THE SHORTEST ROUTE TO VICTORY: SUMMARY JUDGMENT PRACTICE IN PROBATE AND TRUST LITIGATION

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CHAPTER 24

Mark R. Caldwell
Shareholder, Burdette & Rice, PLLC

Mark R. Caldwell was born on June 29, 1979 at Beaufort Naval Hospital in Beaufort, South Carolina where his father flew F-4 Phantoms at the nearby Marine Corps air station (although his mother had the more difficult job of raising three children). After having lived on the East Coast, West Coast and in Hawaii, he attended Eastfield Community College in Mesquite, Texas before transferring to Southern Methodist University, where he earned a full academic scholarship. One year later, he attended the London School of Economics as a General Course Student. Mark earned his law degree from New England School of Law in Boston, Massachusetts in 2005. He entered private practice as a litigator in a boutique probate and trust firm, representing executors, guardians, and beneficiaries in complex estate and trust litigation. He has also represented fiduciaries in all phases of estate, trust, and guardianship administration. Mark enjoys the investigatory aspects of estate and trust litigation, including reviewing and analyzing medical, financial, and suspicious property records and transactions. Mark is committed to developing and maintaining strong, personal relationships with his clients. He endeavors to offer smart, pragmatic and cost-effective legal advice. Mark believes that the strongest winning position is one that is simple, direct, and understandable and he realizes that estate and guardianship litigation often involves substantial damage to family relationships. While he strives to advocate strong, aggressive positions for clients, Mark also strives to resolve disputes in an ethical and reasonable manner that, if desired, does not preclude the opportunity for reconciliation.

Mark is married and has three children. He enjoys living an active life-style, traveling and spending time with his family.

Representative Experience

- Recovered significant settlement in case involving fraud on the community and breach of fiduciary duty through the use of a power of attorney.
- Obtained favorable jury verdict in a guardianship case involving an elderly ward.
- Successfully defeated claim that will was executed without testamentary capacity on summary judgment.
- Obtained temporary injunctions and temporary guardianships in cases involving the abuse of a power of attorney.
- Obtained partial summary judgment against Trustee for breach of fiduciary duty.
- Represents guardians, executors, and administrators in all phases of guardianship and estate administration.

- Routinely serves as attorney ad-litem and guardian ad-litem in guardianship cases.

- Routinely serves as temporary guardian and guardian in guardianship cases and as temporary administrator and administrator in decedents' estates.

Public Speaking & Publications

- Author/Speaker: State Bar of Texas: "Injunctive Relief – The Lethal Preemptive Strike in Probate, Trust, and Guardianship Litigation" – 39th Annual Advanced Estate Planning and Probate Course (2015)

- Co-Author/Speaker: State Bar of Texas: "Elder Exploitation" – Advanced Guardianship Law (2015)

- Co-Author/Speaker: Travis County Bar Association: "Winning the Battle & the War: A Remedies-Centered Approach to Litigation Involving Durable Powers of Attorney" (2015)

- Co-authored, Properly Performing Annual Accounts in Guardianships and Management Trusts Where One or Both Spouses are Incompetent, Real Estate, Probate, & Trust Law Reporter, Volume 52, No. 4 (2014).

- Served as Moderator for the Guardianship and Ad Litem Attorney Certification Course, sponsored by the Dallas Bar Association Probate, Trusts & Estate Section, Dallas County Probate Courts and the Dallas Volunteer Attorney Program to train lawyers in the representation of guardians of indigent wards, and the role and responsibilities of the Attorney Ad Litem (2014).

- Winning the Battle and the War; A Remedies—Centered Approach to Litigation Involving Durable Powers of Attorney; 64 Bay. L. Rev. 435 (Spring 2012).

- Author/Speaker: "An Introduction to Guardianships" – Texas Department of Assistive & Rehabilitative Services (DARS), Dallas, Texas (Fall 2010; Spring 2011).

- Co-authored and presented article, "Proof of Facts and Common Evidentiary Problems Encountered in Contested Probate Proceedings," at the Seventh Probate Litigation Seminar, sponsored by the Tarrant County Probate Bar Association (September 2010).

- Author, A Good Deed Repaid: Awarding Attorney's Fees in Contested Guardianship Proceedings; 51 S. Tex. L. Rev. 439 (Winter 2009).

Community and Bar Association Involvement

- Board of Directors and Vice President, City of Sachse Economic Development Corporation (2010-2014)

- Member, Charter Review Commission, City of Sachse (2012-2013)

- Dallas Bar Association; Probate and Trust Section Member; Trial Skills Section Member

- Dallas Association of Young Lawyers; Elder Law Section Member

- Board of Directors, St. Thomas More Society

- Dallas Bar Mentor Program; Participated as Mentee; Mentor, Edward V. Smith III

- Organized and leads an ongoing monthly probate study group featuring prominent guest speakers and court staff

Awards and Recognition

- Board Certified Estate Planning and Probate Law – Texas Board of Legal Specialization
- Named Rising Star by the Texas Super Lawyers (2014, 2015)

Education

- General Course, The London School of Economics, London, England (2001-2002)
- B.A., *magna cum laude,* Southern Methodist University, Dallas, Texas (2002)
- J.D., New England Law | Boston, Boston, Massachusetts (2005)

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DONOVAN CAMPBELL, JR., Shareholder, Rader & Campbell (A Professional Corporation) (April 2000 - Present); Former Shareholder, Rader, Campbell, Fisher & Pyke (A Professional Corporation) (1992-2000); Former Shareholder, Locke Purnell Rain Harrell (1975 - 1992). Born in Tyler, Texas, November 8, 1950; admitted to bar, 1975, Texas; 1976, U.S. Tax Court; 1977, U.S. Court of Claims; 1978, U.S. Court of Appeals for the Fifth Circuit; 1998, U.S. Court of Appeals for the Eighth Circuit. Preparatory education, Princeton University (A.B., cum laude, 1972); legal education, University of Texas (J.D., 1975). Phi Delta Phi. Member, Board of Advocates. Articles Editor, Texas Law Review, 1974-75. Member, 1976-92, American Bar Association (Tax Section, Estate & Gift Tax Committee, Chairman of Community Property Subcommittee); Member, Dallas Bar Association (Sections of Taxation, Litigation, and Probate Law); State Bar of Texas (Tax Law, Litigation, and Probate Sections); Martindale-Hubbell AV Rated.

Selected Publications and Presentations: Foreign Situs Trusts: The Option of Utilizing a High Taxation Jurisdiction, 52 Tex.L.Rev. 949 (1974); Definition of Exclusion Ratio and Treatment of Capital Gain Element in a Private Annuity, 52 Tex.L.Rev. 149 (1973); Litigation Avoidance and Pre-Litigation Planning for Fiduciaries, East Texas Estate Planning Council (March 4, 2010); Fiduciary Litigation: Ethical Issues in Representing the Fiduciary and the Beneficiary, South Texas College of Law, 10th Annual Wills and Probate Institute (September 26-27, 1996); Revocation of Exempt Status of Charitable Trusts and Organizations, State Bar of Texas Ninth Annual Advanced Tax Law Course (August 28, 1991); The Taxation of Technology Development and Transfers, Dallas Bar Association and LPRH (September 5, 1990); Life Insurance Trusts (Including Crummey Trusts) in Tax Planning, 40th Annual Tulane Tax Institute, Tulane Law School (October 29-31, 1990); Proper Discovery and Available Procedural Techniques After 1999, Downtown Dallas Probate Mentor Group (April 25, 2014); Cutting-Edge Remedies and Relief Recoverable in Fiduciary Cases: Potential Defendants; Qualified Plaintiffs; and Equitable "Damages," State Bar of Texas Ninth Annual Fiduciary Litigation Course (December 4-5, 2014); The Shortest Route to Victory: Summary Judgment Practice in Probate and Trust Litigation, State Bar of Texas 40th Annual Advanced Estate Planning and Probate Course (June 22-24, 2016) (co-author with Mark R. Caldwell; in process).

J. Brian Thomas
Shareholder, Burdette & Rice, PLLC

Brian has committed himself to a single area of practice since he received his law license. Even while excelling in one of the most rigorous trial advocacy programs in the country, Brian worked one-on-one with some of the state's foremost authorities on trusts, estates and fiduciary law. Brian cut his legal teeth in both Houston and Dallas, representing individuals in probate and guardianship cases where the stakes are at their highest. He understands that many people experience probate, estate or guardianship matters only once or twice in their lives, making his role as counselor all the more important. Experience, confidence, and dogged determination are critical when a client wants their story presented to the Court. Brian believes that every case has the chance for resolution, but that clients should be ready and professionally equipped to fight for their own success.

Representative Experience

- Successfully defended an elderly client against allegations of his incapacity and the imposition of an unwanted and unnecessary guardianship of his person and estate.
- Successfully defended a decedent's Last Will and Testament against multiple allegations of lacking capacity and the exertion of undue influence.
- Obtained favorable mediation results in a contested guardianship, resulting in the termination of exploitation of an elderly Ward's finances and the Ward's placement in a facility conducive to her health and welfare.
- Removed an executor from her position upon demonstrating that the fiduciary mismanaged the assets of the estate and withheld information from the estate's beneficiaries.
- Secured a trial victory negating the operation of a "no-contest" clause against a good faith contestant of a decedent's Last Will and Testament, and successfully defended the trial victory on appeal. *Estate of Boylan*, No. 02-14-00170-CV, 2015 WL 598531, at *1 (Tex. App. Feb. 12, 2015), reh'g overruled (Mar. 12, 2015).
- Secured a trial victory preventing the admission of a last will and testament to probate after four years and successfully argued that the proponent was in default for failing to offer the will for probate.

Public Speaking & Publications

- The Probate Process From Start to Finish for Paralegals, National Business Institute, Houston, Texas,

August, 2008

- "Ethical Perils in the Probate Process"
- "The Rights of the Surviving Spouse"

- Find it Free and Fast on the Net: Strategies for Legal Research on the Web, National Business Institute, Dallas, Texas, October, 2008
  - "How to Search Like a Pro"
  - "Finding Free Legal Research Sites and Free Caselaw"
- Estate Administration Procedures: Why Each Step is Important, National Business Institute, Dallas, Texas, April, 2009
  - "Ethical Challenges in Estate Administration"
  - "Common Issues to be Prepared for in Litigation and Probate"
- Estate, Financial and Healthcare Planning for Elder Clients, National Business Institute, Dallas, Texas, July, 2010:
  - "Tips and Traps When Consulting with the Elder Client"
  - "Understanding Post Mortem Options"
  - "Understanding Long-Term Care Options"
- Administering Small Estates: Time-Saving Tips, National Business Institute, National Teleconference, August, 2011
- Find it Free and Fast on the Net: Strategies for Legal Research on the Web, National Business Institute, Dallas, Texas, November, 2011:
  - "How to Search Like a Pro"
  - "Finding Free Legal Research Sites and Free Caselaw"
- The Art of Trust Administration, National Business Institute, National Teleconference, December, 2011
- Trusts 101, National Business Institute, Arlington, Texas, January 2012
  - "Ethical Considerations"
  - "Estate Planning for the Disabled"
- Trust Administration: Challenges and Best Practices, Strafford Publishing, National Teleconference, February, 2012
- Trust Administration: Practical Considerations in Trustee Liability, Tolleson Wealth Management,

Dallas, Texas, March, 2012

- Will Contests, Estate Planning Council of North Texas, Plano, Texas, March 2012
- Closing the Estate and Handling Distributions, National Business Institute, National Teleconference, May, 2012
- Remedies for Attorney in Fact Misconduct, TexasBarCLE, Webcast, July, 2012
- Resolving Legal and Financial Issues in Elder Care, National Business Institute, Dallas, Texas, August, 2012
    - "How to Protect an Elderly Client's Assets"
    - "Insurance to Fund All or Part of Long-Term Care Costs"
- Administering Small Estates: Time Saving Tips, National Business Institute, National Teleconference, August 2012
- Estate Administration: Opening and Closing the Estate and Resolving Related Issues; Strafford Publishing, National Webinar, August 2012
- Remedies for Attorney in Fact Misconduct, Collin County Probate Bar Association, Plano, Texas, October, 2012
- Trust Litigation: Navigating Defenses of Fiduciaries and Claims of Beneficiaries and Third Parties: Trust Contests, Construction Issues and Fiduciary Duties; Stafford Publishing, National Webinar, October, 2012
- Find it Free and Fast on the Net: Strategies for Legal Research on the Web, National Business Institute, Dallas, Texas, November, 2012
    - "How to Search Like a Pro"
    - "Finding Free Legal Research Sites and Free Caselaw"
- Handling Final Beneficiary Distributions, National Business Institute, National Teleconference, March, 2013
- Winning the Battle and the War: A Remedies Centered Approach to Litigation Involving Durable Powers of Attorney; Estate Planning Council of North Texas, Dallas, Texas, Co-Presenter, May, 2013
- The Art of Trust Administration, National Business Institute, National Teleconference, July, 2013
- Powers of Attorney & Fiduciary Duties; 2013 Wealth Management & Trust Graduate Trust School, Dallas, Texas, July, 2013
- A Creditors' Perspective on Administration of Estates; Presented to the Dallas City Attorneys Office, Dallas, Texas, July 2013
- The Art of Trust Administration, National Business Institute, National Teleconference, March, 2014
- The Art of Trust Administration, National Business Institute, National Webinar, October, 2014

- Trust Administration for Paralegals, Institute for Paralegal Education, National Telewebinar, October, 2014
- Trust and Estate Accounting for Paralegals, Institute for Paralegal Education, National Webcast, March, 2015
- Estate Planning 101, Texas State Teachers Association, Annual State House of Delegates / Convention, April, 2015
- Paralegals Essential Guide to Wills and Trusts, Institute for Paralegal Education, National Telewebinar, November, 2015
- The Art of Trust Administration, National Business Institute, National Teleconference, December, 2015
- The Art of Trust Administration, National Business Institute, National Webinar, May, 2016

Prior and Current Professional Memberships/Committees

- Texas Bar Association
- Member, College of the State Bar of Texas
- Dallas Bar Association
- Continuing Education Committee
- Unauthorized Practice of Law Committee
- Elder Law Committee

Education

- B.B.A., Baylor University (2000)
- J.D., Baylor Law School (2005)

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THE SHORTEST ROUTE TO VICTORY: SUMMARY JUDGMENT PRACTICE AND TRUST LITIGATION

I. INTRODUCTION

In the typical probate and trust litigation case, the ever-rising and substantial cost of going to trial usually has the negative impact of reducing the size of the very estate or trust in which the litigants seek to recover. Therefore, the benefits of being able to resolve probate and trust litigation early and effectively through motions for summary judgment cannot be understated. On the one hand, summary judgment practice in probate and trust litigation can be full of numerous procedural and evidentiary "traps" for the unwary. On the other hand, it can present a "goldmine of opportunities" for the experienced, prepared and informed probate litigator. This article seeks to provide the necessary information to enable the probate litigator effectively to obtain or oppose summary judgments in common types of probate and trust litigation, and in doing so, to maximize the opportunity to obtain favorable settlements.

We start our article by outlining and explaining the key components or concepts found in Texas Rule of Civil Procedure (the "Rules") 166a. Common traps found in the filing and service deadlines are discussed. In addition, suggested outlines for various types of motions for summary judgment, responses, and replies are discussed to assist the probate litigator in quickly organizing and preparing efforts to obtain or oppose a motion for summary judgment. Burdens of proof are also covered to guide the probate litigator in understanding exactly what must be established or proven to obtain a favorable ruling from the court on various types of motions for summary judgment. A discussion on common evidentiary issues follows to ensure that only competent evidence is before the court but also to enhance arguments for admissibility. The importance of the doctrine of judicial notice in probate proceedings is also emphasized, and the article explains its interplay with judicial admissions.

Next we identify and outline various burden-of-proof rules and evidentiary presumptions to ensure an effective and accurate strike or counter-strike when seeking to obtain or oppose a summary judgment. We will then discuss and highlight the numerous opportunities to attempt to obtain motions for summary judgment in various specific probate and trust settings. Finally, some key concepts when considering the appellate review of summary judgments are considered.

In short, probate litigation often involves purely "legal" issues that, once resolved, can be outcome-determinative. Thus, even though a motion for summary judgment might not "fully" resolve the typical probate or trust case, we demonstrate that there are ample opportunities to use motions for summary judgment to obtain key "smaller" rulings that can significantly impact the trajectory of the case (including settlement negotiations and mediation) and the length or complexity of trial.

A. Texas Rule of Civil Procedure 166a – Key Concepts

1. Both a Plaintiff and a Defendant Can File for Summary Judgment

Every litigant is entitled to obtain the prompt disposition of a case involving "patently unmeritorious claims and untenable defenses."[1] Rule 166a(a) authorizes a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment to move for summary judgment, full or partial, in his or her favor. Likewise, Rule 166a(b) permits a party *against* whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought to move for summary judgment, full or partial, in his or her favor. Thus, summary judgment is a tool available to plaintiffs and defendants alike.

Two broad types of summary judgment may be sought – traditional and no-evidence.[2] "Traditional" summary judgment is appropriate when the movant contends that there are no genuine issues for any material fact – that is, judgment may be granted as a matter of law.[3] "No-evidence" summary judgment is appropriate when the movant contends that there is no evidence of one or more essential elements of a claim or defense on which the adverse party would bear the burden of proof at trial.[4] A third type of summary judgment, often called a "hybrid" summary judgment, is particularly useful when a single motion combines grounds appropriate for both traditional and no-evidence summary judgment.

Consequently, plaintiffs and defendants (sometimes even in the same case) might use summary judgment procedures for different reasons. Certainly, a litigant could employ summary judgment practice to summarily terminate and "win" a case when no genuine fact issue exists.[5] In most cases, summary judgment is used in this sense to pierce the pleadings, cutting to the chase and to the proof, to assess the

[1] *Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n. 5 (Tex. 1979).

[2] See *infra* Part III (discussing traditional, no-evidence and hybrid motions for summary judgment).

[3] Rule 166a(c).

[4] Rule 166a(i).

[5] *G&H Towing Co. v. Magee*, 347 S.W.3d 293, 296-97 (Tex. 2011).

evidence and determine if a trial is necessary.[6] But a litigant might also use summary judgment as a means to obtain evidence, to narrow down the field of possible trial issues, or even just to educate the judge. In the end, no matter the reason or strategy, plaintiffs and defendants alike are wise to utilize summary judgment procedures when the client craves the elimination of delay and expense.

2. Specificity Requirement

When granted, summary judgment is shaped by the "express issues" set out in the pleading used to secure it.[7] Specificity in pleading a motion for summary judgment is critical, as the motion must "stand or fall" on its own.[8] A court cannot grant summary judgment on grounds that are not presented in the motion.[9] While the availability of partial summary judgments mean that claims or defenses omitted from a motion are not waived[10], the court cannot render summary judgment on a basis left unpled[11], and cannot grant more relief than the movant requests.[12] The type of summary judgment sought might dictate the length or substance of the motion, but specificity is no less important for the traditional or no-evidence movant.

3. Required Timing of Notice

Timing a motion for summary judgment in the course of litigation depends on the type of summary judgment being sought. Traditional summary judgment, for example, may be sought by a party seeking affirmative relief at any time after the adverse party answers the lawsuit.[13] Conversely, no-evidence summary judgment may be sought only after an "adequate time for discovery" has lapsed.[14]

An opportunity to argue the motion is not guaranteed, and the court might determine a motion for summary judgment on submission.[15] Summary judgment may not be granted unless the nonmovant receives 21 days notice of the date of either the hearing or the date that the court will decide the motion on submission.[16] This notice period allows the nonmovant time to prepare and file his response.

The day that the motion is filed is day zero, and is not counted in the 21-day notice period.[17] Conversely, the hearing or submission date is included when counting the days in the notice period.[18] Thus, the earliest that a motion for summary judgment may be heard (or considered on submission) is the 21st day after the motion is filed.

4. Required Timing of Response

Except when leave is granted by the court, when a response is filed, the response must be filed at least seven days prior to the hearing date.[19] Consequently, strict operation of the notice rules might give the nonmovant very little time (14 days) to obtain summary judgment evidence and format and file any response.[20]

5. Documentary Evidence

Rule 166a(c) expressly authorizes a party to use the following types of documentary evidence to show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response: supporting (and opposing) affidavits; deposition transcripts; interrogatory answers; *other discovery responses*; pleadings; admissions; stipulations of the parties; and authenticated or certified public records. Whatever the form of the documents, whether they are depositions, affidavits, interrogatories, or medical or financial records, summary judgment evidence must be in a form that would be admissible in a conventional trial proceeding.[21] Evidentiary rules and exclusions apply equally in trial and summary judgment proceedings.[22] Effectively, there is no difference between the standards for evidence that would be

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[6] *Reynosa v. Huff*, 21 S.W.3d 510, (Tex. App.–San Antonio 2000, no pet.).

[7] Rule 166a(c).

[8] *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997).

[9] *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002).

[10] Rule 166a(a), (b), *McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001).

[11] *Johnson*, 73 S.W.3d at 204.

[12] *Walton v. City of Midland*, 24 S.W.3d 853, 857 (Tex. App. – El Paso 2000).

[13] Rule 166a(a).

[14] Rule 166a(i).

[15] *In re American Media Consol*., 121 S.W.70, 74 (Tex. App. – San Antonio 2003); *Martin v. Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998).

[16] Rule 166a(c).

[17] *Lewis v. Blake*, 876 S.W.2d 314 (Tex. 1994).

[18] *Lewis*, 876 S.W.2d at 316.

[19] Rule 166a(c).

[20] *Extended Servs. Program, Inc. v. First Extended Serv*., 601 S.W.2d 469, 470 (Tex. App. – Dallas 1980).

[21] *Jensen Const. Co. v. Dallas County*, 920 S.W.2d 761, 768 (Tex. App.—Dallas 1996), *writ denied* (Oct. 18, 1996), *disapproved on other grounds, Travis County v. Pelzel & Associates, Inc*., 77 S.W.3d 246 (Tex. 2002).

[22] *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009)(holding trial court did not abuse its discretion in striking the affidavit of an expert not timely disclosed pursuant to an agreed scheduling order deadline).

admissible in a summary judgment proceeding and those applicable at a regular trial.[23]

6. Discovery Not on File; Notice of Intent to Use

Rule 166a(d) expressly states that discovery products not on file with the clerk may nonetheless be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least 21 days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least 7 days before the hearing if such proofs are to be used to oppose the summary judgment.

Rule 166a(d) provides three methods to present unfiled discovery before the trial court. First, a party may actually file the discovery with the trial court. Second, a party may file an appendix containing the evidence. Finally, a party may simply file a notice with specific references to the unfiled discovery.[24]

7. Narrowing Issues at Trial

Rule 166a(e) provides a procedure whereby even if summary judgment is not granted, the court may still specify those facts that have been established as a matter of law. Specifically, the Rule states that if summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.[25] When used correctly, obtaining an order finding that certain facts are established as a matter of law can significantly strengthen certain claims and streamline the presentation of evidence at trial.

8. Affidavits/Declarations

While the technical requirements of an affidavit are discussed in more detail in Section V.B, *infra*, Rule 166a(f) expressly requires that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Rule 166a(f) also expressly states that defects in the form (discussed in Section V. B. 1., *infra*) of affidavits or attachments will not be grounds to reverse a trial court's decision granting a summary judgment unless the defects in form are specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend. The court may also permit affidavits to be supplemented or opposed by depositions or by further affidavits.[26]

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.[27]

Finally, Rule 166a(h) discusses "bad faith affidavits." Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court must order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.[28]

II. FILING AND SERVICE DEADLINES

A. The Motion

The key date in the MSJ process is the date of serving the notice of hearing on the opposing party, not the date of filing and serving the motion itself. That is, the nonmovant must receive at least 21 days' notice of the date set for hearing (or submission) of the MSJ.[29] Thus, if the MSJ and the notice of hearing are filed and served simultaneously, that service must be completed at least 21 days before the hearing (or submission), if such service is by E-service or hand delivery.[30] If the MSJ and notice of hearing are served by mail, they must be mailed to the nonmovant at least 24 days before the hearing.[31] If the MSJ and notice of hearing are served by fax at or before 5:00 p.m. on the day of service, that service must be at least 21 days before the

[23] *United Blood Services v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997).

[24] *Barraza v. Eureka Co., a Div. of White Consolidation Indus., Inc.*, 25 S.W.3d 225, 228 (Tex. App.—El Paso 2000, pet. denied)

[25] Rule 166a(e).

[26] Rule 166a(f).

[27] Rule 166a(g).

[28] Rule 166a(h). *See also Ramirez v. Encore Wire Corp.*, 196 S.W.3d 469, 476 (Tex. App.—Dallas 2006, no pet.)(discussing forged affidavits).

[29] *Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994); Rule 166a(c).

[30] Rules 166a(c); 21a(a)(1), (2).

[31] *Lewis*, 876 S.W.2d at 315.

hearing.[32] If the fax service is after 5:00 p.m., that service must occur at least 22 days before the hearing.[33] In counting the relevant number of days, the day of service is not considered, but the day of the hearing is counted.[34]

B. The Response

In most cases, the nonmovant must file and serve its response (including affidavits and other MSJ evidence) at least 7 days before the hearing.[35] The "mailbox rule" applies to the response, allowing the nonmovant to file by mailing it on the due date (so long as the clerk receives it no more than 10 days after it was due).[36] If the response includes or is accompanied by special exceptions to the MSJ, those special exceptions must be filed and served at least 7 days before the hearing.[37]

C. The Reply

While Rule 166a does not require the movant to file a reply, he may file a reply to the nonmovant's response, and no deadline is provided by Rule 166a for filing such a reply.[38] Local rules of certain courts, however, do set filing deadlines for MSJ replies, so the careful practitioner should always check such local rules. If, however, the movant desires to attack the response by special exceptions, those must be filed and served at least three days before the hearing.[39]

D. Leave of Court to Late File

Usually, the nonmovant is the party seeking to late-file his response (and attached MSJ evidence) less than 7 days before the hearing. To do so effectively, the nonmovant must file a motion for leave to late file and establish good cause for himself and no undue prejudice for the movant.[40] Good cause is shown by proof that the untimeliness was not intentional or the result of conscious indifference but of an accident or mistake.[41] Occasionally, the movant will seek to file a MSJ with less than 21 days' notice, and he should then seek leave of court.[42] If the nonmovant does not object to this tardiness, the movant's error is waived.[43] Both parties must obtain leave of court to late-file MSJ evidence.[44] If the seeking party does not obtain a written ruling on its motion to late-file, an appellate court will not consider that evidence on appeal.[45] If a nonmovant requires additional time to obtain affidavits or discovery for his response, he should file a motion for continuance.[46] In the case of a no-evidence MSJ, the movant should not even file that motion until the nonmovant has had an adequate time for discovery.[47] While the Rule does not require that discovery be completed before a no-evidence motion is filed,[48] in the authors' experience, most courts are reluctant to consider a no-evidence MSJ until the discovery period has ended.[49] It should be noted that, once the required 21-day advance notice of a MSJ hearing has been provided, a resetting of that hearing does not require another 21 days' notice; reasonable notice of 7 days is generally permissible.[50]

E. Amended Pleadings

It is frequently appropriate, in preparing a MSJ response, to file an amended pleading (whether a petition or an answer). Because a court must decide a MSJ based upon the pleadings on file at the time of the hearing,[51] a party may file an amended pleading after he files his motion or response.[52] In such situations, Rule 63 governs the timing of such amended pleadings and generally requires that the amendment be filed no later than 7 days before the hearing.[53] If a party misses this 7-day deadline, he may still file his amended pleading before the hearing, and an appellate court will

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[32] Rules 21a(a)(2), 166a(c).

[33] Rule 21a(b)(2).

[34] *Lewis*, 876 S.W.2d at 316; Rule 4.

[35] *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002); Rule 166a(c).

[36] Rule 5.

[37] *McConnell v. Southside ISD*, 858 S.W.2d 337, 343 n.7 (Tex. 1993).

[38] *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 4 (Tex. App.—San Antonio 2000, pet. denied).

[39] *McConnell*, 858 S.W.2d at 343 n.7.

[40] *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005).

[41] *Id*.

[42] Rule 166a(c).

[43] *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 582 (Tex. App.—Austin 1995, no pet.).

[44] *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996); Rule 166a(c).

[45] *Mathis v. RKL Design/Build*, 189 S.W.3d 839, 842-43 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

[46] Rule 166a(g).

[47] *Fort Brown Villas III Condominium Association v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009); Rule 166a(i).

[48] *Dishner v. Huitt-Zollars, Inc.*, 162 S.W.3d 370, 376 (Tex.App.—Dallas 2005, no pet.).

[49] *See* Rule 166a(i), Comment (a discovery period set by pretrial order should provide adequate opportunity for discovery, and ordinarily a no-evidence motion would be permitted after the period but not before).

[50] *Skelton v. Commission for Lawyer Discipline*, 56 S.W.3d 687, 691 (Tex.App.—Houston [14th Dist.] 2001, no pet.).

[51] Rule 166a(c).

[52] *Cluett v. Medical Protective Company*, 829 S.W.2d 822, 825-26 (Tex.App.—Dallas 1992, writ denied).

[53] *Sosa v. Central Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995)(in the MSJ context, Rule 63's reference to the "trial" applies to the hearing).

assume that the trial court considered the amended pleading, unless the opposing party objects and demonstrates surprise.[54]

III. SUGGESTED STRUCTURE OF MOTION, RESPONSE, AND REPLY

A. Traditional Motion for Summary Judgment

The traditional motion must, of course, be written, but it should not be verified.[55] The motion must recite the grounds on which it is based, and those grounds must be so specifically explained that they give fair notice to the nonmovant.[56] Remember that the motion's grounds must already be set out in movant's pleadings, or he should promptly amend his pleadings to include those grounds. The motion can be based upon facts, in which event the movant's evidence must, as a matter of law, either prove all the elements of the movant's claim or defense or disprove at least one element of the nonmovant's claim or defense.[57] Alternatively, the motion may be based upon the nonmovant's pleadings and may show that he has no viable cause of action or defense as plead.[58] The motion may request either a final or a partial summary judgment. For details regarding a final judgment, see ¶E *infra*. The movant, however, must request the court to dispose of all issues and all parties if he seeks a final summary judgment.[59] The motion may seek a partial summary judgment by requesting the court to dispose of some but not all of the issues or parties.[60] Obviously, if the motion requires supporting evidence, the best practice is to include a section within the motion itself listing the competent supporting evidence, incorporating it by reference, and attaching it to the motion as exhibits. Common types of summary judgment evidence are detailed in Section V *infra*. The motion should further identify any discovery products not on file to be used as such evidence and should include the Rule 166a(d) statement of intent to use such discovery as summary judgment proofs. If appropriate, the motion can ask the court to take judicial notice of its own file, pursuant to Rule 166a(c)(ii) and Texas Rule of Evidence 201. *See also* Section VI *infra*. Finally, if the motion seeks attorneys' fees, that request must be included in the underlying pleadings and must be expressly sought in the motion. Proof of the amount, necessity, and reasonableness of the requested fees should be included, normally in the form of an attorney's affidavit.[61] Because a summary judgment proceeding is not a trial on the merits, the judicial-notice language regarding attorneys' fees in Texas Civil Practice & Remedies Code § 38.004 may not be used.

1. Response

The response must also be in writing and should not be verified.[62] The goals of the response are to identify defects in the motion and explain reasons why the motion should not be granted. Factual reasons to deny the motion include that the movant did not prove all the elements of its cause of action or defense and that nonmovant's evidence raises a genuine issue of material fact.[63] The response may also assert the nonmovant's affirmative defenses to the movant's claim or defense, and the response should submit evidence on each element of the nonmovant's defense.[64] Such an affirmative defense must also be included in the nonmovant's pleadings. If the motion is based upon the pleadings, the nonmovant must demonstrate that the question of law presented must be decided in the nonmovant's favor and that there are no disputed facts.[65] The response should also assert any objections to the motion, its underlying pleadings, or its proffered evidence. For an explanation of the various types of such objections and the grounds therefor, *see* Section V.A and B.1-11 *infra*.

2. Reply

The movant should file a written reply to any response served by the nonmovant. The reply should negate any fact issues alleged in the response by demonstrating that, as a matter of law, no such fact issues exist. Alternatively, if the response advances an affirmative defense, the reply should negate at least one element of such defense as a matter of law.

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[54] *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276-77 (Tex. 1996).

[55] *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 677 (Tex. 1979); *Hidalgo v. Surety S & L Association*, 462 S.W.2d 540, 545 (Tex. 1971).

[56] *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013); *Seaway Products Pipeline Co. v. Hanley*, 153 S.W.3d 643, 649 (Tex. App.–Fort Worth 2004, no pet.); Rule 166a(c).

[57] *Park Place Hospital v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995).

[58] *National Union Fire Insurance v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

[59] *Continental Airlines, Inc.*, 920 S.W.2d at 276-77.

[60] Rule 166a(a),(b).

[61] *Roberts v. Roper*, 373 S.W.3d 227, 233 (Tex. App.–Dallas 2012, no pet.).

[62] *Clear Creek Basin*, 589 S.W.2d at 677; *Quanaim v. Frasco Restaurant & Catering*, 17 S.W.3d 30, 42 (Tex. App.–Houston [14th Dist.] 2000, pet. denied).

[63] *Clear Creek Basin*, 589 S.W.2d at 678; *Dillard's, Inc. v. Newman*, 299 S.W.3d 144, 148 (Tex. App.-Amarillo 2008, pet. denied).

[64] *Via Net v. TIG Insurance*, 211 S.W.3d 310, 313 (Tex. 2006).

[65] *Zurich American Insurance v. McVey*, 339 S.W.3d 724, 734 (Tex. App.–Austin 2011, pet. denied).

B. No-Evidence Motion for Summary Judgment

As with a traditional motion, the Rule 166a(i) no-evidence motion must be in writing and not verified. The no-evidence motion should then assert that an adequate time for discovery has passed and should cite the case's filing date and discovery deadline. Because a no-evidence motion may be used only to attack "a claim or defense on which an adverse party would have the burden of proof at trial," that motion should challenge only such claims or defenses.[66] The no-evidence motion must correctly identify and list each element of each such challenged claim or defense and must contend that there is no evidence to support one or more of them.[67] Normally, a no-evidence motion does not require supporting evidence, but if the movant requests attorneys' fees, he must support that request with competent summary judgment evidence.[68]

1. Response

As with the traditional motion, the response to a no-evidence motion must be in writing and should not be verified. The response should further identify any procedural defect in the motion and argue other reasons why the motion should not be granted. For example, if the motion fails correctly to list the challenged elements, the nonmovant is not required to respond; the better practice, however, is to object on this basis in the response.[69] Most importantly, once a proper no-evidence motion has been filed, the nonmovant bears the entire burden of proof to produce more than a scintilla of probative evidence raising a genuine issue of material fact on each challenged element.[70] More than a scintilla of evidence exists when that evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.[71] Valid objections that may also be asserted in the response include identifying particular claims of the nonmovant not addressed by the no-evidence motion; the court may not address those unchallenged causes of action and cannot render a complete summary judgment on the whole of nonmovant's claims.[72] If the no-evidence motion purports to challenge elements of a claim or defense on which the movant, not the nonmovant, bears the burden of proof at trial, the response should object.[73] In presenting his evidence in the reply, the nonmovant "is not required to marshall its proof; its response need only point out evidence that raises a fact issue on the challenged elements.[74]

2. Reply

The movant's reply should argue that the response's proffered evidence does not rise to the level of a scintilla, if appropriate. The reply should further present any objections to such evidence. *See* Section V *infra*. The movant can also submit his summary judgment evidence in the reply attempting to discredit the response's evidence. The reply may not include new challenges to the nonmovant's claims or defenses.[75]

C. "Hybrid" Motion for Summary Judgment

The "hybrid" motion is just that: a combination of traditional and no-evidence motions presented in one document.[76] Thus, the movant should follow the above-explained structures for presenting a traditional and no-evidence motion. Moreover, the better practice is for the motion clearly to cite both Rule 166a(c) and Rule 166a(i) and to segregate the explanations of the separate standards and grounds for each.[77] In considering a true hybrid motion, the court will decide the no-evidence grounds first.[78]

1. Response

The response to a hybrid motion should combine the responses to a traditional and no-evidence motion, as set out above. In addition, if the hybrid motion fails clearly to cite to and present arguments under both

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[66] *General Mills Restaurant, Inc. v. Texas Wings, Inc.*, 12 S.W.3d 827, 832 (Tex. App..–Dallas 2000, no pet.); Rule 166a(i).

[67] *Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014); *Timpte Industries v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

[68] *Williams v. Bank One*, 15 S.W.3d 110, 116 (Tex. App.–Waco 1999, no pet.). *See* ¶ 1 *supra*.

[69] *General Mills Restaurant*, 12 S.W.3d at 832.

[70] *Burroughs v. APS International, Ltd.*, 93 S.W.3d 155, 159 (Tex. App.–Houston [14th Dist.] 2002, pet. denied).

[71] *Id*. at 160.

[72] *General Mills Restaurant*, 12 S.W.3d at 836; *Bandera Electric Cooperative, Inc. v. Gilchrist.* 946 S.W.2d 336, 337 (Tex. 1997).

[73] *Texas Mutual Insurance v. Sara Care Childcare Center, Inc.*, 324 S.W.3d 305, 318 (Tex. App.–El Paso 2010, pet. denied); *General Mills Restaurants*, 12 S.W.3d at 832.

[74] *Saenz v. Southern Union Gas Company*, 999 S.W.2d 490, 493 (Tex. App.–El Paso 1999, pet. denied); Rule 166a(i), Notes & Comments.

[75] *Community Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 280 (Tex. App.–El Paso 2004, no pet.).

[76] *Binur v. Jacobo*, 135 S.W.3d 646, 650-51 (Tex. 2004).

[77] *Binur*, 135 S.W.3d at 651; *Waite v. Woodard, Hall & Primm, P.C.*, 137 S.W.3d 277, 281 (Tex. App.–Houston [1st Dist.] 2004, no pet.); *Galindo v. Snoddy*, 415 S.W.3d 905, 907 (Tex. App.–Texarkana 2013, no pet.).

[78] *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

Rule 166a(c) and Rule 166a(i), the non-movant should object.[79]

2. Reply

The reply to a hybrid motion should also combine the replies to a traditional and no-evidence motion, as described above.

D. Rule 166(a)(e) Request for Order Specifying Established Facts

Frequently overlooked in summary judgment practice is the ability for the movant to request a Rule 166a(e) "order specifying the facts that are established as a matter of law and directing such further proceedings in the action as are just." Thus, even though the court may not grant the summary judgment motion *in toto*, the alert practitioner may be able to narrow the fact issues to be presented at trial by convincing the court that the movant has at least established certain facts as a matter of law. Most motions should include such a request; this opportunity should not be ignored in prosecuting a summary judgment motion.

E. Hearing and Order/Judgment

Because Rule 166a several times refers specifically to a "hearing" on the motion,[80] it is somewhat surprising that Texas courts have ruled that a trial court may decide the motion on submission, without any appearance or argument by the attorneys.[81] Whatever the court's decision, it must be reduced to an order or judgment. If the court grants the motion completely, and no other issues or parties remain undecided, the court should execute a final judgment. If the court denies the motion, it should sign an order only, not a judgment, because the decision is interlocutory pending a final trial and judgment. If the court grants the motion, but other issues or parties remain undecided, or only partially grants the motion, the court should sign an order, because those decisions are interlocutory. In the latter situation, if the movant desires to make the decision final and appealable, he may nonsuit his remaining claims or defenses or he may move the court to sever the unadjudicated issues or parties in the case. If the court signs such an order of nonsuit or severance, the appellate deadlines relating to the motion start to run on the date of execution of the order.[82]

IV. BURDENS OF PROOF IN SUMMARY JUDGMENTS

A. Traditional Motion for Summary Judgment

1. The Standard

A traditional summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[83] The movant is entitled to summary judgment where he proves, as a matter of law, all the essential elements of his claim or defense.[84] Depending on the circumstances of the case, either side might seek traditional summary judgment. The roles of the movant and the non-movant may take on significant strategic importance in light of the judicial favor afforded to the non-movant in summary judgments. For example, the court must assume that all of the non-movant's proof is true, must make every reasonable inference in favor of the non-movant, and must resolve doubts about the existence of a genuine fact issue against the movant.[85]

2. Plaintiff Moves for Traditional Summary Judgment on its Cause of Action

As a general rule, the party with the burden of proof at trial bears the same burden of proof in the context of summary judgment.[86] Any time after the defendant has answered or appeared, the plaintiff can seek a summary judgment on his own cause of action.[87] The existence of an affirmative defense, by itself, does not preclude summary judgment for the plaintiff.[88] However, left unchallenged, the non-moving defendant could use his affirmative defense to create a fact issue.[89]

When the plaintiff moves for traditional summary judgment on his own affirmative claim, the summary judgment evidence must demonstrate that there is no genuine issue of material fact for each element of that claim.[90] The amount of unliquidated damages is

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[79] *Waite*, 137 S.W.3d at 281 (fair notice not provided to nonmovant when motion designated "hybrid" failed to cite or argue Rule 166a(c)).

[80] Rule 166a(c), (d), (e).

[81] *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998); *In re American Media Consolidated*, 121 S.W.3d 70, 74 (Tex. App.–San Antonio 2003, orig. proceeding).

[82] *Park Place Hospital*, 909 S.W.2d at 510.

[83] *See Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

[84] *See Perez*, 819 S.W.2d at 471.

[85] *Little v. TDCJ*, 148 S.W.3d 374, 381 (Tex. 2004); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

[86] *Barraza v. Eureka Co.*, 25 S.W.3d 225, 231 (Tex. App.–El Paso 2000, pet. denied).

[87] Rule 166a(a).

[88] *Brownlee v. Brown*lee, 665 S.W.2d 111, 112 (Tex. 1984).

[89] *Brownlee*, 665 S.W.2d at 112.

[90] *Hammer v. Powers*, 819 S.W.2d 669, 673 (Tex. App. – Fort Worth 1991, no writ).

specifically exempted under the rules, although the plaintiff must still show the existence of damage (or other remedy) as an element of his claim.[91]

The plaintiff, as movant, bears the burden of submitting sufficient evidence that establishes on its face that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.[92] Even in the rare circumstance where a motion for summary judgment is uncontroverted, the plaintiff must discharge this burden.[93] Only when the plaintiff meets this burden of submission does the burden then shift to the defendant non-movant to disprove, or at least raise a fact issue as to, at least one of the elements.[94]

Once the burden shifts, the defendant may respond in one of two ways. The defendant could raise a fact issue to the plaintiff's elements. Ordinarily, the defendant would respond and point to existing summary judgment evidence or file his own summary judgment evidence identifying a fact issue. As a second method of defeating summary judgment, the defendant could raise a fact issue on each of the elements of an affirmative defense, if one has been pled. Should the defendant choose the latter, he need not entirely prove the affirmative defense by a preponderance of the evidence but may simply submit competent summary judgment evidence that raises a fact issue.[95]

Even then, the summary judgment dance might not be finished. In reply to the fact issue(s) raised by the defendant, the plaintiff may yet show that there are none, and that judgment is warranted as a matter of law. Or, if the defendant has demonstrated fact issues on the elements of his affirmative defense, the plaintiff may yet negate at least one of the elements and secure his summary judgment.

3. Plaintiff Moves for Traditional Summary Judgment on Defendant's Counterclaim

A plaintiff seeking a full and final summary judgment should be careful to also meet his burden of proof concerning any counterclaim that the defendant has raised, in addition to the plaintiff's own affirmative claim. If the defendant has raised a counterclaim, and the plaintiff seeks summary judgment on that counterclaim, the plaintiff must disprove at least one of the elements of the defendant's counterclaim(s) as a matter of law.[96] Once the plaintiff brings forward such competent summary judgment evidence, the burden shifts to the defendant to either find a fact issue in the element(s) that the plaintiff disproved, or create a fact issue by submitting competent evidence that raises a fact issue on the element(s) that the plaintiff attempted to disprove.

4. Defendant Moves for Traditional Summary Judgment on Plaintiff's Cause of Action

Like the plaintiff, the moving defendant is entitled to summary judgment on the plaintiff's cause of action if he establishes that no genuine issue of material fact exists as to one or more essential elements of the plaintiff's claim(s), and that he is entitled to summary judgment as a matter of law.[97] In this sense, the defendant is able to essentially prove that the plaintiff has no cause of action and that the defendant is entitled to judgment as a matter of law.[98] Because he is the moving party, such a defendant bears the burden on the motion. If the defendant can show that no genuine issue of material fact exists as to at least one of the plaintiff's elements, the defendant is entitled to summary judgment on that claim.

5. Defendant Moves for Traditional Summary Judgment on its Affirmative Defense

Affirmative defenses present yet another opportunity for the defendant to affirmatively seek summary judgment. Like any other summary judgment, the defendant must submit competent summary judgment evidence on each element of the affirmative defense. Each element must be proven as a matter of law (*i.e.*, there are no genuine issues of material fact on the defense).[99]

Most affirmative defenses will likely already have been pled when the defendant answered the lawsuit. But, the affirmative defense could even be raised for the first time in the motion for summary judgment.[100] Unpleaded affirmative defenses can be raised for the first time in the summary judgment motion.[101] With this in mind, the non-moving plaintiff should be ever vigilant that an issue is not tried with his express or implied consent. Object and force the defendant to amend his answer. If the plaintiff waits until an appeal

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[91] Rule 166a(a), (c).

[92] *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014).

[93] *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

[94] *Amedisys*, 437 S.W.3d at 511.

[95] *American Petrofina, Inc., v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994).

[96] *Taylor v. GWR Operating Co.*, 820 S.W.2d 908, 910 (Tex. App. – Houston [1st Dist.] 1991, writ denied); *Adams v. Tri-Cont'l Leasing Corp.*, 713 S.W.2d 152, 153 (Tex. App. – Dallas 1986, no writ).

[97] Rule 166a(b), (c).

[98] Rule 166a(b).

[99] *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 927 (Tex. 1996).

[100] *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1995).

[101] *Roark*, 813 S.W.2d at 494.

to mention that the affirmative defense was never pled until raised in the motion, it is too late, and the summary judgment will not be reversed for that reason.[102]

6. Defendant Moves for Traditional Summary Judgment on its Counterclaim

Finally, the defendant could seek summary judgment on his own counterclaim, without regard to whether the plaintiff has sought summary judgment on his own claims. Like any other summary judgment, here the defendant must prove each element of his counterclaim as a matter of law.[103] Should the defendant carry his burden of submission of competent summary judgment evidence, the plaintiff can defeat summary judgment only by creating a genuine issue of material fact as to at least one of the elements of the counterclaim, or by creating a fact issue on the plaintiff's own affirmative defense to the counterclaim.

B. No-Evidence Motion for Summary Judgment

After an adequate time for discovery, a party without the burden of proof may, without presenting evidence, seek summary judgment on the ground that there is no evidence to support one or more essential elements of the non-movant's claim or defense.[104] The motion must specifically state the elements for which there is no evidence.[105] The Supreme Court has explained that Rule 166a(i) does not permit conclusory or general no-evidence challenges.[106] This requirement provides adequate information to the opposing party by which it may oppose the motion and defines the issues to be considered for summary judgment.[107] The purpose of a no-evidence summary judgment motion is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.[108]

1. The Standard

When a no-evidence motion for summary judgment is filed, the burden shifts to the non-moving party to present evidence raising a genuine issue of material fact as to the element(s) specified in the motion.[109] The court should grant a no-evidence motion for summary judgment unless the non-movant presents cognizable summary judgment evidence that raises a genuine issue of material fact on each element of the claim or defense challenged (on which the non-movant bears the burden of proof).[110]

A no-evidence motion for summary judgment will be upheld only if the summary judgment record reveals no evidence of the challenged element, *i.e.*, "(a) a complete absence of evidence [as to the challenged element]; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove [the challenged element]; (c) the evidence offered to prove [the challenged element] is no more than a mere scintilla; [or] (d) the evidence establishes conclusively the opposite of the [challenged element]."[111]

A party may not properly move for a no-evidence summary judgment on a claim or defense on which it has the burden of proof.[112]

2. Movant Moves for No-Evidence Summary Judgment on Non-Movant's Claim

In the probate context, no-evidence motions for summary judgment are most commonly used in will contests cases where the proponent of a will files a motion for no-evidence summary judgment on the contestant's undue influence claim.[113]

3. Movant Moves for No-Evidence Summary Judgment on Non-Movant's Affirmative Defense

In summary judgment practice, a non-movant's affirmative defense could provide grounds for a party to seek summary judgment. For example, in the all-too-common context of a beneficiary suing the fiduciary for breach of trust, the fiduciary might claim the affirmative defense of ratification. Consequently, the beneficiary could move for no-evidence summary

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[102] *Clear Creek Basin Auth.*, 589 S.W.2d at 678.

[103] *Texas Commerce Bank v. Correa*, 28 S.W.3d 723, 726 (Tex. App.–Corpus Christi 2000, pet. denied).

[104] Rule 166a(i); *Salazar v. Ramos*, 361 S.W.3d 739, 745-46 (Tex. App.–El Paso 2012, pet. denied); *All American Telephone, Inc. v. USLD Communications, Inc.*, 291 S.W.3d 518, 526 (Tex. App.–Ft. Worth 2009, pet. denied).

[105] Rule 166a(i); *Timpte Industries, Inc. Gish*,, 286 S.W.3d 306, 310 (Tex. 2009).

[106] *Timpte Industries, Inc.*, 286 S.W.3d at 310.

[107] *Timpte Industries, Inc.*, 286 S.W.3d at 311, *quoting Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex.1978).

[108] *Benitz v. Gould Group*, 27 S.W.3d 109, 112 (Tex. App.–San Antonio 2000, no pet.).

[109] *In re Estate of Ross*, 10-10-00189-CV, 2011 WL 6004336, at *1 (Tex. App.–Waco Nov. 30, 2011, no pet.) (*Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

[110] *See* Rule 166a(i).

[111] *Taylor-Made Hose, Inc. v. Wilkerson*, 21 S.W.3d 484, 488 (Tex. App.–San Antonio 2000, pet. denied)(quoting Robert W. Calvert, "*No Evidence " and "Insufficient Evidence " Points of Error*, 38 Tex. L. Rev. 361, 362–63 (1960).

[112] *See Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 680 (Tex. App.–Houston [14th Dist.] 2003, no pet.).

[113] *See Estate of Davis v. Cook*, 9 S.W.3d 288, 292 (Tex. App.–San Antonio 1999, no pet.)(rejecting contention that a no-evidence summary judgment under Rule 166a(i) is improper in the context of a will contest because of the fact-intensive inquiry involved).

judgment and thus force the fiduciary to present cognizable summary judgment evidence that the fiduciary made full disclosure and is thus entitled to try his affirmative defense of ratification. Similarly, a beneficiary could move for no-evidence summary judgment on the trustee's affirmative defense of release if the release is not in writing, as required by TTC § 114.005.

4. What Constitutes "No-Evidence"

No evidence is essentially less than a scintilla. Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create mere surmise or suspicion."[114] To defeat a no-evidence motion for summary judgment, the non-movant must produce more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements.[115] The non-movant is not required to marshal its proof. The non-movant only needs to show some evidence—more than a scintilla—that a fact issue exists.[116] A non-movant produces more than a scintilla when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.[117]

Thus, the factual dispute must be over "material" and "genuine" facts. A fact is "material" only if it affects the outcome of the suit under the governing law.[118] Such a determination necessarily involves looking at the substantive law, and only those facts identified by the substantive law can be considered material.[119] A material fact is "genuine" if the evidence rises to the level where a reasonable juror could find the fact in favor of the non-moving party.[120] If the evidence is not significantly probative, the fact issue is not genuine.[121] "If the evidence simply shows that some metaphysical doubt as to the fact exists, or if the evidence is not significantly probative, the material fact issue is not 'genuine'."[122]

Another subset of "no evidence" is presented when, with respect to an essential element of a claim or defense, there is a complete absence of a vital fact or the only evidence offered is barred by rules of law or evidence from being considered by the court.[123] If the evidence proffered by the nonmovant is inadmissible, for example, not reliable or irrelevant, then it constitutes no evidence.[124] Where the only evidence submitted by the nonmovant is barred by law or inadmissible under the rules of evidence, summary judgment must be granted.[125] When the competent evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, the non-movant has not produced more than a scintilla.[126]

Finally, a no-evidence summary judgment is improperly granted when the respondent brings forth more than a scintilla of probative evidence that raises a genuine issue of material fact.[127]

C. Combined Traditional and No-Evidence or "Hybrid Summary Judgments

As a third method of moving for summary judgment, the movant might present a single motion that includes a request to grant summary judgment on either or both traditional and no-evidence grounds.[128] In the past, some Texas courts believed that presenting such an argument required two distinct motions, but the Texas Supreme Court has said this is not the case and merely suggests that the litigator clearly delineate in the motion where the basis is on traditional and no-evidence grounds.[129] To avoid a claim that the hybrid motion fails to give adequate notice to the non-movant, the best practice is to be clear and cite that part of Rule 166a that your argument and motion relies upon.

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[114] *Id.* citing *Gomez,* 4 S.W.3d at 283 (citing *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983)).

[115] *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W. 3d 167, 172 (Tex. 2003).

[116] *Nowak v. DAS Inv. Corp.,* 110 S.W.3d 677, 679-80 (Tex. App.–Houston [14th Dist.] 2003, no pet.)

[117] *Ridgway v. Ford Motor Company*, 135 S.W.3d 598, 601 (Tex. 2004).

[118] *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 433 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, at 248 (1986)); *See also Moore v. K Mart Copr.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied).

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Moore v. K Mart Corp*., 981 S.W.2d 266, 269 (Tex. App.–San Antonio 1998, pet. denied).

[123] *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Uniroyal Goodrich Tire Company v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999); *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998)("no evidence" comprehends the situation in which the court is barred by rules of law or evidence from giving weight to the only evidence offered).

[124] *Havner*, 953 S.W.2d at 713.

[125] *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 791 F.Supp. 1042 (D.N.J. 1992), *affirmed*, 6 F.3d 778 (3rd Cir. 1993)(cited favorably by the Texas Supreme Court in *Havner*, 953 S.W.2d at 710).

[126] *Forbes, Inc.*, 124 S.W.3d at 172.

[127] *Benitz v. Gould Group*, 27 S.W.3d 109, 113 (Tex. App.–San Antonio 2000, no pet.); Rule 166a(i); *Gomez v. Tri City Community Hosp., Ltd.*, 4 S.W.3d 281, 283 (Tex. App.–San Antonio 1999, no pet. h.).

[128] Rule 166a(a), (b), (i); Binur v. Jacobo, 135 S.W.3d 646, 650-51 (Tex. 2004).

[129] *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).

The burdens in a hybrid motion for summary judgment work just as they do in standalone motions. They are, however, taken in turn. When the court is presented with both grounds in the same motions, it will first consider the no-evidence grounds before examining the traditional grounds of the motion, if necessary.[130] If the non-movant cannot produce competent summary judgment evidence to meet his burden on the no-evidence point, the traditional motion is rendered moot.[131]

V. COMMON EVIDENTIARY CONCERNS

There is no difference between the standards for evidence that would be admissible in a summary judgment proceeding and those applicable at a regular trial.[132] This precept generally means that all the same objections that could be raised at trial can be raised in a summary judgment proceeding. For preservation of error purposes, objections to "form" and "substance" are treated differently.[133]

Failing to obtain a ruling from the trial court on an evidentiary objection based on a defect of form will preclude that party from raising such objections on appeal.[134] Conversely, defects in the substance of the opposing party's evidence are not waived, do not require a written ruling, and can be raised for the first time on appeal.[135]

To preserve error for appellate review of a party's objections, the record must show that: 1) a party stated its specific grounds for its objections in compliance with the relevant rules, 2) the party obtained a ruling, either expressly or implicitly, on its objections, or 3) the trial court refused to rule on the objections and the complaining party objected to the refusal.[136]

Objections to summary judgment evidence should be sufficiently specific.[137] For example, objections that identified the number of the particular paragraph and stated, "Said paragraph contains statements that are merely legal conclusion (sic)" did not provide any description of the particular basis for the objection and were not sufficiently specific.[138] Objections that statements are "conclusory" may not be "conclusory" themselves.[139] Even if the evidence was substantively defective, appellate courts have rejected objections that were not sufficiently specific.[140] In fact, a trial court can abuse its discretion in sustaining objections to affidavits in a summary judgment proceeding that are conclusory and not sufficiently specific.[141]

The granting of a summary judgment motion does not necessarily provide an implicit ruling that either sustains or overrules objections to the summary judgment evidence.[142] As the Houston Court of Appeals for the 14th District noted in 2000:

> We believe the better practice is for the trial court to disclose, in writing, its rulings on all objections to summary-judgment evidence at or before the time it enters the order granting or denying summary judgment. Practitioners

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[130] *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

[131] *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

[132] *United Blood Services v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997); Rule 166a(f)(requiring that in summary judgment proceedings, supporting and opposing affidavits "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

[133] *Bastida v. Aznaran*, 444 S.W.3d 98, 104 (Tex. App.–Dallas 2014, no pet.).

[134] *Id.* at 104-05.

[135] *Stewart v. Sanmina Texas L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.).

[136] *Morales v. Uptown Properties, Inc.*, 05-05-00295-CV, 2005 WL 3418603, at *2 (Tex. App.–Dallas Dec. 1, 2005)(although appellant filed written objections with the trial court, he did not receive a written order from the trial court regarding his objections; by failing to obtain a ruling on his objections as to lack of personal knowledge and speculation, appellant was foreclosed from raising these objections on appeal)(citing Tex. R. App. P. 33.1(a)).

[137] *See Anderson v. Limestone County*, 10-07-00174-CV, 2008 WL 2629664, at *3 (Tex. App.–Waco July 2, 2008)(holding that objections that merely quoted various statements or cited various paragraphs in each document, labeling each sentence or paragraph as "conclusory," based on conclusions or qualifications, or unsupported by facts, without a "description of the particular basis for the objection," were insufficient). *See also Womco, Inc. v. Navistar Int'l Corp.*, 84 S.W.3d 272, 281 n. 6 (Tex. App.–Tyler 2002, no pet.) ("objection that paragraph 11 contains unsubstantiated legal conclusions is itself conclusory" and fails to "offer any explanation to the trial court as to the precise bases for their objection"); *Garcia v. John Hancock Variable Life Ins. Co.*, 859 S.W.2d 427, 434 (Tex. App.–San Antonio 1993, writ denied) (objections to paragraph on grounds of "speculation" and "conclusion" failed to state the grounds supporting inadmissibility).

[138] *Morales*, 2005 WL 3418603, at *3, citing *Stewart*, 156 S.W.3d at 207.

[139] *Stewart*, 156 S.W.3d at 207.

[140] *Morales*, 2005 WL 3418603, at *3.

[141] *See Ulrich v. Woodforest Nat. Bank*, 09-06-357 CV, 2007 WL 4532800, at *4 (Tex. App.–Beaumont Dec. 20, 2007). *See also Womco, Inc.*, 84 S.W.3d at 281 n. 6 (objection that individual paragraph of affidavit "contains unsubstantiated legal conclusions" was insufficient because it failed to identify which statements in that paragraph were objectionable).

[142] *Allen ex rel. B.A. v. Albin*, 97 S.W.3d 655, 663 (Tex. App.–Waco 2002, no pet.), citing *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 317 (Tex. App.–San Antonio 2000, no pet.).

> should facilitate this procedure by incorporating all parties' objections to summary-judgment evidence in proposed orders granting or denying summary judgment and including a "Mother Hubbard" recitation to encompass any objections not otherwise addressed in the proposed orders .... In any context, however, it is incumbent upon the party asserting objections to obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver.[143]

A. Relevance and Disclosure

Because summary judgment evidence must be admissible, a prerequisite to its admissibility is that it must be relevant.[144] Under Texas Rules of Evidence 401 and 402, "relevant evidence" means evidence tending to make the existence of any fact that is of consequence to the determination of the action more or less probable. For any fact to be "of consequence to the determination of the action," that evidence must be material, and the proposition for which it is offered must be controlling.[145] Such a proposition cannot be case-controlling if that proposition is barred by rules of law, in which event the proffered evidence constitutes "no evidence."[146]

Another prerequisite to admissibility is that the proffered evidence must have been properly and timely disclosed pursuant to the discovery rules, including Rule 194; a party cannot introduce into evidence information not timely disclosed or testimony of a witness not timely identified.[147]

B. Affidavits/Declarations

1. Defects in Substance vs. Defects in Form

A defect is one of substance if the summary judgment proof is incompetent; it is one of form if the summary judgment proof is competent, but inadmissible.[148] If an affidavit contains a defect in form, the party filing it must be given an opportunity to amend.[149]

If the affidavit contains a defect in substance, the court is not required to give the submitting party an opportunity to amend.[150] Substantive defects include affidavits that include legal or factual conclusions.[151] The following objections have been held to be defects in form:

- Failure to affirmatively show that the affiant had personal knowledge;[152]
- Speculation[153];
- Objections that a document contains hearsay.[154]
- Competence.[155]
- Qualifications, relevance, or reliability of an expert's opinion.[156]

2. Jurat Requirement

Much litigation has centered on arguable defects regarding the jurat to be included within an affidavit. If a proffered affidavit lacks a jurat proving that it was sworn to before an authorized officer, the opposing party should object, or the objection is waived.[157] An unsworn statement that purports to be an affidavit, however, will not support a summary judgment.[158] Similarly, a party opposing an affidavit must object if the jurat itself is defective, or else that defect is waived.[159]

3. Personal Knowledge

In a summary judgment context, Rule 166a(f) requires an affiant to "positively and unqualifiedly represent that the facts disclosed [in an affidavit] are true."[160] An interested witness' affidavit which states

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[143] *Dolcefino v. Randolph,* 19 S.W.3d 906, 926 (Tex. App.–Houston [14th Dist.] 2000, pet. denied).

[144] TEX. R. EVID. 402 (evidence that is not relevant is inadmissible).

[145] *John Hancock Mutual Life Insurance Co. v. Dutton*, 585 F.2d 1289, 1294 (5th Cir. 1978); *San Antonio Traction Company v. Higdon*, 123 S.W. 732, 734-35 (Tex. Civ. App. 1909, *writ ref'd*).

[146] *Havner*, 953 S.W.2d at 711.

[147] *Fort Brown Villas III Condominium Association v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009); Rule 193.6.

[148] *See Tri-Steel Structures, Inc. v. Baptist Found. of Tex.*, 166 S.W.3d 443, 448 (Tex. App.–Fort Worth 2005, pet. denied).

[149] Rule 166a(f); *Keeton v. Carrasco*, 53 S.W.3d 13, 24 - 25 (Tex. App.—San Antonio 2001, pet. denied).

[150] *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 315 (Tex. 2012).

[151] *Id.*

[152] *Stewart*, 156 S.W.3d at 207.

[153] *Hou-Tex, Inc.v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.–Houston [14th Dist.] 2000, no pet.).

[154] *Stewart*, 156 S.W.3d at 207, citing *St. Paul Ins. Co.*, 994 S.W.2d at 721.

[155] *Rizkallah v. Conner*, 952 S.W.2d 580, 585-86 (Tex. App.–Houston [1st Dist.] 1997, no pet.) (lack of personal knowledge and competence).

[156] *Gutierrez v. Trevino*, 04-99-00274-CV, 2001 WL 273416, at *4 (Tex. App.–San Antonio Mar. 21, 2001).

[157] *Mansions in the Forest*, 365 S.W.3d at 317.

[158] *Perkins v. Crittenden*, 462 S.W.2d 565, 568 (Tex. 1970).

[159] *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 645-46 (Tex. 1995).

[160] *Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex.1996) (per curiam).

that the affiant "estimates" or "believes" certain facts to be true will not support summary judgment.[161] This result obtains because such language does not positively and unqualifiedly represent that the "facts" disclosed are true.

4. Unequivocal

Rule 166a(c) requires that testimonial evidence of an interested witness or an expert must be "clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies."[162] As referenced in ¶3 above, such testimony cannot be phrased in terms of the witness "believing" or "estimating" certain facts; the factual statements must be unequivocal.

5. No Factual Conclusions

Because obvious conclusions of fact are not evidence and not probative, such factual conclusions, opinions, and subjective beliefs not supported by evidence are inadmissible and objectionable.[163]

6. No Legal Conclusions

Legal conclusions in affidavits are insufficient to support summary judgment as a matter of law.[164] For example, Texas courts have held the following language was conclusory and thus insufficient to support summary judgment:

> I have reviewed the Plaintiff's Original Petition, my file and the relevant and material documents filed with the Court, and it is clear that I acted properly and in the best interest of Mrs. Jimmie F. Anderson when I represented her, and that I have not violated the [DTPA]. I did not breach my contract with Mrs. Jimmie F. Anderson, and have not been guilty of any negligence or malpractice. Mrs. Jimmie F. Anderson has suffered no damages or legal injury as a result of my representation of her.[165]

Similarly, testimony that a party held adverse possession to real property was insufficient.[166] Such statements are objectionable because they are not supported by facts. To object to factual or legal conclusions, a motion to strike the particular statements should be filed.

7. Hearsay

Proffered evidence consisting of hearsay must draw an objection, or else any objection is waived.[167] Hearsay evidence that does not provoke an objection will support a summary judgment.[168] In both supporting and opposing a summary judgment motion, the practitioner should pay careful attention to evidence defined not to constitute hearsay (such as, a witness' prior statements, admissions by a party-opponent, and prior depositions), as well as express hearsay exceptions (such as, statements made for medical diagnosis or treatment, public records, market reports, and statements against interest).[169]

8. Documents Referred to Must be Attached

Rule 166a(f) states that sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached to the affidavit or served with it. In other words, if the affidavit testimony refers to documents, the underlying documents must be attached to the affidavit as exhibits or served with the affidavit. Otherwise, the underlying referenced documents may be excluded.

In interpreting Rule 166a(f)'s requirement, several Texas courts have held that the failure to attach copies of the documents referenced in an affidavit is a defect in substance, and, therefore, can be raised for the first time on appeal.[170] Other courts have held that the failure to attach copies of documents referenced in an affidavit is a waivable defect in form.[171]

To resolve this conflict, some courts analyze whether the failure to attach documents relates to the admissibility of the evidence or its competence.[172] If the failure to attach the documents relates to the

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[161] *Id.* (citing *Lightfoot v. Weissgarber,* 763 S.W.2d 624, 628 (Tex. App.–San Antonio 1989, writ denied) for the proposition that testimony based on affiant's best knowledge and belief does not meet Rule 166a(e)'s strict requirements). *See also Ardila v. Saavedra,* 808 S.W.2d 645, 647 (Tex. App.–Corpus Christi 1991, no writ).

[162] *Trico Technologies v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997)(interested-witness testimony must be clear, positive, direct, otherwise credible, and free from contradictions and inconsistencies).

[163] *Elizondo v. Krist,* 414 S.W.3d 259, 264 (Tex. 2013); *Harley-Davidson Motor Co. v. Young*, 720 S.W.2d 211, 213 (Tex. App.–Houston [14th Dist.] 1986, no writ).

[164] *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991)(citing *Mercer v. Daoran Corp.,* 676 S.W.2d 580, 583 (Tex.1984); *Hidalgo v. Surety Savings & Loan Ass'n,* 487 S.W.2d 702, 703 (Tex.1972) (per curiam).

[165] *Anderson*, 808 S.W.2d at 54.

[166] *Ellis v. Jansing*, 620 S.W.2d 569, 571 (Tex. 1981).

[167] *Harrell v. Patel*, 225 S.W.3d 1, 6 (Tex. App.–El Paso 2005, *pet. denied*).

[168] *Columbia Rio Grande Regional Hospital v. Stover*, 17 S.W.3d 387, 396 (Tex. App.–Corpus Christi 2000, no pet).

[169] TEX. R. EVID. 801(e) and 803(4), (8), (17), and (24).

[170] *Mathis v. Bocell*, 982 S.W.2d 52, 59 (Tex. App.–Houston [1st Dist.] 1998, no pet.) and cases cited therein.

[171] *Id.* and cases cited therein.

[172] *Mathis*, 982 S.W.2d at 59.

evidence's competence, it is considered a defect in substance (which is not waivable and can be made for the first time on appeal).[173] If the affidavit is otherwise competent, but the failure to attach the documents makes the evidence inadmissible, it is considered a defect in form (and thus can be waived).[174] The best practice, of course, is to specifically object to an affidavit that refers to, but does not attach, underlying documents.

9. Special Rules for Business Records Affidavits

As referenced in ¶7 above, there are certain evidentiary exceptions to the hearsay-exclusion mandate of Texas Rule of Evidence 802. One of those exceptions is set out in Texas Rule of Evidence 902(10) regarding business records accompanied by an affidavit and attaching records of a regularly conducted business or activity, which are excepted from the hearsay exclusionary rule by Texas Rule of Evidence 803(6) or (7). The basic provisions of Rule 902(10), which was significantly amended in 2014, require that: the original or a copy of such business records be attached to an affidavit; that affidavit be served on each other party at least 14 days before trial (or hearing, as discussed below); and that the affidavit substantially comply with the standard form set out in such Rule 902(10)(B). That standard form requires: that the affidavit be executed and sworn to by a custodian of the records familiar with the manner in which those records were created and maintained by virtue of his duties and responsibilities; that the original records or exact duplicates be attached; that those records were made at or near the time of the relevant act, event, condition, or diagnosis; that the records were made by, or from information transmitted by, persons with knowledge of the matters set forth therein; that the records were kept in the course of regularly conducted business activities; and that it is the regular practice of the business activity to make those records.

Case law has clarified these requirements. The "14 days before trial" references, in the summary-judgment context, the hearing (or submission) on the summary judgment motion.[175] Thus, any such business records affidavit not served on all parties at least 14 days before the summary judgment hearing should be objected to and excluded. Since Rule 166a(c) mandates that a summary judgment response must be filed and served at least 7 days before the hearing, the careful practitioner must anticipate any needed business records affidavits and be certain to file them at least 14, not 7, days before the hearing. Additionally, the affiant of such an affidavit must either be the employee or representative who made the original record and who had personal knowledge of the act, event, or condition recorded therein or be able, through personal knowledge, to affirm that the original employee who made the record had such personal knowledge; such personal knowledge cannot be supplied by hearsay statements of another, subsequent employee.[176] Thus, the careful practitioner should assure that such an affiant has such personal knowledge or should object on the basis that the proffered affiant does not have such personal knowledge. Such practitioner will also ensure that this affiant has properly and timely been disclosed pursuant to Rule 194, or he should object to that affiant if this witness had not been properly and timely so disclosed. The automatic exclusionary provision of Rule 193.6(a) will require that such a business records affidavit be held inadmissible.[177]

10. Sham Affidavits

A sham affidavit is basically one in which the affiant contradicts his prior deposition or hearing testimony, interrogatory answers, or admissions in the same case.[178] If the affidavit is made after the deposition, hearing, interrogatory response, or admission, and there is a clear contradiction on a material point without sufficient explanation, the affidavit should be disregarded and cannot raise a fact issue.[179] If, however, the affiant was confused during

[173] *See Noriega v. Mireles*, 925 S.W.2d 261, 265 (Tex. App.–Corpus Christi 1996, writ denied).
(stating that if there would have been a dispute as to what is contained in the medical records, the failure to attach the medical records to the summary judgment affidavit would be a substantive defect, but where there was no dispute regarding the contents of the medical records, the failure to attach the relevant medical records to the expert witness's affidavit was a formal, rather than a substantive defect).

[174] *Id.*

[175] *Sosa v. Central Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995).

[176] *Skillern & Sons, Inc. v. Rosen*, 359 S.W.2d 298 (Tex. 1992); *Texas Farm Bureau Mutual Insurance Co. v. Baker*, 596 S.W.2d 639 (Tex. Civ. App. Tyler 1980, *writ ref'd n.r.e); Steves Sash & Door Co. v. WBH International*, 575 S.W.2d 355 (Tex. Civ. App.–San Antonio 1978, *no writ).*

[177] *Alvarado v. Farah Manufacturing*, 830 S.W.2d 911, 914 (Tex. 1992)(the exclusionary rule's purpose is to require complete responses and prevent trial by ambush; the rule is mandatory, and automatic exclusion is required, unless evidence of impossible circumstances is presented).

[178] *Fred Loya Insurance Agency, Inc. v. Cohen*, 446 S.W.3d 913, 927 (Tex. App.–El Paso 2014, pet. denied); *Farroux v. Denny's Restaurants, Inc.*, 962 S.W.2d 108, 111 (Tex. App.–Houston [1st Dist.] 1997, no pet.); *Pierce v. Washington Mutual Bank*, 226 S.W.3d 711, 716-17 (Tex. App.–Tyler 2007, pet. denied).

[179] *Pando v. Southwest Convenience Stores*, 242 S.W.3d 76, 79 (Tex. App.–Eastland 2007, no pet.).

his prior testimony or discovered additional, different materials after that testimony, the sham-affidavit doctrine does not apply.[180] Whether the sham-affidavit theory applies in a particular case appears to be a matter of degree based upon the level of detail and contradiction between the affidavit and the prior testimony, interrogatory answer, or admission.[181]

11. New Rules Permitting Declarations

While federal practice has long allowed non-notarized declarations to be utilized in lieu of affidavits, Texas practice has not allowed the same until recently. Texas Civil Practice & Remedies Code § 132.001 entitled "Unsworn Declaration" was amended effective June 14, 2013, and it basically provides that a conforming unsworn declaration may be used in lieu of a written sworn affidavit, verification, certification, or oath required by statute, rule, or order. Such an unsworn declaration must conform to the statutory form mandating that: it must be in writing; it must be subscribed by the declarant as true under penalty of perjury; and it must contain a specialized jurat reciting the declarant's name, birth date, address, and state and county of declaration.[182] Use of such declarations instead of affidavits in summary judgment practice might greatly reduce controversies over some common affidavit objections referenced in Section V.B above, such as jurat requirements and notary acknowledgment clauses.

C. Deposition Transcripts

Provided that the deposition testimony is competent summary judgment evidence, this discovery can support a summary judgment and may be used.[183] Excerpts of the deposition transcript do not need to be authenticated, and copies of the cited pages typically suffice.[184] Rather than file simply the cited pages, however, a more useful practice would be to include the deposition's cover page, cited portions, reporter's certificates and the deponent's verification page (if signed and returned).

Depositions of an interested party, and the ease with which sham affidavits might be created, present some unique challenges and opportunities to the movant or non-movant. In many cases, an interested party's deposition will be taken before summary judgment is sought. Then, in the face of a no-evidence motion for summary judgment, the interested party adds to the evidence through an affidavit. Conflicts between the two could cause problems for the movant.

For example, at her deposition the witness testified multiple times that she never once spoke with her mother about the mother's estate planning desires. Faced with a no-evidence motion for summary judgment, the same witness swears in her affidavit that she has personal knowledge of her mother's estate planning desires based upon personal interaction. Ordinarily, if conflicting inferences can be drawn from statements made by the same party, we have a fact issue.[185]

But a party cannot file an affidavit in response to summary judgment that contradicts his own deposition testimony without explaining the contradiction.[186] If the affidavit does not explain the reason for the contradiction, the court is correct to assume that the affidavit is a sham intended only to generate a fact issue.[187] The conflicting evidence is rightfully not considered. Thus, movants should scrutinize the affidavits of witnesses that have already testified by deposition to determine if such an effort is at work.

D. Interrogatory Responses

Responses to interrogatories are perfectly acceptable summary judgment evidence, provided that the answers are otherwise admissible into evidence. The key point to remember in the use of interrogatory responses is focused on the party offering them as a part of the summary judgment record. Answers to interrogatories can be used only against the party answering them.[188] A party cannot use its own interrogatory responses.[189]

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[180] *Santander Consumer USA, Inc. v. Palisades Collection, LLC,* 447 S.W.3d 902, 908 (Tex. App.–Dallas 2014, pet. denied)(when conflicting inferences can be drawn between the affiant's affidavit and previous deposition testimony on a material issue, a fact issue is created, defeating summary judgment). *See also Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5, Tex. 1988).

[181] *Cantu v. Peacher,* 53 S.W.3d 5, 10-11 (Tex. App.–San Antonio 2001, pet. denied).

[182] TEX. CIV. PRAC. & REM. CODE § 132.001(c)-(d).

[183] *Rallings v. Evans*, 930 S.W.2d 259, 262 (Tex. App. – Houston [14th Dist.] 1996, no writ); *Wiley v. City of Lubbock,* 626 S.W.2d 916, 918 (Tex. App.–Amarillo 1981, no writ).

[184] Rule 166a(d); *McConathy v. McConathy*, 869 S.W.2d 341, 342 (Tex. 1994) (per curiam).

[185] *Randall,* 752 S.W.2d at 5.

[186] *Burkett v. Wellborn*, 42 S.W.3d 282, 285 (Tex. App. – Texarkana 2001).

[187] *Burkett*, 42 S.W.3d at 285; *Farroux,* 962 S.W.2d at 111.

[188] *In re Denison*, 11-99-00262-CV, 2001 WL 34377242, at *3 (Tex. App.–Eastland Apr. 26, 2001), citing *Walker v. Horine,* 695 S.W.2d 572, 575 (Tex. App.–Corpus Christi 1985, no writ); *Jeffrey v. Larry Plotnick Co., Inc.,* 532 S.W.2d 99, 102 (Tex. Civ. App.–Dallas 1975, no writ).

[189] Rule 197.3; *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000).

E. Admissions

Rule 198.3 states in relevant part that "a matter admitted under this rule is conclusively established as to the party making the admission....". Like interrogatories, answers to requests for admissions can be used only against the party answering them.[190] Additionally, in cases with multiple defendants, matters admitted by one defendant are not conclusively established as to another defendant.[191] Moreover, a party's denials to requests for admissions are not proper summary judgment evidence for that party.[192]

F. Request for Production Responses

One benefit of offering responsive documents supplied pursuant to a request for production is their self-authenticating nature.[193] Keep in mind that documents are not, by themselves, self-authenticated merely because the documents were produced in the course of discovery.[194] What matters is who produced the documents and against whom the produced documents are offered.

Documents produced by an opposing party in response to a request for production are automatically authenticated for use against that opposing party.[195] The same documents, when used by the same producing party, are not self-authenticated when the producing party wants to include them in the summary judgment record.

G. Other Discovery Responses

In addition to affidavits, deposition transcripts, and discovery products, competent summary judgment evidence could be comprised of other elements. Stipulations, for example, are contracts between the parties to a proceeding.[196] Though their use may be limited to only specific parts of the proceedings, such stipulations could form a part of the summary judgment record.[197] Photographs, when properly authenticated, could be used as summary judgment evidence.[198] Some Texas appellate courts have even held that testimony from a prior trial (not involving the very same parties) can form competent summary judgment evidence.[199]

H. Certified Public Records

Texas Rule of Evidence 803(8) expressly provides that public records are an exception to the hearsay rule, allowing for the admission of records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

> (A) the activities of the office or agency;
> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases, matters observed by police officers and other law enforcement personnel; or
> (C) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate lack of trustworthiness.

Texas Rule of Evidence 902(4) provides that certified copies of public records are self-authenticating. As referenced below in Section V. J., public records printed from government websites are also authenticated under Texas Rule of Evidence 903(5).

I. Cell Phone Records

In a probate litigation context, cell phone records can be useful in a variety of situations. For example, such records can be particularly helpful in showing the time and date of certain communications, such as an undue influencer's contact with an estate planner. Cell phone and text-message history is not hearsay as a matter of law. Automatic electronic recording devices or computer self-generated data that is simply being

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[190] *In re Denison*, 2001 WL 34377242, at *3.

[191] *Fiebig v. Fiebig*, 14-12-01166-CV, 2012 WL 9390623, at *3 (Tex. App.–Houston [14th Dist.] Oct. 22, 2012), citing *Allen v. Allen*, 280 S.W.3d 366, 376 (Tex. App.–Amarillo 2008, pet. denied) (discussing in the context of a summary judgment that "in a suit against multiple defendants, evidence in the form of responses to requests for admissions made by one defendant is not admissible against other defendants").

[192] *In re Denison*, 2001 WL 34377242, at *3, citing *City of Richland Hills v. Bertelsen*, 724 S.W.2d 428, 431 (Tex. App.–Fort Worth 1987, no writ); *Denton Construction Company v. Mike's Electric Company, Inc.*, 621 S.W.2d 846, 848 (Tex. App.–Fort Worth 1981, writ ref'd n.r.e.).

[193] Rule 193.

[194] *Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 451-452 (Tex. App.–Dallas 2002, no pet.).

[195] Rule 193.7.

[196] *First Nat'l. Bank in Dallas v. Kinabrew*, 589 S.W.2d 137 (Tex. Civ. App.–Tyler 1979, writ ref'd n.r.e.).

[197] *Kinner Transp. & Enters., Inc. v. State*, 614 S.W.2d 188, 189 (Tex. Civ. App. – Eastland 1981, no writ).

[198] *See Segrest v. Haseltine*, No. 09-01-524CV, 2002 WL 31835067, at *2 (Tex. App.–Beaumont 2002, pet. denied); *Langford v. Blackman*, 790 S.W.2d 127, 132 (Tex. App.–Beaumont 1990, reversed on other grounds).

[199] *Murillo v. Valley Coca-Cola Bottling Co.*, 895 S.W.2d 758, 761 (Tex. App.–Corpus Christi 1995, no pet); *Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239, 244 (Tex. App.–Texarkana 1992, writ denied).

automatically recorded by a machine is not hearsay.[200] Moreover, Texas courts have refused the invitation to hold that printing such information somehow converts it into hearsay.[201]

J. Internet Records

Internet records, especially public records on the internet, can be extremely useful in many probate litigation cases. Such records include, but are not limited to, tax appraisal histories, homestead exemption records, deed records, court docket sheets, corporate entity status, title certificates, and marriage records. Many of these documents are self-authenticating. For example, courts in other jurisdictions have admitted into evidence printouts of postings on the website of the United States Census Bureau as self-authenticating under Federal Rule of Evidence 902(5).[202] Federal Rule of Evidence 902(5) and Texas Rule 902(5) are identical. "When combined with the public records exception to the hearsay rule–Rule 803(8)–these official publications posted on government agency websites should be admitted into evidence easily."[203] Texas courts have relied on federal case law to hold that documents printed from government websites are self-authenticating under Texas Rule of Evidence 902(5).[204]

Authenticating a private website is another matter. As one federal court has noted, "Anyone can put anything on the Internet . . . [The Internet is] one large catalyst for rumor, innuendo, and misinformation."[205] Most private websites are authenticated with a sponsoring witness under Texas Rule of Evidence 901(b)(1). According to one evidence commentator, the testimony must establish: (1) What was actually on the website? (2) Whether the exhibit or testimony accurately reflects the website? (3) If so, is it attributable to the owner of the site?"[206] The same commentator suggests that the following factors will influence courts in ruling whether to admit evidence of Internet postings:

> The length of time the data was posted on the site; whether others report having seen it; whether it remains on the website for the court to verify; whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations); whether the owner of the site has elsewhere published the same data, in whole or in part; whether others have published the same data, in whole or in part; and whether the data has been republished by others who identify the source of the data as the website in question.[207]

Usually, the most difficult element in authenticating a website is proving the information contained in the website is attributable to the owner. As a practical matter, consider sending a request for admission asking the other party to admit the web page as a true and correct copy of what was posted during the relevant time frame. An objection to authentication must be made in good faith.[208] If the party produces a copy of their website in response to a request for production, the website is self-authenticated under Rule 193.2.

K. Statement of Intent to Use

Essentially, the "notice of intent to use" contemplated by Rule 166a(d) is achieved when the following statement is included as part of a traditional

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[200] *Murray*, 804 S.W.2d 279, 284 (Tex. App.–Fort Worth 1991, pet. ref'd)(holding printout of electronic lock showing entrance records was not hearsay). *See, e.g., Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 564 (D. Md. 2007)("When an electronically generated record is entirely the product of the functioning of a computerized system or process, such as the "report" generated when a fax is sent showing the number to which the fax was sent and the time it was received, there is no "person" involved in the creation of the record, and no "assertion" being made. For that reason, the record is not a statement and cannot be hearsay."), citing *State v. Dunn*, 7 S.W.3d 427, 432 (Mo.Ct.App.2000) ("Because records of this type [computer generated telephone records] are not the counterpart of a statement by a human declarant, which should ideally be tested by cross-examination of that declarant, they should not be treated as hearsay, but rather their admissibility should be determined on the reliability and accuracy of the process involved.").

[201] *Murray*, 804 S.W.2d at 284 ("The mere fact that the same data was ultimately printed in hard copy would not convert it into hearsay.").

[202] *See U.S. Equal Employment Opportunity Commission v. E. I. DuPont De Nemours and Co*., 2004 U.S. Dist. LEXIS 20748, 2004 WL 2347556 (E.D. La. Oct. 18, 2004).

[203] *Lorraine v. Markel Am. Ins. Co*., 241 F.R.D. 534, 551 (D. Md. 2007).

[204] *Williams Farms Produce Sales, Inc. v. R & G Produce Co.*, 443 S.W.3d 250, 259 (Tex. App.–Corpus Christi 2014, no pet.). *See also Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 857 n. 6 (Tex.2011) ("Where the Federal Rules of Evidence are similar, we may look to federal case law for guidance in interpreting the Texas evidentiary rules.").

[205] *St. Clair v. Johnny's Oyster & Shrimp, Inc*., 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999).

[206] *Lorraine*, 241 F.R.D. at 555-556 (quoting Gregory P. Joseph, "Internet and Email Evidence," reprinted in 5 Stephen A. Satlzburg et al., Fed. R. Evid. Man., Part 4 at 20 (9th ed. 2006).

[207] *Id.*

[208] Rule 193, Comment 7.

(or hybrid) motion for summary judgment or response after identifying the evidence relied upon: "Pursuant to Texas Rule of Civil Procedure 166(d), [Plaintiff/Defendant] declares [his/her] intent, with respect to the above exhibits, to utilize previously unfiled products of discovery in connection with this [motion/response]." The "notice of intent to use" is not interpreted literally.[209] Thus, a separate statement is not required, although it is probably a better practice to include one.

As for the specificity requirement, Rule 166a(d) requires a party to identify the *specific* evidence on which it relies.[210] But nothing in Rule 166a(d) limits a trial court from considering unreferenced portions of discovery as long as the actual documents are before the trial court.[211]

In other words, a barebones notice of intent to use "unfiled discovery" without any specific reference to the discovery, is insufficient.[212] Similarly, while a party may attach an entire deposition to a motion for summary judgment or response thereto, general references to voluminous records are similarly insufficient.[213]

L. Secure Ruling on Evidentiary Objections

When it comes to objecting to summary judgment evidence, the critical distinction is whether the defect in the evidence is one of form or substance. For defects in form, a party must object in writing to the summary judgment evidence and place the objections before the trial court, or its objections will be waived.[214] On the other hand, defects in substance are not waived by failing to assert a written objection, and they may be raised for the first time on appeal.[215]

The concept of defect in form in summary judgment proof first appeared in *Youngstown Sheet & Tube Co. v. Penn*.[216] The initial mention of "substantive defect" appeared in *Landscape Design and Construction, Inc. v. Warren*.[217] The seminal 1998 Houston Court of Appeals (1st Dist.) case of *Mathis v. Bocell* explained that a defect is substantive if the evidence is incompetent (not waivable), and it is formal if the evidence is competent but inadmissible (waivable).[218] Substantive defects are never waived because the evidence is incompetent and cannot be considered under any circumstances.[219]

Regarding a trial court's rulings on objections to summary judgment evidence, arguments have been made that the objecting party's objections are waived if he does not secure a written ruling from the court at or

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[209] *Garcia v. Andrews*, 867 S.W.2d 409 (Tex. App.—Corpus Christi 1993, no writ)(where a party's summary judgment motion specifically referenced by page number the deposition excerpts which they were offering as proof for their motion and either directly quoted, or paraphrased the substance of the deposition testimony upon which they relied (which was actually attached to the motion as an exhibit and incorporated by reference), but the party did not file a separate notice of intent to use the deposition excerpts as summary judgment proof, a statement in a motion for summary judgment that stated that it was based on the attached evidence and pleadings on file was, in fact, a statement of intent to use the specified discovery as summary judgment proofs within meaning of Rule 166a(d)).

[210] *Id.* (finding trial court abused its discretion in striking *unreferenced* portions of movant's evidence where movant had attached only portions of depositions and other documents totaling 278 pages and included approximately 20 references to parts of this evidence that supported her claim).

[211] *Id.*

[212] *Salmon v. Miller*, 958 S.W.2d 424, 428 (Tex. App.–Texarkana 1997, pet. denied)("Without some description of the evidence which the movant seeks to use as summary judgment evidence, the judge has no indication what impact this evidence would have on the motion. Without the specific evidence, courts would be asked to rule on summary judgments based upon evidence that the parties allege to possess in support of their positions, but that is not before the trial judge. The burden would be placed upon the trial judge to request the unfiled evidence before ruling on the summary judgment motion. We do not believe that Rule 166a(d) intended to place this burden on the trial judge.")

[213] *Guthrie v. Suiter*, 934 S.W.2d 820, 825-26 (Tex. App.–Houston [1st Dist.] 1996, no writ)("We agree that under Rule 166a(d) a party may attach an entire deposition as part of his summary judgment proof. However, the rule does not relieve the party's burden of pointing out to the trial court where in the evidence the issues set forth in the motion or response are raised.").

[214] *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.–Houston [14th Dist.] 2000, no pet.). *See Grand Prairie I.S.D. v. Vaughan*, 792 S.W.2d 944, 945 (Tex. 1990).

[215] *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.–Dallas 2004, pet. denied); *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.–Houston [14th Dist.] 2003, pet. denied).

[216] 363 S.W.2d 230, 234 (Tex.1962).

[217] 566 S.W.2d 66, 67 (Tex. Civ. App.–Dallas 1978, no writ).

[218] *Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.–Houston [1st Dist.] 1998, no pet.), citing Address by Justice Sarah B. Duncan, *No–Evidence Motions for Summary Judgment: Harmonizing Rule 166a(i) and its Comment*, 21st Annual Page Keeton Products Liability and Personal Injury Law Conference (November 20–21, 1997) 25–26.

[219] *Id.*, citing Address by Justice Sarah B. Duncan at 26 ("If evidence is incompetent, it necessarily has no probative value because it either does not relate to a controlling fact, or, if material, does not tend to make the existence of that fact more or less probable; therefore, there is no need to object to the erroneous introduction of incompetent evidence either to preserve the error in its admission or to ensure it is not treated as 'some evidence.' ") (citing *Aetna Ins. v. Klein*, 160 Tex. 61, 325 S.W.2d 376 (1959)).

before the time that it signs the order granting or denying the summary judgment.[220] Most cases, however, hold that an objecting party does not waive his objections so long as the trial court enters written rulings thereon when or before it signs the order granting or denying summary judgment or, at the latest, while that court retains plenary power.[221] Thus, the careful practitioner should persistently pursue the trial court and attempt to obtain a written ruling on his summary-judgment evidentiary objections before or at the time when the court signs its substantive order on the summary judgment motion.

VI. JUDICIAL NOTICE

A. Doctrine Defined

The doctrine of judicial notice generally is well established in Texas jurisprudence. Texas Rule of Evidence 201 states that a court may judicially notice facts and may take such judicial notice on its own.[222] A court must take judicial notice if a party requests it and the court is supplied with the necessary information.[223] Indeed, the trial court may take judicial notice at any stage of its proceeding, and an appellate court has the power to take judicial notice for the first time on appeal.[224] Furthermore, a trial court will take judicial notice of another court's records if a party provides proof of same, and such a court may take judicial notice of its own records in a cause involving the same subject matter between essentially the same parties; the court may take judicial notice, whether requested or not, and the court need not announce that it is taking such judicial notice.[225]

B. Special Application in Probate Proceedings and Summary Judgments

Probate Courts are particularly well positioned to utilize judicial notice in their proceedings because of special statutory authorization. Texas Estates Code §§ 52.001-.003, 52.052, and 54.052 provide, essentially, that probate court records and files are admissible as evidence in any Texas court, and such records and files include: the judge's probate docket, the probate claim docket, the probate fee book, and all case files involving a probate proceeding. Similar rules apply in guardianships.[226] The authors are not aware of any similar Texas statutory provision generally applying to all district court and county court at law case files. Decided cases have upheld expansive use of judicial notice by Probate Courts.[227]

In summary judgment practice, a party could use judicial notice in a variety of ways. For example, a movant in a traditional motion for summary judgment seeking to convince the court that all material facts support his claim could ask the court to take judicial notice of its entire file in order to cover the possibility that the movant might have omitted a significant piece of evidence in filing his motion. Alternatively, a non-movant resisting a no-evidence motion might seek judicial notice of the entire file in hopes that it contained, somewhere, more than a scintilla of evidence to defeat the no-evidence motion.[228]

One limited exception to the utilization of judicial notice in summary judgment proceedings appears to be set out in Chapter 38 of the Texas Civil Practice & Remedies Code dealing with contract claims. Section

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[220] *Rankin v. Union Pacific Railroad Company*, 319 S.W.3d 58, 65 (Tex. App.–San Antonio 2010, no pet.)(trial court's ruling sustaining objections to summary-judgment evidence declared ineffective when that ruling appeared in an order signed after the trial court had granted the summary judgment and even after the court's plenary power had expired).

[221] *Wolfe v. Devon Energy Production Company, LP*, 382 S.W.3d 434, 446-48 (Tex. App.–Waco 2012, pet. denied)(the Texas Rules of Civil Procedure do not prescribe a period of time in which a trial court is required to rule on summary-judgment objections; Texas Rule of Appellate Procedure 33.1(a) states that, to preserve a complaint for appellate review, the record must demonstrate that the trial court ruled on the objection, either expressly or implicitly; thus, even when the trial court delays executing its order on such objections for almost a month after it signs the summary judgment, the objecting party does not waive his objections so long as the trial court still had plenary jurisdiction); *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280 (Tex. App.–Dallas 2009, no pet.)(same).

[222] TEX. R. EVID. 201(b), (c)(1).

[223] *Id*. 201(c)(2).

[224] *Id.* 201(d); *Office of Public Utility Counsel v. Public Utility Commission*, 878 S.W.2d 598, 600 (Tex. 1994).

[225] *Freedom Communications v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012); *Sierad v. Barnett*, 164 S.W.3d 471, 481 (Tex. App.–Dallas 2005, no pet.).

[226] TEC §§ 1055.102, 1052.001-.004, and 1052.052.

[227] *In re The Estate of Downing*, 461 S.W.3d 231 (Tex. App.El Paso 2015, no pet.)(in appeal from Probate Court No. 3 of Dallas County, appellate court held that such trial court could properly take judicial notice of its own records and prior pleadings, with or without the request of a party); *In re Estate of Clark*, 198 S.W.3d 273, 275 (Tex. App.–Dallas 2006, pet. denied)(judicial notice utilized to sustain removal of personal representative of estate for gross mismanagement and misconduct); *Estate of York*, 934 S.W.2d 848, 851 (Tex. App.–Corpus Christi 1996, no writ).

[228] *C.f. Sosa v. Central Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995)(defendant based his summary judgment motion upon admissions made in plaintiffs' first amended petition; however, before the hearing, plaintiffs filed a second amended petition changing their factual statements; Supreme Court held that summary judgment was improper because defendant's basis no longer existed).

38.004 authorizes a trial court to take judicial notice of the usual and customary attorneys' fees and of the contents of the case file in deciding an award of attorneys' fees, but such judicial notice is restricted to a trial on the merits (either a bench or jury trial).[229]

C. Interplay With Judicial Admissions

Judicial notice is sometimes combined with the concept of a party's judicial admissions in summary judgment practice. That is, under Rule 166a, pleadings generally are not considered competent summary judgment evidence.[230] When a party's pleadings contain statements admitting facts or conclusions directly contradicting his theory of recovery or defense, a trial court may take judicial notice of such pleadings, and they can constitute competent summary judgment proof for the opposing party.[231] The careful practitioner involved in a summary judgment matter would do well to review all pleadings and motions filed by the opposing party to ascertain whether he has made any material judicial admissions, after which that practitioner should request judicial notice of same.

Because the relevant case law is not entirely consistent, legitimate arguments can be advanced by either party concerning the existence *vel non* of such a judicial admission. The most restrictive cases require the following elements to establish a judicial admission: the statement must be made during a judicial proceeding; it must be contrary to an essential fact or defense asserted by the party; it must be deliberate, clear, and unequivocal; it cannot be destructive of the opposing party's theory of recovery or defense; and enforcing the admission would be consistent with public policy.[232] Similar cases restrict a judicial admission to solely an admission of fact.[233] Other cases focus on the definition of a judicial admission as "a formal act of waiver of proof usually found in pleadings or the stipulations of the parties."[234] Thus, the summary judgment party arguing in favor of finding a judicial admission should focus on the less restrictive case law, whereas the party opposing such a finding should cite the more restrictive authorities. Each party should, however, beware of the case law holding that, in order to rely upon judicial admissions on appeal, the party asserting such admissions must object to the introduction of any contrary evidence.[235] Moreover, recognize that the Texas Supreme Court has pronounced that an assertion of fact pleaded in the alternative is not a judicial admission.[236]

VII. BURDEN OF PROOF AND CERTAIN EVIDENTIARY PRESUMPTIONS

A. Identifying Who Has the Burden of Proof

Identifying which party has the burden of proof is critical in summary judgment practice for a variety of reasons, including analyzing whether to file a traditional motion for summary judgment, no-evidence motion for summary judgment, or a hybrid motion. It also assists in preparing a response. Case law and/or statutes define which party has the burden of proof for numerous causes of action and defenses regularly implicated in probate litigation. In the absence of a clear rule, however, Texas courts have noted, "the test for determining which party has the . . . burden of establishing a case is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden, of course, being on the adverse party."[237]

Many different types of presumptions can be implicated and/or utilized in probate litigation cases. These "short cuts" can have a significant impact on the strength and/or weakness of particular claims, defenses, and/or positions. In many instances, certain presumptions can be very difficult to overcome, especially when the rules of evidence significantly restrain the ability to introduce relevant admissible evidence.

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[229] *Coward v. Gateway National Bank*, 525 S.W.2d 857, 859 (Tex. 1975)(§ 38.004 may not be utilized in passing on a motion for summary judgment).

[230] *Laidlaw Waste Systems v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995); *Hidalgo v. Surety Savings & Loan Association*, 462 S.W.2d 540, 545 (Tex. 1971).

[231] *H2O Solutions, Ltd. v. PM Realty Group*, 438 S.W.3d 606, 616-17 (Tex. App.–Houston [1st Dist.] 2014, pet. denied)(because plaintiff's earlier pleadings contained judicial admissions establishing that there was no valid contract, defendant prevailed on summary judgment regarding plaintiff's breach-of-contract claim); *Lyons v. Lindsey Morden Claims Management*, 985 S.W.2d 86, 92 (Tex. App.–El Paso 1998, no pet.)(summary judgment can be granted based upon opposing party's judicial admissions in his pleadings).

[232] *H2O Solutions*, 438 S.W.3d at 617; *Kahn v. GBAK Properties, Inc.*, 371 S.W.3d 347, 357 (Tex. App.–Houston [1st Dist.] 2012, no pet.).

[233] *Holloway v. Holloway*, 671 S.W.2d 51, 59 (Tex. 1983); *Houston First American Savings v. Musick*, 650 S.W.2d 764, 769 (Tex. 1983).

[234] *Mendoza v. Fidelity & Guaranty Insurance Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980).

[235] *Musick*, 650 S.W.2d 769; *RBC Capital Markets, LLC v. Highland Capital Management, L.P.*, 2015 WL 7873712 (Tex. App.–Dallas 2015, no pet.).

[236] *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001).

[237] *Union City Transfer v. Adams*, 248 S.W.2d 256 (Tex. App.–Ft. Worth 1952, writ ref'd n.r.e.)(citing *Walker v. Money*, 132 Tex. 132, 120 S.W.2d 428; *Keller v. Miller*, Tex. Civ. App., 207 S.W.2d 684, writ refused, n.r.e.).

B. Prima Facie Evidence

Several Texas courts have noted that the term "prima facie evidence" is ambiguous at best. As Professor Wigmore has highlighted, it is sometimes used "as equivalent to the notion of a presumption," i.e., it entitles the proponent to an instructed verdict on the issue in the absence of evidence to the contrary.[238] Prima facie evidence has also been used to mean sufficient evidence to get a litigant to the trier of fact on the issue presented.[239]

C. Taking Advantage of Evidentiary Presumptions and Prohibitions in Probate Litigation

A presumption is a rule of law requiring the fact finder to reach a particular conclusion in the absence of contrary evidence.[240] The effect of a presumption is to force the party against whom it operates to produce evidence to negate the presumption.[241] Once that burden is discharged and evidence contradicting the presumption has been offered, the presumption disappears and "is not to be weighed or treated as evidence."[242] The Texas Supreme Court explained:

> "[A] presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts."[243]

D. Common Burdens of Proof and Evidentiary Presumptions and Prohibitions in Probate Litigation

1. Fiduciary Duty Burdens of Proof and Evidentiary Presumptions

a. The Existence of a Fiduciary Relationship

A fiduciary relationship is a formal, technical relationship of confidence and trust that imposes upon a fiduciary greater duties than normal between parties as a matter of law.[244] Texas law recognizes basically two forms of fiduciary relationship: a traditional fiduciary relationship and an informal fiduciary relationship. As to proving a fiduciary relationship regarding traditional fiduciaries, the law presumes that certain traditional relationships impose fiduciary duties. Those relationships include: a trustee and his beneficiaries; an executor and his devisees; an attorney and his client; partners and joint venturers; agents and their principals; and real estate brokers and agents.[245] In such cases, the beneficiary/principal bears no burden of proof to establish the fiduciary relationship; the law imposes it.

With respect to informal fiduciary relationships, those usually arise in cases in which influence has been acquired and abused or confidence has been reposed and betrayed deriving from moral, social, domestic, or personal relationships where a special confidence is reposed in another who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the other.[246] A finding of such an informal fiduciary relationship is highly fact-intensive, and the burden to prove the same is upon the putative beneficiary/principal.[247] A fiduciary relationship is an extraordinary one and will not be created lightly.[248] The mere fact that one party to a relationship subjectively trusts the other is not enough to prove the existence of a fiduciary relationship.[249]

b. Presumption of Unfairness in Transactions Between Fiduciary and Principal

If a fiduciary profits or benefits in any way from a transaction with the beneficiary/principal or if the fiduciary places himself in a position in which his self-

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[238] *Coward v. Gateway Nat. Bank of Beaumont*, 525 S.W.2d 857, 859 (Tex. 1975).

[239] *In re Estate of Womack*, 280 S.W.3d 317, 322 (Tex. App.—Amarillo 2008, no pet.), citing *Coward*, 525 S.W.2d at 859.

[240] *Joplin v. Borusheski*, 244 S.W.3d 607, 611 (Tex. App.–Dallas 2008, no pet.)(citing *Temple I.S.D. v. English*, 896 S.W.2d 167, 169 (Tex. 1995)).

[241] *Id.*

[242] *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993).

[243] *Combined Am. Ins. Co. v. Blanton*, 163 Tex. 225, 353 S.W.2d 847, 849 (Tex. 1962).

[244] *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 590 (Tex. App.–Dallas 1994, no pet.), citing *Central Sav. & Loan v. Stemmons N.W. Bank, N.A.*, 848 S.W.2d 232, 243 (Tex. App.–Dallas 1992, no writ).

[245] *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945)(trustees); *Humane Society of Austin v. Austin National Bank*, 531 S.W.2d 574 (Tex. 1975)(executors); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999)(attorneys); *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938)(partners); *Rankin v. Naftalis*, 557 S.W.2d 940 (Tex. 1977)(joint venturers); *Stephens County Museum, Inc. v. Swenson*, 515 S.W.2d 257 (Tex. 1974)(power-of-attorney agents); *Anderson v. Griffith*, 501 S.W.2d 695 (Tex. Civ. App.–Fort Worth 1973, writ ref'd n.r.e.)(real estate agents).

[246] *Texas Bank and Trust Company v. Moore*, 595 S.W.2d 502, 507-08 (Tex. 1980).

[247] *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Marathon Oil Co.*, 893 S.W.2d at 591 ("The party claiming a fiduciary duty has the burden of proving a fiduciary relationship exists.").

[248] *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 728 (Tex. App.–Dallas 2015, no pet.).

[249] *Id. See also Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595 (Tex.1992) ("[M]ere subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship.").

interest might conflict with his fiduciary obligations, a presumption of unfairness arises to shift the burden of proof and persuasion to the fiduciary.[250] The fiduciary then bears the burden of proof to demonstrate that: the transactions were fair and equitable to the beneficiary; the fiduciary made reasonable use of the confidence that the beneficiary placed in him; the fiduciary acted in the utmost good faith and exercised the most scrupulous honesty toward the beneficiary; the fiduciary placed the interests of the beneficiary before his own, did not use the advantage of his position to gain a benefit for himself at the expense of the beneficiary, and did not place himself in any position where his self-interest might conflict with his fiduciary duties; and the fiduciary fully and fairly disclosed all important information to the beneficiary concerning such transactions.[251] If there is no evidence to prove these elements, breach of fiduciary duty is established as matter of law, and even if there were a trial, no breach-of-fiduciary-duty question is required to be submitted to the jury.[252]

The person to whom fiduciary duties are owed does not need to prove damages to avoid the fiduciary's self-dealing transaction.[253] That person can avoid the self-dealing transaction even though the fiduciary has acted in good faith.[254] "[A] self-dealing transaction itself constitutes an injury *vel non*, the undoing of which is an available remedy."[255]

c. If Fiduciary Has Commingled Assets and Cannot Trace, All Assets are Presumed to Belong to Beneficiary

If the beneficiary submits competent evidence that his fiduciary has committed self-dealing and commingled the beneficiary's assets with his own, the fiduciary bears the burden accurately to trace such commingled assets; upon failure to so precisely trace, all assets are presumed to belong to the beneficiary.[256] Moreover, in such instances, the beneficiary is presumed to be entitled to recover interest on his damages/remedies, as a matter of law, at the highest legal rate.[257]

d. Release and Ratification

In these types of cases, the defense of ratification of an asserted breach of fiduciary duty is occasionally made the subject of a summary judgment motion.[258] If the alleged breach involves a failure to provide full disclosure, equivalent to constructive fraud, or outright fraud upon the beneficiary, the ratification defense should fail as a matter of law: a beneficiary cannot ratify a fraud (actual or constructive, extrinsic or not) against himself, as a matter of law.[259] Regarding releases in the fiduciary context, Texas Trust Code § 114.005 provides that if a beneficiary has full legal capacity and is acting on full information, he may release a trustee from any duty or liability, so long as the release is in writing and delivered to the trustee. While this statute does not directly address the burden of proof, the Texas Supreme Court has held that such a release is not effective unless it is made to appear that when he gave his consent, the beneficiary had full knowledge of all material facts that the trustee knew.[260] Thus, it appears that the evidentiary burden to show an effective release is on the fiduciary.

e. Unusual Exceptions in Fiduciary Litigation

(1). Presumption that Parties to a Contract are Charged with Obligation to Read What They Sign is Reversed in a Fiduciary Relationship; Beneficiary is Relieved of that Duty and May Justifiably Rely on his Fiduciary.

Normally, parties to an arm's-length transaction are charged with the obligation of reading what they sign.[261] If, however, there is a traditional or informal

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[250] *Keck, Mahin & Cate v. National Union Fire Insurance Co. of Pittsburgh*, 20 S.W.3d 692, 699 (Tex. 2000); *Moore*, 595 S.W.2d at 509.

[251] *Slay*, 187 S.W.2d at 387-88; *Swenson*, 517 S.W.2d at 261; *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992); *Johnson*, 120 S.W.2d at 787.

[252] *Moore*, 595 S.W.2d at 509.

[253] *Fisher v. Miocene Oil & Gas Ltd*., 335 F. App'x 483, 486–87 (5th Cir. 2009) (concluding that since Texas law does not require proof of damages as an element of a claim for breach of fiduciary duty, judgment should be entered voiding challenged self-dealing transactions).

[254] *Id.*

[255] *Id.*

[256] *InterFirst Bank of Dallas v. Risser*, 739 S.W.2d 882, 888 (Tex. App.–Texarkana 1987, no writ); *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.–Fort Worth 1967, writ ref'd. n.r.e.); *Langford v. Shamburger*, 392 F.2d 939, 942-45 (5th Cir. 1968).

[257] *Langford*, 392 F.2d at 942-45.

[258] *Avary v. Bank of America, N.A.*, 72 S.W.3d 779 (Tex. App.–Dallas 2002, pet. denied).

[259] *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984)(even though beneficiary signed a settlement agreement and received a monetary benefit there from, the beneficiary, as a matter of law, did not ratify the transaction); *Spangler v. Jones*, 861 S.W.2d 392 (Tex. App.–Dallas (*en banc*) 1993, writ denied)(beneficiary's execution of a sale agreement and accepting its benefits did not ratify the fiduciary's constructive fraud because such fraud is incapable of ratification); *Herider Farms v. Criswell*, 519 S.W.2d 473 (Tex. Civ. App.–El Paso 1975, writ ref'd. n.r.e.).

[260] *Slay*, 187 S.W.2d at 377.

[261] *Indemnity Insurance Company of North America v. W.L. Macatee & Sons*, 129 Tex. 166, 101 S.W.2d 553 (1937).

fiduciary relationship between the parties, the beneficiary is relieved of the duty of reading the instrument and can justifiably rely on the fiduciary to treat him with the utmost fairness and to fully disclose to him what it was he was signing.[262] The careful practitioner should watch for this exception in summary judgment practice.

(2). Settlor (and his or her agents) May Not Later Testify as to Their "Actual Intentions" in Earlier Establishing the Trust.

Along with particular evidentiary presumptions in fiduciary litigation, there are some evidentiary prohibitions as well. One of those is the case-law rule that grantors, after their initial settlement of the subject trust, may not later testify contrary to the trust language about their alleged "actual intentions" in originally establishing the trust.[263] This case-announced rule is supported by the statutory requirements that the "terms of the trust" mean the intention of the settlor expressed in a manner that admits of its proof in judicial proceedings and that a trust is enforceable only if there is written evidence of its terms bearing the signature of the settlor.[264] Additional case law supports these statutory restrictions.[265]

2. Burdens of Proof and Evidentiary Presumptions Concerning Lack of Contractual Capacity

The party seeking to invalidate a transaction on the basis of lack of mental capacity has the burden to prove incapacity.[266] To establish "mental capacity" to contract in Texas the evidence must show that, at the time of contracting, the person "appreciated the effect of what [she] was doing and understood the nature and consequences of [her] acts and the business [she] was transacting."[267] Mental capacity, or lack thereof, may be shown by circumstantial evidence, including: (1) a person's outward conduct, "manifesting an inward and causing condition;" (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred.[268]

The law presumes that a person executing a contract or instrument had sufficient mental capacity at the time of its execution to understand his legal rights.[269] Elderly persons are not presumptively incompetent.[270] Absent proof and determination of mental incapacity, a person who signs a document is presumed to have read it and understood the document.[271]

3. Burdens of Proof and Evidentiary Presumptions Concerning Gifts

Donative intent, as compared to mental capacity, has its own special rules and presumptions. The party claiming that a transfer is a gift has the burden to prove the elements of a gift.[272]

To establish that a person made a gift for state law purposes (as opposed to federal tax law purposes), the party seeking to enforce the gift has the burden to prove: (1) the donor intended to make a gift; (2) the donor delivered the property to the donee; and (3) the donee accepted the property.[273] The party claiming the gift was made must prove these elements by "clear and convincing evidence."[274] The donor's intent is

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[262] *Thigpen*, 363 S.W.2d at 251-52.

[263] *State v. Rubion*, 158 Tex. 43, 308 S.W.2d 4, 7-11 (1957); *In re White Intervivos Trusts*, 248 S.W.3d 340 (Tex. App.–San Antonio 2007, no pet.); *DuPont v. Southern National Bank*, 771 F.2d 874 (5th Cir. 1985).

[264] Texas Trust Code §§ 111.004(15), 112.004, and 112.051(c)(a modification or amendment of a written trust must itself be in writing).

[265] *Frost National Bank of San Antonio v. Newton*, 554 S.W.2d 149, 154 (Tex. 1977)(an express declaration of purpose in the trust instrument must be followed); *In re Willa Peters Hubberd Testamentary Trust*, 432 S.W.3d 358, 365-67 (Tex. App.–San Antonio 2014, no pet.)(the purposes expressly set out in a trust must be enforced equally rather than after-the-fact contentions regarding differing weights to be attributed to those purposes).

[266] *See Jackson v. Henninger*, 482 S.W.2d 323, 324 (Tex. Civ. App.–Austin 1972, no writ)("The burden of proof rests on those seeking to set aside the deed to show lack of mental capacity of the grantor at the time of the execution of the deed.").

[267] *In re Estate of Robinson*, 140 S.W.3d 782, 793 (Tex. App.–Corpus Christi 2004, pet. denied).

[268] *Id.*

[269] *McDaniel v. Householder*, 11-09-00307-CV, 2011 WL 3793326, at *2 (Tex. App.–Eastland Aug. 25, 2011), citing *Bradshaw v. Naumann*, 528 S.W.2d 869, 873 (Tex. Civ. App.–Austin 1975, writ dism'd).

[270] *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998) ("Unlike minors, the elderly are not presumptively incompetent, nor, we believe, should they be."); *Turner v. Hendon*, 269 S.W.3d 243, 248 (Tex. App.–El Paso 2008, pet. denied).

[271] *Reyes v. Storage & Processors, Inc.*, 995 S.W.2d 722, 725 (Tex. App.–San Antonio 1999, pet. denied), *abrogated on other grounds by Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544 (Tex. 2001).

[272] *Olson v. Estate of Watson*, 52 S.W.3d 865, 870 (Tex. App.–El Paso 2001, no pet.) (citing *Rusk v. Rusk*, 5 S.W.3d 299, 303 (Tex. App.–Houston [14th Dist.] 1999, pet. denied)).

[273] *See Sumaruk v. Todd*, 560 S.W.2d 141, 146 (Tex. Civ. App.—Tyler 1977, no writ).

[274] *See Dorman*, 932 S.W.2d at 227 (citing *Oadra v. Stegall*, 871 S.W.2d 882, 892 (Tex. App.—Houston [14th Dist.] 1994, no writ)).

generally the primary issue.[275] The Texas Commission of Appeals noted this fact over ninety years ago:

> Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift in praesenti at the very time he undertakes to make the gift; * * * the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no further act of dominion or control over it.[276]

"[T]he requisite donative intent is established by, among other things, evidence that the donor intended an immediate and unconditional divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee."[277] Texas courts have held that statements of future intent coupled with retaining control over the allegedly gifted asset have been insufficient to establish donative intent. [278] Similarly, titling assets in the donee's name for purposes other than making a gift has also been held insufficient to establish donative intent.[279]

One way to prove donative intent is to establish a presumption of gift by proof that the transaction transferred property from parent to child.[280] When property is deeded from a parent to a child or children, it is presumed that the parent intended to make a gift.[281]

4. Burdens of Proof and Evidentiary Presumptions Concerning Community Property

Nowadays, fiduciary litigation frequently involves warring family members contesting family trusts or divorcing parties where existing trusts are at issue. These matters usually invoke the following presumptions and complexities.

a. General Community Property Presumption

In Texas, all property possessed by either spouse during or on dissolution of marriage is presumed to be community property.[282] Community property consists of the property, other than separate property, acquired by either spouse during marriage.[283] Separate property is that property owned by a spouse before marriage or acquired afterward by gift, devise, or dissent.[284]

(1) Real Property Presumptions.

For example, it is well settled law in Texas that real property purchased before marriage is separate property.[285] An increase in the value of the property resulting from appreciation or from fortuitous causes such as market fluctuations remains separate property.[286] The character of property is not altered by the sale, substitution, or exchange of the property; separate property that merely undergoes mutations or changes in form remains separate property.[287]

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[275] *Nipp v. Broumley*, 285 S.W.3d 552, 559 (Tex. App.–Waco 2009, no pet.) (citing *Hayes v. Rinehart*, 65 S.W.3d 286, 289 (Tex. App.–Eastland 2001, no pet.); *Lee v. Lee*, 43 S.W.3d 636, 642 n.4 (Tex. App.—Fort Worth 2001, no pet.); *Dorman*, 932 S.W.2d at 227; *Thompson v. Lawson*, 793 S.W.2d 94, 96 (Tex. App.–Eastland 1990, writ denied)).

[276] *Harmon v. Schmitz*, 39 S.W.2d 587, 589 (Tex. Comm'n App. 1931, judgm't adopted) (alteration in original) (quoting *Allen-West Comm'n Co. v. Grumbles*, 129 F. 287, 290 (8th Cir. 1904)).

[277] *Nipp*, 285 S.W.3d at 559 (emphasis omitted) (citing *Wells v. Sansing*, 245 S.W.2d 964, 965 (Tex. 1952); *Edwards v. Pena*, 38 S.W.3d 191, 197 (Tex. App.–Corpus Christi 2001, no pet.); *Oadra*, 871 S.W.2d at 890; *Thompson*, 793 S.W.2d at 96; *Akin v. Akin*, 649 S.W.2d 700, 703 (Tex. App.–Fort Worth 1983, writ ref'd n.r.e.)).

[278] *See id.* (holding donor lacked donative intent to transfer ownership of certificates of deposit when evidence to prove donative intent consisted of past statements about donor's future intent). *See also Hayes*, 65 S.W.3d at 288–89.

[279] *See Hayes*, 65 S.W.3d at 288–89 (the donor's brother and sister-in-law offered evidence that donor put money in alleged donee's name to get breathing machine and medication paid for by Medicare and Medicaid and to receive treatment at the V.A. Hospital).

[280] *See Richardson v. Laney*, 911 S.W.2d 489, 492 (Tex. App.–Texarkana 1995, no writ).

[281] *Id.* at 493 (finding presumption of gift from parent to child rebutted where evidence established that the parent did not relinquish possession, but continued to live on the property, the property was put in child's name to retain Medicaid benefits, the deed was not recorded until after parent's death, and child judicially admitted parent owned property on parent's death). *See also Oadra*, 871 S.W.2d at 891 ("A presumption of gift arises if a parent delivers possession, conveys title, or purchases property in the name of a child. We have found no cases where the presumption arises when a child does the same for a parent." (citations omitted)).

[282] TEX. FAM. CODE § 3.003.

[283] TEX. FAM. CODE § 3.002.

[284] TEX. FAM. CODE § 3.001; Texas Constitution Article XVI, § 15.

[285] *See Dawson v. Dawson*, 767 S.W.2d 949, 951 (Tex. App.–Beaumont 1989, no writ)(purchasing property under a contract for deed prior to the marriage determined the character of the property as separate).

[286] *Bakken v. Bakken*, 503 S.W.2d 315, 317-18 (Tex. Civ. App.–Dallas 1973, no writ)("If [spouse] had owned a [separate property] farm of 100 acres, which had a value of $100 per acre or a total of $10,000 at the time of acquisition, and had sold 25 of these acres at $1,000 per acre, the entire $25,000, even though in excess of the original value of the entire farm, would clearly have been her separate property.").

[287] *Legrand-Brock v. Brock*, 246 S.W.3d 318, 321 (Tex.

When one spouse uses his or her separate property to pay for real property acquired during marriage and takes title to the real property in the name of both spouses, it is presumed such spouse intended the interest placed in the other spouse's name to be a gift.[288] This presumption, however, can be rebutted by evidence clearly establishing there was no intention to make a gift.[289]

Recitals in a deed conveying property to a spouse stating that the grantor conveyed the property to that recipient spouse as his or her sole and separate property, for consideration paid out of such recipient spouse's separate property, creates a presumption that such property was the recipient spouse's separate property.[290]

(2) Personal Property Presumptions.

To the extent that a spouse brings cash funds into the marriage, it is well settled law that any income accruing after the date of marriage, including interest and dividends paid on any separate property investments, are considered community property.[291] The mere act of depositing separate property funds into an account under the control of both spouses, however, does not automatically make the funds community property.[292]

b. Rebutting the Community Property Presumption

The burden of overcoming the community property presumption is on the party asserting otherwise, that is, that the questioned property constitutes separate property, and the standard of proof is clear and convincing evidence.[293] "Clear and convincing evidence" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.[294] Whether property is separate or community is determined by its character at the inception of the party's title, and such inception of title occurs when a party first has a right of claim to the property.[295]

First, a party seeking to rebut the community presumption must trace the assets on hand during the marriage back to property that is separate in character.[296] Essentially, tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property.[297]

The clear and convincing standard is generally not satisfied by testimony that funds possessed at the time the marriage is dissolved are separate property when that testimony is unsupported by documentary evidence tracing the asserted separate nature of the funds.[298] In addition, a party has the burden to provide clear and convincing evidence as to the exact nature of the portion of property that is his or her separate property, even though the other spouse concedes that some portion of property is the other spouse's separate property.[299] Testimony that "some" portion of

App.–Beaumont 2008, pet. denied).

[288] *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975); *Bahr v. Kohr*, 980 S.W.2d 723, 726 (Tex. App.–San Antonio 1998, no pet.); *In re Thurmond,* 888 S.W.2d 269, 273 (Tex. App.–Amarillo 1994, writ denied).

[289] *Id.*

[290] *Kyles v. Kyles*, 832 S.W.2d 194 (Tex. App.–Beaumont 1992, no writ).

[291] *Bakken*, 503 S.W.2d at 317 ("When these cash dividends are passed on to married owners of mutual fund shares who hold them as separate property, there is no question that these dividends become community property of the spouses."); *See Taylor v. Taylor*, 680 S.W.2d 645 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.)(noting in opinion the general contention that income generated from a spouse's separate property is deemed community property).

[292] *Celso v. Celso*, 864 S.W.2d 652, 655 (Tex. App.–Tyler 1993, no writ) ("The mere fact that the proceeds of the sale were placed in a joint account does not change the characterization of the separate property assets. The spouse that makes a deposit to a joint bank account of his or her separate property does not make a gift to the other spouse.").

[293] TEX. FAM. CODE § 3.003(b).

[294] TEX. FAM. CODE § 101.007.

[295] *Barnett v. Barnett*, 67 S.W.3d 107, 111 (Tex. 2001); *Smith v. Smith*, 22 S.W.3d 140, 145 (Tex. App.–Houston [14th Dist.] 2000, no pet.)

[296] *Cockerham*, 527 S.W.2d at 167; *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App.–Fort Worth 2004, no pet.).

[297] *Boyd*, 131 S.W.3d at 612.

[298] *Zamarripa v. Zamarripa*, No. 14-08-00083-CV, 2009 WL 1875580, at *3 (Tex. App. June 30, 2009)(citing *Brehm v. Brehm*, No. 14-99-00055-CV, 2000 WL 330076, at *3 (Tex. App.–Houston [14th Dist.] Mar. 30, 2000, no pet.) (not designated for publication) for the proposition that husband's testimony that he purchased certificate of deposit with separate assets, without documentary evidence tracing the supposedly separate funds, held insufficient to rebut the community property presumption notwithstanding wife's failure to provide controverting testimony) and *In re Marriage of Santopadre*, No. 05-07-00027-CV, 2008 WL 3844517, at *3 (Tex. App.–Dallas Aug.19, 2008, no pet.) (mem. op., not designated for publication) for the proposition that husband's failure to produce documentary evidence establishing the time and means by which he originally obtained possession of assets-including a pension-precluded trial court from finding that husband met clear and convincing standard notwithstanding husband's testimony that the assets were his separate property).

[299] *See Zamarripa*, WL 1875580)(although wife conceded that some portion of a pension was husband's separate property, it remained husband's burden to provide clear and convincing evidence as to the exact nature of that portion, and the trial court was not required to speculate about it).

commingled property is separate property, standing alone, is insufficient to rebut the community property presumption.[300]

Second, if separate and community property have been so commingled as to defy resegregation and identification, the property will be presumed to be community property.[301]

Third, the clear and convincing burden is not satisfied when characterizing the property at issue as separate property requires surmise or speculation by the court.[302] Mere testimony that property was purchased with separate funds, without any tracing of the funds, is insufficient to rebut the community presumption.[303] Texas courts resolve any doubt as to the character of property in favor of the community estate.[304]

c. Community Property Complexities Involving Trusts; *Sharma.*

These presumptions and burdens of proof assume substantial complexity when family trusts are involved in divorce situations. The most frequently litigated questions seem to be whether, with respect to a family trust established by the parents of one of the spouses prior to or during his marriage: are the income distributions from that trust during marriage community property or separate property; and, with respect to trust income accumulated and not distributed during marriage, are those accumulations community property or separate property. These issues have been addressed by appellate courts in Texas since at least 1873,[305] and different courts have reached varying opinions.[306] Apparently the most current appellate resolution of these complexities is presented by the *Sharma* opinion (referenced in n. 306 below), which has adopted what it references as "Rule C": trust income distributions or retentions of same are community property only if the recipient spouse has a present possessory right to part of the corpus, even if the recipient has chosen not to exercise that right, because the recipient's possessory right to access the corpus means that the recipient is effectively an owner of the trust corpus.[307] Practical applications of this rule would involve trust situations in which the beneficiary-spouse has a right to invade some or all of the corpus (such as by virtue of a *Crummey* clause), whether or not that right is exercised, or in which the beneficiary-spouse has the right to receive all net income periodically but elects to leave in the trust some of such income.[308] Apparently unresolved at this point are the finer issues involving situations in which the beneficiary-spouse has a present possessory right to only a small part of the corpus (that is, is only the income on that small portion of the corpus community property) or that spouse elects to leave in the trust only a small percentage of the mandatory net income to which he is entitled annually (that is, is only future income on that undistributed-income portion community property in the future).[309] Moreover, because the Texas Supreme Court has not definitively ruled on these issues after the *Sharma* decision, it is uncertain whether Texas appellate courts other than the 14th District will follow the *Sharma* analysis.

5. Burden of Proof and Evidentiary Presumptions Concerning Marriage

A valid informal, or common-law, marriage consists of three elements: (1) agreement of the parties to be married; (2) after the agreement, their living together in Texas as husband and wife; and (3) their representing to others in Texas that they are married.[310] The statutory requirement of "represented to others" is synonymous with the judicial requirement of "holding out to the public."[311]

The existence of an informal marriage is question of fact, and the party seeking to establish the existence of the marriage bears the burden of proving the three elements by a preponderance of the evidence.[312] An informal marriage does not exist "until the concurrence of all three elements."[313]

A person may not be a party to an informal marriage if the person is "presently married to a person

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[300] *Zamarripa*, 2009 WL 1875580, at *3.

[301] *Beal Bank v. Gilbert*, 417 S.W.3d 704, 709 (Tex. App.–Dallas 2013, no pet.).

[302] *See McKinley v. McKinley*, 496 S.W.2d 540, 544 (Tex. 1973).

[303] *See Irvin v. Parker*, 139 S.W.3d 703, 708 (Tex. App.–Ft. Worth 2004, no pet.).

[304] *Akin v. Akin*, 649 S.W.2d 700, 703 (Tex. App.–Fort Worth 1983, writ ref'd n.r.e.); *Contreras v. Contreras*, 590 S.W.2d 218, 221 (Tex. App.–Tyler 1979, no writ).

[305] *Hutchison v. Mitchell*, 39 Tex. 487 (1873).

[306] *Sharma v. Routh*, 302 S.W.3d 355, 361-64 (Tex. App.–Houston [14th Dist.] 2009, no pet.)(summarizing history of such appellate opinions in Texas and concluding that those opinions reflect at least four different possible rules that could apply to such situations).

[307] 302 S.W.3d at 362.

[308] *Id*. at 362-68.

[309] *Id*.

[310] TEX. FAM. CODE § 2.401(a)(2); *Nguyen v. Nguyen*, 355 S.W.3d 82, 88-89 (Tex. App.–Houston [1st Dist.] 2011, no pet.).

[311] *Matter of Estate of Giessel*, 734 S.W.2d 27, 30 (Tex. App.–Houston [1st Dist.] 1987, *writ ref'd n.r.e.*); *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 166 (Tex.1981).

[312] *Id. See also Weaver v. State*, 855 S.W.2d 116, 120 (Tex. App.–Houston [14th Dist.] 1993, no pet.).

[313] *Nguyen v. Nguyen*, 355 S.W.3d 82, 88 (Tex. App.–Houston [1st Dist.] 2011), citing *Eris v. Phares*, 39 S.W.3d 708, 713 (Tex. App.–Houston [1st Dist.] 2001, pet. denied).

who is not the other party to the informal marriage."[314] A marriage is void if it is entered into when either party to the marriage has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse.[315] When two or more marriages of a person to different spouses are alleged, courts will presume that the most recent marriage is valid against each marriage that precedes it, until one who asserts the validity of a previous marriage proves its validity.[316] This presumption is one of the strongest known to law; it is, in itself, evidence; and it "may even outweigh positive evidence to the contrary."[317] In fact, the presumption's strength increases with the lapse of time, acknowledgments by the parties to the marriage, and the birth of children.[318]

This presumption that the most recent marriage is valid continues "until a party proves the impediment of a previous marriage and its continuing validity."[319] The burden of proof is, therefore, on the party challenging the most recent marriage on the basis of a prior marriage to prove (1) the validity of the prior marriage and (2) its continuing validity.[320]

6. Burden of Proof and Presumptions Concerning Paternity

TEC § 201.052 sets forth how a child may establish a paternal right of inheritance. Generally, for purposes of inheritance, a child is the child of the child's biological father if:

(1) the child is born under circumstances described by Section 160.201, Texas Family Code;
(2) the child is adjudicated to be the child of the father by court decree under Chapter 160, Texas Family Code;
(3) the child was adopted by the child's father; or
(4) the father executed an acknowledgment of paternity under Subchapter D, Chapter 160, Texas Family Code,[1] or a similar statement properly executed in another jurisdiction.

Texas Family Code § 160.201 generally sets forth how the father-child relationship can be established between a man and a child by:

(1) an unrebutted presumption of the man's paternity of the child under Section 160.204;
(2) an effective acknowledgment of paternity by the man under Subchapter D,[1] unless the acknowledgment has been rescinded or successfully challenged;
(3) an adjudication of the man's paternity;
(4) the adoption of the child by the man; or
(5) the man's consenting to assisted reproduction by his wife under Subchapter H,[2] which resulted in the birth of the child.

Under the first prong of Texas Family Code § 160.201, a presumption of paternity can be established under Texas Family Code § 160.204. Pursuant to that section, a man is presumed to be the father of a child if:

(1) he is married to the mother of the child and the child is born during the marriage;
(2) he is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
(3) he married the mother of the child before the birth of the child in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
(4) he married the mother of the child after the birth of the child in apparent compliance with law, regardless of whether the marriage is or could be declared invalid, he voluntarily asserted his paternity of the child, and:
    (A) the assertion is in a record filed with the vital statistics unit;
    (B) he is voluntarily named as the child's father on the child's birth certificate; or
    (C) he promised in a record to support the child as his own; or
(5) during the first two years of the child's life, he continuously resided in the household in which the child resided *and* he represented to others that the child was his own.

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[314] TFC § 2.401(d); *Nguyen*, 355 S.W.3d at 89, citing *Howard v. Howard*, 459 S.W.2d 901, 904 (Tex. Civ. App.–Houston [1st Dist.] 1970, no writ) ("If an impediment to the creation of a lawful marriage between the parties exists, as when one is married to another ... there can be no common law marriage even if all the three elements are proved.").

[315] TEX. FAM. CODE § 6.202(a); *Nguyen*, 355 S.W.3d at 89.

[316] *Nguyen*, 355 S.W.3d at 89, citing *In re Estate of Loveless*, 64 S.W.3d 564, 573–74 (Tex. App.–Texarkana 2001, no pet.).

[317] *Id.* citing *In re Estate of Loveless*, 64 S.W.3d at 574.

[318] *Id.*

[319] *Id.*

[320] *Id.*

A presumption of paternity established under TFC § 160.204 may be rebutted only by:

(1) an adjudication under Subchapter G[1]; or
(2) the filing of a valid denial of paternity by a presumed father in conjunction with the filing by another person of a valid acknowledgment of paternity as provided by TFC § 160.305.

The paternity of a child having a presumed, acknowledged, or adjudicated father may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child.[321] In the context of a proceeding to declare heirship, TEC § 204.051 states that the court may, on the court's own motion, and shall, on the request of a party to the proceeding, order one or more specified individuals to submit to genetic testing as provided by Subchapter F, Chapter 160, Family Code.

Generally, a divorce decree operates as an adjudication of parentage in a suit to dissolve a marriage as long as the court has personal jurisdiction over the parties and the final order expressly identifies the child as a "child of the marriage."[322]

Conversely, the mother-child relationship is established between a woman and a child by:

(1) the woman giving birth to the child;
(2) an adjudication of the woman's maternity; or
(3) the adoption of the child by the woman.[323]

E. Other Probate Presumptions

1. Testator under Guardianship at the Time of Will Execution Creates Presumption Testator Lacked Testamentary Capacity

Texas courts have generally held that a testator under a guardianship is "not necessarily incompetent to make a will although such adjudication [of incapacity] is not set aside [at the time the will was executed]."[324] However, where a testator is under a guardianship at the time that he executes a will, a presumption is created that he lacks testamentary capacity.[325] That presumption may be rebutted with evidence that the testator had testamentary capacity on the day that he executed the will.[326] Although a guardianship determination is relevant to the question of testamentary capacity, a testator does not automatically lack testamentary capacity after a court places the testator under a guardianship.[327]

2. Valid Will Creates Rebuttable Presumption of Continuity and Direct Evidence of Non-Revocation Unnecessary in the Absence of Evidence of Revocation

Once it is proven that a will is otherwise valid and has been executed with the requisite formalities and solemnities, a rebuttable presumption of continuity is recognized, and it is not necessary for the proponent to produce direct evidence of non-revocation in the absence of evidence of revocation.[328]

3. Absence of Original Will Creates Rebuttable Presumption of Revocation

TEC § 256.156 allows lost wills to be admitted to probate. The lost will must be proved in the same manner as provided in TEC § 256.153 for attested wills and TEC § 256.154 for holographic wills.[329] The party offering a will for probate has the burden to prove non-revocation.[330]

Under TEC § 253.003, a written will may be revoked by subsequent: (1) will; (2) codicil; or declaration in writing that is executed with like formalities. A written will may also be revoked by the testator: (1) destroying or cancelling the same; or (2)

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[321] TEX. FAM. CODE § 160.631.

[322] TEX. FAM. CODE §160.637 ("Binding Effect of Determination of Parentage").

[323] TEX. FAM. CODE § 160.201.

[324] *Evans v. Allen*, 358 S.W.3d 358, 367-68 (Tex. App.—Houston [1st Dist.] 2011, no pet.), citing *Clement v. Rainey,* 50 S.W.2d 359 (Tex. Civ. App.–Texarkana 1932, writ ref'd). *See also Duke v. Falk*, 463 S.W.2d 245, 252 (Tex. Civ. App.–Austin 1971, no writ) ("Even if the guardianship proceedings had demonstrated that [the testator] had been declared a person of unsound mind, being prior to and not too remote from the date of making the will, nevertheless such evidence would have no probative force except as it might tend to show his state of mind at the time of execution of the will.").

[325] *See Evans*, 358 S.W.3d at 367-68 and authorities cited therein.

[326] *Id. See Clement,* 50 S.W.2d at 359; *Stephen v. Coleman*, 533 S.W.2d 444, 447 (Tex. Civ. App.–Fort Worth 1976, writ ref'd n.r.e.) (noting that if testator had been adjudicated incompetent before will was executed, there is *presumption* of no testamentary capacity). *See also Bolton v. Stewart*, 191 S.W.2d 798, 802 (Tex. Civ. App.–Fort Worth 1945, no writ) ("We also believe that the prima facie evidence of insanity at all times subsequent to the adjudication is subject to rebuttal by competent proof....").

[327] *Evans*, 358 S.W.3d at 368.

[328] *Matter of Page's Estate*, 544 S.W.2d 757, 760 (Tex. Civ. App.–Corpus Christi 1976, *writ ref'd n.r.e.*), citing *May v. Brown*, 144 Tex. 350, 190 S.W.2d 715 (1945).

[329] TEC § 256.156.

[330] TEC § 256.152(a)(1); *Bostic v. Bostic*, 12-02-00305-CV, 2003 WL 22047902, at *2 (Tex. App.–Tyler Aug. 29, 2003).

causing it to be destroyed or cancelled in the testator's presence.[331]

When a will was last known to be in the decedent's possession and cannot be located after death, a rebuttable presumption of revocation arises.[332] The "presumption can be overcome by proof and circumstances contrary to the presumption" or evidence that the will "was fraudulently destroyed by some other person."[333] In addition, evidence that the decedent recognized his will's continued validity and had continued affection for the primary beneficiary of his will, without evidence that he was dissatisfied with the will or had any desire to change or cancel it, is sufficient proof of circumstances contrary to rebut the presumption.[334] The standard of proof necessary to rebut the presumption is a preponderance of the evidence.[335]

4. Statements in Attestation Clause of a Will Raise a Rebuttable Presumption of Proper Execution

A will's attestation clause raises a rebuttable presumption of due execution.[336] "Attestation of a will is the act of witnessing the performance of the statutory requirements to a valid execution of the will."[337] This act is done by the witnesses signing their names to the instrument in the presence of the testator.[338]

5. Inventory, Appraisement and List of Claims is Presumed Accurate

An estate's inventory is not conclusive of the title to the property listed or omitted in the inventory, but instead is only prima facie evidence of that fact.[339]

6. Presumption of the Necessity of Administration

The necessity of administration of an estate is presumed in every case unless facts are shown that make the case an exception to the general rule.[340] The burden of showing that no administration is necessary is on the complaining party.[341]

VIII. OPPORTUNITIES TO UTILIZE MOTIONS FOR SUMMARY JUDGMENT IN PROBATE, TRUST & GUARDIANSHIP LITIGATION

A. Breach of Fiduciary Duty

1. Self-Dealing Transactions

[**Discussed *Supra* VII. D (1)(b)**] The burden of proof in fiduciary litigation can shift depending on the particular duty at issue in a breach of fiduciary duty case. Some authors on the subject categorize fiduciary duties into two categories: (1) those corresponding to the principle that the law does not demand perfection in a fiduciary's judgment, and (2) those corresponding to the principle that fiduciary law does demand absolute loyalty and honesty.[342] In most cases involving the former, the defendant fiduciary bears no burden and the plaintiff must carry the burden of his own case.[343] However, in cases involving the latter, including those concerning self-dealing, the defendant fiduciary is often required to negate some breach.[344]

Self-dealing has no hard and fast definition in the litany of cases discussing it. Though some case law suggests that self-dealing can emerge simply when a fiduciary engages in a transaction with a party to whom the fiduciary owes a duty,[345] other opinions look beyond fiduciary-beneficiary transactions to those where the fiduciary places himself in a position in which his self-interest might conflict with his obligations,[346] or those where the fiduciary profits or

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[331] TEC § 253.002.

[332] *In re Estate of Wilson*, 252 S.W.3d 708, 713 (Tex. App.–Texarkana 2008, no pet.), citing *In re Estate of Capps*, 154 S.W.3d 242, 245 (Tex. App.–Texarkana 2005, no pet.) (op. on reh'g). *See O'Brien v. Stanzel*, 603 S.W.2d 826, 827 (Tex.1980).

[333] *In re Estate of Wilson*, 252 S.W.3d at 713, quoting *In re Estate of Capps*, 154 S.W.3d at 245. *See also Matter of Estate of Standefer*, 11-14-00221-CV, 2015 WL 5191443, at *3 (Tex. App.—Eastland, 2015).

[334] *In re Estate of Capps*, 154 S.W.3d at 245

[335] *Id*.

[336] *See Matter of Page's Estate*, 544 S.W.2d at 760 ("It is a settled principal of law in this State that where there is no primary evidence of proper execution, the attestation clause constitutes some evidence of proper publication. . . The statements in the attestation clause raise a rebuttable presumption of proper execution.").

[337] *Brown v. Traylor*, 210 S.W.3d 648, 666 (Tex. App.–Houston [1st Dist.] 2006, no pet.).

[338] *Zaruba v. Schumaker*, 178 S.W.2d 542, 543 (Tex. Civ. App.–Galveston 1944, no writ).

[339] *Adams v. Sadler*, 696 S.W.2d 690, 692 (Tex. App.–Austin 1985, *writ ref'd n.r.e.*), citing *Krueger v. Williams*, 163 Tex. 545, 359 S.W.2d 48 (1962); *Little v. Birdwell*, 21 Tex. 597 (1858).

[340] *Eastland v. Eastland*, 273 S.W.3d 815, 829 (Tex. App.–Houston [14th Dist.] 2008)(discussing appointment of successor executor); *Davis v. Cayton*, 214 S.W.2d 801, 804 (Tex. Civ. App.–Amarillo 1948, no writ).

[341] *Id.*

[342] Joyce Moore, *Defending the Fiduciary: What you Really Need to Know*; Anatomy of Fiduciary Litigation, Chapter 13, State Bar of Texas, 2012.

[343] Joyce Moore, *Defending the Fiduciary: What you Really Need to Know*; Anatomy of Fiduciary Litigation, Chapter 13, State Bar of Texas, 2012.

[344] Joyce Moore, *Defending the Fiduciary: What you Really Need to Know*; Anatomy of Fiduciary Litigation, Chapter 13, State Bar of Texas, 2012.

[345] *Miller v. Miller*, 700 S.W.2d 941, 947 (Tex. App. – Dallas 1985, writ ref'd n.r.e.).

[346] *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260-261 (Tex. 1975).

benefits in some way from a transaction – regardless of whether or not the transaction involved a beneficiary.[347] No matter the tenor of the allegation, the fact of the allegation against the fiduciary works to generate a presumption that the fiduciary must rebut. A presumption of unfairness in the transaction arises, and the fiduciary is burdened with establishing that the transaction was fair.[348]

Thus, summary judgment might be utilized in self-dealing cases in a variety of ways. For example, cast in the posture of carrying a burden of production, persuasion and proof, the fiduciary could be susceptible to a no-evidence motion for summary judgment. Faced with the motion, that the fiduciary would have to present competent summary judgment evidence to raise a fact issue on an element of breach by showing that: (1) the transaction was fair and equitable; (2) the fiduciary made reasonable use of the confidence placed in him; (3) the fiduciary acted in good faith; (4) the fiduciary did not use his position as an advantage at the expense of the beneficiary; and (5) the fiduciary fully and fairly disclosed the transaction to the beneficiary.[349]

2. Trust Suits

a. Express Trust

In some trust construction cases, the very existence of the trust relationship is at issue. Summary judgment can be used in an action for declaratory judgment to determine the issue as a matter of law, and thus make clear that the provisions of the Texas Trust Code apply to the relationship.

That is, traditional summary judgment could be sought to establish the elements of an express trust. The movant's competent summary judgment evidence would show that: there exists a written instrument signed by the settlor establishing the trust; that instrument names the trustee and bestows affirmative powers and duties upon him; the instrument identifies the beneficiaries; the instrument declares the trust relationship (dividing legal and equitable title); the instrument reasonably identifies the trust property; and the object of the trust is reasonably certain.[350] Conversely, the party seeking to avoid the trust relationship might employ a no-evidence motion for summary judgment when evidence of a required element of the trust relationship is lacking.

b. Trust Interpretation

With some frequency, our courts are tasked with interpreting the provisions of a trust. Here too is summary judgment a useful tool for both sides. It is well-settled that when our courts engage in such interpretations, the trial court must look only to the four corners of the document itself and may not consider or admit any extrinsic or parol evidence.[351] As a sole exception to this "four corners" rule, courts permit outside evidence only upon a finding of ambiguity in the material and relevant language.[352]

A party may move for summary judgment that the instrument either is, or is not, ambiguous. The issue of ambiguity is a question of law, and thus well-suited for summary judgment.[353]

c. Trustee Removal

A trustee may be removed either pursuant to the terms of the trust instrument, or at the discretion of a court upon a petition by an interested person.[354] While the removal terms of the instrument could be entirely unique, the court's discretion to remove a trustee must be premised upon a violation (or attempted violation) of the terms of the trust, the incapacity or insolvency of the trustee, the trustee's failure to account, or "other cause."[355]

The first three instances lend themselves easily enough to summary judgment practice. The complaining interested party could, for example, move for judgment as a matter of law on the failure to account. Accounting – a subset of the duty to disclose – is hardly lukewarm. It has either happened (in compliance with TTC §§ 113.151 and 113.152) or not, and there are likely few instances where a genuine issue of material fact exists as to the act of accounting.

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[347] *Keck, Mahin & Cate v. National Union Fire Insurance Co.*, 20 S.W.3d 692, 699 (Tex. 2000).

[348] *Miller*, 700 S.W.2d at 947.

[349] *See* Comm. On Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges: Family & Probate PJC 235.10 cmt. (2016); *Miller vs. Lucas*, 2015 WL 2437887 (Tex. App.–Fort Worth 2015, pet denied)(considering cross-motions for summary judgment, court granted that of principal against agent who transferred principal's property to himself for no consideration, finding self-dealing as a matter of law).

[350] *Nolana Development Association v. Corsi*, 682 S.W.2d 246 (Tex. 1984); *Barrientos v. Nava*, 94 S.W.3d 270 (Tex. App.–Houston [14th Dist.] 2002, no pet.); *Tomlinson v. Tomlinson*, 960 S.W.2d 337 (Tex. App.–Corpus Christi 1997, pet denied).

[351] *State v. Rubion*, 158 Tex. 43, 308 S.W.2d 4, 7-11 (Tex. 1957); *Hurley v. Moody Nat'l Bank of Galveston*, 98 S.W.3d 307, 310 (Tex. App.–Houston [1st Dist.] 2003, no pet.).

[352] *Rubion*, 308 S.W.2d at 7-11.

[353] *Hurley*, 98 S.W.3d at 310, citing *Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 286 (Tex. App.–Houston [1st Dist.] 1995, no writ).

[354] TTC §113.082(a).

[355] TTC §113.082(a)(1) – (4).

d. Fee Disgorgement and Equitable Forfeiture

For those cases where a breach of fiduciary duty can be clearly established, fee forfeiture and/or surcharge may be appropriate. This remedy is especially powerful given the fact that a party is not required to prove injury and causation where the party seeks fee forfeiture.[356] As recently as 1999, the Texas Supreme Court, in *Burrow v. Ace,* commented, "Texas courts of appeals, as well as courts in other jurisdictions and respected commentators, have also held that forfeiture is appropriate without regard to whether the breach of fiduciary duty resulted in damages."[357] Fee forfeiture is a type of punishment: "The main purpose of fee forfeiture is not to compensate an injured principal. . . . Rather, the central purpose . . . is to protect relationships of trust and confidence by discouraging agents' disloyalty."[358] There is ample authority in the Texas Trust Code to reduce or deny a trustee's compensation. TTC §§ 111.0035(b)(5)(C) and (E) provide that the terms of a trust may not limit the power of the court, in the interest of justice, to take action or exercise jurisdiction including the power to exercise its jurisdiction under TTC § 115.001 (giving the court the power to surcharge a trustee) or adjust or deny a trustee's compensation if the trustee commits a breach of trust. Additionally, TTC § 114.008 gives the court the power to remedy a breach of trust that has occurred or might occur by reducing or denying the compensation to the trustee. Again, TTC § 114.061 states that if the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation.

3. Estate Administration

a. Will Interpretation

The proper construction of a will is a question of law.[359] If the court can give a certain legal meaning or interpretation to the words used in the will, the will is unambiguous and the trial court should construe it as a matter of law.[360] In construing a will, the focus is on the testator's intent.[361] The testator's intent must be ascertained by looking at the language and provisions of the instrument as a whole, as set forth within its four corners.[362] The question for the court is not what the testator intended to write, but the meaning of the words he actually used.[363] Terms used are to be given their plain, ordinary, and generally accepted meanings unless the instrument itself shows them to have been used in a technical or different sense.[364] Finally, if possible, all parts of the will must be harmonized, and every sentence, clause, and word must be considered in ascertaining the testator's intent.[365] Courts must presume that the testator placed nothing meaningless or superfluous in the instrument.[366] The determination of whether a will is ambiguous is a question of law, as is the proper construction of a will.[367] When the intent of the testator is apparent on the face of the will, extrinsic evidence is not admissible to show a contrary meaning.[368] Note, however, that the 2015 Legislature added new TEC §§255.451-.456 permitting judicial modification or reformation of wills to correct a scrivener's error, address administrative issues, achieve a testator's tax objectives, or qualify a beneficiary for governmental benefits.

b. Qualification

Fights routinely erupt about who is more qualified to serve as the personal representative of an estate.

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[356] *Si Kyu Kim v. Harstan, Ltd.*, 286 S.W.3d 629, 635 n.1 (Tex. App.–El Paso 2009, pet. denied) (citing *Burrow*, 997 S.W.2d at 240); *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.–San Antonio 2000, pet. withdrawn pursuant to settlement).

[357] *Burrow v. Arce*, 997 S.W.2d 229, 239-40 (Tex. 1999).

[358] *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 872–73 (Tex. 2010) (quoting *Burrow*, 997 S.W.2d at 238). This *ERI* case has now been remanded from the Texas Supreme Court back to the Tyler Court of Appeals, which has recently issued a new opinion detailing the relationship among equitable disgorgement, actual damages, and punitive damages. *Swinnea v. ERI Consulting Engineers, Inc.*, Appeal No. 12-14-00288-CV, __ S.W.3d ___ (Tex. App.–Tyler February 10, 2016): equitable disgorgement of fees or contractual consideration is distinct from actual damages, and proof of actual damages is not necessary to succeed on a claim of such forfeiture. *Id*. at ___. Moreover, equitable disgorgement and punitive damages may both be awarded in the proper case, and they are not duplicative. *Id.* at ___. Where the defendant's breach of fiduciary duty was intentional, malicious, continuing, calculated to cause injury to the plaintiff, designed to serve the fiduciary's own self-interest, and highly offensive to a public sense of justice and propriety, substantial actual damages, disgorgement, and punitive damages may all be awarded. *Id*. at ___.

[359] *Eisen v. Capital One, Nat'l Ass'n*, 232 S.W.3d 309, 312 (Tex. App.–Beaumont 2007, pet. denied), citing *Harris v. Hines*, 137 S.W.3d 898, 903 (Tex. App.–Texarkana 2004, no pet.); *Hurley v. Moody Nat'l Bank of Galveston*, 98 S.W.3d 307, 310 (Tex. App.–Houston [1st Dist.] 2003, no pet.).

[360] *Key v. Metcalf*, 14-04-00782-CV, 2006 WL 348149, at *3 (Tex. App.–Houston [14th Dist.] Feb. 16, 2006), citing *Steger v. Muenster Drilling Co.*, 134 S.W.3d 359, 373 (Tex. App.–Fort Worth 2003, pet. denied).

[361] *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex.2000).

[362] *Steger*, 134 S.W.3d at 372.

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] *Id.*

[367] *Eisen*, 232 S.W.3d at 312.

[368] *Harris v. Hines*, 137 S.W.3d 898 (Tex. App.–Beaumont 2004, no pet.); *Kirk v. Beard*, 162 Tex. 144, 345 S.W.2d 267, 273 (1961).

Priority to serve may offer the most fertile opportunity for summary judgment. The trial court is obligated to appoint the persons named in the will and under the order of priority set forth in TEC § 304.001.[369] In fact, when an applicant is among those named in the Texas Estates Code as a person entitled to priority, the party opposing the appointment has the burden of establishing the applicant's disqualification.[370] In other words, in this situation, a no-evidence motion for summary judgment might be appropriate for the party seeking appointment who enjoys priority over other applicants.

Alternatively, using a summary judgment to oppose an applicant's qualification to serve may be appropriate under certain circumstances, as many of the disqualifications found in Texas Estates Code § 304.003 are fairly straight forward. Unfortunately, there is no comprehensive, discrete explanation delineating the attributes that make someone unsuitable.[371] One court noted, "While there is no "bright line" test to be applied, generally a person claiming ownership of property, to the exclusion of the estate, is deemed unsuitable because of the conflict of interest between the person and the estate, while a person making a claim within the probate process (i.e., claiming under the will or attempting to collect a debt from the estate) is not deemed unsuitable."[372]

c. Executor or Administrator Removal and Resignation

As with qualification, there are several areas where a motion for summary judgment could be used to remove an executor, especially for those grounds that are fairly straightforward. TEC § 404.003 provides that the probate court, on the court's own motion or on the motion of any interested person, and without notice, may remove an independent executor appointed under this subtitle when: (1) the independent executor cannot be served with notice or other processes because: (A) the independent executor's whereabouts are unknown; (B) the independent executor is eluding service; or (C) the independent executor is a nonresident of this state without a designated resident agent; or (2) sufficient grounds appear to support a belief that the independent executor has misapplied or embezzled, or is about to misapply or embezzle, all or part of the property committed to the independent executor's care.

There are also several additional grounds under which an executor may be removed with notice. Under TEC § 404.0035, the probate court, on the court's own motion, may remove an independent executor after providing 30 days' written notice of the court's intent to remove the independent executor, by certified mail, return receipt requested, to the independent executor's last known address and to the last known address of the independent executor's attorney of record, if the independent executor: (1) neglects to qualify in the manner and time required by law; or (2) fails to return, before the 91st day after the date the independent executor qualifies, either an inventory of the estate property and a list of claims that have come to the independent executor's knowledge or an affidavit in lieu of the inventory, appraisement, and list of claims, unless that deadline is extended by court order.

The probate court, on its own motion or on motion of any interested person, after the independent executor has been cited by personal service to answer at a time and place fixed in the notice, may remove an independent executor when: (1) the independent executor fails to make an accounting which is required by law to be made; (2) the independent executor fails to timely file the affidavit or certificate required by TEC § 308.004; (3) the independent executor is proved to have been guilty of gross misconduct or gross mismanagement in the performance of the independent executor's duties; (4) the independent executor becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause becomes legally incapacitated from properly performing the independent executor's fiduciary duties; or (5) the independent executor becomes incapable of properly performing the independent executor's fiduciary duties due to a material conflict of interest.[373]

It may also be possible to use a summary judgment to remove co-executors under TEC § 309.055 for failing to file an excuse for not signing the inventory, appraisement and list of claims. TEC § 309.055 states that if more than one personal representative qualifies to serve, any one or more of the representatives, on the neglect of the other representatives, may make and file an inventory,

[369] *In re Estate of Gaines*, 262 S.W.3d 50, 55 (Tex. App.–Houston [14th Dist.] 2008, no pet.)("If an independent executor named in the will comes forward within the statutory period for probating a will, offers it for probate, and applies for letters testamentary, the court has no discretionary power to refuse to issue letters to the named executor unless he is a minor, an incompetent, or otherwise disqualified under the provisions of section 78 of the Texas Probate Code [now Texas Estates Code § 304.003]").

[370] *In re Estate of Robinson*, 140 S.W.3d 801, 805 (Tex. App.–Corpus Christi 2004, pet. dism'd.), citing *Monson v. Betancourt*, 818 S.W.2d 499, 500 (Tex. App.–Corpus Christi 1991) (orig. proceeding) (citing *Powell v. Powell*, 604 S.W.2d 491, 493 (Tex. Civ. App.–Dallas 1980, no writ)).

[371] *In re Estate of Gaines*, 262 S.W.3d at 56.

[372] *In re Estate of Robinson*, 140 S.W.3d at 806.

[373] TEC §404.0035(b).

appraisement, and list of claims or an affidavit in lieu of an inventory, appraisement, and list of claims. Often there is no showing that the other co-independent executor "neglected" his or her duties to file an inventory.[374] In that case, all of the co-independent executors should sign the inventory. TEC § 309.055(b) strips the non-signing co-independent executor of his or her power to act over the estate: "A personal representative who neglects to make or file an inventory . . . may not interfere with and does not have any power over the estate after another representative makes and files an inventory."

In fact, the personal representative who files the inventory is entitled to the whole administration unless, before the 61st day after the date the representative files the inventory, one or more delinquent representatives file with the court a written, sworn, and reasonable excuse that the court considers satisfactory.[375] The court shall enter an order removing one or more delinquent representatives and revoking those representatives' letters if: (1) an excuse is not filed; or (2) the court does not consider the filed excuse sufficient.[376]

The statutory bases to remove an administrator can be found in TEC § 361.051 (without notice) and 361.052 (with notice).

d. Fee Disgorgement and Equitable Forfeiture

There is ample authority in the Texas Estates Code to reduce or deny a personal representative's compensation. Under TEC § 351.004, the court may, on application of an interested person or on the court's own motion, wholly or partly deny a commission if the court finds that the executor or administrator has not taken care of and managed estate property prudently. In fact, under TEC § 352.051, it is only upon proof satisfactory to the court that a personal representative of an estate is entitled to: (1) necessary and reasonable expenses incurred by the representative in: (A) preserving, safekeeping, and managing the estate; (B) collecting or attempting to collect claims or debts; and (C) recovering or attempting to recover property to which the estate has a title or claim; and (2) reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the estate.

As recently as 2013, the Amarillo Court of Appeals prohibited an independent executor from being reimbursed $82,121.08 in attorney's fees for pursuing a baseless claim.[377] When the personal representative's own omission or malfeasance is at the root of the litigation, the estate will not be required to reimburse the personal representative for his attorney's fees.[378] As the San Antonio Court of Appeals so aptly noted in 1984 in *Tindall v. Tex. Dep't of Mental Health and Mental Retardation,* "it is thus apparent that when the fiduciary's omissions or malfeasance is at the root of the litigation, the estate will not be required to reimburse the fiduciary for his or her attorney's fees" as such "fees are not necessarily incurred in connection with the management of the estate."[379]

e. Marital Property Characterization

A motion for summary judgment may be useful in certain situations where the character of marital property is in dispute. For example, a party seeking to rely on the community property presumption should consider filing a no-evidence motion for summary judgment where there is insufficient evidence to rebut the presumption. Conversely, where there is clear evidence that allows a party to trace assets and rebut the community property presumption, the party seeking to establish the separate property character of marital property should consider utilizing a traditional motion for summary judgment.

f. Declaratory Judgments

Texas Civil Practice & Remedies Code §37.005 states that an independent executor in the administration of the estate of a decedent may have a declaration of rights or legal relations in respect to the estate: (1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine *any question* arising in the administration of the trust or estate, including questions of construction of wills and other writings; or (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

Texas courts have approved interested parties in estate administration contexts to utilize Section 37.005 solely to determine questions of fact. For example, the plain language of section 37.005(3) allows a devisee to seek a declaration of rights or legal relations to determine "*any question* arising in the administration"

[374] TEC §309.055(a).

[375] TEC §309.055(c).

[376] TEC §309.055(c).

[377] *In re Estate of Bessire*, 399 S.W.3d 642, 650 (Tex. App.–Amarillo 2013, pet. denied).

[378] *Id.* (attorney's fees denied under § 242 [now § 352.051] where independent executor pursued futile efforts to establish wrongdoing by another beneficiary). *See Tindall v. Tex. Dep't of Mental Health and Mental Retardation,* 671 S.W.2d 691, 693 (Tex. App.–San Antonio 1984, writ ref'd n.r.e.)

[379] *Tindall*, 671 S.W.2d at 693.

of an estate, including questions of whether a Decedent and another woman were married. [380]

B. Undue Influence

The elements of a claim for undue influence are: (1) the existence and exercise of an influence upon the testator (2) that operated to subvert or overpower the testator's mind at the time the will was executed, (3) such that the execution would not have occurred but for the undue influence.[381]

1. Burden of Proof

The burden of proof is always on the contestant: the contestant must prove undue influence by the "preponderance of the evidence."[382]

2. Fiduciary Relationship Raises Presumption of Undue Influence

If there is some evidence of fiduciary relationship, a presumption of undue influence is raised. The only effect of this presumption, however, is to establish the burden of producing evidence.[383] A presumption is not evidence of something to be weighed along with the evidence.[384] Generally speaking, the effect of a presumption is to force the party against whom it operates to produce evidence to negate the presumption.[385] Once that burden is discharged and evidence contradicting the presumption has been offered, the presumption disappears and "is not to be weighed or treated as evidence."[386]

3. Equal Inference Rule

Undue influence can be established by what is known as circumstantial, as well as direct, evidence.[387] A will contestant may prove every element of undue influence with either direct or circumstantial evidence.[388] Because of the nature of the claim, most contestants rely almost entirely upon circumstantial evidence rather than its direct counterpart.[389] In fact, "[m]ore often than not, undue influence is impossible to establish by direct proof and may only be shown by circumstances."[390] "Circumstantial evidence is simply indirect evidence that creates an inference to establish a central fact."[391] Any ultimate fact may be proved by circumstantial evidence.[392] "By its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern."[393] Texas case law on undue influence requires a trial court to consider the circumstances offered in support of an undue influence claim in a broad manner:

A. Law is not an exact mathematical science.[394] No two cases involving undue influence are alike, and each case must stand or fall depending upon the legal sufficiency of the facts proved.[395]
B. It is impossible to frame a definition of undue influence that embraces all forms and phases of the term.[396] There are no hard and fast rules that will accurately govern the question as to whether a given set of facts contain affirmative probative evidence of undue influence.[397]
C. Undue influence, by "its very nature, like all fraudulent and vicious schemes, hides its features behind masks and operates in dark and secret places and in covert ways, and

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[380] *In re O'Quinn*, 355 S.W.3d 857, 866-66 (Tex. App.—Houston [1st Dist.] 2011, no pet.)(concluding that a devisee under a will may permissibly seek declaratory relief pursuant to § 37.005(3) to determine "any question arising in the administration" of a decedent's estate, including questions of whether the decedent and another woman were married).

[381] *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).

[382] *Estate of Woods*, 542 S.W.2d 845, 846 (Tex. 1976).

[383] *Spillman*, 587 S.W.2d at 172.

[384] *Id.*, citing *Southland Life Ins. Co. v. Greenwade*, 138 Tex. 450, 159 S.W.2d 854 (1942); *Armstrong v. West Texas Rig Co.*, 339 S.W.2d 69 (Tex. Civ. App.–El Paso 1960, writ ref'd n. r. e.).

[385] *Joplin v. Borusheski*, 244 S.W.3d 607, 611 (Tex. App.–Dallas 2008, no pet.)(citing *Temple I.S.D. v. English*, 896 S.W.2d 167, 169 (Tex.1995).

[386] *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993).

[387] *Long v. Long*, 133 Tex. 96, 99-100, 125 S.W.2d 1034, 1036 (Tex. 1939).

[388] *Id.*

[389] *See Truelove v. Truelove*, 266 S.W.2d 491, 497 (Tex. Civ. App.–Amarillo 1953, writ, ref'd) (holding that undue influence, by "its very nature, like all fraudulent and vicious schemes, hides its features behind masks and operates in dark and secret places and in covert ways, and proof of it must usually be by circumstantial rather than by direct testimony.").

[390] *In re Estate of Olsson*, 344 S.W.2d 171, 173–74 (Tex. Civ. App.–El Paso 1961, writ re'fd n.r.e).

[391] *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015). *See Felker v. Petrolon, Inc.*, 929 S.W.2d 460, 463–64 (Tex. App.–Houston [1st Dist.] 1996, writ denied).

[392] *State v. $11,014.00*, 820 S.W.2d 783, 785 (Tex.1991); *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975).

[393] *Browning–Ferris, Inc.* v. *Reyna*, 865 S.W.2d 925, 927 (Tex. 1993).

[394] *Long*, 125 S.W.2d at 1035.

[395] *Rothermel*, 369 S.W.2d at 921; *In re Estate of Johnson*, 340 S.W.3d 769, 777 (Tex. App.–San Antonio 2011, pet. stricken).

[396] *Long*, 125 S.W.2d at 1035.

[397] *Id.*

proof of it must usually be by circumstantial rather than by direct testimony."[398]

D. "The exertion of influence that was or became undue is usually a subtle thing and by its very nature usually involves an extended course of dealings and circumstances."[399]

E. The undue influence need not occur during the execution of the will, if the *effect* of the influence continues until the execution of the instrument and operates to procure its execution contrary to the maker's wishes. In appropriate cases, Texas courts have held that the undue influence was exerted at the time of the making of the instrument.[400] However, the kinds of "pre-execution" and "post-execution" facts required to show that undue influence actually existed at the time the will was executed have involved fairly egregious acts.[401]

F. Undue influence does not need to be accomplished forcibly and directly, for example, at gunpoint.[402] While some practitioners envision undue influence as constituting some form of a malicious, overt act, Texas courts have noted that undue influence is more often exercised by subtle and devious, but no less effective, means, such as deceit and fraud.[403]

Despite a seemingly broad consideration of the circumstances offered to prove undue influence, the same "circumstantial evidence" rules that apply in the rest of Texas jurisprudence hold in undue influence cases. Texas Supreme Court cases on circumstantial evidence and the so-called "equal inference rule" establish fundamental limits when attempting to use circumstantial evidence. As recently as 2014, the Texas Supreme Court declared in *Graham Central Station, Inc.* that the factfinder "may not reasonably infer an ultimate fact from *meager* circumstantial evidence which could give rise to any number of inferences, none more probable than another."[404] This is the most accurate reiteration of the equal inference rule – that is, when circumstances are consistent with two or more *unreasonable* inferences, there is no more than a scintilla of evidence.

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[398] *Truelove v. Truelove*, 266 S.W.2d 491, 497 (Tex. Civ. App.–Amarillo 1953, writ ref'd).

[399] *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).

[400] *Furr v. Furr*, 403 S.W.2d 866, 871 (Tex. Civ. App.–Fort Worth 1966, no writ) (quoting *In Re Olsson's Estate*, 344 S.W.2d 171. *See also Curry v. Curry*, 270 S.W.2d 208, 214 (Tex. 1954). When it comes to the timing of exerting undue influence, the trial court can receive and consider all relevant facts occurring within a reasonable time before or after the will is executed which tend to indicate the existence of undue influence at the time of execution. *Lowery v. Saunders*, 666 S.W.2d 226, 234 (Tex. App.–San Antonio 1984, *writ refused n.r.e.*).

[401] For example, in *Furr*, 403 S.W.2d at 871, the court upheld a jury finding that the will was executed as a result of undue influence where there was evidence that the undue influencer, before the will was executed, had: (1) accompanied the testatrix to the will execution ceremony; (2) taken active steps to sequester the testatrix from her family; (3) attempted to spread apparent falsehoods about the testatrix to her family in an attempt to manipulate and control her relationship with her other family members; (4) exhibited significant, if not total, control over all aspects of the testatrix's financial life. In *Furr*, the evidence was also undisputed that the testatrix thought fondly of her five grandchildren until her death and had (at least for a significant period before the will was executed) stated that her sons meant as much to her as the undue influencer; yet, her will made no provision for them presently or for the future. Moreover, at the time the will was executed the testatrix was in poor health and weighed about 100 pounds. *Id.* at 867. The *Furr* court held that the jury could have believed from the evidence that the undue influencer completely dominated the testatrix's mind and actions and that in doing so, could have answered the ultimate question of whether the disputed will was a product of such undue influence by responding, "yes". *Id.* at 871.

[402] In *Lowery*, 666 S.W.2d at 226, the San Antonio Court of Appeals upheld a trial court's finding that a testatrix was acting under undue influence at the time she executed a will. There, the undue influencer instructed the estate-planning attorney on how to draft the will, the undue influencer was present when the will was executed, and the estate-planning attorney testified he had never seen the testatrix alone. *Id.* at 234-35. The undue influencer had paid for a doctor to examine the testatrix before she signed the will. Other witnesses indicated that the undue influencer usually did most of the talking for the testatrix. *Id.* at 235.

[403] *Holcomb v. Holcomb*, 803 S.W.2d 411, 414 (Tex. App.–Dallas 1991, *writ denied*). In *Holcomb*, a father expressed his intent for his children to be provided for equally. He had originally signed a will leaving his property to his daughter to offset property that his ex-wife had conveyed to their son. Sometime later, the father executed a later will leaving his estate equally between his two children. The daughter alleged that her brother had exerted undue influence over her father in executing the later will through various misrepresentations and false promises. The Dallas Court of Appeals upheld the jury's finding that the brother had exerted undue influence by misrepresenting to his father the value of property he would receive from his mother (the father's ex-wife) and by falsely promising to equalize both estates if his father would leave his estate equally between him and his sister.

[404] *Graham Cent. Station, Inc. v. Pena*, 442 S.W.3d 261, 265 (Tex. 2014) (emphasis added), quoting *Hancock v. Variyam*, 400 S.W.3d 59, 70–71 (Tex. 2013).

To constitute "some evidence," circumstances used to support undue influence, when taken together and in context, must produce reasonable inferences – not suspicions or guesses. Suspicions and guesses are not "evidence". The key is whether an inference from the circumstances offered, when taken in context with all the other known circumstances and facts, rises to the level of a "reasonable inference" or instead constitutes a guess or speculation. This rule and these principles can be gleaned from the language and reasoning of the following cases:

A. In 1984, in *Litton*, in the context of a products liability case when determining whether an adapter was sold after the effective date of the DTPA:

> We have in this case *meager* circumstantial evidence giving rise to inferences which are equally consistent with the proposition that Litton's act or conduct occurred before May 21, 1973, or after that date. When circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred.[405]

B. In 1997, in *Hammerly Oaks, Inc.*, in the context of determining whether a leasing agent was a vice principal of a corporate owner of an apartment complex:

> This Court has held that the trier of fact may draw inferences, but only *reasonable* and *logical* ones. The evidence on which Edwards relies is "*meager* circumstantial evidence" which could give rise to any number of inferences, none more probable than another. [citations omitted]. A jury may not infer an ultimate fact from such evidence."[406]

C. In 2001, in *Lozano*, the Texas Supreme Court indicated that the circumstances offered must support two or more *reasonable* inferences to present a fact issue:

> When circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect, no evidence. Circumstantial evidence is not legally insufficient merely because more than one *reasonable* inference may be drawn from it. If circumstantial evidence will support more than one *reasonable* inference, it is for the jury to decide which is more reasonable."[407]

D. In 2005, in *City of Keller*, while discussing whether circumstances present "some evidence", the Court reiterated that there can be no inference if all the factfinder can do is guess:

> In claims or defenses supported only by *meager* circumstantial evidence, the evidence does not rise above a scintilla (and thus is legally insufficient) if jurors would have to guess whether a vital fact exists. When the circumstances are equally consistent with either of two facts, neither fact may be inferred.[408]

E. In 2015, in *Suarez*, within the context of determining whether a municipality had knowledge of a dangerous condition so as to be grossly negligent:

> An inference is not reasonable if it is susceptible to multiple, equally probable inferences, requiring the factfinder to guess in order to reach a conclusion.[409]

Although circumstances can be evidence of an ultimate fact when the fact may be *fairly and reasonably* inferred from other facts in the case, the Texas Supreme Court has long cautioned that the circumstances have to support more than a guess.[410] As the Texas Supreme Court stated in *City of Keller* in 2005, "[The fact finder] may not simply speculate that a particular inference arises from the evidence."[411]A fact is established by circumstantial evidence when the

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[405] *Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984)(citing *Texas Sling Co. v. Emanuel*, 431 S.W.2d 538 (Tex. 1968)); *Continental Cas. Co. v. Fountain*, 257 S.W.2d 338 (Tex. Civ. App.–Dallas 1953, writ ref'd).

[406] *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997); (citing *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex.1995) (quoting *Litton Indus. Prods. v. Gammage*, 668 S.W.2d 319, 324 (Tex.1984)).

[407] *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001)(emphasis added).

[408] *City of Keller v. Wilson*, 168 S.W.3d 802, 814 (Tex. 2005).

[409] *Suarez v. City of Texas*, 13-0947, 2015 WL 3802865, at *8 (Tex. June 19, 2015).

[410] *Blount*, 910 S.W.2d at 933.

[411] *Serv. Corp. Intern. v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011) (citing *City of Keller*, 168 S.W.3d at 821.

fact may be *fairly and reasonably* inferred from other facts proved in the case."[412]

When circumstantial evidence is used to support a claim for undue influence, it cannot be viewed in isolation or in a vacuum. As the Texas Supreme Court indicated in *Rothermel* in 1963, the circumstances must be considered "as a whole":

> In the absence of direct evidence all of the circumstances shown or established by the evidence should be considered; and even though none of the circumstances standing alone would be sufficient to show the elements of undue influence, if when considered together they produce a *reasonable* belief that an influence was exerted that subverted or overpowered the mind of the testator and resulted in the execution of the testament in controversy, the evidence is sufficient to sustain such conclusion.[413]

An inference is not reasonable if the circumstances support multiple, equally probable inferences, requiring a guess in order to reach a conclusion. At least one Texas court has defined "inference" by noting that "for [the fact finder] to infer a fact, it must be able to deduce that fact as a logical consequence from other proven facts."[414] An inference is not reasonable if it is premised on mere suspicion.[415] Suspicion and conjecture are not evidence.[416] "Legally sufficient circumstantial evidence requires a logical bridge between the proffered evidence and the necessary fact."[417] "Some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence."[418] As noted above, an inference is not reasonable if it is susceptible to multiple, equally probable inferences, requiring the factfinder to guess in order to reach a conclusion.[419]

Undue influence case opinions do, in fact, examine whether circumstances offered to prove undue influence create "reasonable inferences" so as to constitute some evidence of undue influence. Although a contestant may prove undue influence by circumstantial evidence, the evidence must be probative of the issue and not merely create a surmise or suspicion that such influence existed at the time the will was executed.[420] Stated another way, the circumstance must be so strong and convincing and of such probative force as to lead a well-guarded mind to a reasonable conclusion that such influence was exercised and that it controlled the will power of the testator at the very time the will was executed.[421]

C. Testamentary Capacity

To have testamentary capacity, the testator must: (1) have the ability to understand the business he was engaged in; (2) understand the nature and extent of his property; (3) know the persons to whom he meant to devise and bequeath it; (4) understand the persons dependent upon his bounty and the mode of distribution among them; and (5) have sufficient memory to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least, their obvious relation to each other, and be able to form a reasonable judgment as to them.[422]

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[412] *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993); *Dallas County Flood Control v. Cross*, 815 S.W.2d 271, 279–80 (Tex. App.—Dallas 1991, writ denied); *Walter Baxter Seed Co. v. Rivera*, 677 S.W.2d 241, 244 (Tex. App.–Corpus Christi 1984, writ ref'd n.r.e.).

[413] *Rothermel*, 369 S.W.2d at 922 (emphasis added).

[414] *Marshall Field Stores, Inc. v. Gardiner*, 859 S.W.2d 391, 400 (Tex. App.–Houston [1st Dist.] 1993, *writ dismissed w.o.j*), *decision clarified on denial of reh'g* (July 29, 1993) (citing BLACK'S LAW DICTIONARY 700 (5th ed. 1979) for the definition of inference as follows: In the law of evidence, a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved....). *See also Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059, 1064 (1898).

[415] *Suarez*, 2015 WL 3802865, at *8 (citing *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727–28 (Tex. 2003)).

[416] *Lozano*, 52 S.W.3d at 152, citing *Browning–Ferris, Inc.*, 865 S.W.2d at 928; *Kindred v. Con/Chem Inc.*, 650 S.W.2d 61, 63 (Tex. 1993).

[417] *Lozano*, 52 S.W.3d at 152.

[418] *Browning–Ferris, Inc.*, 865 S.W.2d at 927. *See also* n. 3, ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."), citing *Kindred, Inc.*, 650 S.W.2d at 63.

[419] *Suarez*, 2015 WL 3802865 at *8, citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004); *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001); *City of Keller v. Wilson*, 168 S.W.3d 802, 814 (Tex. 2005).

[420] *Reynolds v. Park*, 485 S.W.2d 807, 813 (Tex. Civ. App.–Amarillo 1972, writ ref'd n.r.e); *Bradshaw v. Naumann*, 528 S.W.2d 869, 871 (Tex. Civ. App.–Austin 1975, writ dism'd).

[421] *Kirkpatrick v. Raggio*, 319 S.W.2d 362, 366 (Tex. Civ. App.–Fort Worth 1958, *writ refused NRE*) (discussing JNOV and noting that "For the evidence to be sufficient to submit an issue on undue influence, it must be more than purely speculative and when its probative force is so weak that it only raises a mere suspicion or surmise, the evidence is insufficient to support such an issue.").

[422] *Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890).

1. Burden of Proof

The party offering a contested will for probate has the burden[423] to prove testamentary capacity and due execution by a preponderance of the evidence.[424]

2. No Presumption of Testamentary Capacity

Before a will may be admitted to probate it must be proved that the testator was of sound mind at the time of its execution.[425] The fact that a will is self-proved does not shift the burden if the contest is filed before the will was admitted to probate.[426] A self-proving affidavit constitutes prima facie evidence of the validity of the execution of the will, and although the attesting affidavit is subject to contradiction by competent testimony, such testimony does not destroy the prima facie case established by the attestation clause and only raises a fact issue for the trier of facts.[427]

3. Competent Testator Presumed to Know the Contents of Will

If a testator, who is of sound mind and able to read and write, executes a will and has it witnessed as required by statute, the testator is presumed to know the contents of the testamentary instrument which he has signed.[428] The rule is not without exception, however.[429]

[423] *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968); *Reynolds*, 485 S.W.2d at 815-816 (preponderance standard).

[424] *See Greene v. Watts*, 332 S.W.2d 419 (Tex. Civ. App.—Dallas 1960, no writ) (placement of burden).

[425] *In re Price's Estate*, 375 S.W.2d 900, 903 (Tex. 1964). *See* TEC § 256.152(a)(2)(B)(i)(requiring applicant to prove testator was of sound mind if the will is not self-proved).

[426] *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983); citing *Reynolds*, 485 S.W.2d at 816-17. *See also In re Price's Estate*, 375 S.W.2d at 903.

[427] *Gasaway v. Nesmith*, 548 S.W.2d 457, 458 (Tex. Civ. App.–Houston [1st Dist.] 1977, *writ ref'd n.r.e*).

[428] *Gilkey v. Allen*, 617 S.W.2d 308, 311 (Tex. Civ. App.–Tyler 1981), citing *Boyd v. Frost National Bank*, 145 Tex. 206, 196 S.W.2d 497 (1946); *Kelly v. Settegast*, 68 Tex. 13, 2 S.W. 870.

[429] *Gilkey*, 617 S.W.2d 310, citing *Settegast* and noting that "the court in that case stated that the presumption does not prevail if it be shown that there existed a set of circumstances in the case which casts suspicion on the issue of whether the testator knew the contents of the will. The suspicious circumstances in that case showed that the testator, a man unable to read and write, while gravely ill at the home of one of the legatees, did not request that a will be prepared but signed the will by his mark disinheriting his only living daughter, bequeathing his property to legatees who were not related to him."

IX. APPELLATE REVIEW

A. Standards on Appeal

There are three key questions to ask prior to any appeal of a summary judgment ruling. Is it final? What grounds can be reviewed? And what is the appellate standard of review?

Summary judgment must be final to be appealable.[430] If the summary judgment leaves unresolved claims in the case, it is interlocutory and therefore not appealable.[431] Only when the court disposes of all parties and issues in the lawsuit can the non-movant appeal the granting of summary judgment.[432]

Motions for summary judgment must state specific grounds, and a motion for summary judgment must "stand or fail on the grounds expressly presented in the motion.[433] Thus, a trial court acts improperly when it grants a summary judgment motion on grounds that are not included in the motion itself.[434] As one appellate court succinctly explained, "[w]hen a motion for summary judgment asserts grounds A and B, it cannot be upheld on grounds C and D, which were not asserted, even if the summary judgment proof supports them."[435] The express ground relied upon must be found in the motion itself, and Texas courts take a very strict view of this requirement – even going so far as to not consider additional grounds unstated in the motion but expressly laid out in an accompanying brief or other accompanying summary judgment evidence.[436] The lesson is clear. If you want your summary judgment to survive on appeal, expressly state all of your grounds in the motion and leave nothing to chance.

As to the appellate standard of review, the appeals court reviews a traditional and a no-evidence summary judgment de novo.[437] When the parties file cross-motions for summary judgment, and the trial court grants one but denies the other, the appeals court

[430] *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001).

[431] *See Lehmann*, 39 S.W.3d at 205.

[432] *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995).

[433] Rule 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993).

[434] *Roberts v. Southwest Texas Methodist Hosp.*, 811 S.W.2d 141, 145 (Tex. App.–San Antonio 1991, writ denied).

[435] *Roberts*, 811 S.W.2d at 145; *McConnell*, 858 S.W.2d at 342.

[436] *McConnell*, 858 S.W.2d at 341; *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 915 (Tex. 1992).

[437] *Southwestern Bell Tel., L.P. v. Emmett*, 459 S.W. 3d 578, 589 (Tex. 2015); *Valence Operating Co. v. Dorsett*, 164 S.W. 3d 656, 661 (Tex. 2005).

should review both parties' evidence and render the judgment that the trial court should have ordered.[438]

B. Might An Adverse Summary Judgment Ruling of the Trial Court Represent a Violation of the Texas Constitution's Open Courts Guarantee.

Article I, § 13 of the Texas Constitution provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." This constitutional right has been interpreted by the courts to guarantee all litigants the right to redress their grievances through the court system.[439] While usually an Open Courts challenge is leveled at a new statute issuing from the state legislature,[440] occasionally this constitutional protection has been aimed at aggressive and clearly erroneous trial court orders depriving a litigant of his day in court.[441] The thesis of the Open Courts guarantee is that no state actor may arbitrarily withdraw all legal remedies from a party having a well-defined cause of action under the common law.[442]

This concept might apply to a trial court's clearly erroneous order on a summary judgment motion in probate or trust litigation. For example, assume that a written *inter vivos* trust agreement designates a remainder individual beneficiary by name and grants a different individual beneficiary lifetime rights to income and/or principal for health, support, maintenance, and education, with all of the trust corpus remaining at his death to be distributed outright and free of trust to the named remainder beneficiary. The separate individual trustee proceeds to engage in clear self-dealing transactions and fails to comply with his duty to diversify the trust investments, resulting in significant financial losses to the trust. The remainder beneficiary sues the trustee while the lifetime beneficiary is still alive, claiming breaches of fiduciary duty resulting in substantial damages. The defendant trustee files a motion for summary judgment contending that the remainderman has no standing, and the uninformed trial court grants the summary judgment, effectively terminating that plaintiff's claim for breach of fiduciary duty. The trial court issues such order despite the overwhelming Texas common law establishing that such a remainder beneficiary designated by name constitutes an "interested person" under TTC § 111.004(7) and a necessary party to any trust litigation under TTC § 115.011(b)(2) with full standing to bring such a breach-of-fiduciary-duty cause of action against the trustee.[443] In this instance, the trial court will have truncated the plaintiff's legal remedies for his well-defined common-law cause of action for breach of fiduciary duty. Has this trial court, as a state actor, violated the plaintiff's Open Courts due process rights entitling that plaintiff, as an appellant, to a reversal of the trial court's summary judgment on this constitutional basis? Some reported cases appear to hold that such an unreasonable and arbitrary lower court judgment can unreasonably restrict a cognizable common-law cause of action justifying constitutional protection.[444] Numerous other probate and trust causes of action deriving from the common law might also be entitled to such protection under the Open Courts constitutional guarantee.

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[438] S*eaBright Ins. v. Lopez*, 465 S.W. 3d 637, 641-642 (Tex. 2015); *Gilbert Tex. Constr. L.P. v. Underwriters at Lloyd's London*, 327 S.W. 3d 118, 124 (Tex. 2010).

[439] *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986); *Edwards Aquifer Authority v. Day*, 274 S.W.3d 742, 758 (Tex. App.–San Antonio 2008 (pet. granted); *Glazer's Wholesale Distributors, Inc. v. Heineken USA, Inc*., 94 S.W.3d 286, 299 (Tex. App.–Dallas 2001, pet. vacated).

[440] *Diaz v. Westphal*, 941 S.W.2d 96, 101 (Tex. 1997); *Hanks v. City of Port Arthur*, 121 Tex. 202, 207-16, 48 S.W.2d 944, 946-50 (1932).

[441] *Glazer's*, 95 S.W.3d at 286, 298-303.

[442] *Id*. at 298-99.

[443] *Slay v. Burnett Trust*, 187 S.W.2d 377, 382 (Tex. 1945); *Ablon v*. Campbell, 457 S.W.3d 604, 616-17 (Tex. App.—Dallas 2015, pet. denied); *Snyder v. Cowell*, 2003 WL 1849145 (Tex. App.–El Paso 2003, no pet.)(such a trust's remainderman has standing to sue the trustee currently for breaches of fiduciary duty); *Elliott v. Green*, 1995 WL 437206 (Tex. App.–Dallas 1995, no pet.)(Dallas Court of Appeals held that it was "inconceivable" that such remainder beneficiaries are "necessary parties," as well as persons to whom the trustee owes a duty, but are unable to protect their interest by suing the trustee); *Yturri v. Yturri*, 504 S.W.2d 809 (Tex. Civ. App.–San Antonio 1973, no writ)(remainderman-plaintiff had full standing as an interested person to sue the trustee for an accounting and to remove the trustee).

[444] *Glazer's*, 95 S.W.3d at 286, 298-303.