presence. [Davis v. Davis, supra]

### 5. Attorney Liability for Negligence--Privity of Contract Defense

In *Morris v. Estate of West*, discussed above, the attorney bungled the will's execution. As a result, the will was denied probate, and decedent's estate passed by intestacy. Did the intended will beneficiaries have a cause of action against the attorney for negligence? Historically, under the principle of privity of contract, only the client could sue an attorney for negligence--a rather convenient theory when applied to negligently prepared wills! In recent years, courts in a number of states have discarded the privity of contract shield and have ruled that the attorney who prepares a will owes a duty, not only to the testator, but to the intended beneficiaries of the testamentary plan. In these states, attorneys have been held liable to the beneficiaries despite the absence of privity. Texas, however, has retained the privity of contract defense.

### 6. Proof of Wills in Probate

#### 1. All that Is Required Is Testimony of One Attesting Witness

Texas law is decidedly liberal on the requirements for proof of due execution of a will. All that is needed is the testimony of one attesting witness in open court. If all the witnesses are nonresidents of the county, or being residents are for some reason unable to testify in open court, the testimony of the one attesting witness may be obtained by deposition or interrogatory. [Tex. Prob. Code Ann.' 84]

#### 2. No Living Witnesses--Testimony as to Handwriting of Any Signatory Sufficient

If none of the witnesses is living or can be located, the will may be proved by the testimony or deposition of two witnesses to the handwriting of any one of the signatories to the will: the testator or either of the attesting witnesses.

#### 3. Presumption that Will Duly Executed

When the attesting witnesses are dead and the will's due execution is proved by the testimony of two persons as to the testator's (or a witness's) handwriting, how does the court know that the requirements of due execution were satisfied? (Specifically, that the witnesses signed in the testator's presence, the only substantial requirement?) No problem; it is presumed that the requisites of section 59 were satisfied and the burden is on the will opponents to show that they were not.

#### 4. Attestation Clause Is Prima Facie Evidence of Facts Recited Therein

An attestation clause, which appears below the testator's signature line and above the signature lines for the witnesses, merely recites the elements of due execution.

While use of an attestation clause is not legally required in any state, such a clause can be very useful. The Texas courts have admitted wills to probate on the basis of the recitals in the attestation clause in cases where a witness testifies that he cannot recall the event, and even in cases where the witness testifies that (i) he did not sign the will in testator's presence, and (ii) the signature on the will was not the testator's signature. A full attestation clause reciting compliance with all formalities of execution and signed by the witness is prima facie evidence of the validity of the will, although the witness's memory is faulty, or he contradicts the fact stated in the clause, or where he is dead. [Jones v. Whiteley, 533 S.W.2d 881 (Tex. Civ. App. 1976, n.r.e)]

#### 7. Self-Proved Wills

Even under Texas's liberal probate rules, practical problems can be encountered in proving up a will. It is necessary to locate one of the witnesses and arrange for his testimony in probate court. If the witness resides in another country or state, his testimony must be secured by deposition. If neither witness can be located or both are dead, it is necessary to prove the will by signature. To eliminate these practical problems, Texas is one of a growing number of states that allow proof of a will by a self-proving affidavit. While the affidavit can be made at any time after the will is executed, in practice, the affidavit is executed as part of the will execution ceremony. In the presence of the witnesses and a notary public, the testator signs the will, and then the witnesses sign the will underneath the attestation clause. The testator and the witnesses then sign the self-proving affidavit--a sworn statement that is notarized by the notary public.

##### 1. Admitted to Probate on Basis of Affidavit--No Need to Call Attesting Witnesses

The sworn affidavit recites all of the elements of proof that the witnesses would testify to in open court: that the testator is over age 18; that the witnesses are over age 14; that the testator declared that the instrument was her will; that the testator signed in the witnesses' presence; that the witnesses signed in the testator's presence; and that, in the witnesses' opinion, the testator is of sound mind. The affidavit serves as a substitute for the witnesses' testimony in open court. A self-proved will is admitted to probate on the basis of the affidavit; no further proof of its execution with the formalities and solemnities is required to make it a valid will. [Tex. Prob. Code Ann.' 59]

##### 2. Attestation Clause and Self-Proving Affidavit Compared

An attestation clause (which is not sworn to) is corroborative only, and a will that is not self-proved cannot be admitted to probate unless evidence required by the statute (either testimony of an attesting witness or proof of signature) is presented. Once such evidence is presented, however, the recitals in the attestation clause can be relied upon--even in the face of hostile testimony, if the jury finds that the attestation clause (and not the witness

on the witness stand) tells the truth. [Jones v. Whiteley, supra] In contrast, a self-proving affidavit is evidentiary and serves the same function as the witnesses' deposition.

### 3. Testator or Witnesses Signed Affidavits But not Will--Will admissible But Not Self-Proved

Suppose that the witnesses sign the self-proving affidavit, but do not sign the will itself. The lines for their signatures under the will's attestation clause are left blank. The statute provides that a signature on a self-proving affidavit can be considered a signature on the will if necessary to prove that the will was signed by the testator and two witnesses. In that case, however, the will cannot be considered a self-proved will. Thus, to prove up the will, the standard procedures for proof of wills in probate, supra, must be followed. [Tex. Prob. Code Ann.' 59(b)] In other words, the signatures can be used only once. If they are used to validate the will, they cannot be used to self-prove the will.

### 4. Invalid Affidavit Does Not Invalidate Will

If the self-proving affidavit is invalid because it was not sworn to but is merely acknowledged, this simply means that the will cannot be admitted to probate as a self-proved will. Since the affidavit is not part of the will, its invalidity does not invalidate the will, which can be probated upon proof of its due execution. [Cutler v. Ament, 726 S.W.2d 605 (Tex. App. 1987)]

## III. INTERESTED WITNESSES

### 1. Gift to Witness Never Invalidates Will, But Witness-Beneficiary May Lose Legacy

At common law, a testamentary gift to a beneficiary made the beneficiary an incompetent witness. If he was one of the two attesting witnesses to the will, the will was denied because it had only one competent witness.

In Texas, as in most states, the fact that a beneficiary is also one of the attesting witnesses never affects the validity of the will. The only consequence is that the witness-beneficiary may lose his legacy. [Tex. Prob. Code Ann." 61-62] This type of interested witness statute is called a Apurging statute. The statute eliminates the problem by purging the witness's legacy, thereby making him a disinterested witness.

### 2. Testimony of Disinterested Witness May Save Gift

If a subscribing witness to a will is also a legatee or a devisee of that will, and the will cannot be otherwise established, the bequest is void. [Tex. Prob. Code Ann.' 61] Thus, a legacy to an attesting witness will not be purged if the will can be proved by the testimony of a disinterested attesting witness.

### 3. Legacy Not Purged If Testimony Corroborated by Disinterested Person

A bequest to a subscribing witness is not void if his testimony proving the will is corroborated by one or more disinterested and credible persons who testify that the testimony of the subscribing witness is true and correct. [Tex. Prob. Code Ann.' 62]

#### 4. Disqualified Interested Witness Takes Lesser of Legacy or Intestate Share

In the case of a disqualified interested witness, Texas follows the Awhichever is least rule. If the witness would have been entitled to a share of the estate had there been no will, he will be entitled to as much of such share as does not exceed the value of the bequest to him in the will. [Tex. Prob. Code Ann.' 61]

#### 5. Consequence - Interested Witness Statute Rarely Invoked

Because of the many escape hatches, the Texas interested witness statute is rarely invoked to void a witness' bequest. In most cases, a disinterested attesting witness will be available to testify. Failing that, it may be possible to corroborate the testimony of the witness-beneficiary by some other person who was present at the time the will was executed. Failing that, the witness-beneficiary may still take up to his intestate share if he would have been an heir had there been no will.

#### 6. Statute Invoked Only When Witness Receives Direct Economic Benefit Under Will

The purging statute is invoked only when the attesting witness receives a direct economic benefit under a will. Thus, a gift to an organization of which an attesting witness is a member would not bring the purging statute into play.

### IV. HOLOGRAPHIC WILLS

#### 1. Must Be in Testator's Handwriting and Signed by Testator

Texas is one of about 20 states that recognize holographic (handwritten and unwitnessed) wills. A holographic will must be Awholly in the handwriting of the testator and signed by him. [Tex. Prob. Code Ann.' 60]

#### 1. Need Not Be Dated

Several states that allow holographs require them to be dated; Texas does not.

#### 2. Signature Can Appear Anywhere

The testator's signature does not have to be at the end of the will. [See Lawson v. Dawson's Estate, 55 S.W. 64 (Tex. Civ. App. 1899), writ re'd] - discussed above.] Also, the signature need not be the testator's full name; his initials - even AYour brother, Ed - will suffice as a signature. [Barnes v. Horne, 233 S.W. 859 (Tex. Civ. App. 1922)]

#### 3. Can Be Written on Anything

The will can be written on anything: There have been cases involving wills written on the back of a used envelope, on a scratch pad, on a nurse's petticoat, and on the fender of a tractor that ran over and pinned decedent to the ground.

This will can be written on hotel stationary or other paper that contains printing, as long as the printed words are not incorporated into and made part of the will (in which case the entire will would be denied probate).

#### 4. Surplusage Rule - Extraneous Printed Words Do Not Invalidate Will

Extraneous printed words that are not necessary to complete the will do not invalidate a holographic will. This is called the surplusage rule. This principle has been applied in several cases involving wills written on hotel stationary.

#### 2. Testamentary Intent Must Be Shown

The most commonly litigated question concerning holographs is whether a letter written by decedent, or memorandum found in his desk, was intended to be a will. The issue of AWas this document written with testamentary intent? should be discussed in any question involving an alleged holograph, unless the writing in terms begins: AThis is my last will and testament.

#### 3. Proof of Holographic Will in Probate - Witness to Handwriting

A holographic will may be proved in probate by the testimony of two witnesses to the testator's handwriting, taken in open court or by deposition. Holographic wills can be self-proved by the testator making an affidavit before a notary. [Tex. Prob. Code Ann.' 84]

## 22. ORAL WILLS

#### 1. Valid Only as to Personal Property and Only If Made in Last Illness

Texas recognizes nuncupative (oral) wills in very limited circumstances. The following strict tests must be met:

1. Applicable only to personal property;
2. Must have been made in last sickness and at his home Aexcept when the deceased is taken sick away from home and dies before he returns to such home;
3. If value of property exceeds \$30, must be three or more credible witnesses to the oral will;
4. Cannot be probated more than six months after X's death Aunless the testimony or the substance thereof shall have been committed to writing within six days after making the will.

[Tex. Prob. Code Ann." 65, 89]

#### 2. Realty vs. Personalty

In the leading case, the testator's oral will included this statement: AI want Edith Purcell and her daughters to get enough of my estate to buy a little home, not to exceed \$12,000. The argument that this was a gift of realty, not permitted by a nuncupative will, was rejected. AThis is a devise of money with limitation as to amount and upon its use. [Connor v. Purcell, 360 S.W.2d 438 (Tex. Civ. App. 1962, n.r.e.)]

## VI. NONPROBATE ASSETS CANNOT BE DISPOSED OF BY WILL

Only property owned by the decedent at death can be disposed of by will. A will cannot make a gift of nonprobate assets - interests that pass at death other than by will or intestacy. Also, nonprobate assets are not subject to the personal representative's possession for purposes of administering the decedent's estate. There are three principal categories of nonprobate assets.

### 1. Property Passing by Contract - Life Insurance Proceeds, Employee Benefits

Life insurance proceeds (and death benefits under an employee retirement plan) are payable to the beneficiary designated by the insured (or employee) in his contract with the life insurance company (or retirement plan carrier).

### 2. Property Passing by Right of Survivorship

Property held by the decedent and another person as joint tenants with right of survivorship passes directly to the survivor outside of the probate process.

### 3. Property Held in Trust

When an inter vivos trust is established, legal title to the settlor's assets is transferred to the trustee, and if the trust continues in operation after the settlor's death, legal title remains in the trustee.

## REVOCATION OF WILLS; LOST WILLS

### I. BY OPERATION OF LAW

#### 1. Subsequent Marriage Does Not Affect Will

Texas does not have a pretermitted spouse statute. Marriage following execution of a will has no effect on the will or any of its provisions.

#### 2. Divorce or Annulment Revokes All Provisions and Appointments in Favor of Former Spouse

If the testator is divorced or the testator's marriage is annulled after making a will, all provisions in the will in favor of the testator's former spouse, or appointing such person to any fiduciary capacity under the will, are revoked unless the will expressly provides otherwise. [Tex. Prob. Code Ann.' 69]

#### 1. Property Distributed as Though Former Spouse Predeceased Testator

The statute goes on to provide that for purposes of construing the decedent's will, a person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

#### 2. Statute Does Not Apply If Couple Remarry Each Other

This is the effect of the last clause in the statute cited above. Section 69 has no application when, following the divorce, the couple remarry.

### 3. Effect of Divorce on Life Insurance Policy Naming Spouse as Beneficiary

Suppose one spouse is the insured under a life insurance policy that names the other spouse as beneficiary. The parties later divorce, and then the insured dies without changing the beneficiary designation. Section 69 applies only to wills; it makes no mention of life insurance policies. The Texas courts held that the terms of the insurance contract (and not the probable intent of the insured) govern disposition of the policy proceeds. Accordingly, the proceeds were payable to the former spouse notwithstanding the divorce. [Dreesen v. Coleman, 531 S.W.2d 201 (Tex. Civ. App. 1975, n.r.e.)] Dissatisfaction with this result led to the enactment, in 1987, of detailed rules governing the effect of divorce on previously issued life insurance policies. Since the statutes are contained in the Texas Family Code, the subject is discussed in the Family Law outline.

## II. BY SUBSEQUENT WRITING (THE STANDARD WAY)

### 1. Revoking Instrument Must Be Executed with Testamentary Formalities

A will, codicil, or any gift therein can be revoked only by a later will or codicil, executed with like formalities. [Tex. Prob. Code Ann.' 63]

#### 1. Holographic Writing Can Revoke Typewritten, Attested Will

Do not take the Aexecuted with like formalities too literally. What is meant here is a subsequent writing executed with the required testamentary formalities. Thus, an attested will can be revoked by a holograph (and vice versa), even a terse writing that says AI revoke my will. /s/ John Jones. (Here is a case where a date would be desirable, though. Since it must be shown that the writing was made after the attested will was executed, there could be a proof problem here.)

#### 2. Oral Codicils to Written Wills Are Permitted

In some jurisdictions that purportedly recognize oral (nuncupative) wills, it is not possible to have an oral codicil to an attested or holographic will; for if the oral codicil altered the terms of the earlier will (or simply carved a little out of the residuary gift), this would be a partial revocation - not executed with like formalities.

There is no problem in Texas, though. A number of Texas cases, including Connor v. Purcell, have allowed oral codicils to written and attested wills, even though giving effect to the codicil altered the disposition made by the attested will. The oral codicil would have to be uttered under the very restrictive rules governing nuncupative wills, though (i.e., last sickness, personal property only, etc.).

### 2. Testator Must Have Capacity to Revoke

To revoke a will by a subsequent instrument, the testator must have testament capacity (i.e., must be of sound mind) at the time the subsequent instrument is executed. Otherwise, the attempted revocation is without effect. [Lowery v. Saunders, 666 S.W.2d 226 (Tex. Civ. App. 1984)]

### 3. Revocation by Implication

If a testator executes a second will that does not expressly revoke an earlier will, so far as possible, the two wills are read together. The second will is treated as a codicil and revokes the earlier will only to the extent of inconsistent provisions. But if the later will makes a complete disposition of the testator's property, it revokes all prior wills by implication.

## III. BY PHYSICAL ACT

### 1. Revocation by Physical Act Requires Physical Act and Intent to Revoke

A will may be revoked by the testator destroying or canceling the will, or causing it to be destroyed or canceled in his presence. [Tex. Prob. Code Ann.' 63] A valid revocation requires both the physical act and the intent to revoke.

### 2. Act Must Be Directed at Entire Will - No Partial Revocation

The statutes in several states give a long list of the types of physical acts; tearing, burning, obliterating, mutilating, etc. The Texas statute mentions only destroying or canceling. The Texas cases make it clear that any physical act done to the will, when coupled with the necessary intent to revoke, will constitute a valid revocation - provided that the act of destruction was directed at the whole will and not just a portion thereof. Texas does not recognize partial revocation by physical act.

### 3. Act of Revocation Must Be by Testator or by Someone in Testator's Presence

To be effective, a physical act of revocation must be performed by the testator or by someone in his presence and at his direction.

### 4. Physical Act of Revocation Must Be on Will, Not Another Document

The mere intention to destroy a will, coupled with a belief that destruction has occurred, is insufficient to effect a revocation. Revocation by physical act requires the intent to revoke and the physical act of revocation on the will itself. [Morris v. Morris, 642 S.W.2d 448 (Tex. 1982)]

### 5. Partial Revocation by Physical Act

#### 1. Attested Wills - No Partial Revocation by Physical Act

In most states, a testator can partially revoke a will by physical act, as by crossing out a clause with a marking pencil. In Texas, however, partial revocations of attested wills by physical act are not permitted. [Leatherwood v. Stephens, 24 S.W.2d 819 (Tex. Civ. App. 1930); Pullen v. Russ, 209 S.W.2d 630 (Tex. Civ. App. 1948)]

#### 2. Holographic Wills - Interlineations and Partial Revocations Given Effect

In contrast to the rule for attested wills, interlineations and partial revocations of holographic wills are given effect, provided they are shown to have been made by the testator's hand.

## IV. BURDEN OF PROOF AND PRESUMPTION AS TO REVOCATION

### 1. Burden of Proof on Will Proponent; A Presumption of Continuity

The will proponent must prove that such will was not revoked by the testator. [Tex. Prob. Code Ann. § 88(b)] In the ordinary case where the will is found after death where it should be found, and there is no evidence that the will may have been revoked, the will proponent is aided by the presumption of continuity - that is, that the will has had a continuous legal existence. But if there is any evidence that the testator may have revoked the will, when the issue of revocation *vel non* is submitted to the jury, the burden of proof is placed on the will proponent.

### 2. Certain Facts May Give Rise to Presumption of Revocation

#### 1. Lost Will Last Seen in Testator's Possession or Control - Presumed Revoked

Where the will was last seen in the testator's possession or in a place where the testator had ready access to it, and the will cannot be located after diligent search, a presumption arises that the testator destroyed the will with intent to revoke it. The evidence needed to overcome the presumption of revocation is a preponderance of the evidence (not clear and convincing evidence). [Estate of Glover, 744 S.W.2d 939 (Tex. 1988)] Evidence that the will was last seen in the possession of someone adversely affected by its contents is sufficient to rebut the presumption of revocation. [Estate of Capies, 683 S.W.2d 741 (Tex. App. 1984)]

#### 2. Mutilated Will Last Seen in Testator's Possession or Control - Presumed Revoked

Where a will last seen in the testator's possession or control is found in a mutilated condition after the testator's death, the presumption is that the testator did the mutilating; i.e., the presumption is that the testator revoked the will by physical act.

## 22. NO REVIVAL OF REVOKED WILLS IN TEXAS

### 1. Texas Applies the Common Law No Revival Rule

At common law and in Texas, once a will is revoked by language of revocation in a later will, it is legally dead and cannot be revived (i.e., restored to testamentary effectiveness) merely by destroying the second will (and with it the revoking language of the second will). A revocation of the later will does not, of itself, revive the prior will or any provision thereof.

### 2. How Can Will Be Restored to Testamentary Effectiveness?

#### 1. Republication with Testamentary Formalities

To be restored to testamentary effectiveness, a revoked will must be reexecuted with full testamentary formalities; i.e., signed (or previous signature acknowledged) before two attesting witnesses.

#### 2. Republication by Codicil

The valid execution of a codicil that makes express reference to the revoked will would cause the will to be revived under the doctrine of republication by codicil.

### 3. Effect of Revocation of Codicil

Revocation of a codicil to a will revokes only the codicil, and the will is read as though the codicil had never been written. [Dean v. Garcia, 795 S.W.2d 763 (Tex. Civ. App. 1989)]

## VI. DEPENDENT RELATIVE REVOCATION (ADRR)

### 1. DRR Permits Court to Disregard Revocation Based on Mistake of Law

The common law doctrine of dependent relative revocation operates to cancel a revocation when the court determines that the revocation was premised on a mistake of law or fact, and that the revocation would not have been made but for a mistaken belief that another disposition of property had been effectively made.

When a will is revoked because of a mistaken belief that an earlier will would be revived, the court may disregard the revocation. The point is this: In the example above, will #1 cannot be probated because of the no-revival rule. However, to carry out T's plan so far as possible, since any revocation requires an intent to revoke, we will seize on the Adependent nature of her revocation and disregard the revocation. It is will #2 that is probated. (The contents of the destroyed will and its execution would have to be proved under the Alost will statute, see G., *infra*.)

### 2. Dispositive Plans Must Be Generally Similar

DRR should be applied only if the dispositive provisions of the two wills are generally similar. For example, suppose in the above case that will #1 gave T's estate outright to grandchild G, and will #2 gave the estate outright to nephew, N. Then the same scenario: T destroys will #2 with the intent to revoke it and to revive will #2. DRR should not be applied to disregard the revocation of will #2 despite the mistake of law as to the no-revival rule. From these facts, it is clear that T's intent to revoke will #2 was independent of her intent to revive will #2. It is clear from the facts that T had two independent intents: (i) she wanted her estate to go to G, and (ii) she did not want it to go to N.

### 3. No Texas Case Has Ever Applied DDR

There are no Texas cases invoking the equity-type doctrine of dependent relative revocation. However, it has been mentioned favorably in dictum [Burton v. Bell, 380 S.W.2d 561 (Tex. 1964); Chambers v. Chambers, 542 S.W.2d 901 (Tex. Civ. App. 1976)], and it is an established part of the common law. Thus it is believed that the Texas courts would invoke the doctrine on the right facts.

## VII. PROOF OF LOST WILLS IN PROBATE

As is true of most states, Texas has a statute authorizing probate of a lost will. [Tex. Prob. Code Ann.' 85] This statute is important; otherwise the power of testation could be frustrated by the accidental (or intentional) destruction of the will. Three elements must be established in order to probate a lost will.

### 1. Due Execution Must be Established

Due execution of the will must be proved by the testimony of at least one attesting

witness, as in any other case. In an early case, it was protested that this was an impossible burden; since the will was lost, the proponents did not even know who the witnesses were, and there was no handwritten signature of the testator for witnesses to testify on. Replied the court, AIt surely cannot be maintained that facts which must be established in order to give effect to a testamentary instrument, if it were before the court, need not be proved if it is not produced. If so, the case derives strength from its intrinsic weakness. [This may make proof of a lost will impossible in some cases, but] the mere difficulty of making the proof required by the law affords no reason for departure from the rules by which courts are governed.

## 2. Cause of Nonproduction Must Be Established

The cause of nonproduction of the will must be proved. In several cases, the fact that the will was last seen in the possession of one adversely affected by its contents was deemed to satisfy this requirement. Aside from this situation, the will proponent must somehow overcome the presumption of revocation, i.e., that the reason the will cannot be found is that the testator destroyed it with the intent to revoke.

## 3. Content Must Be Substantially Proved

A lost will's contents Amust be substantially proved by the testimony of a credible witness who has read it or heard it read.

## 4. Proof of Lost Will Solely to Show It Revoked Prior Will

Sometimes the will itself cannot be probated as a lost will because its contents cannot be substantially proved, but its existence is proved merely to show that it revoked a prior will. The leading case is *May v. Brown*, 190 S.W.2d 715 (Tex. 1945). In that case, the testator deserted his family in Fort Worth and moved in with his practical nurse, Jean Brown, in Brownsville. He executed a will devising his entire estate to Jean Brown. After a number of years, he evidenced a change of heart and began to correspond with his wife and children. In trial to probate the Jean Brown will, the only will found after his death, evidence showed he asked a lawyer whether Texas recognized handwritten wills, and the lawyer advised him to have the will witnessed; two girls in his employ testified that they had witnessed a will for him; they had no idea of its contents except that they recalled the first clause revoked all prior wills. Further evidence was that Jean Brown and her son were at his bedside when he died; Jean rifled his pockets and gave her son a key to T's office. A second will was never found, but Brown's son was seen carrying a tin box out of the office. In the generous words of the court, AThere was some probability that the second will might have been in this tin box.

The alleged second will was not offered for probate, for its contents could not be proved. But it was offered as evidence that the first will had been revoked by this unproduced second will. Held: Lower court's decision to probate first will reversed. Although Aproof of lost will statute was not satisfied, this was no problem, for the second will was not being offered for probate. All that was sought to be shown was that a later revoking instrument had been executed, and the evidence was sufficient to show this.

## RESTRICTIONS ON THE POWER OF DISPOSITION

## 1. PROTECTION OF SURVIVING SPOUSE - COMMUNITY PROPERTY

Because Texas is a community property state, there is no such thing as a dower, a curtesy, or a statutory forced share for a surviving spouse. (Also, the common law tenancy by the entirety estate is not recognized in Texas.) The built-in protection accorded by the community property system is deemed abundant protection of the surviving spouse. It is thus conceivable that a spouse who never worked and who owned nothing but separate property could disinherit his spouse, leaving her penniless and without means of support. Conceivable, but not likely. First, the income from separate property is community property, meaning there is always going to be some community property. Second, the likelihood of the commingling of separate and community property, together with the vigorously applied presumption that all property on hand at the dissolution of marriage is community, operate strongly to protect the surviving spouse. (See Community Property outline.)

### 1. Each Spouse Has Testamentary Power Over Own One-Half Community Interest

Each spouse has the unrestricted power of disposition over his separate property, but each spouse has the power of testamentary disposition over only his one-half community interest. A will that devises all my property disposes of all the spouse's separate property, but only his one-half interest in community assets. If a spouse leaves a will that purports to devise the entire community interest in assets, and not just his one-half interest therein, this gives rise to the widow's election situation, discussed in the Community Property outline.

### 2. Each Spouse Has Limited Power to Make Gifts of Community Property

A spouse's power to make lifetime dispositions of the entire estate in community assets is also limited, but by much more general tests: The transfer must not be fraud on the other spouse's community rights or illusory. (See Community Property outline.)

## II. PROTECTION OF CHILDREN

Under the Texas pretermitted child statute, if a child born or adopted after the will is executed (i) is not provided for or mentioned in the will and (ii) is not provided for by any nonprobate transfers taking effect at the testator's death, the child shares in the estate as described below. [Tex. Prob. Code Ann.' 67]

### 1. Scope of Statute

#### 1. Applies Only to Children Born or Adopted After Will's Execution

In a few states, the pretermitted child statute applies to all omitted children, including those alive at the time the will was executed as well as afterborns. That time of statute requires that all children be at least mentioned in the will. The Texas statute, like most, applies only to afterborn and afteradopted children, including a child conceived during testator's lifetime but born after his death.

#### 1. Does Not Apply to Grandchildren

The statute does not protect grandchildren even if the grandchild's parent predeceased the testator and would have been protected by the statute law had she lived.

## 2. Can Apply to Child Born Out of Wedlock

A child born out of wedlock is given rights under the pretermitted child statute if the child would be an heir for purposes of intestate succession. (See 1.D.2., supra.) [Johnson v. Mariscal, 620 S.W.2d 905 (Tex. App. 1981)]

## 2. Does Not Require Bequest to Child

As with every state except Louisiana, Texas has no forced heirship. A parent is not required to leave any property to his or her children, not even the proverbial one dollar. The statute gives protection only if an afterborn or afteradopted child is neither provided for nor in any way mentioned in the testator's will.

## 3. Does Not Apply If Child Mentioned in Will or Provided For by Nonprobate Transfers

The pretermitted child statute does not apply if the child is provided for or mentioned in the will, or if the child is provided for by a nonprobate transfer that is intended to take effect at the testator's death. For these purposes, a contingent gift is sufficient provision for the child.

## 2. Testator Had No Other Children When Will Executed - Pretermitted Child Takes Intestate Share of Property Not Bequeathed to Other Parent

In applying the pretermitted child statute, the first step is to determine whether the testator had other children at the time the will was executed. If the testator had no children, the pretermitted child takes the share of the estate he would have inherited under section 38(a) of the Probate Code if the testator had died intestate and unmarried, owning only that portion of his estate not bequeathed to the child's other parent. The purpose of this latter provision is to insure that the parent of the pretermitted child always receives his or her share of the testator's estate as provided in the will.

## 3. Testator Had Other Children When Will Executed

If the testator had other children when the will was executed, the pretermitted child's rights turn on whether bequests were made to any of the other children.

## 1. Will Makes Gifts to Other Children - Pretermitted Child's Share Limited to Such Gifts

If the testator had children at the time the will was executed and the will makes gifts to one or more of these children, the portion of the estate to which the pretermitted child is entitled is limited to the gifts made to other children. The bequests to the other children are reduced, but no other beneficiary's bequest is reduced. The pretermitted child takes such share of the bequests to the other children as he would have received had the testator included all pretermitted children with the children upon whom benefits were conferred, and given an equal share of such benefits to each such child.

## 2. Other Children Not Provided For - Pretermitted Child Takes Intestate Share of Property Not Bequeathed to Other Parent

If the testator made no provision for any of the children living when the will was executed, the pretermitted child takes that part of the estate he would have inherited under section 38(a) of the Probate Code had the testator died intestate, unmarried, and

owning only that portion of his estate not bequeathed to the parent of the pretermitted child.

### III. NO RESTRICTIONS ON GIFTS TO CHARITY

Texas has no mortmain statute; there are no restrictions on charitable gifts, whether inter vivos or by will.

### IV. COURT CANNOT ENJOIN TESTATOR FROM CHANGING WILL

A court may not prohibit a person from executing a new will or a codicil to an existing will. [Tex. Prob. Code Ann. '69A] This statute was enacted in 1993 in response to reports that some judges in divorce actions were entering temporary orders enjoining one party from changing his or her will.

## DOCTRINES THAT RELATE TO THE COMPONENTS OF A WILL

### I. INTEGRATION

A will often consists of more than one sheet of paper, yet the testator and the witnesses sign and attest on only one sheet; the last page of the will. The rarely litigated doctrine of Aintegration concerns the following question: What sheets of paper were present at the time of will execution and thus constitute the decedent's will? The requirements of intent and presence are presumed when there is a physical connection of the pages (staple, paper clip, etc.) or when there is an internal coherence by provisions running from one page to the next. These requirements can also be established by the testimony of witnesses or other extrinsic evidence.

### II. INCORPORATION BY REFERENCE

In Texas and most states, an extrinsic document (not present at the time the will was executed and thus not a part of the will under the integration doctrine) may be incorporated into the will by reference so that it is considered a part of the will. To incorporate a document by reference, the following requirements must be met:

#### 1. Document Must Be in Existence at Time Will Executed

The requirement for incorporation most strictly adhered to by the courts is that the extrinsic writing must actually be in existence on the date of execution of the will. The courts are fearful that if this requirement is not invoked, the testator could incorporate Aa paper that I plan to write and place in my desk drawer, undercutting the safeguards of the Statute of Wills.

#### 2. Document Must Be Clearly Identifiable from Language in Will

The extrinsic writing must be so clearly identifiable from language in the will as to preclude any mistake as to the document referred to. The will must contain a reference to the document's title, date, or some other indicia, so as to identify one and only one writing.

### III. FACTS OF INDEPENDENT SIGNIFICANCE

Under the facts of independent significance doctrine (sometimes called the doctrine of Antestamentary acts), a will may dispose of property by reference to acts and events that have significance apart from their effect on the disposition made by the will. Even though the identification of a beneficiary or the amount of a bequest will be determined by some future unattested act, the bequest is nonetheless valid if the act has some lifetime significance other than providing for the testamentary gift.

#### 1. Identification of Beneficiaries

The future act may relate to the identification of beneficiaries.

#### 2. Identification of Property

This doctrine also permits identification of the property that is to be the subject matter of a bequest.

#### 3. Gift of Real or Personal Property Does Not Include Contents Unless Will Expressly So Provides

A bequest of personal property does not include its contents unless the will directs that the contents are included in the bequest. A devise of real property does not include any personal property located on or associated with the property unless the will directs that the personal property is included in the devise. [Tex. Prob. Code Ann.' 58(c)]

#### 1. Gift of Contents Does Not Include Personal Property Whose Ownership is Evidenced by Title Document

Absent a contrary provision, a gift of the contents of real or personal property includes all tangible personal property (e.g., clothing, pictures, furniture, coin collections) other than titled personal property. A titled personal property is property whose ownership is evidenced by a certificate of title or other document that requires a formal transfer of title (e.g., automobile, motor home). [Tex. Prob. Code Ann.' 58(d)]

### III. POUR-OVER GIFT BY WILL TO INTER VIVOS TRUST

Section 58a permits devises by will to the trustee of any trust (including an unfunded life insurance trust, even though the trustor has reserved any or all rights of ownership in the insurance contracts), the terms of which are evidenced by a written instrument in existence before or concurrently with the execution of such will and which is identified in such will, even though such trust is subject to amendment, modification, revocation, or termination. Property so devised passes to the trust and is administered under its terms even though the trust is later amended. (See Trusts outline.) If the trust is revoked prior to the testator's death, the devise to the trustee lapses.

### IV. REPUBLICATION BY CODICIL

In some cases it may be important to establish the date on which a will is deemed to have been executed. Under the doctrine of republication by codicil, for purposes of construing the will and its codicil, the will is deemed to Aspeak (i.e., is treated as having been executed) on the date of the last validly executed codicil thereto.

## 22. POWERS OF APPOINTMENT

A power of appointment is an authority created in or reserved by a person enabling that person (called the donee of the power) to designate, within the limits prescribed by the creator of the power (called the donor), the persons who shall take the property and the manner in which they shall take it. When a person reserves a power in herself, she is both donor and donee of the power. Takers in default of appointment are the persons designated to take the property if the donee fails to effectively exercise the power.

### 1. General vs. Special Power of Appointment

While the distinction between general and special powers derives from the common law, the only definition that really counts today is the one given by section 2041 of the Internal Revenue Code, which applies the federal estate tax to property over which the decedent held a general power, but not to property over which she held a special power.

#### 1. General Power of Appointment

A general power of appointment is a power exercisable in favor of the donee herself, her estate, her creditors, or the creditors of her estate. A power that is exercisable in favor of any one of these groups is a general power.

#### 2. Special Power Appointment

A special power of appointment is one exercisable in favor of a limited class of persons, which class does not include the donee, her estate, her creditors, or the creditors of her estate.

### 2. Inter Vivos vs. Testamentary Power

An inter vivos power of appointment (sometimes called a presently exercisable power) is one that is exercisable by the donee during his lifetime. A testamentary power is one that is exercisable only by the donee's will.

### 3. Residuary Clause Does Not by Itself Exercise Testamentary Power

Texas follows the majority rule: A residuary clause or other general language in the donee's will does not operate to exercise any testamentary power held by the donee.

#### 1. Exception - Exercise by Implication

When the donee purports to dispose of the property as though it was his own rather than merely appointive property, it is usually held that the power of appointment was exercised by implication. Since the donee would otherwise have no right to dispose of property he does not own, the disposition can be given effect only if it is treated as an exercise of the power. An exercise by implication can be found unless the donor called for the power's exercise by a specific reference to the power.

#### 2. A Blanket Exercise of Power Permissible

If a person holding a testamentary power of appointment leaves a will that devises all of my property, including any property over which I may have a power of appointment, this

Ablanket exercise of any power of appointment will be given effect unless the donor called for the power's exercise by a specific reference to the power.

## CHANGES IN BENEFICIARIES AND PROPERTY AFTER EXECUTION OF WILL

### 1. LAPSED GIFTS AND THE TEXAS ANTI-LAPSE STATUTE

#### 1. Beneficiary Predeceases Testator - Gift Lapses

If a will beneficiary dies during the testator's lifetime (or within 120 hours after the testator's death), the gift lapses; i.e., it fails. A will cannot make a gift to a dead person, because a dead person cannot hold title to property.

#### 2. Texas Anti-Lapse Statute

Nearly all states have anti-lapse statutes that operate to save a gift if the predeceasing beneficiary was in a specified degree of relationship to the testator and left descendants who survive the testator. The beneficiary's descendants take by substitution under the anti-lapse statute. These statutes vary in their scope. The Texas statute covers predeceasing beneficiaries who were descendants of the testator's parents and thus encompasses the testator's children, grandchildren, brothers, sisters, nephews, and nieces. [Tex. Prob. Code Ann.' 68(a)] To be substituted as takers under the anti-lapse statute, the descendants of the deceased beneficiary must survive the testator by 120 hours. Distribution among the descendants is per capita with representation.

#### 1. Statute Does Not Apply If Contrary Provision in Will

The anti-lapse statute applies unless a contrary intention appears in the will.

#### 2. Statute Applies Only to Gifts by Will

The Texas anti-lapse statute applies only to testamentary gifts. It does not apply to inter vivos trusts, life insurance beneficiary designations, or other nonprobate transfers.

### 3. Lapse in Residuary Estate

#### 1. Surviving Residuary Beneficiaries Take

Suppose the beneficiary who predeceases the testator is one of the legatees named in the will's residuary clause. Under the common law (and in Texas until 1991), any lapsed residuary gift falls out of the will and passes under the intestacy statutes to the testator's heirs. By statute, Texas has replaced this "no residue of a residue" rule with a rule under which the residuary beneficiaries who survive the testator by 120 hours take the deceased beneficiary's share. If the residue is devised to two or more persons and the share of one of them fails for any reason, her share passes to the other residuary beneficiaries in proportion to their interests in the residue (absent a contrary will provision). [Tex. Prob. Code Ann.' 68(c)] One of the consequences of this rule is that it tends to avoid partial intestacies. There will be a partial intestacy only if all of the residuary beneficiaries predecease the testator (and the anti-lapse statute does not apply.) [Tex. Prob. Code Ann.' 68(d)]

## 2. Exception If Anti-Lapse Statute Applies

If the predeceasing residuary beneficiary was within the scope of the anti-lapse statute and left descendants, the anti-lapse statute trumps the rule that the surviving residuary beneficiaries take.

## 4. Gift to Dead Person Is Void, But Same Rules Apply

Suppose that a testator's will makes a gift to his sister, but unbeknownst to the testator, his sister is dead at the time the will is executed. This is called a void gift. In some states, the anti-lapse statute does not apply to void gifts. In Texas, however, all of the statutory rules (anti-lapse, statute, surviving residuary beneficiaries rule) apply to void gifts. Thus, if the sister left children who survive the testator by 120 hours, the children would take by substitution under the anti-lapse statute. [Tex. Prob. Code Ann.' 68(a)]

## 1. Exception - Class Member Deceased When Will Executed

If the will makes a class gift to beneficiaries who are within the scope of the anti-lapse statute (e.g., brothers and sisters) and some class member is deceased at the time the will is executed, the anti-lapse statute does not apply in favor of that person's descendants.

# II. ABATEMENT OF LEGACIES; BURDEN OF DEATH TAXES

## A. Classification of Gifts

Legacies and devises are classified for purposes of ademption and abatement.

### 1. Specific Legacy or Devise--Gift of Specific Item of Property

A specific bequest is a testamentary gift of some particular item of personal or real property. A devise of a Blackacre or Amy Bulova watch are examples.

### 2. Demonstrative Legacy--General Amount from Specific Source

A demonstrative legacy is a testamentary gift of a certain amount of money, to be satisfied primarily out of a certain fund or particular property; e.g., AI bequeath to X the sum of \$1,000 to be paid out of the proceeds of the sale of my Xerox Corporation stock.

### 3. General Legacy--Amount Payable Out of General Assets

A general legacy is a legacy that is payable out of general assets of the estate and does not require the delivery of any particular item of the testator's property for its satisfaction. The most common example is a general pecuniary legacy: AI bequeath to M the sum of \$500.

### 4. Residuary Legacy--Gift of Remainder of Estate

AI give all the rest, residue, and remainder of my property to . . . . This is a gift of all the remainder of the testator's estate after all debts have been paid and all specific, demonstrative, and general legacies have been satisfied.

## 2. Order of Abatement

Suppose that the assets that the testator owns at her death are not sufficient to pay all of

the testator's debts and also satisfy all the specific, pecuniary, and general legacies in the testator's will. Which legacies must be sacrificed first in order to pay the testator's debts and expenses of administration? The Texas abatement order is as set out below. Thus, in the typical case where there are sufficient assets to pay all death costs and still satisfy all gifts made by the will, debts and expenses are charged against the residuary estate.

Within each category, personal property abates before real property.

(i) Intestate property. If decedent left a will, this provision would be brought into play if she died partially intestate; i.e., if her will did not make a complete disposition of her estate.

(ii) Personal property in the residuary estate.

(iii) Real property in the residuary estate.

(iv) General legacy of personal property.

(v) General legacy of real property.

(vi) Specific bequest of personal property.

(vii) Specific devise of real property.

[Tex. Prob. Code Ann.' 322B]

### 1. Secured Claims Against Specific Property

The abatement statute does not affect claims of secured creditors who elect to have their claim continued as a preferred debt and lien against specific property. (See Estate Administration outline.)

### 2. Contrary Testamentary Provision

The above order of abatement is applicable in the absence of some testamentary provision to the contrary. A testator can always specify a different formula for abatement of legacies.

### 3. Estate Taxes Are Apportioned Among All Beneficiaries

Absent a contrary will provision, the personal representative must charge each person interested in the estate (i.e., any person receiving a probate or nonprobate asset from the decedent) with a portion of the total estate taxes assessed against the estate. A Estate means the gross estate for federal estate tax purposes and is not confined to the decedent's probate estate. The pro rata share charged to each person represents the same ratio as the taxable value of that person's interest bears to the total taxable value of the interests of all persons interested in the estate. The personal representative is given the right to bring an action, if necessary, to recover the tax from beneficiaries of nonprobate transfers. [Tex. Prob. Code Ann.' 322A]

#### 1. Beneficiary of Gift that Qualifies for Deduction Obtains Benefit of Deduction

In apportioning the tax, any deduction, exemption, or credit allowed in connection with the estate tax inures to the beneficiary of the gift that qualifies for the deduction, exemption, or credit. The two most commonly encountered cases that invoke this rule are gifts to spouses that qualify for the marital deduction and gifts to charities that qualify for the charitable deduction.

## 2. Interest of Income Beneficiary Not Subject to Apportionment

An interest in income for life or for a term of years (e.g., a trust income interest) is not subject to apportionment. Thus the pro rata share of the estate taxes attributable to a trust is charged against the trust corpus or remainder interest. (The resulting depletion of the corpus will of course cut down on the income from the trust, but there is no direct charge of estate taxes against the life tenant.)

## 3. Contrary Will Provision

The apportionment statute applies in the absence of a testamentary provision to the contrary. A testator can always specify a different formula for allocating the burden of taxes among the estate's beneficiaries. The testator may also grant a discretionary power of apportionment to another person (e.g., the executor).

## 4. Allocation of Debts and Expenses Between Estate Income and Principal

Absent a contrary will provision, all expenses incurred in the settlement of an estate are charged against principal of the estate: debts, funeral expenses, estate taxes, and family allowance. However, attorneys' and accountants' fees, executors' commissions and expenses, and court costs are allocated between income and principal of the estate as the executor determines in its discretion to be just and reasonable. [Tex. Prob. Code Ann.' 378B]

## 5. Liens on Specifically Devised Property Are Exonerated

Suppose the testator makes a devise of Blackacre to A, and Blackacre is encumbered by a mortgage that secures an indebtedness of \$5,000. Texas applies the common law doctrine of exoneration of liens. Absent a contrary provision, the mortgage must be exonerated (i.e., the debt must be paid out of the residuary estate), if the lien debt was a personal obligation of the decedent [Currie v. Scott, 187 S.W.2d 551 (Tex. 1945)]

### 1. Only Residuary Estate is Subject to Payment for Exoneration of Liens

A lien on specifically devised property is exonerated only to the extent that there are sufficient assets in the residuary estate for payment of the debt. Other specific bequests and general legacies made by the will are not affected, as there is nothing to indicate that the testator intended to favor one specific beneficiary over another (unless the will expressly provides otherwise).

## III. ADEMPTION

### 1. Ademption Applies to Specific Devises and Bequests Only

Where the testator's will makes a specific bequest of a particular item of property, and the item does not exist as a part of her estate at the time of her death (e.g., the item is sold, given away, taken by eminent domain, or lost), the bequest is adeemed; i.e., it fails completely.

#### 1. Testator's Intent Irrelevant

The testator's intent to adeem or not to adeem is not controlling; ademption is operative

against a bequest or devise of specific property in all cases where the property is not in the testator's estate at her death.

## 2. Partial Ademption

Pro tanto ademption would operate where, for example, the testator devised a large tract of land, then sold a portion of the tract. The remaining tract in her estate at her death would pass under the terms of the devise.

## 3. Gift of Sale Proceeds - Ademption May Not Apply

Where the testator's will makes a bequest of the sale proceeds of a specific item and that item is not part of the estate at the testator's death, ademption may not apply.

## 4. Sale by Guardian - Ademption May Not Apply

Suppose a testator's will makes a specific bequest of real property. Thereafter, the testator is adjudicated incompetent and a guardian is appointed. If the guardian sells the property to raise funds for the testator's care, does ademption apply? While no Texas case has considered the question, it has been indicated in dictum that ademption should not apply (and the specific devisee should be entitled to a legacy in an amount equal to the sale proceeds) since, under these circumstances, the testator would have no capacity or opportunity to adjust her testamentary disposition. [Shriner's Hospital v. Stahl, *supra*]

## 2. Ademption Does Not Apply to General or Demonstrative Legacies

The doctrine of ademption does not apply to general or demonstrative legacies. Thus, if the testator makes a general legacy of \$500 to P, and at the testator's death there is not \$500 in cash in the estate, other property in the testator's residuary estate must be sold to satisfy this general legacy.

## 3. Application of Doctrine to Bequests of Securities

### 1. Bequest of 100 Shares of Stock Held to Be General

To avoid the harsh result of the ademption doctrine, courts will construe a bequest of stock as general rather than specific whenever possible.

### 2. Bequest of 100 Shares of ABC Stock Held to be Specific

The above reasoning is not applicable if the bequest is of 100 shares of ABC stock, or of 100 shares of stock in the ABC Corporation owned by me. Here the reference to shares owned by the testator is inescapable; it is a specific bequest, and it is subject to ademption.

### 3. Stock Resulting from Reorganization, Merger, Etc.

A specific devisee of stock is entitled to securities of another organization owned by the testator as the result of a merger, takeover, consolidation, or other distribution by the organization or any successor organization, other than securities acquired through the exercise of a purchase option or a plan of reinvestment. [Tex. Prob. Code Ann. § 70A(a)(2)]

## IV. INCREASE IN SECURITIES

### 1. Specific Devisee Takes Shares Produced by Stock Split or Stock Dividend

A specific devisee of securities is entitled to any additional or other securities of the same entity owned by the testator because of action initiated by the entity, including stock splits, stock dividends, and new issues of stock acquired in a reorganization, redemption, or exchange. The specific devisee is not entitled to securities acquired through the exercise of a purchase option or a plan of reinvestment. [Tex. Prob. Code Ann.' 70A(a)(1)]

### 2. Specific Devisee Not Entitled to Cash Dividends Declared Before Death

Unless the will provides otherwise, a devise of securities does not include a cash distribution relating to the securities and accruing before the testator's death, even though the dividend is paid after death. For this purpose, it is the date the dividend is declared by the corporation that controls. [Tex. Prob. Code Ann.' 70A(b)]

### 3. Cash Dividends Declared After Testator's Death Belong to Specific Devisee

The beneficiary of specifically devised property owns the property from the moment of death, subject to the personal representative's right to possession of the property for purposes of administration. [Tex. Prob. Code Ann.' 37] Thus, the specific legatee owns the stock and the time the dividend is declared and is, of course, entitled to it.

### 4. General Legacies Earn Six Percent Interest If Not Paid Within One Year After Grant of Letters Testamentary

Absent contrary will provision, a general legacy (e.g., \$10,000 to my sister Sue) is entitled to interest at the legal rate (currently 6%) if not paid within one year after the date the court grants letters testamentary or letters of administration to the personal representative [Tex. Prob. Code Ann.' 3781B(f)]

## CLASS GIFTS

### 1. DEFINITION PROBLEMS

#### 1. Dispositions to A Children

Who are a person's A children? In the discussion that follows, assume that the testator's will or the settlor's trust makes a disposition A to A for life; and on A's death, to his children in equal shares.

#### 1. Children by All Marriages Included

Children from all of the testator's marriages are included in the term A children. Suppose A is married to a second wife and has children by her as well as by a former spouse. In the absence of a contrary indication, the products of both marriages qualify as A's children.

#### 2. Stepchildren Not Included

Stepchildren are not included in the definition of A children for this purpose. Suppose A's

second wife had children by a former marriage whom A did not adopt when he married her. These are A's stepchildren; they are not A's children. There is no legal relationship between A and his stepchildren.

### 3. Grandchildren Are Not Children

A gift to A children is restricted to descendants of the first degree, and does not include grandchildren. This would appear to be self-evident, but the issue has been litigated several times in recent years, where an unsuccessful effort was made to show that grandchildren were intended to be included. [Busby v. Gray, 616 S.W.2d 284 (Tex. Civ. App. 1981)]

### 4. Children Born Out of Wedlock Not Included

Along with most American jurisdictions, Texas follows the English rule that a disposition to A children prima facie means legitimate children only. [Tindol v. McCoy, 535 S.W.2d 745 (Tex. Civ. App. 1976)]

#### 1. Exception - No Legitimate Children

A few other jurisdictions (I know of no Texas cases) take the position that illegitimates are not excluded from a gift to A children when there are no legitimate children of the named person - particularly when this was the situation when the testator wrote his will.

#### 2. Exception - Intention to Include Children Born Out of Wedlock

Children born out of wedlock may not be excluded if an intention to include them can be shown. This can be shown by express statements or by necessary implication from words in the will; it can also be shown by surrounding facts and circumstances (i.e., extrinsic testimony is permitted).

### 2. Adopted Children

#### 1. Presumptively Included in Gifts to A Children, A Descendants, or A Issue

A The terms 'child,' 'descendant,' 'issue,' and any 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. '16.09(c) - on effect of adoption decree] Thus, a gift to someone's A descendants can include a person who was an adult when adopted, since Texas law expressly permits adoption of an adult. [Lehman v. Corpus Christi National Bank, 668 S.W.2d 687 (Tex. 1984)]

#### 2. Language in Will May Show Intent to Exclude Adopted Children

A gift by remainder to A any grandchildren who may be born after my death has been held to show a A clear intent by the settlor to exclude adopted children. [Ortega v. First Republic Bank, 792 S.W.2d 452 (Tex. 1990)] The same is true of a gift by remainder to A heirs of the body of the life income beneficiary. [Nail v. Thompson, 806 S.W.2d 599 (Tex. App. 1991)]

3. Gift to ALineal Descendants Means Per Stirpes to Lineal Descendants Then Living  
A gift to Alineal descendants means those descendants living at the time for distribution. Such descendants take per stirpes.

## II. CLASS GIFT RULE

### 1. Class Members Who Survive Testator Take Gift

Wills sometimes make gifts to beneficiaries who are generically described as class; e.g., to the Achildren or Anephews and nieces of a designated person. If some members of the class die during the testator's lifetime, those class members who are alive at the testator's death take the gift. This is commonly referred to as the Aclass gift rule.

#### 1. Rationale

One reason given for the rule is that the testator was Agroup-minded with respect to the gift of Blackacre. Since the beneficiaries were not named individually, it is presumed that the testator would want this class or group of persons to share in the ownership of the property, rather than have the deceased class member's share pass to some Astranger to the class. Another reason given for this result is purely mechanical. A will applies to the facts as they exist (you Aread the will) as of the testator's death. In the example set out above, when the will takes effect, only Bart and Cart meet the description as Athe children of my friend Gladys.

#### 2. Anti-Lapse Statute Overrides Class Gift Rule

The class gift rule gives way to the anti-lapse statute if the predeceasing class member was a descendant of the testator's parent and left descendants who survived the testator. [Tex. Prob. Code Ann.' 68(a)]

#### 2. Rule Does Not Apply If Gift Made to Individually Named Beneficiary

The class gift rule applies only if the gift is to a class or group that can expand (if more class members are born) or contract (if a class member dies). It does not apply if the gifts are to individually named beneficiaries.

#### 3. Rule Applies Only When Class Member Predeceases Testator

A common student error is to conclude that the class gift rule (Asurviving class members take) applies anytime a class member dies before the distribution of a class gift is to be made. This is not the case.

## CONTRACTS RELATING TO WILLS; JOINT AND MUTUAL WILLS

### 2. DEFINITIONS

The terminology used by the Texas courts is somewhat distinctive in that the term Amutual is applied to wills that are determined to have been executed pursuant to a contract.

#### 4. Joint Will -Wills of Two or More Persons in One Instrument

A joint will is a will of two or more persons executed on the same piece of paper.

#### 5. Reciprocal Wills--Separate Wills Containing Reciprocal Provisions

Reciprocal wills are two separate wills containing reciprocal (Amirror) provisions.

#### 6. Mutual Will--Contract Not to Revoke

A joint and mutual will (alternately, reciprocal and mutual wills) is a will executed pursuant to a contract between the testators that upon the death of the first of them to die, the survivor shall not revoke the will.

## II. IS THE WILL CONTRACTUAL?

### 1. Contract - Survivor Shall Not Revoke

If a will is found to be contractual, the contract is that the survivor shall not revoke the will after the death of the first to die. Either of the parties can revoke the will during their joint lives, upon giving notice to the other party. But once one of them dies, the survivor cannot change the agreed-upon disposition by making a new will. (As is explained below, technically, the survivor can revoke the will. However, the beneficiaries under the new will hold on a constructive trust for the beneficiaries of the contractual will. It is the contract, not the will, that is irrevocable without notice to the other party.)

### 2. Post-1979 Will Not Contractual Unless It States that Contract Exists and Contains Material Provisions

AA contract to make a will or devise, or not to revoke a will or devise, if executed or entered into on or after September 1, 1979, can be established only by provisions of a will stating that a contract does exist and stating the material provisions of the contract. The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract. [Tex. Prob. Code Ann. '59A]

But if the joint will was executed in 1970, evidence on whether the joint will was contractual is admissible even if the parties die in 1986. Only joint wills executed on or after September 1, 1979, must expressly recite that a contract exists. [Wiemers v. Wiemers, 683 S.W.2d 355 (Tex. 1984)]

### 3. Will Is Contractual - Second Will Probated and Constructive Trust Imposed

If a will is found to be contractual, and the survivor revokes the will and executes another, the second will is probated, but a constructive trust is imposed against the beneficiaries of the second will in favor of the beneficiaries of the contractual will. (Constructive trusts are discussed in the Trusts outline.)

### 4. First Decedent Breached Contract - Constructive Trust Imposed

In Estate of Johnson, 781 S. W. 2d 390 (Tex. App. 1989, writ denied), a case of first impression, H and W executed a joint will that was determined to be contractual.

Without W's knowledge, H later executed a new will that revoked the earlier will and left

his entire estate to his son S by a former marriage. On H's death survived by W and S, both wills were offered for probate. Held: H's second will is admissible to probate because it was his last will, and it revoked the earlier will. Since, however, execution of the second will was in breach of H's contract with W, S holds on a constructive trust in favor of W, who can enforce the contract by specific performance. The court specifically rejected the English view that a contractual will cannot be enforced by the surviving co-testator where the first to die revoked the will during both testators' lifetimes.

## WILL CONTESTS

### 1. PROCEDURAL RULES GOVERNING WILL CONTESTS

#### 1. Contest Must Be Filed Within Two Years After Will Admitted to Probate

A will contest must be filed within two years after the will has been admitted to probate and not afterward. [Tex. Prob. Code Ann. '93]

#### 3. Exception - Minors and Incapacitated Persons

Persons who are non compos mentis and minors have two years after removal of their disabilities to institute a will contest.

#### 4. Exception - Contest Based on Fraud or Forgery

A will contest based on fraud or forgery may be instituted within two years after discovery of the fraud or forgery.

#### 5. Compare - Probate of Later Will

A proceeding to probate a later will is not subject to the two year statute of limitations.

### 2. Only Interested Parties Can Contest Will

Parties who can contest a will are the decedent's heirs, legatees named in a prior will that was revoked by the will being offered for probate, spouses, creditors, assignees of any of the foregoing, and any other persons having a pecuniary interest that would be affected by the probate or defeat of the will. [Logan v. Thomason, 202 S.W.2d 212 (Tex. 1947)]

#### 3. Legatees Named in Will and Heirs Are Necessary Parties

All heirs and will beneficiaries are necessary parties to a will contest.

#### 4. Different Rule for Testamentary Trust - Doctrine of Virtual Representation

In *Srp*, supra, the court distinguished *Mason v. Mason*, 366 S.W.2d 552 (Tex. 1963), where the will created a testamentary trust under which the trustee was the income beneficiary and her children were the remaindermen. In a suit to cancel the trust, only the trustee-life tenant was named as defendant. In that case, the Texas Supreme Court adopted the trust doctrine of virtual representation: "Where a suit is brought to cancel a trust instrument, the beneficiaries are considered to be adequately represented by the trustee if their interests are not in conflict." But (said the court in *Srp*), it is a different

situation in a will contest. The executor is the representative of the estate of the decedent; he is not the equivalent of a trustee.

#### E. Legatee Who Accepts Benefits Under Will Estopped from Contesting Will

A legatee who accepts benefits under a will with full knowledge of the facts upon which a contest might be based is estopped from later contesting a will had he lived, the beneficiaries of his estate claiming derivative rights are also estopped.

#### F. Expenses Incurred in Defending Will

An executor, administrator, or will beneficiary who is good faith and with just cause defends or contests any proceeding to have a will admitted to probate is entitled to reimbursement for expenses incurred, including attorney's fees whether or not the attempted probate or contest of the will is successful. [Tex. Prob. Code Ann. '243] But if the will is denied probate, attorneys' fees will be awarded to the party who unsuccessfully attempted to probate the will only if there is a jury finding that the defense of the will was made in good faith. [Allridge v. Spell, 774 S.W.2d 707 (Tex. App. 1989)]

## II. GROUNDS FOR CONTESTING A WILL

In addition to the assertion that the will was not properly executed, grounds for denial of probate of a will are: lack of testamentary capacity; undue influence; fraud or mistake; or that the testator did not know contents of his will.

Since these cases primarily involve factual disputes rather than the application of legal doctrines, they are not a likely source of bar exam questions. Still, there are some basics with which you should be familiar.

## III. LACK OF TESTAMENTARY CAPACITY

### A. Burden of Proof

#### 1. When Will Offered for Probate - Burden as to Capacity on Will Proponents

If the issue of testamentary capacity is raised at the time the will is offered for probate, the will proponents have the burden of establishing that the testator had capacity. The fact that the will was self-proved does not shift the burden of proof to the contestants. [Croucher v. Croucher, 660 S.W.2d 55 (Tex. 1983)]

#### 2. After Will Admitted to Probate - Burden as to Capacity on Contestants

As is true in most states, a will can be contested at the time the will is offered for probate, or within two years after the will has been formally admitted to probate (i.e., after due execution has been proved.) In fact, most will contests are filed within that two-year period after the will has been probated: The probate proceedings are usually commenced within a few weeks after the testator's death, and the possible contestants may not have yet decided whether they want to challenge the will or whether they have sufficient evidence to do so. Once the will is admitted to probate, the burden of proof as to testamentary capacity shifts to the contestants.

## B. Requisites of Testamentary Capacity

At the time of executing the will, the testator must have had sufficient capacity to:

- (i) Understand the nature of the act he was doing;
- (ii) Know the nature and character of his property;
- (iii) Know the objects of his bounty; and
- (iv) Understand the disposition he was making.

Capacity to make a will may exist where capacity to make a contract does not. The fact that a testator was committed to a mental hospital shortly before or shortly after executing a will, while of strong probative force, is not conclusive evidence of lack of capacity; a jury might still find the testator met the four-point test above. Likewise, evidence that the testator was old, feeble, and in poor health is, by itself, insufficient to establish lack of testamentary capacity. [Rich v. Rich, 615 S.W.2d 795 (Tex. Civ. App. 1980)]

### 3. Witnesses Cannot Testify as to Testator's Legal Capacity

A lay or expert witness may not be asked whether the testator had legal capacity to make a will because a witness's definition of capacity may differ from the legal definition. In Carr v. Radkey, 393 S.W.2d 806 (Tex. 1965) (leading case), the court stated that the reason a witness cannot testify on whether the testator did or did not have testamentary capacity is that this involves a legal definition and a legal test, and the witness's definition or understanding of capacity to perform the act in a legal manner may differ from the legal standard.

#### 1. However, Witnesses Can Testify as to Testator's Mental Condition

Competent evidence about the testator's mental condition and mental ability or lack of it which does not involve legal tests, legal definitions, or pure questions of law should be admitted. . . . A witness may be asked, assuming he knows or is a properly qualified expert, whether the testator knew or had the capacity to know the objects of his bounty, the nature of the transactions in which he was engaged, the nature and extent of his estate, and similar questions. [Carr v. Radkey, supra]

#### 2. Was Testator of Sound Mind? - Permissible Question

In Carr v. Radkey, the court stated that it is permissible to ask a witness whether, in her opinion, the testator was of sound or unsound mind. This question addresses the testator's mental condition and does not involve the test of legal capacity to make a will.

### 4. Lucid and Sensible Holographic Will Is Evidence of Testamentary Capacity

In Carr v. Radkey, the supreme court held that a rational and sensible holographic will is evidence of the fact that the will was written during a lucid interval but does not give rise to a presumption of testamentary capacity.

### 5. Adjudicated Incompetence Is Not Conclusive Evidence of Lack of Capacity

The fact that the testator has been adjudicated incompetent is evidence of a lack of testamentary capacity, but it is not conclusive evidence.

## 6. Evidence of Incapacity at Times Other than Execution

Evidence of lack of testamentary capacity at times other than when the will was made can be used to establish incapacity on the date the will was executed if such evidence is probative of a lack of capacity at the time the will was executed.

## 7. Insane Delusion

Although the testator may otherwise meet the four-point test for testamentary capacity, a will or a gift therein may be invalid if it is the product of an insane delusion: A belief that has no basis in fact or reason, and to which the testator adheres against all reason and evidence. In Texas, to establish that the will (or gift) was the product of an insane delusion, the contestants must meet a two-point test:

(i) The testator's belief in a state of supposed facts that do not exist; and

(ii) No rational person would believe the supposed facts. To prove this second element, the contestants must show that an organic brain defect or a functional disorder of the mind existed. [Lindley v. Lindley, 384 S.W.2d 676 (Tex. 1964)]

### 1. Mistaken Belief of Facts Is Not by Itself an Insane Delusion

The mere fact that the testator was mistaken in her beliefs regarding her children (whom she disinherited in her will) does not establish an insane delusion. The two-point test, supra, must be met. [Spillman v. Estate of Spillman, 587 S.W.2d 170 (Tex. Civ. Ap. 1979)]

### 2. Delusion Must Be Based on Supposed Facts, Not Subjective Opinion

A testator's belief that his family does not love him does not constitute an insane delusion. An insane delusion is a belief that can be judged true or false by reference to the physical world or to the realm of specific facts. A belief about the existence of family love is subjective and is not suited to proof as a belief in supposed facts. [Estate of Bauer, 687 S.W.2d 410 (Tex. App. 1985)]

## IV. UNDUE INFLUENCE

### 1. Testamentary Capacity Subjected to and Controlled by Dominant Influence or Power

To establish undue influence, the contestant must prove:

#### 1. Existence of Exertion of an Influence

The contestant must prove that a dominant influence exists and has been exerted upon the testator.

#### 2. Overpower mind and Will of Testator

One contending that the testator was unduly influenced must further prove that the effect of the influence was to overpower the mind and free will of the testator.

#### 3. Will Would Not Have Been Executed But For the Influence

Last, the will contestant must prove that the product of the influence is a will that would not have been executed but for the influence. 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. One may request or even importune and entreat another to execute a favorable dispositive instrument; but unless (these) are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument with undue influence. [Rothermannel v. Duncan, 369, S.W.2d 917 (Tex. 1963)]

## 2. Circumstantial Evidence of Undue Influence - These Alone Are Not Enough

### 1. Mere Opportunity to Exert Influence

AA will cannot be set aside on proof of facts which at the most do no more than show an opportunity to exercise influence.

### 2. Mere Susceptibility to Influence Due to Age or Physical Condition

Mere susceptibility to influence due to old age or physical condition is insufficient to prove undue influence. This evidence may be considered as establishing a physical incapacity to resist or the susceptibility of the testator's mind to an influence exerted. However, this evidence does not establish that the testator's mind was in fact subverted and overpowered at the time the will was executed.

### 3. An Unnatural Disposition that Favors Some Family Members Over Others

The mere fact that the will makes an unnatural disposition that favors some family members over others is not enough to establish undue influence. It is only where all reasonable explanation for the devise is lacking that the trier of facts may take this circumstance as a badge of disorder or of undue influence.

### 3. Impaired Mental Capacity May Render Testator More Susceptible to Undue Influence

The fact that the testator was laboring under an impaired mental condition, not amounting to an actual testamentary incapacity, may support a finding of undue influence, as such a person would be more susceptible to undue influence.

## D. Other Jurisdictions - Shifting the Burden of Proof

In some jurisdictions, various facts (that X stood in a confidential or fiduciary relation to T; that the disposition is unnatural in that it favors one child over others) raise a presumption of undue influence that can open to shift the burden of proof. Not so in Texas. These and other such facts give rise to an inference only, such as to support a submission of the issue to the jury; they do not shift the burden of proof.

As the Rothermel decision suggests, the prevalent pattern is for the appellate court to overturn a jury determination of undue influence where the evidence is entirely circumstantial and there is some plausible explanation for the disposition made.

## 22. FRAUD

Where the execution of a will or the inclusion therein of a particular gift is the result of fraud, the will or the particular gift is invalid. Fraud consists of making that which is

false appear to the testator to be true, thereby affecting his will. The party seeking to prove fraud must show that: (i) the speaker made false representations knowing them to be false, (ii) the representations were made with the intent to deceive the testator, (iii) the testator was ignorant of the falsity, and (iv) relying upon such representations, the testator made a different will than he otherwise would have made. There are two types of fraud:

#### 1. Fraud in the Execution (Fraud in the Factum)

In fraud in the factum, there is a misrepresentation as to the nature or contents of an instrument.

#### 2. Fraud in the Inducement

In fraud in the inducement, the testator intends to execute the instrument as her will and to include the particular contents of the instrument, but she is fraudulently induced into making this will or some particular gift therein by misrepresentations as to facts that influence her motivation. The will or the particular gifts affected by the fraud can be set aside upon proof of the fraudulent inducement.

### VI. MISTAKE

#### 1. Wrong Will Signed - Argue Both Ways

Suppose that reciprocal wills are prepared for H and W, under which each devises his or her estate to the other. By mistake, H signs the will prepared for W, and W signs the will prepared for H. Thus, the will signed by H read, AI, Rose Snide, leave all of my property to my husband, Harvey Snide. On H's death, can the will that he signed be probated? Some courts have denied relief on the ground that H lacked testamentary intent because he did not intend the document that he signed to be his will. [Pavlinko's Estate, 148 A.2d 528 (Pa., 1959)] However, the better and modern view is that the court should grant relief because both the existence and the nature of the mistake are so obvious. The court should insert AHarvey for ARose and Ahusband for Awife (and vice versa), as appropriate. [Matter of Snide, 418 N.E.2d 656 (N.Y. 1981)] No Texas case has considered this question.

#### 2. Mistake in Inducement - No Relief Granted

If the alleged mistake involves the reasons that led the testator to make the will (or the reasons for making or not making a particular gift therein), and the mistake was not the result of fraud or undue influence, no relief is granted. Rationale: To allow evidence as to the alleged mistake would open the door to fraudulent testimony, since the testator is dead and cannot contradict the testimony as to the supposed mistake. Moreover, even if the alleged mistake were shown, this would not establish that the testator would have made a different disposition had the true facts been known.

#### 3. Mistake as to Contents of Will

##### 1. Mistaken Omission - No Relief Granted

Extrinsic evidence is not admissible to show that a provision was mistakenly omitted from a will or that a provision contained in the will is not what the testator intended.

Absent evidence of fraud, duress, or suspicious circumstances, it is conclusively presumed that the testator understood and approved the terms of the new will when she signed it. Rationale: The courts are reluctant to have property pass, not pursuant to the terms of the duly executed will, but on the basis of oral testimony.

#### 2. Plain Meaning Rule - Evidence Not Admissible to Contradict Plain Language

If the language of the will is unambiguous, evidence is not admissible to show that the testator made a mistake in describing a beneficiary or the property that was to be the subject of the gift. Rationale: The testator signed the will and is conclusively presumed to have read, understood, and intended its contents. To allow oral testimony to contradict the will's plain meaning would open the door to fraud.

#### 4. Latent or Patent Ambiguity - Extrinsic Evidence Admissible to Cure Ambiguity

##### 1. Latent Ambiguity - Misdescription

A latent ambiguity exists when the language of the will, although clear on its face in describing a beneficiary or property, results in a misdescription when applied to the facts to which it refers. There are two types of latent ambiguity. One type describes a person or thing, and two more persons or things fit the description. The other type exists when no person or thing fits the description in the will, but two or more persons fit the description in part, or imperfectly. Extrinsic evidence is admissible to cure the ambiguity. [Bristol v. Mazza, 288 S.W.2d 564 (Tex. Civ. App. 1966)] Rationale: Reliance on extrinsic evidence does not have the effect of rewriting the will or changing its terms. Rather, the evidence is being received to give meaning to the words the testator actually used. But note: If the evidence does not cure the ambiguity, the gift fails.

##### 2. Patent Ambiguity - Mistake on Face of Will

A patent ambiguity exists when the uncertainty appears on the face of the will (e.g., where the will mentions two cousins, Mary Smith and Mary Jones, and then makes a gift Ato my cousin Mary). Extrinsic evidence is admissible to show family status, the testator's situation, and other circumstances relating to his affairs in determining what the testator intended. [Federal Land Bank v. Little, 197 S.W.2d 374 (Tex. 1937)]

### VII. TESTATOR DID NOT KNOW CONTENTS OF WILL

Texas recognizes this unusual and rarely encountered ground for denial of probate if suspicious circumstances are present.

#### 1. Competent Testator Is Presumed to Know Contents of Will

A competent testator is presumed to know the contents of a testamentary instrument he has signed, unless a set of circumstances exists that casts suspicion on the issue. [Gilkey v. Allen, 617 S.W.2d 308 (Tex. Civ. App. 1980)] This presumption arises even if the testator was blind or illiterate.

#### 2. Unnatural Will and Suspicious Circumstances - Will Proponent Must Show Testator Knew Contents

An exception to the general rule arises if suspicious circumstances surround the will's execution and the will makes an unnatural disposition. In this situation, the will proponent has the burden of affirmative showing that the testator knew the content of the paper offered for probate.

### 3. Testator Cannot Read or Understand English - Will Must be Explained or Translated

When a will is prepared in English, the fact that the testator cannot read or understand English is not a barrier to probate if the will is explained or translated to him. [Jedlicka v. Williams, 459 S.W.2d 956 (Tex. Civ. App. 1970, writ sim'd) - lawyer explained will to testator and was satisfied that testator understood its contents]

## VIII. NO-CONTEST CLAUSES

### 1. Enforceable Unless Contest Brought in Good Faith and With Probable Cause

A typical no-contest clause, sometimes called an in terrorem clause, provides: AIf any beneficiary contests this will or any of its provisions, he shall forfeit his legacy hereunder. The Texas courts apply the majority rule: If a beneficiary contests the will and loses, the no-contest clause is given effect and the beneficiary forfeits his legacy - unless the court finds that, even though the beneficiary lost the contest, he brought the action in good faith and had probable cause to contest the will. (If the contest is successful and the will is denied probate, there is no forfeiture because the no-contest clause is tossed out along with the will.)

### 2. No-Contest Clauses Strictly Construed

No-contest clauses are strictly construed by the courts. Forfeiture is to be avoided if possible. Therefore, a breach will be declared only when the act of a party falls strictly within the clause. [Estate of Newbill, 781 S.W.2d 840 (Tex. Civ. App. 1984)] Thus, a forfeiture is not triggered by an action against the executor seeking a final accounting and distribution of the estate. [Estate of Minnick, 653 S.W.2d 503 (Tex. App. 1983)], or an action challenging appointment of the person named in the will as executor on the ground that he was not qualified to serve [Estate of Newbill, supra].

### 3. Not Triggered by Suit to Construe Will

A suit to construe a will's provisions is not a contest that will trigger an in terrorem clause. Such an action does not challenge the will or its validity. Rather, the issue in such a proceeding is to determine what interests were created by the will. [Estate of Hamill, 866 S.W.2d 339 (Tex. App. 1993)]

### 4. Not Triggered by Contest Filed by Guardian

A no-contest clause is invalid as applied to a minor or incompetent beneficiary. Enforcement of the forfeiture provisions would be against public policy, as it would deprive the guardian (acting on behalf of the court) of the powers and duties imposed by law for the protection of infants and incompetents. Also, a forfeiture should not be triggered because of actions taken by a third party rather than by the beneficiary himself. [Ellis v. Birkhead, 71 S.W. 31 (Tex. Civ. App. 1902) (dictum)]