PROBATE, GUARDIANSHIP & TRUSTS
STATUTES OF LIMITATIONS ISSUES

by
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and
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2010 Advanced Estate Planning & Probate Course
State Bar of Texas
San Antonio

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SELECTED RECENT PRESENTATIONS and PAPERS

"Statute of Limitations Issues in the Probate, Guardianship & Trust Context The Advocate (Vol. 48 Fall 2009)
"Appealing Bench Trials" State Bar Nuts and Bolts of Appellate Practice (2009)
"Everything you wanted to know but were afraid to ask: an open Q&A with Judge Hurley, Justice Wainwright & Chief Justice Jones" Panel Moderator Austin Bar Association Bench bar (2009)
"Oil Tank Farm and Gas Storage Cases on Appeal" Texas Oil & Gas Association 2009 Property Tax Representatives Annual Conference (2009) (co-presenter)
"Case Law Update" Austin Bar Association Nuts & Bolts of Administrative Law Seminar (February 2009)
"Practice Before the Courts of Appeals" State Bar Appellate Boot Camp (2008)
"Jury Charge Issues" State Bar 31st Annual Advanced Civil Trial Course (2008)
"Midland Tank Farm Appeal Update" Texas Oil & Gas Association 2008 Property Tax Representatives Annual Conference (2008) (co-presenter)
"Not Just for Toxic Tort Cases: Strategic Use of Multidistrict Litigation Consolidation" 71

TexBar J. 98 (2008) (co-author with Lynne Liberato)
"Preserving Issues in Post-Trial Motions" Austin Bar Association Civil Litigation Section Ultimate Trial Notebook Seminar (June 2007)
"Shaking Out the New Multidistrict Litigation Rules and MDL Panel Decisions" Permian Basin Oil & Gas Law Weather Report (March 2007)
"Appellate Practice Tips Every Lawyer Needs to Know" Austin Bar Association First Friday CLE (December 2006)
"Multidistrict Litigation" 20th Annual Advanced Civil Appellate Practice Course (2006)
"Case Law Update" 7 Tex. Tech. Admin. L.J. 1 (Spring 2006) (co-author)
"Appeals Involving the Government" 19th Annual Advanced Civil Appellate Practice Course (2005)
"Case Law Update" Austin Bar Association Annual Advanced Administrative Law Seminar (2005, 2004, 2002)
"Supreme Court Update" College of the State Bar Summer School (co-presenter)(2005)
Ethics Seminar Class, "Lifestyle Issues" South Texas College of Law (co-presenter) (2004)
"Third Court of Appeals Update" Travis County Bar Association Bench-Bar Conference (April 2004)
Austin Lawyer: Third Court of Appeals Update" - monthly article (2001-present)
The Appellate Advocate: Texas Supreme Court Update" - annual article (co-author) (2002-present)

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INTRODUCTION

The focus of this paper is to highlight common statute of limitations issues in probate, guardianships and trusts. Some time limits (such as filing a bond) are discussed, even though they are not technically statutes of limitations. They are mentioned because they may be important in monitoring the actions of a fiduciary to avoid his being (or to cause him to be) driven from his office.

This paper does not cover deadlines for appealing final judgments or bills of review or direct and collateral attacks on judgments.

The finality of judgments in probate court is a quagmire. Not only can it impact when you must appeal; it also tells you whether or not a particular order of the court may be reviewed at a later date. Severance and vigilance are the keys. Judge Steven King's article on final judgments was most recently presented at the 2009 Advanced Estate Planning and Probate Course and will be found at Tab 23. Also see, the discussion after Probate Code Section 5 Johanson's Texas Probate Code.

On direct and collateral attacks on probate judgments see generally Texas Practice Series, Probate and Decedents' Estates.

On probate bills of review, see Section 31 (Decedents' Estates) and Section 657 (Guardianships) of the Texas Probate Code. For an introduction to equitable bills of review see pages 529 et seq of O'Connor's Texas Rules, Civil Trials 2010.

References to sections are to the Texas Probate Code unless otherwise indicated. It is also worth noting that the Guardianship Code is actually a part of the Probate Code beginning at section 601. The Trust Code is in the Property Code at Sections 101.001 through 117.012.

There are other sections of the Property Code dealing with trust matters. Most notably section 142.005 on court created trusts, chapter 121 on employees' trusts, chapter 123 on the attorney general's participation in charitable trusts, chapter 163 on institutions funds and chapter 181 on powers of appointment.

1. **PROBATE**

a. **The effect of death on the statute of limitations.**

i. Section 16.062 of the Civil Practice and Remedies Code tolls for one year any action in favor of or against a dead person. TEX. CIV. PRAC. & REM. CODE §16.062. Thus, if a plaintiff dies before suit is filed, there can be up to one additional year to bring an action. Likewise, if a defendant dies before suit is filed, the plaintiff has an additional year to bring any action.

ii. Except if a personal representative is appointed within a year of death. In that case this statute begins to run on the date the personal representative qualifies. Id. §16.062.

iii. Note that Section 16.062 only tolls the claims on behalf of the decedent and his estate, not those made by the family under the wrongful death statute. *See* TEX. CIV. PRAC. & REM. CODE § 71.001 *et seq*.

iv. This statute does not revive any action that was barred at the time of death. *Russell v. Ingersoll-Rand Co*., 841 S.W.2d 343, 344-45 (Tex. 1992).

v. In *Garcia v Caremark, Inc.*, 921 S.W.2d 417, 421 (Tex.App.—Corpus Christi, no writ 1996), the parent sued on behalf of his child's estate. The suit was filed more than 2 years after the child's death but less than 3 years. The defendant contends that the extra year under §16.062 was not available because the parent had acted as de factor administrator. The Court rejected that contention indicating that §16.062 calls for a personal representative to qualify, which means taking an oath and possibly filing a bond. Further, that if they allowed an informal or defacto administrator to start the running of the statute of limitations that the dates would be nebulous. Whereas with a formal administration there is a definite date.

b. **An estate is not an entity.** An estate is not an entity and cannot sue or be sued, *Henson v. Estate of Crow*, 734 S.W. 2d 648 (Tex. 1987). The personal representative of an estate can sue and be sued and in certain instances the heirs of an estate can sue and be sued.

c. **A suit against an estate may not toll the statute of limitations.**

i. There are a number of cases in which a plaintiff sued an estate and not the personal representative. In some the judgment was declared void. In others the judgment was sustained because the defendant had knowledge of the suit, participated or made an appearance. There are three supreme court cases.

(1) In *Price v. Estate of Anderson*, 522 S.W.2d 690 (Tex. 1975), the plaintiff sued the "Estate of Anderson" and served the temporary administrator. As authorized, the administrator accepted service, notified the insurance company and retained counsel. The attorney filed an

answer and several other documents on behalf of the "estate." Subsequently, the attorney filed a motion to dismiss, arguing the action was barred by the statute of limitations.

(a) The plaintiff then amended and named the temporary administrator as a defendant. The trial court dismissed the action against both the estate and the temporary administrator.

(b) The plaintiff argued that this was a "misnomer" case where the plaintiff misnamed the defendant. The supreme court disagreed and concluded it was not a "misnomer" case, but was a mistake of law. *Id.* at 691-92. The court refused to consider whether or not this mistake was inexcusable. Instead it held that the purposes of the statute of limitations were not breached in this matter, because the defendant knew of the lawsuit and had attorneys who represented him throughout the proceeding. *Id.*

(2) In *Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex. 1987), a landlord sued for back rents; the defendant died during the litigation and the defendant's lawyer gave notice of death. The plaintiff then amended and added the "Estate of Bruce L. Crow" as the defendant. The lawyer who had been representing the decedent filed an answer on behalf of the estate. The court entered judgment for the defendant and against the plaintiff landlord.

(a) Citing *Price v. Estate of Anderson*, the supreme court held that the estate was not a legal entity and could not be sued. The plaintiff argued that problem was waived because the attorney filed an answer for the estate. The supreme court disagreed and concluded that this case was different from those where the personal representative appears. The plaintiff also argued that the estate waived any error because it did not except to the defect. The supreme court again rejected the plaintiff's argument. According to the court, since the estate is not a legal entity there was no one before the court to make exception or to waive defects. *Id.* at 649. The supreme court affirmed. There was no indication or discussion of whether or not the plaintiff was now barred from making a proper claim against the personal representative. Nor did the supreme court discuss any limitations problems.

(3) The supreme court took up this problem one more time in *Rooke v. Jenson*, 838 S.W.2d 229 (Tex. 1992). In this car accident case, the plaintiff first sued Sam Reed. After learning that Reed was deceased, the plaintiff amended and named Reed's wife, who was the sole heir and executrix in Reed's will, as the defendant. Reed's daughter, Jenson, knowing of the suit, became the personal representative rather than the widow, but more than two years after the accident. Rooke again amended her lawsuit this time to name Jensen, as executor, as a defendant. The trial court dismissed the lawsuit on the basis of limitations.

(a) The supreme court held that because Jensen knew about the lawsuit no purpose of the statute of limitations would be served by dismissing the action. *Id.* at 230.

(b) Jensen argued that, unlike *Price, supra*, in this case the person actually serving as executor was different from the person originally sued. The court disagreed because Jensen was fully aware of the suit and used the same attorney who had represented the mother. *Id.*

ii. There are several lower court cases as well.

(1) In *Estate of C.M. v. S.G.*, 937 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1996, no writ), plaintiff brought an action against LCM for molestation and against the estate of his wife, CM. LCM was the executor and the plaintiff had him served. However, LCM never appeared or participated as executor. He had one lawyer and the "estate" had another.

(2) The trial court entered judgment for the plaintiff and against both LCM and CM's estate. On appeal the court on its own determined that the matter had to be reversed because the estate was not a legal entity. Thus, the trial court lacked "fundamental jurisdiction" which could not be waived. The court of appeals said that suits seeking to establish liability of an estate should be filed against the personal representative or in some instances, the heirs or beneficiaries. *Id.* at 10.

(3) The court explained that a judgment against an estate is not necessarily void if the personal representative appears or participates in the lawsuit. *Id.* at 10. The court held that because the executor did not appear or participate in the trial in his capacity as executor, the trial court lacked jurisdiction to enter judgment against the estate. The court reversed and rendered a take-nothing judgment. *Id*. at 10-11.

(4) The reasoning of this court does not seem to square with the knowledge element set out in *Price, supra.*

(5) What the court did not say is whether or not a subsequent action was barred either by res judicata or by limitations or if there had been a tolling of the statutes.

iii. In *Gregg v. Barron*, 977 S.W.2d 654 (Tex. App.—Fort Worth 1998, pet. denied), plaintiff sued the estate and listed the son as the child and heir of the decedent. The son was served with process. The heir answered and participated in discovery. After limitations ran, plaintiff amended and named the son, as the personal representative of the estate, as a defendant and as sole heir. *Id.* at 655. Son moved for summary judgment in that an estate was not a legal entity, that no one had been appointed personal representative and that son was not joined until after the statute of limitations had run. The trial court granted summary judgment for the son.

(1) The court of appeals reversed and remanded.

Although acknowledging that a personal representative is the proper party, not the estate; the court of appeals concluded that the statute of limitations was tolled because the proper defendant participated in the trial although the suit was incorrectly styled as being brought against the estate. *Id.* at 656-57; *see also Dueitt v. Dueitt*, 802 S.W.2d 859, 861-62 (Tex. App.--Houston [1st Dist.], 1991, no writ) (only estate was named as plaintiff but executor participated in his representative capacity; judgment was not set aside).

(2) Son went on to argue that Price could be distinguished

> "…because no personal representative has been appointed to his father's estate. However, this difference does not affect the spirit of the *Price* opinion, nor does it change the fact that Charles participated in the trial of the case. More importantly, Charles has not denied that he is the sole heir of the deceased."

iv. In *Richardson v. Lake*, 966 S.W.2d 681 (Tex.App.—San Antonio 1998, no pet.) the statute of limitations was about to run. In his suit, filed against "The Estate of Torfeasor" plaintiff stated that he knew he had to make the personal representative a party but that there was no administration pending. As soon as the temporary administrator was appointed (which was after the statute of limitations had run), the plaintiff had him served with process. The court was persuaded that the plaintiff knew the law and complied with it as promptly as possible. *Id*. at 683.

d. **The relation back doctrine as a means of curing defects in capacity.**

i. Under the relation back doctrine, if a filed pleading relates to a cause of action or defense that is not subject to limitations when the pleading is filed, a subsequent amendment that changes the facts or grounds of liability is not subject to limitations unless the amendment is wholly based on a new, distinct or different transaction or occurrence. Tex. Civ. Prac. & Rem. Code §16.068.

ii. Two Texas Supreme Court cases are worth noting. In both cases, the supreme court concluded that a plaintiff's lack of capacity could be cured by the subsequent appointment as administrator after limitations had run, but before the actions were dismissed.

iii. First, in *Austin Nursing Center, Inc. v Lovato*, 171 S.W.3d 845 (Tex. 2005), a woman asserted a health care liability claim on behalf of her mother's estate. She filed suit within the statute of limitations individually and as personal representative of her mother's estate. In fact, however, she was not the personal representative. After the statute of limitations had run, the probate court appointed her the personal representative. *Id.* at 847.

iv. According to the supreme court, the estate's claims were not barred and her claims as personal representative related back to her original filing. *Id.* at 852-53. The court characterized the issue as one of capacity to sue, not as standing to sue. *Id.* at 848-49. Thus, the defendant had to raise the issue in the trial court by a verified pleading. *Id.* at 849. Standing on the other hand, which is a component of subject matter jurisdiction, can be raised for the first time on appeal. *Id.*

v. Second, the supreme court addressed a similar issue with similar facts in *Lorentz v. Dunn,* 171 S.W.3d 854 (Tex. 2005). Lorentz, the decedent's sister, brought an action purporting to be the administrator of her sister's estate. In fact her application was pending and had not been granted at the time she filed suit. Her appointment as administrator came after the statute of limitations had run. Defendant moved to dismiss contending that Lorentz lacked standing when the suit was filed. Defendant also asked that the matter be dismissed as sanctions for misrepresenting her capacity.

vi. As in *Lovato*, the supreme court treated the issue as one of capacity not standing. *Id.* at 856. The court concluded that the after acquired capacity cured the pre-limitations lack of capacity. *Id..* The Court declined to address the sanctions motion, leaving that to the discretion of the trial court.

vii. The Amarillo Court of Appeals addressed the relation back doctrine in *Covington v. Sisters of Charity*, 179 S.W.3d 583 (Tex. App.--Amarillo 2005, pet denied). The case is instructive in its discussion of *Lovato* and *Lorentz*.

viii. In *Covington*, decedent's sister brought an action for herself and "on behalf of the estate," even though one of the decedent's children had already been appointed administrator. *Id.* at 584-85. After being challenged, and after the statute of limitations had run, the sister amended her lawsuit to include the court appointed administrator. *Id.* at 585.

ix. The Amarillo Court held that the relation back doctrine did not apply. According to the court, the sister was a "stranger" to the lawsuit, and thus she did not have any claims. *Id.* at 587-89.

x. Interestingly, the administrator did not bring the action as required by Civil Practice and Remedies §71.001(c). The case does not discuss the administrator's possible liability.

e. **Limitation issues relating to probating a will.**

i. **Probate of the Living: Void.** Any administration of an estate or probating of a will of a person who is still living is void. TEX. PROB. CODE § 72(a).

ii. **Pre Mortem Probate.** Similarly, one cannot establish the validity of a will during the testator's life. While some states allow proof of

the validity of a will during a testator's lifetime, Texas does not have any such provision. *See* Gerry Beyer, TEXAS LAW OF WILLS, § 52.38 et seq.

iii. **Pre Mortem Agreements and Assignments.** But agreements regarding the disposition of a living person's estate are sometimes made. Some courts have approved such agreements and others have declined jurisdiction. This occurs occasionally in contested guardianships where the parties want to avoid further litigation on the death of the proposed ward. Such an agreement would not be binding on the Ward, for example if they subsequently regained capacity. Under Texas law, a person may assign an expectancy. See Section 11.7, **Texas Practice, Wills** If a person assigns an expectancy, the assignee only takes what the assignor actually has at death. A testator always has the right to change a will.

iv. **4 Years to Probate.** The statute of limitations to probate a will is four years from the date of death. TEX. PROB. CODE § 73.

(1) In *Farr v. Bell*, 460 S.W.2d 431, 436 (Tex.Civ.App.—Dallas 1970, writ ref. n.r.e.) the court held that article 5538 of the Revised Civil Statutes (the predecessor to Civil Practice & Remedies Code §16.062) did not extend this four year statute.

v. **After 4 Years: Muniment of Title.** A will may be admitted to probate after four years but only for the limited purpose to prove title, as a muniment of title. No personal representative can be appointed. The person offering the will must establish that they are not in default for failing to present the will for probate within the four-year period. TEX. PROB. CODE §73(a). In *Brown v Byrd*, 512 S.W.2d 753, 755 (Tex.Civ.App.—Tyler 1974, no writ), the court defined, not in default as "…a failure due to the absence of reasonable diligence on the part of the party offering the instrument."

vi. **After 4 Years: Innocent Purchasers.** If a bona fide purchaser buys property from the heirs four years after the decedent's death, and no will has been probated, he is protected. The subsequent probate of a will does not effect the good title of the purchaser. Section 73(b). Any complaint the beneficiaries under the will has to be directed against the heirs and the proceeds received from the BFP. But anyone who buys from heirs takes subject to an administration. Texas Practice, Decedent's Estates, Section 191.

vii. **After 4 Years: Faultless Beneficiaries.** Even though one beneficiary under a will may be barred from probating the will because they are in default, another beneficiary who is not in fault may successfully submit it for probate. *Fortinberry v. Fortinberry*, 326 S.W.2d 717, 719-20 (Tex. Civ. App.--Waco 1959, writ ref'd n.r.e.).

(1) This rule, however, does not protect the successors to a beneficiary in default. In *Faris v Faris*, 138 S.W.2d 830 (Tex. Civ.

App.--Dallas 1940, writ ref'd), the widow survived her dead husband by 20 years, but never offered his will for probate. On her death, her children tried to probate his will. According to the court of appeals, widow waived her rights and her successors--even though not directly in default--could not probate the will. *Id.* at 832.

(2) The courts have been more generous with grantees under deeds who are trying to establish a link in their chain of title. *Chovanec v. Chovanec*, 881 S.W.2d 135, 137-38 (Tex.App.--Houston [1st Dist.] 1994, no writ).

(3) If a will is probated as a result of the application of a person not in default, everyone under the will takes their interest, even a person who could not have probated the will because they were in default. *Masterson v. Harris*, 107 Tex. 73, 174 S.W. 570, 573-75 (1915).

(4) In *Estate of Williams*, 111 S.W.3d 259, 263-64 (Tex.App.--Texarkana 2003, pet. denied), only one beneficiary applied to probate the will. The appellate court held that he was in default and that the lack of fault of the other beneficiaries (who did not apply to have the will probated) was irrelevant. Whether or not those persons could subsequently seek probate of the will was not addressed.

(5) If a will is offered for probate after four years, the decedent's heirs (or beneficiaries of a prior will) must be given notice of the application. TEX. PROB. CODE §128B. Section 128B details the type of notice and its requirements. This statute was enacted in 1999. The only reported case applying §128B is *Estate of Cornes*, 175 S.W.3d 491 (Tex.App.--Beaumont 2005, no pet). In *Cornes*, the Beaumont Court held that the constitutional county court's failure to give notice was harmless error because the issues were tried "de novo" in the district court. *Id.* at 494-95.

viii. **After 4 Years: Abandonment** However, a proponent may raise a presumption that the application was abandoned. In *Abrams v. Ross' Estate*, 250 S.W. 1019, 1021-22 (Tex. Comm'n App.1923, judgm't adopted), the court held that a 44-year delay from an order of continuance created a "conclusive" presumption of abandonment. But generally, a presumption of abandonment may be rebutted. *Brown v. Byrd*, 512 S.W.2d 753 (Tex. Civ. App.—Tyler 1974, no writ).

ix. **After 4 Years. To Show Revocation.** A will not admissible to probate because not offered within four years can still have effect. Such will can show revocation of an earlier will. Even if the will was not admitted to probate because the proponent was at fault in not offering it earlier, it can still be used to show revocation of an earlier will. *In re Estate of Williams*, 111 S.W.3d 259 (Tex.App.--Texarkana 2003, pet. denied).

f. **Limitations issues in will contests.**

i. As with any proceeding in which court relief is sought, a will may be contested before it is admitted to probate. Section 10 of the Probate Code provides for the filing of an opposition by an interested person. TEX. PROB. CODE §10. A will may also be contested for two years after its probate. TEX. PROB. CODE § 93.

ii. There is also an exception to the two-year statute of limitations to contest a will for incapacitated persons. An incapacitated person has two years after gaining capacity to institute a contest. TEX. PROB. CODE 93.

iii. Courts tend to be lenient in allowing will contests. For example, personal service on a person before the will is admitted to probate does not bar a post probate will contest under Section 93. *Estate of Blevins*, 202 S.W.3d 326, 328 (Tex.App.--Tyler 2006, no pet.).

iv. The appointment of a guardian ad litem for a minor in the original contest did not bar the minor from filing a contest within two years of reaching majority. *Ladehoff v. Ladehoff*, 436 S.W.2d 334, 340 (Tex. 1968). This mysterious result is explained because the minor was not served with process. Service on a minor is a prerequisite to having a judgment binding on a minor.

v. A proceeding to probate a will dated later than the one already admitted to probate is not a will contest--because it is not disputing the validity of the probated will-- and is controlled by the four year statute, Section 73; not the two-year limitation in Section 93. *See Estate of Morris*, 577 S.W.2d 748, 752 (Tex.Civ.App.—Amarillo 1979, writ ref'd n.r.e.).

g. **Statute of limitations issues relating to temporary administrators.**

i. The temporary administration procedure is set out in Texas Probate Code § 131A *et seq*; *see* 17 M.K. WOODWARD & ERNEST E. SMITH, III, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES §§ 461-80 (1971).

ii. Temporary administrations should be avoided if at all possible. It will double the administration costs. Also, some probate judges are openly hostile to establishing a temporary administration especially if the only reason is because a plaintiff's attorney has not been diligent. However, if a temporary administrator is involved, below are issues to consider.

iii. At best, a permanent personal representative cannot be appointed until the first Monday 10 days after the application is filed and citation is posted. TEX. PROB. CODE §§ 128; 33(f)(2).

iv. If the statute of limitations will run, even with the help of TCPRC Section 16.062, before an administrator can be appointed, the court can appoint a temporary

administrator. If the temporary administrator is to be a defendant, he should be authorized to accept service of suit, notify the insurance carrier, to demand defense and indemnity and to co-operate with the insurance company.

v. While it is true that a creditor of an estate (such as a plaintiff in a personal injury claim) is entitled to be appointed administrator under Probate Code §77(f), it is not the best practice. If the plaintiff asks for an administrator so there is a proper party to sue, the plaintiff should decline to serve and ask that an independent third party be appointed.

vi. A decedent's debtor, a potential defendant, is not an interested person under Section 3(r) of the Texas Probate Code. Thus, a debtor may not bring an action to appoint an administrator.

vii. If the deceased does not have any assets (or at least not any non-exempt assets) other than his rights under an insurance policy, the applicant may have to pay the temporary administrator's fees and expenses.

h. **Limitations issues relating to the appointment of a personal representative.**

i. **Before Appointment.**

(1) **30 Days.** The Probate Code provides for a hammer on executors who fail to offer a will for probate in a timely manner. Section 178(b) provides, *inter alia*, that letters of administration shall issue if a person named as executor in the will, without good cause, fails to offer the will for probate within 30 days of the decedent's death. Thus, a third party could step in and be appointed administrator rather than the person named in a will. This rule is seldom used. But it is there, and the statute uses "shall." There have been no cases since it was amended in 2007 to add the "good cause" clause. For a discussion of the cases before that time, see Johanson's Texas Probate Code discussion following Probate Code § 178.

(2) **Four Years.** There is a four-year statute of limitations for appointing a personal representative. Section 73(a) states that no personal representative shall be appointed where a will is probated more than four years after the date of death. TEX. PROB. CODE §73(a).

(3) **After Four Years.** However, apparently a personal representative can be appointed after four years if the application to appoint him was filed within four years. See Section 74 and Texas Practice, Decedents' Estates, Section 226. This could come up if a will has been probated as a muniment of title or in an heirship proceeding.

ii. **After Appointment.**

(1) **20 days: Bond & Oath.** After the court appoints a personal representative, the

representative must file a bond (if any is required) and oath within 20 days of the order of appointment. If the bond and oath are not filed within 20 days, the court may revoke the order appointing the personal representative. TEX. PROB. CODE §192.

(2) **60 Days. Notice to Beneficiaries.** Under Section 128A a personal representative has to give notice to all beneficiaries under a will that the will has been probated and the personal representative has been appointed.

(3) **90 Days. Inventory.** Within 90 days of qualifications, the personal representative must file an inventory unless an extension has been granted. Section 250.

(4) **Notice to Creditors.**

(a) 30 Days. Publish in Newspaper. Within 30 days of qualification, the personal representative must publish a notice to creditors in the newspaper. Section 294.

(b) 2 Months. Within 2 months of qualification, the personal representative must give notice by certified mail to all secured creditors. Section 295.

(c) At any time. At any time, the personal representative may give to unsecured creditors that they must present their claims within four months are their claim will be barred. Section 294(d)

i. **Limitations: Affidavits of Heirship.**

i. Section 52 of the Texas Probate Code provides that affidavits of heirship that have been on file for five years are prima facie evidence of the facts stated in the affidavit in heirship proceedings and suits involving title to real or personal property.

ii. Section 52(c) states that this statute is cumulative and that it is not to abrogate any right to present evidence or rely on an affidavit

iii. For more on the relationship between that Section and Texas Rules of Civil Procedure Rules 804(b)(3) and 893 (14), see Compton v. WWV Enterprises, 679 S.W.2d 668 (Tex. App.–Eastland 1984, no writ). For a history of affidavits of heirship, see Johanson's discussion of Nonstatutory affidavits of heirship in his Commentary following Section 52.

iv. These affidavits have always been looked on with favor. But in 1999, at the behest of the Texas title companies, the Texas Legislature enacted Section 52A. That is a statutory form for affidavits of heirship. Since then, affidavits of heirship have become even more accepted for proving up title to real estate.

v. However, affidavits of heirship are merely evidentiary devices. They do not start the running of any statutes of limitation. Section 52(c) says:

> "An affidavit of facts concerning the identity of heirs of a decedent

does not affect the rights of an omitted heir or creditor."

vi. So while they can be very handy and economical, they should be used with caution.

j. **Limitations issues relating to heirship proceedings.**

i. **East, Kenedy & Fernandez.** On April 16, 2010, the Texas Supreme Court decided four cases arising out of the estates of John Kenedy and Sarita East: *Frost National Bank v. Fernandez*, _____ S.W.3d _____, 2010 WL 1526369 (Tex.); *In re the John G. and Marie Stella Kenedy Memorial Foundation*, --- S.W.3d ----, 2010 WL 1526353 (Tex.); *John G. and Marie Stella Kenedy Memorial Foundation,v. Fernandez*, --- S.W.3d ----, 2010 WL 1509668 (Tex.); and,*John G. and Marie Stella Kenedy Memorial Foundation,v. Fernandez* --- S.W.3d ----, 2010 WL 1509657 (Tex.). Most of the facts and comments regarding limitations are set out in the *Frost National Bank v. Fernandez, supra,* opinion.

(1) Ann Fernandez was born in 1925 to Maria Rowland. Rowland worked for the Kenedy family.

(2) John G. Kenedy, Jr. died in 1948 with a holographic will that left his property to his wife Elena. It was promptly probated in the Kenedy County Court.

(3) In 1949 Humble Oil, which was a lessee of part of the Kenedy Estate mineral interests, filed a will construction suit in district court to find out if that will disposed of all of his property. That year the district court found that "all of the Kenedy heirs were before it and that it did not leave an intestacy." That district court held as a matter of law that

> "'all persons who would have inherited any part of the Estate of John G. Kenedy, Jr., deceased, if he had died intestate as to all or any part of his estate, are parties to this suit and therefore all necessary and interested parties are included among the defendants herein.'"

(4) In 1952 "Kenedy's estate was distributed, taxed, and closed"

(5) In 1961 his sister, Sarita Kenedy East died. Her will was probated that same year. There were several contests of that will. In 1975 the district court entered a judgment pursuant to a settlement with some of the parties. The rest of the will contests were resolved in 1978, See Trevino v Turcotte, 564 S.W.2d 682 (Tex. 1978).

(6) In 1987, East's estate was closed.

(7) Mrs. Kenedy died in 1984. Her will was probated that year and her estate closed in 1987.

(8) Fernandez contended that while she had heard rumors it was only in 2000 that her mother told her that Kenedy was her

father. She immediately started filing actions including bills of review and applications to determine heirship.

(9) The supreme court took up a number of issues that are very interesting to a probate lawyer (standing, dominant jurisdiction, exclusive jurisdiction, good faith pleadings used to determine jurisdiction exhumation, direct attacks on judgments, bills of review, abatement, and jurisdiction for heirship proceedings)

(10) As concerns this paper it addresses limitations and the discovery rule. At the very beginning of the opinion the court says

> "...we hold that the discovery rule does not apply to inheritance or heirship claims by non-marital children, or bill of review claims to set aside probate judgments. Because Fernandez's claims were barred by the applicable statute of limitations, we render judgment reinstating the district court's judgment."

(11) At page 10, the court says

> "When an heirship claim is brought after an administration of the decedent's estate or a conveyance of the decedent's property to a third party, courts have applied the four-year residual limitations period of Texas Civil Practice and Remedies Code section 16.051. *See, e.g., Cantu v. Sapenter,* 937 S.W.2d 550, 552 (Tex.App.-San Antonio 1996, writ denied); *Smith v. Little,* 903 S.W.2d 780, 787-88 (Tex.App.-Dallas 1995), *rev'd in part on other grounds,* 943 S.W.2d 414 (Tex.1997). Under any conceivable accrual date, the four-year statute of limitations ran well before Fernandez first asserted claims to the Kenedy and East estates. Fernandez **conceded** (emphasis added) that the residual statute of limitations applies and has never denied that it bars her heirship claim absent the application of the discovery rule to save her claims, arguing that we should apply the discovery rule in heirship cases such as this."

(12) The court discusses its prior refusal to extend the discovery rule to adopted children. They remind us that in *Little v Smith, supra*, the court declined to apply the discovery rule even though adopted children may have many barriers to knowing they were adopted or getting records unsealed to learn who their biological parents are.

(13) Generally, this is a well written case. But, there are troubling parts:

(a) They refer to dominant jurisdiction.

(b) They did not tell us when limitations accrue.

(c) They misstated, albeit in dictum, that you cannot have an heirship proceeding in

the absence of a probate proceeding. That's got to be wrong.

(i) First of all, Section 48(a) says a court may declare intestacy in several instances including when, "... no administration has been granted in this State."

(ii) Then, what about an heirship proceeding when there is no need for an administration, or it is too late to request one.

(iii) And what about a future interest (remainder interest under a will, remainder interest under a trust) where the fiduciary needs to know who takes but there is no administration pending.

(d) Fernandez's lawyer "conceded" that the four year statute applied. Why didn't he argue that the real estate statutes of limitations applied?

(e) Apparently he did not argue the Section 31 bill of review. The argument was only regarding the equitable bill of review. The statute appears fairly clear but it would be nice to know if there is a discovery rule that applies.

(f) They do not discuss whether their decision is based in any part of this being an rem proceeding.

(g) They do not tell us if the 1949 intestacy determination included ad litems and citations by publication.

(h) They do not discuss the impact of the now mandatory citation by publication (Section 50(b)) and the now mandatory appointment of ad litems (Section 53(c)) both of which were added to the statutes in 2001.

(i) They do not discuss if these same rules apply to marital children.

ii. **Cases Before East, Kenedy & Fernandez**

(1) Sections 48 through 56 of the Texas Probate Code provide a court procedure for determining the heirship of a deceased person. While the procedure is set out, there is no statute of limitations mentioned. Because the Probate Code is silent, courts have held that the general four year statute applies. TEX. CIV. PRAC. & REM. CODE § 16.051;

(2) However, Section 55 (a) does say that if an heir is not served, he may

> "...within four years from the date of the such judgment have the same corrected by bill of review or upon proof of actual fraud, after the passage of any length of time,..."

(3) In *York v. Flowers*, 872 S.W.2d 13, 16 (Tex.App.--San Antonio 1994, writ denied), the court made an exception for real estate. Husband died intestate in 1944. The widow conveyed the land by general warranty deed in 1955. His out-of-wedlock daughter brought suit to

recover her interest in 41.5 acres that her father and his wife owned as community property at the time he died.

(a) The trial court granted summary judgment for Flowers. First, Flowers contended that out-of-wedlock children had no inheritance rights. The San Antonio Court of Appeals concluded that such children do have inheritance rights based on *Trimble v. Gordon, supra*. Flowers next argued that he had good title under all of the adverse possession statutes including the 25 year statute. The court said that since the child was a co-tenant from the time of her father's death, the burden was on Flowers to show "actual notice of repudiation of the co-tenancy relationship…. There is no evidence of actual notice of repudiation."

(b) Finally, the court rejected Flowers argument that Section 16.051 of CPRC controlled because it is restricted to personal actions. The court reversed and remanded.

(4) Then in *Cantu v. Sapenter*, 937 S.W.2d 550, 552-53 (Tex. App.—San Antonio 1996, writ denied) the court discussed, Section 55(a) of the Texas Probate Code. It said there is a four-year rule, but it is a four year bill of review, not a statute of limitation. It says that a person not served "…may at any time within four years from the date of such judgment have the same corrected by a bill of review, or upon proof of actual fraud, after the passage of any length of time…."

(a) In *Cantu v. Sapenter*, children born out of wedlock brought an heirship action eleven years after the date of death. There was no administration but the widow conveyed the property to a bona fide purchaser. The court pointed out that §55a of the Probate Code had this four-year bill of review provision, but it did not have a limitation provision. The court noted that when a cause of action was not governed by a particular statute, that the four-year residuary statute applied. *Cantu*, 937 S.W.2d at 552. The court applied these rules while acknowledging the rights of illegitimates under the equal protection clause as announced in Weber v. *Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175-76, 92 S.Ct. 1400, 1406-07, 31 L.Ed.2d 768 (1972). *Id.* at 552-53.

(b) This court also said that *York v Flowers* did not apply because this was a probate proceeding and *York* was an action to recover real estate. The court did acknowledge that the determination of heirship was a perquisite to recovery in *York.*

(c) This court said that the children knew they were the decedent's children and knew that he had died, but took no action. The court said that the recording of that deed gave them at least constructive notice that their interest in the property was at stake.

(d) The court acknowledged that at that time there was no mechanism under Texas law for a non marital child to assert their interests. However, effective

September 1, 1987 the statute was amended to allow their claims. Thus on September 1, 1991 the statute of limitations had run.

(e) Finally the court said that is was restricting this holding to cases with similar facts and that they were not expressing any opinion in cases where the children did not know and through diligence could not have found about the facts adverse to their rights.

(5) In *Jeter v. McGraw*, 79 S.W.3d 211 (Tex.App.—Beaumont 2002, pet. denied), a "non marital child," contended that when dad died in 1947 intestate that dad's estate passed to non marital child and not to the surviving spouse. There was no administration of his estate and no proceeding to determine heirship. There was an affidavit of heirship prepared in 1981 by Jeter's attorney showing that Jeter was an heir of the decedent. The surviving spouse conveyed her one-fourth interest to McGraw. And in the next year signed another deed to McGraw conveying "…all [her] undivided interest. The appellate court held that because this involved real estate that the four year residual statute (Section 16.051 CPRC) did not apply, but suggested that on remand that the adverse possession statutes should be considered. *Id.* at 215-16.

k. **Limitations issues relating to adopted children.**

i. Probate Code Section 40 and Family Code Section 162.507 set out the rights of adopted children.

ii. In *Little v. Smith*, 943 S.W.2d 414 (Tex. 1997), an adopted child discovered in 1989 the identities of her biological mother and grandmother. She learned that both were dead and that her biological mother (died in 1969) had predeceased her grandmother and that her biological grandmother had died in 1982.

iii. In 1991, the adopted child tried to make a claim after the grandmother's estate had been distributed and closed. The Texas Supreme Court said that the discovery rule did not apply. The court reasoned that the rights of an adopted child were trumped by the need for finality of probate proceedings and the need to maintain confidentiality of adoption records. *Id.* at 418-20.

l. **Additional Limitations issues for children without a presumed father.**

i. See the discussion of *Frost National Bank v Fernandez*, supra.

ii. Children whose father's paternity have not been established in modern times are sometimes referred to as nonmartial children, or children both outside of wedlock. The Family Code refers to such children as "children without a presumed father. TEX. FAM. CODE § 160.204.

iii. For inheritance purposes, children whose paternity is established or presumed under Family Code §160.204 shall inherit from that father. TEX. PROB. CODE §42(b). Children who do not have a presumed father may petition the probate court for a determination of the right to inherit.

iv. According to case law, there is a four-year statute of limitations for heirship proceedings. For example, in *Cantu v Sapenter*, 937 S.W.2d at 553, the San Antonio Court held that the four-year statute of limitations barred an heirship claim.

v. In *Turner v. Nesby*, 848 S.W.2d 872, 876-78 (Tex.App.--Austin 1993, no writ), the Austin Court held a bill of review filed more than seven years after heirship judgment was barred and not available to a non-marital child. According to the court, the statute of limitations began to run when the judgment was entered, not later when the legislature expanded the statute. *Id.* at 878. The court reasoned that the need for finality of judgments was key. *Id.*

vi. While these decisions, and *York supra,* are not favorable to children without a presumed father, there is a substantial constitutional overlay that has to be considered. *See Trimble v. Gordon*, 430 U.S. 762 (1977).

vii. Also see cases discussed under Limitations issues relating to heirship proceedings, *supra*.

m. **Limitations issues involving void marriages.**

i. At death, if there is no action pending to have a marriage declared void because of incapacity, a person has one year after the death of one of the parties to the marriage to bring an action to declare the marriage void. TEX. PROB. CODE §47A. This section was added in 2007. Before this statute, upon death there was no procedure for setting aside the marriage. The statute was in response to numerous cases of care giver abuse where the caregiver would marry an elderly person and even keep it a secret until death.

ii. Johanson in Texas Probate Code Annotated after Section 47A details one egregious example of this behavior.

n. **Limitations issues with common law marriages.** An action to establish a common law marriage must be brought within two years after the date the parties separate or the death of one. TEX. FAM. CODE §2.401(b); *see Amaya v. Oravetz*, 57 S.W.3d 581, 583-84 (Tex. App.—Houston [14th Dist. 2001, pet. denied).

o. **Limitations issues relating to claims against an estate.** Because the statute of limitations applicable to claims against an estate are some of the shortest in Texas jurisprudence, they are also worth noting here.

i. **Unsecured Creditors: 4 Month Notice.** For unsecured claims, there is s **4-month** barring statute. A personal representative may give notice to unsecured creditors pursuant to Section 294(d) of the Texas Probate Code. That notice, if properly given, requires the creditor to present its claim within four months or the claim will be barred. A guardian may send a similar notice under Probate Code § 784(d).

ii. **Secured Creditors.** For secured creditors, there is an election. Under Section 295, the personal representative must give certified mail notice to all secured creditors of the issuance of letters testamentary or of administration. Within four months of receiving the notice, or six months from the date letters or granted (whichever is later, the creditor must make an election for their claim to be "matured secured" or "preferred debt and lien" under Section 306.

(1) **Election.** Section 306(b) says that if they do not timely make that election, they are treated as a "preferred debt and lien holder under Section 306(a)(2)

(2) **Preferred Debt and Lien.** A "preferred debt and lien" means the creditor is entitled to foreclose on his collateral, but cannot proceed against the estate for any deficiency. This is best illustrated in the case of *Cessna Finance Corp. v. Morrison*, 667 S.W.2d 580 (Tex.App.--Houston [1st Dist.] 1984, no writ). In that case, the collateral was a Cessna airplane that crashed in South America. The creditor elected preferred debt and lien status and much to its surprise was only entitled to go to South America and pick up the airplane. It had no right to pursue any other claims or deficiencies against the estate. *Id.* at 583-84.

(3) **Matured Secured** "Matured secured" means the creditor subordinates its rights in the collateral to a Class 3 claim. That is, the proceeds from the collateral will first go to pay funeral and last illness expenses (Class 1) and expenses of administration (Class 2). Then the creditor gets what is left from the proceeds of the sale of the collateral. If that is not sufficient to pay the creditor in full, it is a Class 8 unsecured for any deficiency.

(4) **Usual Election.** Because most creditors are reluctant to have their claims be subordinate to administrative expenses (which includes lawyers fees), they tend to take their collateral (preferred debt and lien).

(5) **Deemed Election.** If the creditor does not make an election within four months of receiving notice, he is deemed to have elected "preferred debt and lien" status.

iii. **Tolling of claims in the Probate Code.** There is a tolling provision on the statute of limitations relating to claims. Section Probate Code § 299 states that the presentment of a claim or the filing of a suit tolls any statute of limitation.

iv. **Liquidated claims in dependent administrations.** In dependent administrations, claims for liquidated amounts have to go through a specific process.

(1) **4 Months.** First a creditor has the four months problem arising from Section 294(d) if they receive notice from the administrator.

(2) **30 Days.** First, once the creditor makes a claim, the personal representative has 30 days to allow or reject the claim. TEX. PROB. CODE § 309. If the claim is allowed, it goes to the court for approval.

(3) **90 Days.** If the claim is rejected, the creditor has 90 days to file suit. TEX. PROB. CODE § 313. If suit is not filed within 90 days the claim is barred. TEX. PROB. CODE § 313. If the representative does not act on the claim within 30 days, it is deemed to have been rejected and the 90 days begins to run.

p. **Foreclosures and dependent administrations.**

i. Once a debtor dies, the rights of a secured creditor change. If a secured creditor forecloses after the death of the debtor but before any administration is taken out, a subsequently appointed administrator may set the foreclosure aside, *Pearce v. Stokes*, 155 Tex. 564, 291 S.W.2d 309, 311-12 (1956). Only four years after the decedent's death does such a foreclosure become final. *Wiener v. Zweib*, 105 Tex. 262, 141 S.W. 771 (1912); *see* 18 WOODWARD & SMITH, TEXAS PRACTICE: PROBATE AND DECEDENTS' ESTATES § 921. As a result, the only safe procedure for a secured creditor is to apply for an administration of the decedent's estate.

ii. After the establishment of an administration, any non judicial foreclosure is void, *Pearce v. Stokes*, *supra*.

q. **Foreclosures and independent administrations.** In an independent administration, the rights of the creditor do not change as dramatically. As distinguished from a dependent administration, a non judicial foreclosure can occur before or during an independent administration and not be subject to set aside, *Pearce v. Stokes, supra*, and *Pottinger v. Southwestern Life Ins. Co.*, 138 S.W.2d 645, 647-48 (Tex.Civ.App.–Waco 1940, no writ). If matured secure status has been elected, there is no foreclosure available. If preferred debt and lien has been elected, then the creditor may foreclose without judicial permission if there is a default. *See* "Claims Procedures in Probate and Guardianship," Schwartzel 1996 Advanced Estate Planning and Probate Tab D and "Handling Claims Against Decedent's Estates," Horrigan, 1997 Advanced Estate Planning and Probate Tab K.

r. **Limitations issues relating to contracts for bequests.** The statute of limitations on breaches of contract to make a bequest does not begin to run until the death of the decedent. *Seale v. Muse*, 352 S.W.2d

534, 538 (Tex.Civ.App.--Dallas 1961, writ ref'd n.r.e.).

s. **Statutory bill of review proceedings.** In addition to the equitable bill of review which applies to all civil cases, the Probate Code has some specialized statutory bills of review.

i. Section 31 of the Texas Probate Code, allows an application for a bill of review at any time up to two years from the time an order is entered. The petitioner must prove a meritorious position, some wrongful act by the other party and that the petitioner was not negligent.

As contrasted with Section 93 below, Section 31 does not set out any exceptions to the two year limit.

In *Power v Chapman*, 994 S.W.2d 331 (Texarkana 1999, no writ), Power learned within two years about the probate of his wife's will. However, he did not bring an action to set it aside until more than two years after the order admitting it to probate and within two years of learning of the probate and less than four years from the probate.

Then he brought his action under Section 31 not Section 93.

The trial court poured him out and the court of appeals affirmed saying

> "Power argued that he brought suit within two years of discovering that he had been defrauded by the appellees. At the time Power filed suit, limitations had run on the statutory bill of review and he was not entitled to an equitable bill of review because he failed to pursue his legal remedies..."

ii. Section 93 provides that a probated will can be challenged within two years of the date the order was entered. In addition, a will may be challenged within two years of the discovery of any fraud or forgery or two years after an incapacitated person has their disabilities removed.

iii. And as discussed above, there is a special four year bill of review provision in proceeding to determine heirship under Section 55(a).

iv. In the case of *In re Vance*, No. 10-09-00177, 2009 WL 4574896 (Tex.App.--Waco 2009), the court lists the possible remedies.

2. **INCAPACITY AND GUARDIANSHIPS** Guardianships do not have the limitations that you find in decedent's estates. Obviously, a guardianship can be sought at any time when a person is incapacitated or a minor.

a. **Guardian Appointed.** Once an appointment of a guardian is made, however, there are deadlines that have to be met and they deviate slightly from probate proceedings.

i. **Bond and Oath.** As with probate estates, the guardian must take his oath and file his bond within 20

days of the order of appointment. TEX. PROB. CODE § 701.

ii. **Inventory.** The inventory however, must be filed within 30 days of qualifying TEX. PROB. CODE § 729. Note that this is a recent change in the statute. Before 2003, a guardian had 90 days to file an inventory, just like probate. The current 30-day deadline allows the probate court to know as soon as possible if the bond was sufficient and what assets were available for the care of the ward.

iii. **Allowance.** If an allowance was not established in the order appointing the guardian, the guardian must seek a monthly allowance within 30 days of qualifying. TEX. PROB. CODE §776.

iv. **Investments.** The guardianship code also provides certain investment parameters and deadlines for the guardian in managing existing assets of the ward. The guardian may retain, without court approval, the assets of the ward that were on hand at the time of appointment for up to one year without any duty to diversify and without liability for any depreciation or loss. TEX. PROB. CODE §855A(a). The guardian may seek an order of the court allowing continued retention after that the one year period. TEX. PROB. CODE §855A(b).

Within 180 days of qualification, the guardian must have the estate's assets invested pursuant to Section 855(b) (the safe harbor provision) or submit a proposed investment plan. TEX. PROB. CODE §855B.

b. **Incapacity tolls the statute of limitations.** As everyone knows, incapacity tolls the statutes of limitations. As it turns out, this is a general rule.

i. **Personal Actions.** As it relates to personal actions, Section 16.001 of the Civil Practices and Remedies Code addresses limitations on incapacitated persons.

(1) If a person is "under a disability" when a cause of action accrues, the period of disability is not included in the limitations period. TEX. CIV. PRAC. & REM. CODE §16.001(b).

(2) Two examples: 1) if a sixteen year-old child is injured in a car accident, limitations begins when the child turns eighteen; and 2) if a minor or adult is injured and never regains capacity, limitations never runs. *See infra* "The effect of the appointment of a guardian on limitations." This only applies to limitations of personal actions arising under Subchapter A of Chapter 16 (16.001 through 16.012).

The statute also has some qualifications. A disability arising after the limitations period has started does not suspend the statute. TEX. CIV. PRAC. & REM. CODE §16.001(d). Disabilities also cannot be stacked to extend a limitations period. *Id.* at §16.001(c).

ii. **Real Estate.** Sections 16.021 et seq sets out the limitation and tolling provisions for actions involving real estate., Civil

Practices and Remedies Code §16.022 sets out the tolling rules when there is a disability.

(1) The statute defines persons who are under a disability as minors, incapacitated persons and persons serving in the armed forces during a time of war. The statute is tolled for these persons if the claim or defense is based on title to real property. For the tolling provision to operate, the person has to be under a disability at the time title vests or adverse possession commences. If tolled, the statute does not run during the period of disability.

(2) With two exceptions, the statute begins to run when the disability is lifted.

(a) First, regardless of a disability, an action must be brought within 25 years to recover real estate where another is asserting title by adverse possession. TEX. CIV. PRAC. & REM. CODE §16.027.

(b) Second, regardless of a disability, an action must be brought within 25 years where another person is claiming by adverse possession coupled with a deed. TEX. CIV. PRAC. & REM. CODE §16.028.

c. **The effect of the appointment of a guardian on limitations.**

i. There are several older cases that say the appointment of a guardian does not start the statute running. *Neblett v. Valentino*, 127 Tex. 279, 92 S.W.2d 432, 434-35 (1936); *Collins v. McCarty*, 68 Tex. 150, 3 S.W. 730, 731-32 (1887); *Texas Utilities Co. v. West*, 59 S.W.2d 459, 460-61 (Tex. Civ. App.--Amarillo 1933, writ ref'd), and *Brown v. Midland Nat. Bank*, 268 S.W. 226, 228 (Tex. Civ. App.-- El Paso 1924, writ ref'd).

ii. However, a recent Texas Supreme Court case may hint at a guardian discovery rule. In *Yancy v. United Surgical Partners International, Inc*. 236 S.W.3d 778 (Tex. 2007), the primary issue was the Open Courts Doctrine not directly a statute of limitations issue. The plaintiff's mother was appointed guardian and then brought an action against some but not all of the possible defendants. More than 2 years after the incident occurred (and she was appointed) the guardian joined additional defendants. *Id.* at 780.

iii. In analyzing the Open Courts Doctrine, the Court states that the guardian knew of the Ward's

> "...condition and retained a lawyer well within the limitations period. On this record, there is no fact issue establishing that Yancy (on Yates's behalf) did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that she sued within a reasonable time after discovering the alleged wrong." Id. at 786.

d. **Creditors** The rules on creditors in guardianships are very similar to those set out above for dependent administrators. There is a

similar provision for giving notice to a secured creditor in a guardianship, Section 784(a).

i. **Election: Secured Creditor.** In Section 793 the secured creditor has to state whether he wants matured secured or preferred debt and lien status. If he does not make an election, he is deemed to have elected preferred debt and lien.

ii. **120 Day Notice.** A guardian is required to give notice to unsecured creditors, Section 784(b). And if the creditor does not assert a claim within 120 days, that claim will be barred. Section 784(e). This is similar to Section 294(d) for decedent's estates. However, notice that this provision is mandatory not permissive and that it uses 120 days rather than 4 months.

iii. **90 Day Barring Statute.** Further, if a creditor makes a claim and it is rejected, whether by the guardian or by operation of law after 30 days, and the creditor does not file suit within 90 days, the claim is barred. Section 800.

e. **Bill of Review.** Section 657 is the guardianship counter part to Section 31 bill of review for decedent's estates. It gives a person two years from the date of a "decision, order, or judgment" to bring an action to set it aside. It goes on to give a person two years after the removal of their disabilities to file a bill of review.

3. **NEXT FRIEND**

a. Statute of limitations issues also arise when a suit is brought by a next friend. The bringing of an action by the next friend of a minor, and the dismissal thereof, did not cause limitations to commence to run against a subsequent suit on the same cause of action, since it does not remove the disability. The bringing of an action by a father as next friend for an injury to his son does not create the relation of guardian and ward, so as to start the running of limitations against the minor. *Galveston, H. & S.A. Ry. Co. v. Washington*, 25 Tex.Civ.App. 600, 63 S.W. 538, 540-41 (1901, no writ).

b. Similarly, a statutory cause of action for death of a father was, according to the court, a property asset belonging to minor children, and was not barred because not brought within two years after appointment of guardian, when children were still minors at time of trial. *Texas Utilities Co. v. West*, 59 S.W.2d 459, 461 (Tex.Civ.App.—Amarillo, 1933, writ ref'd).

4. **TRUSTS**

a. **General.** While many of the limitation issues concerning trusts are the same as in decedent's estates and guardianships, there are important differences. First, there is no court participation initially or thereafter unless someone specifically invokes the jurisdiction of the court. Also, trusts are apt to run for a very long time as compared to estates. Thus, limitations

issues may be triggered years in the future.

b. **Removal: No Limitation.** In *Ditta v Conte*,298 S.W.3d 187, (Tex. 2009), the Texas Supreme Court held "...that no statutory limitations period restricts a court's discretion to remove a trustee." *Id.* at 187. There were further proceedings in the court of appeals, *Ditte v. Conte*, ____ S.W.3d _____ 2010WL1053097 (Tex.App.-Houston [1st Dist.] Mardall 2010, no. pet. h.).

i. Ditta, a court appoint guardian of the estate, applied to remove the trustees more than four years after the offending events and more than 4 years after he was appointed guardian.

ii. The Ward and her husband created the trust. After he died she was the trustee along with her two children. It was subsequently discovered that the son was not properly administering the trust and litigation ensued.

iii. In August of 1998, Ditta as guardian sought the appointment of a receiver. The court appointed a successor temporary trustee and suspended the powers of the children as trustees.

iv. In June 2000, the temporary trustee filed an accounting from the date of dad's death to December 1999. That accounting revealed that both son and daughter had obtained trust funds for their own benefit. A settlement of those issues occurred in January 2001 in which the obligation was recognized.

In January 2003, son was removed as a trustee, and in April of 2004, Ditta applied to remove daughter as trustee. The trial court removed her, but the court of appeals reversed, concluding that § 16.004 of the CPRC applied.

v. The Texas Supreme Court reversed and remanded, concluding that there was no statute of limitations *Id.* at _____.

vi. In reaching its result, the Court observed that the trustee position is a "status." The court then analogized a removal action to a divorce sought on the basis of cruelty and adultery. *Id.* at *3-4. According to the court, marriage is a status and an action for divorce does not have to be brought within any statutory deadline.

The Court further analogized removal to a real property action to remove a cloud on title. *Id.* at *4.

vii. The Court concluded that the daughter breached her duties and "...her role as trustee was compromised due to her indebtedness to the Trust and her tenuous relationship with her..." mother and brother. *Id.* at *4. According to the Court, removal actions "...exist to prevent the trustee from engaging in further behavior that could potential harm the trust." *Id.* at *4. A trustee's prior conduct can be indicative of future conduct.

viii. The Court did not address laches, the discovery rule, or the impact of the 2001 settlement agreement.

c. **Trust Contest**. Like a will, a trust can be challenged because of lack of capacity, undue influence, improper execution etc. *See* "Contesting Inter Vivos Trusts," T. Jack Challis, ACTEC Notes Vol. 26 No. 3 at 221 (Winter 2000).

i. Unlike a will, however, there is no direct statutory guideline on when this must be done. Section 16.051 CPRC is the four year residual limitations period applying to actions not otherwise covered by a statute of limitations. Section 16.051 applies to contracts. *Seureau v. ExxonMobil Corp*., 274 S.W.3d 206, 227 (Tex. App.--Houston [14th Dist.] 2008, no pet.). As we have seen, it covers heirship determinations, *Cantu v. Sapenter*, *supra*.

ii. Presumably it covers contests of the validity of a trust as well. If so, some notice or discovery of the existence of the trust should be necessary to trigger the statute.

iii. While there is no Texas authority on point, there is some authority nationally. BOGERT ON TRUSTS discusses at Section 950 including the paucity of specific statutes on trust contests. Section 604 of the Uniform Trust Code provides for a 3-year limitation period on contests of revocable trust that begins to run from the date of the settlor's death. That section shortens that time to 120 days from the time notice is given by the trustee. The Uniform Trust Code makes no reference to the time frame for challenging an irrevocable trust. When the Texas legislature cherry picked the Uniform Trust Code it did not import these limitation provisions into Texas law.

iv. Much of the case law in Bogert and elsewhere applies to trustees who have repudiated a trust and the beneficiaries are attempting to enforce it. Similarly, most of the trust cases cited under §16.051 are repudiation cases. *See*, *e.g. Courseview v. Phillips Petroleum Co.*, 158 Tex. 397, 312 S.W.2d 197, 205 (1958) (limitations does not begin to run in favor of a trustee and against the cestui until the latter has notice of a repudiation and there is no duty to investigate until the cestui has knowledge of facts sufficient to incite inquiry).

v. There are also numerous cases under §16.025 of the CPRC that say limitations for trusts holding real estate do not start to run until there has been a repudiation.

d. **Limitation in Venue.** While this may stretch any definition of limitations, it is worth noting that for a single non-corporate trustee, an action shall be brought in any county in which the trustee resided for the four years preceding the filing of an action, TEX. PROP. CODE § 115.002(b)(1), or in the county in which the situs of administration was maintained at any time in the four years preceding the filing. TEX. PROP. CODE § 115.002(b)(2).

If there are multiple trustees or a corporate trustee, the action shall be brought in any county in which "situs of administration is maintained or has been maintained" for the last four years. These provisions

were added in 1999. Previously the test was the principal office of the trust. There are no Texas cases on what the constitutes "situs of administration."

e. **No shortening of limitations periods: Mandatory Rules.** Section 111.0035 of the Trust Code (the Texas Property Code) sets out default and mandatory rules for trusts. Generally, the provisions of a trust trump the rules set out in the Trust Code. And, to the extent that the trust does not speak to an issue the provisions of the Trust Code control. TEX. PROP. CODE § 111.0035(a).

However, Section 111.0035(b) sets out those matters, the mandatory rules, which cannot be overridden by the trust instrument. One of those rules is Section 111.0035(b)(3). It provides that, " . . .the terms of the trust may not limit . . . the periods of limitation for commencing a judicial proceeding regarding a trust."

5. **BREACHES OF FIDUCIARY DUTY**

a. **General.** Section 16.004(a)(5), which was enacted in 1999, sets a four year statute of limitations for breaches of fiduciary duty. Section 16.004a(b) sets a four statute for bonds, personal representatives and guardians. All of this illustrates the importance of full disclosure and notice. The preference is for judicial releases over the usual releases.

b. **Older Cases.** Section 16.004(a)(5) of the CPRC requires that an action for breach of fiduciary duty must be brought within four years of the time the action accrues.

i. Because of the relationship between the trustee and the beneficiary, the courts have applied various rules for when the cause of action accrues.

ii. Older cases generally refer to repudiation. Later cases say when a beneficiary knew or should have known and that this is especially true in a fiduciary relationship where one party is entitled by law to rely on another.

c. **Cases Under the Statute.** Although §16.004(a)(5) was enacted 10 years ago, it has only been cited in three cases: *Conte v. Ditta*, 287S.W.3d28 (Tex. App. Houston [1st Dist.] 2007), rev'd, 298S.W.3d187 (Tex.2009); *Crull v. Rhodes*, No. 02-04-235-CV, 2005 WL 737473 (Tex.App.--Fort Worth March 31, 2005, no pet.); *US MCT, Inc. v. Brodsky*, No. 05-98-00204-CV, 2001 WL 1360301 (Tex.App.--Dallas November 07, 2001, no pet).

d. ***Conte*, Court of Appeals.** While the supreme court in *Ditta v. Conte, supra,* concluded that there is no statute of limitations for removal actions and reversed, the court of appeals' opinion provides an excellent rendition of what is probably the status of the discovery rule in fiduciary matters:

> "Statute of limitations serve to compel the assertion of claims within a reasonable period during which the evidence is fresh in the

minds of the parties and witnesses. *Price v. Estate of Anderson*, 522 S.W.2d 690, 692 (Tex.1975). The discovery rule defers accrual of a cause of action until the plaintiff knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action. *Trinity River Auth. v. URS Consultants,* 889 S.W.2d 259, 262 (Tex.1994). However, the discovery rule applies only in certain limited circumstances. *See Computer Assocs. Int'l, Inc. v. Altai, Inc.,* 918 S.W.2d 453, 456 (Tex.1996). Generally, application has been permitted in cases where the nature of the injury incurred is inherently undiscoverable and the evidence of the injury is objectively verifiable. *See id.* The requirement of inherent undiscoverability recognizes that the discovery rule exception should be permitted only where "it is difficult for the injured party to learn of the negligent act or omission." *Willis v. Maverick,* 760 S.W.2d 642, 645 (Tex.1988) This is particularly true in the context of a fiduciary. *ee Itai,* 918 S.W.2d at 456 Fiduciaries are presumed to possess superior knowledge, and the injured party is presumed to possess less information than the fiduciary. *See id.* While a person owed a fiduciary duty has some responsibility to ascertain when an injury occurs, it may be said that the nature of the injury is presumed to be inherently undiscoverable. *Courseview, Inc. v. Phillips Petroleum Co.,* 158 Tex. 397, 312 S.W.2d 197, 205 (1957). The issue in a breach of fiduciary duty case is, thus, when the plaintiff knew or should have known, with the exercise of reasonable diligence, of the legal injury giving rise to the right to sue. *In re Fawcett,* 55 S.W.3d 214, 219 (Tex.App.-Eastland 2001, pet. denied)"

Conte v. Ditta, 287S.W.3d at 34-35.

e. **Bonds: Executors, Administrators and Guardians Statute.** Section 16.004 says actions against executors, administrators and guardians and their bonding agents, must be brought within four years of their death, resignation, removal or discharge.

f. **Accountings and Releases:**

i. **Guardians and Dependent Administrators.** The Section 16.004 provisions are shortened with the proper notice and pleading of a final in court supervised proceedings. For an excellent treatment of this problem see Joyce Moore, "Releases and Receipts and Judicial Accountings," Chapter 27, 2008 Advanced Estate Planning and Probate Course.

ii. **Independent Executors**. Before 1999 there was no clear means for an independent executor to obtain a discharge or release.

(1) In particular, section 151 (d) stated that an executor could require a receipt from a beneficiary but "...shall not require a waiver or release from a distributee as a condition of delivery of property..."

(2) In 1999, the State legislature enacted Sections 149D through 149G. This now allows a means for an independent executor to obtain a judicial discharge of liability for all matters that are "fully and fairly disclosed." Section 149D.

iii. **Trustees.** A court's approval of a final account and order closing estate may result in a discharge of the personal representative. But that may not be a release of the fiduciary or his bondsman. *Texas State Bank v. Amaro*, 87 S.W.3d 538, 544-45 (Tex. 2002). At best it is only a release to the extent fo "fair and full" disclosure. To that extent that the approval of the accounting will represent a bar is dependent upon notice and res judicata. *See Coble Wall Trust Co. Inc. V. Palmer*, 859 S.W. 2d 475, 481 (Tex.App. – San Antonio 1993, writ denied).

6. **LACHES** A related issue to the statute of limitations is laches. There is very little law in Texas applying laches to trust litigation. Most of it is old and deals with repudiation of a trust by a trustee.

a. **Two Uses.** Bogert on Trusts, 2nd, sets out two bases for laches at Section 948.

i. First, when there is no applicable statute of limitations, laches will bar a beneficiary when he has "inexcusably" delayed and it has caused prejudice to the trustee. Bogert gives examples of delay in complaining about sales or mortgages of trust property. (Footnotes 4 and 5 at page 583).

ii. Second, on page 584 Bogert notes that even if there is a statute of limitations, and that time has not run, the courts have sometimes granted the defense of laches.

b. **Applies to Settlors and Trustees as well as Beneficiaries.** At footnote 6 and 7 on page 583, Bogert notes that laches can also apply to settlors or trustees.

c. **Affirmative Defense.** Laches is a frequently pled as an affirmative defense that must be pled by the defendant. See Tex. R. Civ. P. 94. As stated in Bogert, the theory in Texas underlying laches is that the staleness of a claim will prejudice a defendant if the claim is not barred. *Stevens v. State Farm Fire & Cas. Co.*, 929 S.W.2d 665, 672 (Tex. App.—Texarkana 1996, writ denied).

d. **Elements.** Laches is not mere delay; it is delay that works a disadvantage to another. *Ross' Estate v. Abrams*, 239 S.W 705, 709 (Tex. Civ. App.—San Antonio 1922), aff'd, 250 S.W. 1019 (Tex.Comm'n App. 1923, judgment adopted). There are two elements that must exist for laches to bar a claim:

i. an unreasonable delay by one having a legal or equitable rights in asserting those rights and

ii. a good faith change of position by another (generally the trustee) to her detriment because of the delay.

Rogers v. Ricane Enters., Inc., 772 S.W.2d 76, 80 (Tex. 1989); *In re Jindal Saw Ltd.,* 264 S.W3d 755, 760 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding). Delay alone is not enough to establish laches, there must be injury or prejudice. *Tribble & Stephens Co. v. RGM Constructors, L.P.*, 154 S.W.3d 639, 669 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). Laches is a question of fact that must be determined by considering all the circumstances in a particular dispute. *Tribble*, 154 S.W.3d at 669. The defendant bears the burden of proving laches. *City of Fort Worth v. Johnson*, 388 S.W.2d 400, 403 (Tex. 1964).

e. **Relation to Statute of Limitations.** Laches is generally not appropriate when the controversy is one to which a statute of limitations applies. *Graves v. Diehl*, 958 S.W.2d 468, 473 (Tex. App.—Houston [14th Dist.] 1997, no pet.). In certain exceptional circumstances, however, laches may bar a claim in a period shorter than the applicable statute of limitations. *Graves*, 958 S.W.2d at 473. For example in *Stevens v. State Farm*, the carrier asserted laches against the policy holder's claim for additional money for damages to home. The claim was made within the statute of limitations but after the policy holder razed his home following a fire and built a new one. The court of appeals concluded that the summary judgment evidence did not conclusively establish laches. 929 S.W.2d at 672.

f. **Removal.** The Texas Supreme Court left open the possibility of the application of laches in a removal action. *See Ditta v. Conte*, 298 S.W.3d 187, 192 (Tex. 2009). In that case, the Court held that removal of a trustee is not subject to a limitations analysis. *Id.* The Court, however, expressly did not "pass on whether equitable defenses, such as laches or estoppel, may apply to removal actions." *Id.* at n.27.

g. **Old Repudiation Cases.** In cases before the enactment of the Trust Code statute of limitations, courts held that laches did not bar a beneficiary from suing a trustee until the trust had been clearly and unequivocally repudiated and the beneficiary had notice of the repudiation. *Murphy v. Johnson*, 54 S.W.2d 158, 164 (Tex. Civ. App.—Austin 1932, writ dism'd). The same applied with a resulting trust. The beneficiary of a resulting trust is not barred from enforcing a trust merely by delay. *Atkins v. Carson*, 467 S.W.2d 495, 501 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.). It is only where the trustee under the resulting trust repudiates the trust and the beneficiary has knowledge of the repudiation that the beneficiary may be barred by laches from enforcing the trust. *Id.*

h. **Restatement.** While Texas authority on this issue is limited, the Restatement of Trusts provides guidance.

i. **Factors Considered**. A beneficiary may lose her right to sue a trustee for breach of trust because of laches. As set out in the Restatement of Trusts, in determining if a beneficiary is barred by laches in pursuing a breach of trust by the trustee, the court will consider among others the following factors:

i. the amount of time between the commission of the breach of trust and the bringing of suit;

ii. whether the beneficiary knew or had reason to know of the breach of trust;

iii. whether the beneficiary was incapacitated;

iv. whether the beneficiary has a present or future interest;

v. whether the beneficiary had complained of the breach of trust;

vi. the reasons for the delay in suing;

vii. change of position by the trustee, including loss of rights against third persons;

viii. the death of witnesses or parties;

ix. hardship to the beneficiary if relief is not given;

x. hardship to the trustee if relief is given.

Restatement (Second) Trusts §219.

j. **Damages vs Enforcement.** While laches may bar a beneficiary's suit for damages against a trustee, laches does not preclude the beneficiary from enforcing the trust. Restatement (Third) Trust §98.

k. **Third Parties.** In addition, laches may apply against a trustee who fails to timely pursue an action against a third party. The laches that applies to the trustee also bars the action by the beneficiary unless the third party knowingly participated in the breach of trust and the beneficiary was not himself guilty of laches. Restatement (Second) Trusts §327.