

JURY CHARGES IN PROBATE

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I. INTRODUCTION

When preparing your petition or amended petition in probate, guardianship or trust litigation, it is wise to either simultaneously begin the jury charge or, at least begin formulating it at or around the same time. If you do, you will have researched the elements for each allegation in your pleading and, hopefully, proceed to conduct discovery driven by what you must prove or negate. In many areas of law, pattern jury charges exist and can be molded to your specific case. Specific instructions also exist in some areas which can be easily applied. Probate, guardianship and trust litigation possess no pattern jury questions and instructions from which to expand.

Because probate, guardianship and trust litigation practitioners do not have the benefit of previously and established and approved jury questions or instructions, we must rely on case law and common sense. The charges we submit must place the proper burden on the correct party and must not lead the court to err.

First, there are jury questions in will contests. The standard jury questions for valid execution, testamentary capacity and undue influence are fairly well established. When, however, you deal with allegations of insane delusion, mistake of fact, fraud in the inducement, tortious interference with inheritance rights, tortious interference with administration or revocation issues, there is room for error and not always guidance by case law or other precedent.

Next, there are guardianship jury issues. The Texas Probate Code was thoroughly revised in 1993 as it relates to guardianships, so a reliance on old jury issues may be ill placed. Additionally, there are not as many appellate cases for review because the ward's estate is usually being depleted by the litigation and few verdicts are taken to the appellate level. In addition, all guardianships are now "limited" guardianships unless there is a finding of total incapacity. It becomes difficult to correctly phrase the jury questions concerning powers retained by the proposed ward and powers removed from him or her. There is also the unanswered question, "if the jury finds a person partially incapacitated, do the powers granted to the guardian ever go to a jury, or are they decided by the Court?" We must also add the jury questions of "least restrictive alternative" to a guardianship and "good faith and just cause" as to attorney's fees, thus creating more room for error in jury submissions.

Finally, an entire book could be, and has been, written on trust litigation and all of the litigation to amend, terminate, create trusts and seek judicial discharge. There is also an abundance of causes of action alleged against trustees and other fiduciaries, thus raising issues of not only who has the burden, but also when and if the burden shifts. Additionally, there are numerous affirmative

defenses to alleged breaches. Finally, there may be causes of action against beneficiaries or third parties in trust litigation brought either as an original cause of action or as a counterclaim.

Because other miscellaneous causes of action or defenses arise in most lawsuits, jury questions become particularly complicated. For example, occasionally in probate we allege acceptance of benefits as a defense to an allegation of lack of testamentary capacity. In guardianships, you have disqualification or eligibility issues, and in trust litigation, you add waiver estoppel, commingling and compensation issues. The drafting of jury questions, then, becomes a seemingly insurmountable task.

The purpose of this article is to offer some guidance and examples of jury issues where there is strong case law supporting the issue and instruction. These are combined with jury questions in those areas in which the proper jury submission is in question. When possible, more than one suggestion or form of submission is offered. Perhaps this article can be a beginning for adopting pattern jury questions and instructions in probate litigation.

II. WILL CONTESTS

Luckily, we have strong case law to support the various forms of submission in the area of will contests involving execution of the will with all formalities, testamentary capacity and undue influence.

If you are the applicant/will proponent, you most likely want simplistic instructions on testamentary capacity, a broad submission on formalities, a narrow submission on undue influence, and a definition making it difficult for the jury to find that influence is undue.

By contrast, if you are the will contestant, you will want to try to limit any instruction which would too easily answer the jury question on capacity in the affirmative. In contrast, as to undue influence, you would want as broad of a submission, with as many criteria for finding undue influence, as you can uphold by case law.

A. Formalities in Execution. Section 59 of the Texas Probate Code sets forth how a will is to be executed with all of the formalities, in order to make it a valid will. A will is an instrument by which a person makes a disposition of property at death, and which is revocable during the lifetime of the person. *In re: Estate of Brown* 507 S.W.2d 801 (Tex. Civ. App.—Dallas, 1974, writ ref'd, n.r.e.). To be a will, the instrument must be executed with testamentary intent. *Estate of Wilson*, 539 S.W.2d 99 (Tex. Civ. App.—Waco, 1976, writ ref'd n.r.e.). A self-proving affidavit constitutes prime facie evidence of the validity of the will's execution. *Garaway v. Nesmith*, 548 S.W.2d 457 (Tex. Civ. App.—Houston [1st Dist.], 1977, writ ref'd n.r.e.). So, if you are a *proponent* of a will,

you want a simple jury question finding that the will was signed by the testator and attested by two credible witnesses over the age of 14, each of whom signed in the testator's presence, but not in the presence of each other.

In contrast, the *contestant* will want a more complicated charge, giving the jury more options. The contestant will attempt to obtain a question on the testator's understanding of the will. A competent testator is presumed to know and understand the contents of the testamentary instrument signed. The contestant may want to allege circumstances that cast suspicion on this issue. *Gilkey v. Allen*, 617 S.W. 2d 308 (Tex. Civ. App.—Tyler, 1981, no writ). When suspicious circumstances exist, it must be shown that the testator understood the contents of the will when he signed it, as the formal proof of execution is not enough. *Kelly v. Settegast*, 68 Tex. 13, 2 S.W. 870 (1887). Also, if the contestant alleges that alterations are so substantial that the will, as executed, cannot be proven, the will can be denied probate. *Mahan v. Dovers*, 730 S.W.2d 467 (Tex. App.—Ft. Worth, 1987, no writ).

B. Revocation. Pursuant to case law, a will does not have to dispose of property, so it could merely revoke another testamentary instrument, or merely appoint an executor. See *Boyles v. Gresham*, 153 Tex. 106, 263 S.W.2d 935 (1954); §§3(ff); 58(b). If the will being contested revokes a prior will(s), either the proponent or the contestant may seek a jury question on revocation, depending on who it benefits and what the evidence shows. Section 63 of the Texas Probate Code governs how a will can be revoked. Questions pertaining to a revoking instrument being executed with all the formalities of a will must be stated in the negative, or it places an erroneous burden on the contestants. *Turk v. Robles*, 810 S.W.2d 755 (Tex. App.—Houston [1st Dist.], 1991, writ denied). There can also be issues submitted to a jury as to revocation by implication; *Baptist Foundation of Texas v. Buchanan*, 291 S.W.2d 464 (Tex. Civ. App.—Dallas 1956, writ ref'd, n.r.e.); revocation by physical act; *Morris v. Morris*, 642 S.W.2d 448 (Tex. 1982); or presumption of revocation. *In re: Estate of Glover*, 744 S.W.2d 939 (Tex. 1988); § 88(b)(3).

In *Evans v. May*, 923 S.W.2d 712, (Tex. App.—Houston [1st Dist.] 1996, writ denied), the Court held that a will which had been torn up and taped back together, was not revoked. Thus, there can be instructions regarding revocation even if the original will, in an altered state, is offered for probate. There must be absence of evidence that the testator destroyed it with the intention of revoking it. See *Simpson v. Neely*, 221 S.W.2d 303 (Tex. Civ. App.—Waco, 1949, writ ref'd). *Evans* further stands for the proposition that further alterations, such as tracing, which might result in revocation, cannot be raised the first time on appeal. *Id.* At 715.

C. Forgery or Alteration. Obviously, if pages look different, the type is different, the ink is not the same on all pages, a signed copy of the will of even date is not identical to the original, or the witnesses and/or notary deny involvement in the execution of the instrument, a jury question regarding forgery or alteration may be appropriate. Depending on the issue, a jury question on alteration or whether a forgery took place can be difficult to draft. The burden is on the person alleging the forgery to prove forgery by a preponderance of the evidence. See *Estate of Jernigan*, 793 S.W.2d 88 (Tex. App.—Texarkana, 1990, no writ). The standard to find that a document is a forgery or alteration is amply set forth in *Brown v. State*, 888 S.W.2d 216 (Tex. App.—Amarillo, 1994 no writ). Although *Brown* is a criminal case, it involved the execution of a will after the testator was dead, and it sets forth the definition and elements of forgery. Additionally, forgery and fraud must be raised within four years of the forgery or fraudulent act, or within two years of the *discovery* of such forgery or fraud, whichever is later. This gives rise to the need for an issue concerning when the person alleging the forgery should have discovered it. See *Aston v. Lyons*, 577 S.W.2d 516, (Tex.Civ.App.—Texarkana, 1979, no writ.) Fraud can also be proven by circumstantial evidence, which might give rise to the need for an instruction or definition of same. See *Stone v. State*, 823 S.W.2d 375 (Tex.App.—Austin, 1992, writ ref'd untimely).

III. TESTAMENTARY CAPACITY

A. **Burden of Proof.** If the will has not been admitted to probate, the proponent has the burden of establishing that the testator was of sound mind and the fact that the will was self-proved does not shift the burden to the contestant. § 88(b); *Croucher v. Croucher*, 660 S.W.2d 55 (Tex. 1983). If the will is admitted to probate, the contestants have the burden on all issues. *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968). If the will has not been admitted to probate, the issue will be submitted requiring a positive finding of capacity. If the will has been admitted to probate, the issue of capacity will need to be submitted in the negative, i.e., a finding that the testator did not have capacity on the date of execution.

B. **Legal Test.** If you are the contestant, you want the legal test for testamentary capacity to have the five (5) components set forth in *Prather v. McClelland* and its progeny. See *Prather v. McClelland*, 76 Tex. 574, 584-585, 13 S.W. 543, 546 (1890); *Oeschner v. AmeriTrust, Texas, N.A.*, 840 S.W.2d 131 (Tex. App.—El Paso, 1992, writ denied; *Reding v. Eaton*, 551 S.W.2d, 491 (Tex. Civ. App.—Austin 1977, no writ). If you are an applicant/proponent, you will want the four (4) criteria set forth in *Duke v. Falk*, 463 S.W.2d 245 (Tex. Civ. App.—Austin 1971, no writ). Be aware that the five prong test is safer. Even though case law has varied the criteria for testamentary capacity, more cases follow *Prather*. The five criteria are: (1) understand the business he was engaged in; (2) know the general nature and extent of his property; (3) know the objects of his bounty; (4) know the effect of the act of making a will; and (5) possess memory sufficient to collect the other four elements and hold them together long enough to form a judgment as to them.

As proponent, you may desire an instruction that the degree of capacity to make a will is less than that necessary to make a contract. *Rudersdorf v. Bowers*, 112 S.W.2d 784 (Tex. Civ. App. 1937, writ dismissed w.o.j.). Also, as proponent, you want to limit the inquiry into testamentary capacity to only the date of the will execution. Conversely, if you are the contestant, you will want to allege and prove a condition prior to the execution of the will that persisted at the execution. *Horton v. Horton*, 965 S.W.2d 78 (Tex. App.—Ft. Worth 1998, no writ). Only if evidence of the condition is allowed to be presented at trial will an instruction be submitted to the jury allowing them to look to a date prior to the execution of the will to assess testamentary capacity.

C. Other issues and instructions. If you are the applicant/proponent of the will you want to explain what infirmities can and cannot be considered in arriving at a verdict. For example, the fact that a person is old and feeble is not alone any evidence of incapacity. *Rich v. Rich* 615 S.W.2d 795 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). You may also want an instruction regarding any perceived eccentricities of the testator. For example, you can be odd, mean, uncouth, not always socially acceptable, and still possess testamentary capacity. See *Stolle v. Kanetzky* 259 S.W. 657 (Tex. Civ. App. 1924, writ dism'd w.o.j.) Additionally, you may need to address substance abuse and coherence if the issue is sharply disputed. *Specia v. Specia* 292 S.W.2d 818 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.). Finally, if you are the applicant/proponent of a will in which testamentary capacity is an issue, and which leaves the estate to someone other than the natural objects of the testator's bounty, you may want to seek a special instruction concerning the rights of the testator. For example, that "it does not matter if the testator made an unwise or unfair distribution of his assets," and that he/she has the right to dispose of his or her estate in any way chosen. See *In re: Estate of Good* 274 S.W.2d 900 (Tex. Civ. App. 1955, writ ref'd n.r.e.).

IV. UNDUE INFLUENCE

Undue influence is usually pled together with allegations of lack of testamentary capacity. The question, for purposes of jury submission, is whether the two causes of action should be pled alternatively. For example, must you possess capacity to be unduly influenced if the allegation is that, "but for the undue influence, the testator would not have executed the will?" Or, is the standard defined as a "diminished capacity, such that the person exercising the undue influence would have more opportunity to influence a person whose capacity is diminished?" While several cases talk around the capacity issue, no one case states you are either required or not required to have testamentary capacity to be unduly influenced. So, the jury submission debate begins with whether undue influence is an alternative submission used if you *find* the person *has* testamentary capacity, or is answered *regardless* of the jury's finding concerning testamentary capacity. Also, how do you deal with undue influence if you also are requesting a fraud finding, since undue influence is a species of fraud? See *Curry v. Curry*, 270 S.W. 208 (Tex. 1954).

A. Burden of Proof. The burden of proof is on the contestant to show that the person or persons alleged to have unduly influenced the testator actually did so.

B. Legal Test. At a minimum, the jury instruction under the question on undue influence should call for the contestant to prove:

- (1) the existence and exertion of an influence;

- (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the will; and
- (3) the execution of a will which the maker thereof would not have executed but for such influence.

The leading case on undue influence is *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex. 1963). There must be satisfactory proof of each of the stated elements to meet the burden of proving undue influence.

C. Applicant or Proponent's Desired Instruction. If you are the applicant or proponent of a will, you will seek an instruction to the jury that is succinct and includes only the bare elements as set forth above. You will also seek an instruction that opportunity to exert influence and susceptibility of the testator due to age or physical condition, and even an unnatural disposition is not enough, absent subversion or overpowering of the mind. *In re: Estate of Woods*, 542 S.W.2d 845 (Tex. 1976). If there is an alternative lifestyle not accepted by the contestants, the proponent may desire an instruction that the type of relationship is irrelevant if the elements of undue influence are not met. See *Evans v. May*, 923 S.W. 2d 712 (Tex. App.—Houston [1st Dist.] 1996, no writ). If the applicant or beneficiary was in a fiduciary relationship with the testator, i.e., agent under a power of attorney or trustee of a trust created by testator during lifetime, you may want an instruction that a fiduciary relationship, standing alone, is insufficient to prove undue influence. See *Dailey v. Wheat* 681 S.W. 2d 747 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

D. Contestant's Desired Instructions. If you are the contestant, you will want to prepare an instruction and ask its submission to provide to the jury a laundry list of items (hopefully proven by your pleadings and evidence), which prove the three elements of undue influence. There is no case law in Texas as to what a record must contain to establish undue influence. See *Long v. Long* 125 S.W. 2d 1034 (1939). In *Long*, undue influence could cause a testator to act against his will due to a desire to have peace. *Long* at 1035. The contestant will most likely want to provide to the jury an instruction like the one found in *Mackie v. McKenzie* 900 S.W.2d 445 (Tex. App.—Texarkana 1995, writ denied). From the standard set forth in *Mackie*, the instruction could include:

- (1) circumstances surrounding the execution of the instrument;
- (2) relationship of the testator and recipients of the bounty;
- (3) motive, character and conduct of the persons benefitted;
- (4) participation by beneficiaries in the drafting and/or execution of the instrument;
- (5) the words and acts of the parties;

- (6) the interest in and opportunity for the exercise of influence;
- (7) the physical and mental condition of the testator at the time of execution, including dependence on the beneficiary; and
- (8) the improvident, unjust, unreasonable and unnatural disposition of the property.

Do not expect this instruction if the evidence only shows conduct just as consistent with that of an instrument executed with free will, as one of someone unduly influenced.

The contestant may also want an instruction as to the subtlety of the act of undue influence. For example, undue influence is subtle and devious by means such as deceit or fraud. It need not be at gunpoint. *In re: Olsson*, 344 S.W.2d 171 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.)

Just as the evidence of each case may vary, so may the instruction. Each side on an undue influence case will seek a charge most favorable to them which can be upheld on appeal.

V. INSANE DELUSION

This is a difficult and seldom tried cause of action to set aside a will. It presumes that a testator is capable of attending to most business affairs. But, the testator's mind is so warped by some false and unfounded belief that he is incapable of formulating a rational plan of testamentary disposition. See *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. 1964). The charge would include that the testator held "a belief of a state of supposed facts that do not exist and which no rational person would believe." *Knight v. Edwards*, 264 S.W.2d 692 (1954).

A. Contestant's Desired Instructions. The contestant will want an instruction that the insane delusion will be judged true or false by reference to the physical world or to a realm of specific facts. See *Bauer v. Estate of Bauer*, 687 S.W.2d 410 (Tex. App.—Houston, [14th Dist.] 1985, writ ref'd n.r.e.)

B. Applicant/Proponent's Desired Instructions. The applicant will want a more subjective instruction. Beliefs that a person is not loved or that a person's spouse is being pressured to disinherit him or her are subjective. Thus, it does not matter what another person would believe in this situation, but only that the testator believed it. See *Bauer* at 413.; *Oechsner v. AmeriTrust Texas, N.A.* 840 S.W.2d 131 (Tex. App.—El Paso, 1992, writ denied).

Finally, if an insane delusion exists, it must directly influence the will, and the Applicant/Proponent should seek such a specific instruction. The mental error must be the operative factor in the will. See *Rich v. Rich*, 615 S.W.2d 795 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); *Gulf Oil Corp. v. Walker*, 288 S.W.2d 173 (Tex. Civ. App.—Beaumont 1956, no writ).

VI. TORTIOUS INTERFERENCE

A. With Inheritance Rights. The landmark case on the fraud of tortious interference is *King v. Acker*. In that case, the court held that one who by fraud, duress or other tortious means, intentionally prevents another from receiving from a third person an inheritance or gift, commits the act of tortious interference with inheritance rights. See *King v. Acker*, 725 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1987, no writ). No claim for tortious interference arises if the claimant would not have received the property in any event. *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144, (Tex. App.—Houston [14th Dist.] 1998, writ denied).

In a case founded on tortious interference with inheritance rights, both the contestant and proponent allege tortious interference. The allegation is usually made asking for both actual and punitive damages. Thus, after a finding of tortious interference, the will is admitted or denied probate and, if timely sought, the will contest trial may be bifurcated from the trial on the issue of punitive damages.

B. With Administration. Without addressing the issues of the limited persons who have standing to allege tortious interference with administration, there is some authority that this cause of action can be maintained. See *Harmann v. Solbrig*, 12 S.W.3d 587 (Tex. App.—San Antonio, 2000, no writ); *Hawkins v. Estate of Volkman*, 898 S.W.2d 334 (Tex. App.—San Antonio 1994, writ denied).

First, you must accept or reject that tortious interference with administration of an estate is analogous to tortious interference with the conducting of a business, for which a cause of action does lie. Then, you can argue for or against the proposition that the actions of one or more parties did or did not interfere with the “business” of the estate. See *Coppock & Teltschik v. Mayor, Day & Caldwell*, 857 S.W.2d 631 (Tex. App.—Houston [1st Dist.] 1993, writ denied.)

Also remember that the person alleging the interference has the burden to prove it. In order to establish tortious interference with administration, it must also be found that the contestant or beneficiary/proponent of a previous or subsequent will, has repeatedly filed frivolous pleadings, groundless causes of action and has generally cost the estate substantial funds to defend against unfounded claims. If the conduct is willful and knowing, there can be a question on both actual and punitive damages.

VII. OTHER TYPES OF FRAUD

Along with undue influence, there can be jury issues on other species of fraud. Some examples are fraud in the inducement, fraud in the factum and mistake of fact caused by fraud. Each jury question involves a specific question and possibly an instruction that relates to the specific type of fraud. Each case will evolve from the facts, but the burden will be on the person alleging the fraud to prove each element of fraud. Black's Law Dictionary defines fraud as, "an intentional perversion of trust for the purpose of inducing another in reliance upon it to part with some valuable thing or to surrender a legal right."

For a discussion of fraud in the inducement, see *Shearson Lehman Brothers, Inc. v. Kilgore*, 871 S.W.2d 925 (Tex. App.—Corpus Christi 1994, orig. proceeding); *In re. Education Management Corporation, Inc.*, 14 S.W.3d 418 (Tex. App.—Houston [14th Dist.] 2000, no writ). See also, *Holcomb v. Holcomb*, 803 S.W.2d 411 (Tex. App.—Dallas 1991, writ denied), in which a will was set aside based on undue influence along with fraud in the inducement.

VIII. GOOD FAITH AND JUST CAUSE

It is imperative that a person defending a will plead that they are prosecuting the will and defending the will contest in good faith and with just cause. If you are not the proponent of a will or a beneficiary of a will, you have no statutory authority to recover attorney's fees and expenses. See *Muse, Currie & Kohen v. Drake*, 535 S.W.2d 343 (Tex. 1976) (administrator had no right to contest will). You will need a finding of good faith for an award of fees. *Harkins v. Crews* 907 S.W.2d 51 (Tex. App.—San Antonio 1995, writ denied). The proponent of each will offered, whether admitted or not, has the burden of showing that they are acting in good faith, and with just cause.

IX. GUARDIANSHIPS

A jury trial in a guardianship does not occur on a frequent basis. Many times litigants realize they are either (1) spending funds that could be used to take care of the proposed ward; or (2) that the litigants are spending their potential inheritance. However, there are some reported cases of jury trials of guardianship proceedings. The issue of capacity is often one for a jury. *Krause v. White*, 612 S.W.2d 639 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) and *In re: Guardianship of Dahl*, 590 S.W.2d 191 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.).

A. Burden of Proof - Permanent Guardianship. The burden of proof as to incapacity of the applicant is to find by clear and convincing evidence that (1) the person is incapacitated; (2) it is in

the best interest of the proposed ward to have a guardian; and (3) the rights of the proposed ward or proposed ward's property will be protected by the appointment of a guardian. Texas Probate Code § 684(a); *Ulrickson v. Hawkins*, 696 S.W.2d 704 (Tex. App.—Ft. Worth 1988, writ ref'd n.r.e.). However, the burden is by a preponderance as to the following: (1) venue; (2) eligibility of the proposed guardian; (3) that a minor is not placed under guardianship to attend a school he or she could otherwise not attend; and (4) the proposed ward is totally incapacitated or partially incapacitated. Texas Probate Code §684(b). The applicant must prove each element by the appropriate standard of either “clear and convincing” or “preponderance of the evidence.”

B. Temporary Guardianship - Trial by Jury Issue. An emergency temporary guardianship is by its nature an *ex parte* proceeding. Thus, when it is granted, a confirmation hearing after service as required must be commenced within ten (10) days. It is unclear if either a proposed ward or a contestant would be entitled to a jury trial that would commence within ten (10) days. See Section 875 of the Texas Probate Code. *In re: B.A.G.*, 794 S.W.2d 510 (Tex. App.—Corpus Christi 1990, no writ), was a temporary guardianship tried to a jury, but without objection. So the case would not be on point as to the right to a jury trial, but simply authority that a temporary guardianship had been tried to a jury. Therefore, the question remains an open one.

C. Temporary Guardianship - Burden of Proof. At the conclusion of the temporary guardianship confirmation hearing, the applicant must prove (1) that there is substantial evidence that the person is a minor or incapacitated person; and (2) that the physical health or safety of the respondent will be seriously impaired; or (3) that the respondent's estate will be seriously damaged or dissipated, unless immediate action is taken, Texas Probate Code §875(g). As you can see, the proposed jury questions for a permanent guardianship would be entirely different than that of a temporary guardianship, and only the incapacity finding would be similar, and even that finding is not the same.

D. Proposed Instructions - Applicant - Capacity. As an applicant for permanent guardianship, you may wish to limit the charge to as succinct and simplistic as possible, with few instructions. An instruction that is almost always present is the definition of incapacity. There is only one statutory definition of incapacity, so the applicant will not be able to mold the instruction to suit the situation.

The applicant will probably seek the instruction of person and estate in subparts of one question rather than two separate jury questions. Thus, if the jury cannot recall specific incapacity issues as to the estate, for example, it will be easier to get a “yes” or a “we do” finding on one question as opposed to two separate questions.

E. Proposed Instruction - Contestant or Proposed Ward - Capacity. The contestant or proposed ward contesting incapacity will want as many instructions to cloud the issue of incapacity as much as possible. For example, even if a power of attorney for health, finances, or both was executed at or around the time of alleged incapacity, the person contesting will seek a separate question to ask if there is a less restrictive alternative than a guardianship citing. See Texas Probate Code § 602.

F. Qualification or Disqualification of a Proposed Guardian. In many guardianship contests, there is an allegation of disqualification against contestant and/or applicant. The person seeking guardianship has the burden of proving their qualification by a preponderance of the evidence.

The contestant will need to allege and introduce evidence supporting each ground for disqualification in order to get a jury question as to each disqualification allegation. Absent evidence, the ground for disqualification will most likely not be included in the jury questions.

1. Disqualification - Grounds. Issues of disqualification are to be alleged in the form, “Do you find by a preponderance of the evidence that . . .”. There are numerous grounds for disqualification, but a few are as follows (references as to the Texas Probate Code):

- (a.) A minor - § 681 (1);
- (b.) Notoriously bad - § 681 (2) *Legler v. Legler*, 37 S.W.2d 284 (Tex. Civ. App.—Austin 1931, no writ);
- (c.) Incapacitated applicant - § 681(3);
- (d.) Party to a lawsuit where your position conflicts with proposed ward - § 681(4); *Mirales v. Alvarez*, 789 S.W.2d 947 (Tex. App.—San Antonio 1990, writ denied);
- (e.) Indebted to proposed ward - § 681(5);
- (f.) Person with adverse claims to ward - § 681 (6);
- (g.) Person incapable due to lack of education, experience or otherwise cannot handle guardianship - § 681(7); *Trimble v. Texas Dept. of Protective Services*, 981 S.W.2d 211 (Tex. App.—Houston p14th Dist.] 1998, no pet.);
- (h.) Failure to designate a resident agent - § 681(10);
- (i.) Person found unsuitable - § 681(8)
- (j.) Disqualified by Declaration - § 681(9), § 679.

The broadest areas to find a person disqualified are incapability and a person found unsuitable. There are no absolutes as to what determines incapability or unsuitability.

2. Applicant’s Instruction - Qualification. As to qualification, the applicant will want only the question as to qualification, with most likely no instruction. For example, “Do you find

_____ is qualified to serve as guardian of the person and estate of _____?” Here is where the instruction or preference of the proposed ward would most likely be placed as an instruction. If the preference or designation is helpful, the applicant will want it included. If, by chance, the applicant has been designated as guardian by written document, the applicant may seek an instruction on the prima facie effect of designating applicant as guardian. See Texas Probate Code §679(c).

3. Contestant or Proposed Ward Instruction - Disqualification. The contestant or proposed ward will most likely request that each ground of disqualification be listed separately, thus giving a jury more opportunity to examine each ground by which the applicant can be disqualified. See Texas Probate Code §681 for grounds for disqualification. Again, if there is a preference expressed or a designation of guardian for someone other than the applicant, the ward or contestant will want such instruction as to preference, and the need to take the preference into consideration.

G. Designation of Guardian - Issue in Contest. It is unclear how to correctly attack a designation of guardian in the midst of a guardianship contest. Section 679(c) of the Texas Probate Code states that . . . a properly executed and witnessed declaration and declarant affidavit are prima facie evidence that the declarant was competent at the time the declarant executed the declaration and that the guardian named in the declaration would serve the best interests of the ward.

So, to uphold the designation, you may seek an instruction that the declarant, since not adjudicated, is presumed to be competent and seek that instruction as prima facie evidence of competency. Also, you want an instruction on the validity of the declaration. If the declaration disqualifies the applicant, you are likewise eager to have the instruction of its validity.

Conversely, if you want to attack the declaration, you may request a finding by question as to the capacity of the person to execute the designation (if this is an issue), or you may allege and seek to prove that the person designated to serve is disqualified. You may request a question as to the declaration which should be worded with an instruction, “. . .not be answered if the person named is found to be disqualified.”

Currently the issue of a jury question regarding designations, i.e., how to phrase it, how to attack it, and what type of question or instruction you receive, if you receive one at all, is an open issue. Do you ask for and get a jury question on the “validity of the declaration” or do you try to get an instruction under the “who should be guardian” question?

H. Restoration and Modification. The restoration trial of an adjudicated ward is an area ripe for appellate review as to the proper way to submit the jury questions. Additionally, Section 694A

through 694K of the Texas Probate Code have only existed in their current forms since 1999. A literal reading of them suggests that (1) the Court is the fact finder; (2) the Ward or interested person has the burden of showing he or she is no longer incapacitated by a preponderance of the evidence; and (3) if the Ward is unsuccessful, except on good cause, he/she may not try again for one year from the date of the hearing on his/her restoration or modification.

Thus, since there is no authority for a jury trial on restoration, a proposed charge is not included. The issue remains open as to whether a ward or interested person can obtain a jury trial on restoration or modification.

X. TRUST LITIGATION

Trust litigation is typically more complex than a straightforward will contest or guardianship contest. The realm of litigation can range from amending, constructing, terminating, and accounting in trusts, to all species of litigation on breach of fiduciary duties, conversion and civil conspiracy. It will not be possible to cover all anticipated jury questions that can arise in trust litigation, but this section should provide a starting point.

A. **Burden of Proof - Fiduciary Duties.** It is difficult to assess the burden of proof in a fiduciary case. It can shift from plaintiff to defendant depending on what type of fiduciary relationship exists and which of the duties is alleged to be breached.

1. **Burden on Plaintiff - Breach of Fiduciary Duty Lawsuit**

The following are fiduciary allegations where the burden is *usually* placed on the plaintiff as the person asserting the claim:

- (a) Existence of a Fiduciary Relationship - *Thigpen v. Locke*, 363 S.W.2d 247 (Tex. 1962);
- (b) Fiduciary Not Acting Competently - *Jewitt v. Capital National Bank of Austin*, 618 S.W.2d 109 (Tex. App.—Waco 1981, writ ref'd n.r.e.);
- (c) Fraud - *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965);
- (d) Breach of Contract - *Omohundro v. Matthews*, 341 S.W.2d 401 (Tex. 1960);
- (e) Conversion - *Avila v. Havana Painting Co.*, 761 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1988, writ den'd);
- (f) Tortious Interference with Trust Administration; Tex. Prop. Code § 1114.031(a) (1);
- (g) Removal of Trustee by Petition - Tex. Prop. Code § 113.082;

- (h) Conspiracy - *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963).
2. Burden of Proof on Fiduciary or Defendant in Breach of Fiduciary Duty Lawsuit.
- (a) Self-Dealing and Presumption of Unfairness - *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502;
- (b) Tracing Commingled Funds - *Eaton v. Husted*, 172 S.W.2d 493 (Tex. 1943);
- (c) Gifts from Beneficiary to Fiduciary; *Sorrell v. Elsen*, 748 S.W.2d 584 (Tex. App.—San Antonio 1988, writ denied);
- (d) Conflict of Interest - *Stephens County Museum, Inc. v Swenson*, 571 S.W.2d 257 (Tex. 1974);
- (e) Usurpation of Trust Opportunity - *Huffington v. Upchurch*, 532 S.W.2d 576 (Tex. 1976);
- (f) Purchase, loans, contracts and business transactions of fiduciary in relation to trust or beneficiary - *Land v. Lee*, 777 S.W.2d 158 (Tex. App.—Dallas, 1989, no writ); *Dominguez v. Brackey Enterprises, Inc.*, 756 S.W.2d 788 (Tex. App.—El Paso 1988, writ denied); *InterFirst Bank Dallas v. Risser*, 739 S.W.2d 882 (Tex. App.—Texarkana 1987, no writ);
- (g) Failure to keep records, exercise discretion or obtain information - *Corpus Christi Bank and Trust v. Roberts*, 597 S.W.2d 752 (Tex. 1980); *Jewitt v. Capital Nat. Bank of Austin*, 618 S.W.2d 109 (Tex. Civ. App.—Waco 1991, writ ref'd n.r.e.);
- (h) Show cause for removal - burden on trustee to show cause why he or she should not be removed.

Obviously each breach case will be different and the jury charge will need to be tailored to the facts pled and evidence introduced at trial.

B. Trust Amendment, Construction, Modification or Termination.

1. Introduction. Most of the statutes governing the handling of trusts are found in the trust instrument or in the section of the Texas Property Code commonly known as the “Texas Trust Code.” Some trusts can be modified or terminated by their terms and the Court is not involved.

2. Judicial Modification or Termination. If a contested issue arises as to the workable nature of a trust or a judicial modification or termination is sought, the issue becomes a judicial one. Texas Property Code §112.054.

Again, it would appear from the wording of the Texas Property Code that the sole fact finder of the modification and termination issue is the Court. Thus, this article contains no jury charge as to modification and termination.

3. Construction and Interpretation of Instruments. If the instrument is ambiguous, it is ripe for litigation. This is especially true if there are issues or rumblings of breach of fiduciary duty and the parts of the instrument on which the fiduciary is relying are ambiguous. The clarification of (a) the standing to sue the trustee due to an *in terrorem* clause; (b) the validity and scope of exculpatory clauses; and (c) clarification of ambiguities needs to be resolved before the fiduciary faces a trial for breach of duty, removal, and damages. It may be necessary to have two separate jury trials, depending on the outcome. If, however, the potential plaintiffs are excluded by standing or the *in terrorem* clause, the fiduciary will be glad the issue was resolved first. Conversely, if the ambiguity favors the plaintiff, or the exculpatory clause does not protect the fiduciary, the plaintiff will be allowed to proceed without the fiduciary being able to cloud the breach of fiduciary allegations.

For example, in *Johech v. Clayburne*, 863 S.W.2d 516 (Tex. App.—Austin 1993, writ denied), the Court held that the trustee's duty of fidelity was modified by the exculpatory provision of the instrument. Thus, the verdict in favor of the beneficiaries was reversed on appeal for failure to instruct the jury of the modification. Also, in *Neuhaus v. Richards*, 846 S.W.2d 70 (Tex. App.—Corpus Christi 1992, writ denied), the Court erroneously instructed on the exculpatory clause, again resulting in reversal at the appellate level.

Also, it is important to see if you are going to violate an *in terrorem* clause before you file the lawsuit. A separate declaratory judgment trial could save all litigants time and money on the issue of what does and does not violate an *in terrorem* clause. See *McLendon v. McLendon*, 862 S.W.2d 668 (Tex.App.—Dallas 1993, no writ). The Texas Rules of Civil Procedure allow for separate trials on these issues. See Tex. R. Civ. P. 174.

XI. AFFIRMATIVE DEFENSES

If you are the defendant and alleged fiduciary, you may want to plead and introduce facts supporting no fiduciary relationship or not in the scope of a fiduciary role, if applicable, and a realm

of affirmative defenses. Some such defenses which may give rise to a jury question or instruction include:

1. No fiduciary relationship or breach did not fall within scope of fiduciary role; - *Blieden v. Greenspan*, 751 S.W.2d 858 (Tex. 1988);
2. *res judicata* - *Coble Wall Trust Co., Inc. v. Palmer*, 859 S.W.2d 475 (Tex. App.—San Antonio 1993, writ denied);
3. Accord and Satisfaction - *King v. Cliett*, 31 S.W.2d 350 (Tex. Civ. App.—Waco 1930, no writ);
4. Release - Tex. Prop. Code § 114.005;
5. Estoppel - *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.—Ft. Worth 1967, writ ref'd n.r.e.);
6. Waiver - *Ford v. Culbertson*, 308 S.W.2d 855 (Tex. 1958);
7. Ratification - *Burnett v. First Nat. Bank of Waco*, 536 S.W.2d 600 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.);
8. Laches - *Fitzgerald v. Hull*, 237 S.W.2d 256 (Tex. 1951);
9. Avoidance or Exculpatory Clauses; - *Moulton v. Alamo Ambulance Service, Inc.*, 414 S.W.2d 444 (Tex. 1967); Tex. Prop. Code §113.059;
10. Statute of Limitations - §16.004; *Peek v. Berry*, 184 S.W.2d 272 (Tex. 1944); see conversely *Estate of Degley*, 797 S.W.2d 299 (Tex. App.—Corpus Christi 1990, no writ).

XII. OPEN ISSUES ON JURY QUESTIONS IN FIDUCIARY LITIGATION

A. **Self-Dealing.** With self-dealing allegations, the burden is on the fiduciary to rebut the presumption that the transaction was unfair. The case law indicates the presumption is “rebuttable.” See *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257 (Tex. 1974).

The question is if the unfairness presumption is rebutted, does the burden shift to the plaintiff to submit a finding as to whether a specific fiduciary duty was breached? If so, does the fairness issue disappear or become a part of an instruction? See *Archer v. Griffith, supra*, at 739.

B. **Fulfillment.** If the transaction is found to be fair, the fiduciary will want the jury question phrased in terms of whether he “fulfilled” his duty, not in terms of whether he “breached” his duty. But, is this the correct placement of the burden? The case law varies on both the burden and the submission as to whether it is submitted as a “breach” or as whether a fiduciary “fulfilled” and “complied” with his or her duties. See *Townes v. Townes*, 867 S.W.2d 414 (Tex. App.—Houston

[14th Dist.] 1994, writ denied); *Sorrell v. Elsey*, 748 S.W.2d 584 (Tex. App.—San Antonio 1988, writ denied); *Cole v. Plummer*, 559 S.W.2d 87 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); *Johnson v. J. Hiram Moore, Ltd.*, 763 S.W.2d 496 (Tex. App.—Austin 1988, writ denied).

XIII. BIFURCATED TRIAL AND JURY QUESTIONS

Upon a timely motion by a defendant, a trial court can bifurcate the amount of punitive damages from the preceding liability questions and the determination of actual damages. See *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

Thus, you would have two separate charge conferences and two entirely separate jury question submissions. To separate the two, the second part, if applicable, is usually labeled “Charge of Court - Second Phase” or similar wording to segregate the exemplary damage award from the initial jury verdict. There are then special statements to the jury stating what they have previously “found” which gives rise to the questions being asked in the second phase of trial.

XIV. MISCELLANEOUS JURY QUESTIONS AND INSTRUCTIONS

A. Removal Issues.

1. Executor. It would appear under current law that in a lawsuit for removal of executor/trustee for breach of fiduciary duty and excessive executor fees, the Court has discretion to decide whether or not to remove an executor and a jury questions is not required. This is because of the “may remove” language in Section 149C of the Texas Probate Code. See *Lee v. Lee*, No. 14-97-00162-CV Corrected Opinion of May 17, 2001, modifying opinion of February 8, 2001; *Geeslin v. McElhenney*, 788 S.W.2d 683 (Tex. App.—Austin 1990, no writ).

2. Trustee. There appears to be no discretion in the removal of a trustee if he is found to have materially violated his duties resulting in a material financial loss to the trust. See *Akin v. Dahl*, 661 S.W.2d 911 (Tex. 1983). You should also plead for removal under Section 113.082 of the Texas Property (Trust) Code.

B. Constructive Trust Question. A constructive trust is a special species of trust arising out of a court’s equitable jurisdiction to right a wrong. See *Meadows v. Bierschwale*, 516 S.W.2d 125 (Tex. 1974). There does not need to be an actual trust “instrument” for the court to impose the terms of the trust. When property has been acquired under circumstances in which the holder had no legal title to retain the interest, equity makes that person a “trustee” for the benefit of the person whose property right was wrongfully held by the constructive “trustee.” *Talley v. Howsley*, 176 S.W.2d 158 (Tex. 1943). If the party is a fiduciary and acquires property from some else’s funds,

the aggrieved party can seek the property or its value. *Sullivan & Co. v. Ramsey*, 155 S.W. 580 (Tex.Civ.App.—San Antonio 1913, no writ.)

Even a will contest can include a jury question on constructive trust. See *Pope v. Garrett*, 211 S.W.2d 559 (Tex. 1948). In *Pope*, the beneficiaries physically kept the ailing testator from signing a will disinheriting them, thus providing the remedy of a constructive trust for their actions.

C. Civil Conspiracy. Even attorneys, not in privity, can be held liable for knowingly participating with others to defraud a third person. *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468 {Tex.App.—Houston [1st Dist.] 1985, no writ.) The elements of civil conspiracy are (a) two or more persons; (b) an object to be accomplished; (c) a meeting of the minds; (d) one or more overt acts; and (e) damages as the proximate result. *Massey v. Armco Steel Co.*, 652 S.W.2d 933 (Tex. 1983). If persons are found to have jointly committed a fraud, the civil conspiracy can be upheld. See *Lesikar v. Rappeport*, 33 S.W.3d 282 (Tex.App.—Texarkana , 2000, no writ).

D. Malicious Prosecution. Malicious prosecution can be tried to a jury once the original proceeding is favorably ended as to the one alleging malicious prosecution. The plaintiff has the burden and must show there was a lack of probable cause for the proceedings brought against him by the Defendant. *James v. Brown*, 637 S.W. 2d 914, (Tex. 1982). In *Akin v. Dahl*, the jury found no probable cause for having Mr. Dahl be the subject of the various guardianship proceedings brought against him. See *Akin v. Dahl*, 661 S.W.2d 917 (Tex. 1983).

XV. CONCLUSION

There are no pattern jury charges in probate. It may be that the flux of legislative changes and changes in rights and duties, makes the task too difficult. It is hoped this attempt at a consolidation of various options for jury questions in probate, guardianship and trust litigation will provide a starting point.

EXHIBITS

**APPLICANT'S CHARGE
 FORMALITIES, TESTAMENTARY CAPACITY, UNDUE INFLUENCE
 REVOCATION, WAIVER, ESTOPPEL, LACHES,
 TORTIOUS INTERFERENCE and GOOD FAITH**

NO. _____

In the Estate of *****	X	IN THE _____ COURT
Deceased	X	
	X	
****, Contestant	X	NUMBER ****
v.	X	
****, Proponent	X	_____ COUNTY, TEXAS

Charge of the Court

LADES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this Charge. In discharging your responsibility on this Jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the Charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of _____ or more members of the Jury. The same _____ or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than _____ jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire Jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7. You have been allowed to take notes during the trial of this case. You may have those notes with you in the jury room during your deliberations. The notes you have taken are not evidence. Your personal recollection of the evidence takes precedence over any notes you have taken. You should base your verdict only on the evidence presented during the trial. You may not display your notes or disclose the contents of your notes to any other juror during your deliberations. To do so is a violation of these instructions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted. The presiding juror or any other who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again. When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

In answering a question based on a "preponderance of the evidence," a fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proven.

If you answer questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may

not be. Any recovery will be determined by the court when it applies the law to your answers at time of judgment.

QUESTION NO. _____

Do you find from a preponderance of the evidence that _____ executed the Will dated _____ with all the formalities to make it a lawful and valid will?

Answer "yes" or "no."

Answer: _____

INSTRUCTION:

You are instructed that all of the formalities required by law to make a valid will are as follows:

1. The will must be in writing;
2. The testator must be 18 years of age or older;
3. The testator must personally sign the will; and
4. The will must be attested by two or more credible witnesses above the age of 14 years who each subscribe their name to the will in their own handwriting in the presence of the testator. There is no requirement that the witnesses sign in each other's presence.

With respect to formality (4) above, you are instructed that a witness is in the presence of the testator if the testator is able to see the witness sign the will from the testator's actual position at the time, or from a slightly altered position if the testator had the power readily to alter his/her position without assistance.

If you have answered question no. _____ "yes", then answer the following question. Otherwise, do not answer question no. _____.

QUESTION NO. _____

Do you find that _____ had testamentary capacity on _____ when he/she executed the [insert date of will here] Will?

Answer “yes” or “no.”

Answer: _____

INSTRUCTION:

You are instructed that for _____ to have testamentary capacity, he/she must have sufficient mental ability on [insert the date of the will here] (1) to understand the business in which he/she was engaged; (2) to understand the effect of his/her making the will; (3) to understand the general nature and extent of his/her property; (4) to know his/her next of kin and the natural objects of his/her bounty and their claims on him/her; and (5) to have sufficient memory to collect in his/her mind the elements of the business to be transacted, to hold these elements long enough to perceive their obvious relation to each other, and to be able to form a reasonable judgment as to these matters.

You are further instructed that the degree of capacity to make a will is less than the capacity necessary to make a contract.

Rudersdorf v. Bowers, 112 S.W.2d 784

The fact that a person is old and feeble is not, alone, evidence of incapacity.

Rich v. Rich, 615 S.W.2d 795

You can be odd, mean, uncouth and not always socially acceptable and still have testamentary capacity.

Stolle v. Karetzky, 259 S.W.2d 657

You are further instructed that if _____ had testamentary capacity, the leaving of his/her estate to someone other than the objects of his/her bounty is not to be considered for purposes of this question.

In re. Estate of Good, 274 S.W.2d 900

QUESTION NO. _____

Do you find from a preponderance of the evidence that _____ was unduly evidenced at the time he/she executed his/her Last Will and Testament?

Answer “yes” or “no.”

Answer: _____

INSTRUCTION:

“Undue influence” means:

- (1) the existence and exertion of an influence;
- (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of execution of the will; and
- (3) the execution of a will which the maker thereof would not have executed but for such influence.

Rothermel v. Duncan; 369 S.W.2d 917.

You are further instructed that neither the opportunity or susceptibility alone constitutes undue influence.

In re. Estate of Woods, 542 S.W.2d 845.

QUESTION NO. _____

Do you find from a preponderance of the evidence that _____ validly revoked the Will dated _____?

INSTRUCTION:

A person who has testamentary capacity may revoke a will by executing a subsequent instrument revoking the prior instrument.

If the original will cannot be located, and only a copy is offered for probate, and the original will was last seen in the possession of the testator, there is a presumption of revocation.

In re. Estate of Glover, 744 S.W.2d 939.

QUESTION NO. _____

-

Do you find from a preponderance of the evidence that Proponents of the Will dated _____, _____ and _____, have acted in good faith and with just cause in the prosecution of their Application for Probate of the Will dated _____ and in contesting the will dated _____?

Answer "Yes" or "No"

Answer: _____

INSTRUCTION:

“Good faith” means an action which is prompted by honesty of intention or a reasonable belief that the action was probably correct.

“With just cause” means the actions of _____ in this proceeding were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

QUESTION NO. _____

Did _____ waive his/her right to contest the Will of _____ dated _____?

INSTRUCTION:

"Waiver" means the intentional surrender of a known right or intentional conduct inconsistent with claiming that right if made after receipt of full disclosure of all material information.

Answer "Yes" or "No"

Answer: _____

QUESTION NO. _____

Do you find that _____ is estopped from contesting the will of
_____ dated _____?

INSTRUCTION:

A person is estopped if, after full disclosure of all material facts, he acts or fails to act with the intention that another rely on such action or inaction, and if such other person does in good faith does rely to his detriment on the acts or inactions of the first person.

Answer "Yes" or "No"

Answer: _____

QUESTION NO. _____

Do you find that _____ unreasonably delayed in asserting his contest of the will of _____ and is barred by laches?

Answer "Yes" or "No"

Answer: _____

INSTRUCTION:

A party unreasonably delays in asserting his rights if the delay causes a good faith change of position by the other party to his detriment.

"Laches" means a claimant has failed to assert a right or claim for an unreasonable time though they had actual knowledge of the facts, and _____ in good faith relied to his detriment because of the unreasonable delay.

QUESTION NO. _____

Do you find that in making his claims against _____,
_____ has acted with unclean hands?

INSTRUCTION:

A person acts with unclean hands if he attempts to obtain the benefit of the results of his own fraud, dereliction of duty, violation of law, wrongful conduct or other inequitable conduct in the transaction in question.

Answer "Yes" or "No"

Answer: _____

QUESTION NO. _____

Did _____ intentionally interfere with a gift to or the inheritance rights of any of the following parties without just cause or excuse?

INSTRUCTION:

Tortious interference with inheritance occurs when:

- a. a party has an expectancy of inheritance or gift;
- b. there is a reasonable certainty that the expectancy would have been realized, but for the interference;
- c. the interference with the expectancy is intentional and without just cause or excuse;
- d. the interference takes the form of conduct such as fraud, duress or undue influence; and
- e. damages result from the interference.

Answer "Yes" or "No" for each party.

Answer for each:

Person/entity #1 _____

Person/entity #2 _____

etc.

If you answered Question No. _____ in the affirmative, then answer Question No. _____.

QUESTION NO. _____

What sum of money, if paid now in cash, would fairly and reasonably compensate the following parties for any intentional interference found by you in your answer to Question No. ____

You may consider the following elements of damages and no others:

- a. Actual pecuniary losses caused by the interference;
- b. Consequential loss caused by the interference, and
- c. Emotional distress reasonably expected to be caused by the interference.

Answer in dollars and cents, if any, for each party:

Answer:

1. Party/entity #1 \$ _____

2. Party/entity #2 \$ _____

etc.

If you answered Question No. _____ in the affirmative, then answer Question No. _____.

QUESTION NO. _____

Do you find by clear and convincing evidence that the tortious interference with inheritance rights found by you in answer to Jury Question No. _____, if any, was committed by _____ with malice?

"Malice" means:

- (a) a specific intent by _____ to cause substantial injury to _____;
- (b) an act or omission by _____;
 - (i) which, when viewed objectively from the standpoint of _____ at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
 - (ii) of which _____ had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No" for each party:

Answer:

- a. Party #1 _____
- b.. Party #2 _____
- etc.

If you answered Question No. _____ in the affirmative, then answer Question No. _____.

QUESTION NO. _____

What sum of money, if any, should be awarded as exemplary damages to **[list all parties here]** against _____, etc. for the conduct found by you in Jury Question No. _____.

INSTRUCTION:

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

- a. The nature of the wrong;
- b. The character of the conduct involved;
- c. The degree of culpability of the wrongdoer;
- d. The situation and sensibilities of the parties concerned; and,
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The size of an award needed to deter similar conduct in the future.

Answer dollars and cents, if any, for each party:

- a. Party #1 _____
- b. Party#2 _____

etc.

QUESTION NO. _____

What sum of money, if any, do you find from a preponderance of the evidence to be a reasonable fee for the attorney's fees, expenses, and costs of _____?

You may consider the following factors as guides in determining a reasonable fee for the value of attorney's services:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services;
8. Whether the fee is fixed or contingent;
9. The complexities of the particular litigation;
10. The time involved, including trial time;
11. Expenses and disbursements; and
12. The attorney's opinion of the reasonable value of services.

Answer in dollars and cents:

For Trial	\$ _____
For Appeal to the Appellate Court	\$ _____
For Appeal to the Supreme Court	\$ _____

CONTESTANT'S CHARGE

ISSUES OF FORMALITIES, TESTAMENTARY CAPACITY, UNDUE INFLUENCE, FRAUD, AND GOOD FAITH

QUESTION NO. _____

Do you find from a preponderance of the evidence that _____ executed the will dated _____ with all the formalities to make it a lawful and valid will?

Answer “Yes” or “No”

Answer: _____

INSTRUCTION:

You are instructed that all of the formalities required by law to make a valid will are as follows:

1. The will must be in writing;
2. The testator must be 18 years or older;
3. The testator must personally sign the will; and
4. The will must be attested by two or more credible witnesses above the age of 14 years who each subscribe their name to the will in their own handwriting in the presence of the testator. There is no requirement that the witnesses sign in each other’s presence.

If you answered Question _____ “yes”, then answer Question No. _____. If not, do not answer this Question.

QUESTION NO. _____

Do you find from a preponderance of the evidence that _____ knew the provisions and contents of the will when she executed it on _____?

Answer “yes” or “no”.

Answer: _____

Kelly v. Settegast, 2 S.W. 870.

QUESTION NO. _____

Do you find from a preponderance of the evidence that _____ had testamentary capacity at the time he executed the instrument bearing the date of _____, and offered for probate as his last will and testament?

Answer "Yes" or "No"

ANSWER: _____

INSTRUCTION:

"Testamentary Capacity" is the legal capacity to make a valid will and means that the deceased, when executing a will, must have the following:

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

Prather v. McClelland, 13 S.W. 543.

You are further instructed that you may consider evidence of _____'s mental condition at times other than on _____ (date of will execution) only if it demonstrates that a condition affects her testamentary capacity and was persistent and likely present on _____ (date of will execution).

Horton v. Horton, 965 S.W.2d 78.

QUESTION NO. _____

-
Do you find from a preponderance of the evidence that at the time of the making and execution of the instrument which is sought to be probated here as the Last Will and Testament of _____ the Will was procured by undue influence" on the part of _____?

Answer "Yes" or "No"

Answer: _____

INSTRUCTION:

"Undue Influence" as used in the preceding question is such influence or domination by excessive importunities, imposition of fraud exercised at the time of the making of said instrument as destroys the free agency of the testator and overcomes his wishes in regard to the disposition of his property to such an extent that the instrument does not in fact express his wishes as to the disposition of his property, but those of the person exercising such influence. It may stem from fear, the desire for peace, or some other feeling which the testator is unable to resist. In this connection, you may consider the condition of the testator's mind, his age, weakness of body or mind, if any, whether produced by the infirmities of his age or by disease; and the opportunity to exert undue influence.

You may also consider the circumstances surrounding the execution of the instrument; the relationship of the testator and recipients of the bounty; motive, character and conduct of the persons benefited; participation in the drafting and execution of the instrument; the words and acts of the parties; and the improvident, unjust, unreasonable and unnatural disposition of the property. You are further instructed that undue influence cannot be inferred alone from motive or opportunity, but there must be some evidence to show that undue influence not only existed, but that it was exercised with respect to the making of the will at issue.

QUESTION NO. _____

Do you find that the signing of the will dated _____ by _____ was procured by fraud on the part of _____ or _____?

INSTRUCTION:

“Fraud” occurs when:

1. a party makes a material representation;
2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the trust and as a positive assertion;
3. the misrepresentation is made with the intention that it should be acted on by the other party; and
4. the other party acts in reliance on the misrepresentation and thereby suffers injury.

“Fraud” may also occur when:

1. a party conceals or fails to disclose a material fact within the knowledge of that party;
2. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth;
3. the party intends to induce the other party to take some action by concealing or failing to disclose the fact; and
4. the party suffers injury as a result of action without the knowledge of the undisclosed fact.

“Misrepresentation” means;

1. a false statement of fact, or
2. a statement of opinion based on a false statement of fact, or
3. a statement of opinion that the maker knows to be false, or
4. an expression of opinion that is false, made by the one claiming or implying to have special knowledge of the subject matter of the opinion.

“Special knowledge” means knowledge or information superior to that possessed by the other party and to which the other party did not have equal access.

Answer “Yes” or “No” for each person listed:

Answer: for each:

Person #1 _____

Person #2 _____

QUESTION NO. _____

Do you find from a preponderance of the evidence that the signature on the will dated _____ is not the signature of _____?

Answer "yes" or "no".

Answer. _____

QUESTION NO. _____

Do you find by a preponderance of the evidence that the instrument dated _____ and offered for probate was substantially altered by (changing pages, white out, insertions, scratch throughs, etc) ?

Answer "yes" or "no".

Answer: _____

Mahan v. Dovers, 730 S.W.2d 467.

QUESTION NO. _____

-

Do you find from a preponderance of the evidence that Proponents of the Will dated _____, have acted in good faith and with just cause in the prosecution of

their Application for Probate of the will dated _____ and in contest to the will dated _____?

Answer “Yes” or “No”

Answer: _____

INSTRUCTION:

“Good faith” means an action which is prompted by honesty of intention or a reasonable belief that the action was probably correct.

“With just clause” means the actions of _____ in this proceeding were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

QUESTION NO. _____

What sum of money, if any, do you find from a preponderance of the evidence to be a reasonable fee for the attorney's fees, expenses, and costs of _____?

You may consider the following factors as guides in determining a reasonable fee for the value of attorney's services:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services;
8. Whether the fee is fixed or contingent;
9. The complexities of the particular litigation;
10. The time involved, including trial time;
11. Expenses and disbursements; and
12. The attorney's opinion of the reasonable value of services.

Answer in dollars and cents:

For Trial	\$ _____
For Appeal to the Appellate Court	\$ _____
For Appeal to the Supreme Court	\$ _____

(LEAST CONTROVERSIAL CHARGE)

GUARDIANSHIP QUESTIONS

(1ST ALTERNATIVE)

CAUSE NO. _____

IN RE GUARDIANSHIP OF	X	IN THE _____ COURT
OF THE PERSON AND ESTATE OF	X	
_____	X	_____ COUNTY, TEXAS

INSTRUCTIONS AND CHARGE OF THE COURT

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given to you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given to you by the court. In your deliberations, you will not consider anything that is not represented by the evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.
5. You will not decide the answer to a question by lot, or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.
6. You may render your verdict upon the vote of _____ or more members of the jury. The same _____ or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than _____ jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions, unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer to a question in which the preponderance of the evidence is the standard, then answer "No."

The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in the case.

Some questions will instead have a burden of proof known as "clear and convincing evidence." If you do not find that there is clear and convincing evidence supporting a "Yes" answer to a question in which clear and convincing evidence is the standard, then answer "No." The term "clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when provided by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

QUESTION NO. ____

Do you find by clear and convincing evidence that:

- (1) _____ is an incapacitated person;
- (2) _____ it is in the best interest of _____ to have the court appoint a person as guardian of person/estate; and
- (3) _____ the rights of _____ or his/her property will be protected by the appointment of a guardian?

Answer "yes" or "no"

Answer: _____

INSTRUCTION:

You are further instructed that a determination of incapacity must be evidenced by recurring acts or occurrences within the preceding six-month period and not by isolated instances of negligence or bad judgment.

DEFINITION:

You are instructed that an "incapacitated person" is an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs.

If you answered Question No. _____ "Yes", then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. _____

Do you find by a preponderance of the evidence that _____ is totally without capacity to care for himself/herself and to manage his/her property?

Answer "yes" or "no"

Answer: _____

If you answered Question No. ____ "No", then answer both parts of the following question. Otherwise, do not answer the following question

QUESTION NO. ____

Do you find by a preponderance of the evidence that _____ lacks capacity to do some, but not all:

(a) of the tasks necessary to care for her physical needs?

Answer "yes" or "no"

Answer: _____

(b) of the tasks necessary to manage his/her property?

Answer "yes" or "no"

Answer: _____

QUESTION NO. _____

Do you find by a preponderance of the evidence that _____ acted in good faith and with just cause in the filing and prosecution of the Application for Appointment of a Guardian of the Person and Estate of _____?

Answer “yes” or “no”

Answer: _____

Source: TEX. PROB. CODE ANN. Section 665B

INSTRUCTION:

“Good faith” means an action which is prompted by honesty of intention or a reasonable belief that the action was probably correct.

“With just cause” means the actions of _____ in this proceeding were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

If you answered Question No. ____ “Yes,” then answer the following question.

Question No. ____

State in dollars and cents the amount, if any, of the attorneys fees, expenses and costs incurred by _____ that were reasonably and necessarily incurred in pursuing the request for the appointment of a Guardian.

ANSWER IN DOLLARS AND CENTS.

Answer: _____

Source: Tex. Prob. Code Ann. Section 665B

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this entire charge read aloud and then you will deliberate upon your answers to the questions asked. It is the duty of the presiding juror:

1. To preside during your deliberations;
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;
4. To vote on the question;
5. To write your answers to the questions in spaces provided; and
6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of that fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

Judge Presiding

CERTIFICATE

We, the jury, have answered the above questions as herein indicated, and return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

Presiding Juror

(To be signed by those rendering the verdict if not unanimous.)

(Some Controversial Issues)

GUARDIANSHIP QUESTIONS

(2nd Alternative)

Question No. _____

Should the Court appoint a guardian for _____? [**alternative wording**]

Answer “yes” or “no”

Answer: _____

INSTRUCTION:

You are instructed that to find that a guardian should be appointed for _____, you must find by clear and convincing evidence that:

- (1) _____ is an incapacitated person;
- (2) it is in the best interest of _____ to have the court appoint a person as guardian of _____; and
- (3) the rights of _____ or her property will be protected by the appointment of a guardian.

DEFINITION:

You are further instructed that an “incapacitated person” is an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual’s own physical health, or to manage this individual’s own financial affairs.

NOTE: “Clear and convincing” is defined in instructions of court for this charge.

Source: TEX. PROB. CODE ANN. Section 684(a)

If you answer Question No. ___ “Yes,” then answer the following question. Otherwise, do not answer the following question.

Question No. _____

Do you find by a preponderance of the evidence that _____ is totally without capacity?

Answer "yes" or "no"

Answer:

As to the "person?" _____

As to the "estate?" _____

Source: TEX. PROB. CODE ANN. Section 684(b) (4)

If you answered Question No. ____ “No” and only in that event, answer Question No. ____

Question No. ____

Do you find by a preponderance of the evidence that _____ is partially incapacitated?

Answer “yes” or “no”

Answer:

As to the “person?” _____

As to the “estate?” _____

Source: TEX. PROB. CODE ANN. Section 684(b)(4)

If you answered Question No. ____ “yes” and only in that event, answer Question No. ____

Question No. ____

Do you find that _____’s guardian should be granted the following powers and authorities over him/her?

ANSWER EACH SEPARATELY:

A. to collect and to protect his/her assets?

Answer “yes” or “no”

Answer: _____

B. to pay, compromise and defend claims?

Answer “yes” or “no”

Answer: _____

C. to contract and to incur other obligations on his/her behalf?

Answer “yes” or “no”

Answer: _____

D. to make residential care decisions?

Answer “yes” or “no”

Answer: _____

E. to apply for and to receive funds from governmental sources for him/her or, in the alternative, to execute a binding waiver of funds to be received from governmental sources on his/her behalf?

Answer “yes” or “no”

Answer: _____

F. to apply for and to consent to governmental services on his/her behalf?

Answer “yes” or “no”

Answer: _____

G. to apply for, to consent to and to enroll himself/herself in non-residential programs and services which are reasonable required and needed by him/her and which are operated by public and private agencies and facilities?

Answer "yes" or "no"

Answer: _____

H. to make application for, to consent to and to enroll himself/herself in public and private residential care facilities?

Answer "yes" or "no"

Answer: _____

I. to apply for, arrange for and consent to any and all medical, dental, psychological and psychiatric tests and evaluations for himself/herself, including but not limited to, comprehensive diagnoses and evaluations?

Answer "yes" or "no"

Answer: _____

J. to consent to the disclosure of his/her psychological records and medical records?

Answer "yes" or "no"

Answer: _____

K. to consent to major medical and dental treatment and testing for himself/herself, including surgery, psychotropic drugs and the choice of physicians or dentists?

Answer "yes" or "no"

Answer: _____

L. to enter into or procure insurance contracts of every nature for himself/herself?

Answer "yes" or "no"

Answer: _____

M. to propose or to contest his/her proposed transfer or discharge from a care facility?

Answer "yes" or "no"

Answer: _____

N. to manage and care for his/her personal property?

Answer "yes" or "no"

Answer: _____

O. to manage and care for his/her real property?

Answer "yes" or "no"

Answer: _____

Source: TEX. PROB. CODE ANN. Sections 767 & 768

If you answered Question No. ____ “Yes” and Question No. ____ or No. ____ “Yes” as to the “person,” then answer the following question.

Question No. ____

Who do you find by a preponderance of the evidence should be appointed guardian of the person of _____?

Answer “yes” or “no”

[name of proposed guardian of the person #1 here]

Answer: _____

[name of another person asking to be appointed here]

Answer: _____

INSTRUCTION:

You are instructed that only one person in this situation may be appointed as guardian of the person.

Source: TEX. PROB. CODE ANN. Section 684(b) (2)

If you answered Question No. ____ “Yes,” and Question No. __ or No. ____ “Yes” as to the “estate,” then answer the following question.

Question No. 6

Who do you find by a preponderance of the evidence should be appointed guardian of the estate of _____?

Answer “yes” or “no”

1 [name of proposed guardian here]

Answer: _____

2. _____ Bank/Trust Company, etc.

Answer: _____

Source: TEX. PROB. CODE ANN. Section 684(b)(2)

Question No. _____

Did _____ act in good faith and with just cause in the filing and prosecution of the Application for Appointment of Guardianship of the Person and Estate of _____?

Answer “yes” or “no”

Answer: _____

Source: TEX. PROB. CODE ANN. Section 665B

INSTRUCTION:

“Good faith” means an action which is prompted by honesty of intention or a reasonable belief that the action was probably correct.

“With just cause” means the actions of _____ in this proceeding were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

If you answered Question No. ____ “Yes,” then answer the following question.

Question No. ____

State in dollars and cents the amount, if any, of the attorneys fees, expenses and costs incurred by _____ that were reasonably and necessarily incurred in pursuing the request for the appointment of a Guardian.

ANSWER IN DOLLARS AND CENTS.

Answer: \$ _____

Source: Tex. Prob. Code Ann. Section 665B

(MOST CONTROVERSIAL CHARGE)

GUARDIANSHIP QUESTIONS

(3rd Alternative)

QUESTION NO. ____

Do you find by clear and convincing evidence that _____ is an incapacitated person?

Answer “yes” or “no”

Answer: _____

INSTRUCTIONS:

“A determination of incapacity must be evidenced by recurring acts or occurrences within the immediate preceding six-month period and not by isolated instances of negligence or bad judgment.”

“A person for whom a temporary guardian has been appointed may not be presumed to be a totally or partially incapacitated person.”

DEFINITIONS:

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth or the allegations sought to be established.

“Incapacitated person” means an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for the individual’s own physical health, or to manage the individual’s own financial affairs.

Source: TEX. PROB. CODE ANN. Section 601(13)

If your answer to Question No. __ is “No,” then and only then answer Question No. ____.
Otherwise, do not answer the following question.

QUESTION NO. _____

Do you find by clear and convincing evidence that _____ lacks capacity to do
some, but not all of the tasks necessary to care for his/her person?

Answer “yes” or “no”

Answer _____

If your answer to Question No. __ is “No,” then and only then answer Question No. ____.
Otherwise, do not answer the following question.

QUESTION NO. _____

Do you find by clear and convincing evidence that _____ lacks capacity to do
some, but not all of the tasks necessary to manage his/her property?

Answer “yes” or “no”

Answer: _____

If your answer to Question No. ____ or ____ is “Yes,” answer Question No. ____.
Otherwise, do not answer this question.

QUESTION NO. _____

Do you find by clear and convincing evidence that the rights of _____ will be protected
by the appointment of a guardian of his/her person?

Answer “yes” or “no”

Answer: _____

If your answer to Question No. ____ or ____ is “Yes,” answer Question No. ____.
Otherwise, do not answer this question.

QUESTION NO. _____

Do you find by clear and convincing evidence that the property rights of _____
will be protected by the appointment of a guardian of his/her estate?

Answer “yes” or “no”

Answer: _____

If you answer to Question No. ___ is “yes”, then and only then answer Question No. ____.

NOTE: Many judges believe this question is the purview of the Court ONLY.

QUESTION NO. _____

Do you find that _____ should retain the following rights as to his/her estate:

ANSWER EACH ONE SEPARATELY, “yes” or “no”

A. To collect and to file suit to collect debts, rentals, wages or other claims due?

Answer “yes” or “no”

Answer: _____

B. To pay, compromise and defend claims?

Answer “yes” or “no”

Answer: _____

C. To contract and to incur obligations?

Answer “yes” or “no”

Answer: _____

D. To enter into obligations and purchases?

Answer “yes” or “no”

Answer: _____

E. To apply for and to receive funds from governmental sources?

Answer “yes” or “no”

Answer: _____

F. To vote.

Answer “yes” or “no”

Answer: _____

G. To enter into or procure insurance contracts of every nature?

Answer “yes” or “no”

Answer: _____

[Additional Issues]

H. To manage and to sell real or personal property or every kind and nature which belong to him/her?

Answer “yes” or “no”

Answer: _____

I. To represent her/himself in any claims or litigation?

Answer “yes” or “no”

Answer: _____

J. To make, assign, draw and endorse checks, drafts or other negotiable or non-negotiable instruments and to open, close and utilize accounts at banks or other financial institutions.

Answer “yes” or “no”

Answer: _____

K. To buy, sell, hold and invest in stocks, bonds, debentures, securities and/or other financial instruments.

Answer “yes” or “no”

Answer: _____

L. To make gifts, pay tuition, etc., [for example, to or for his/her grandchildren], etc.

Answer “yes” or “no”

Answer: _____

M. To hold his/her position as in whatever entity the person may be engaged--trusts, boards, companies, etc.

Answer “yes” or “no”

Answer: _____

If your Answer to Question No. _____ is “yes,” then and only then Answer Question No._____.

QUESTION NO. _____

Do you find that _____ should retain the following rights as to his/her person?

A. To apply for, to consent, or to enroll in non-residential programs and services which are reasonably required and needed by _____ and which are operated by public and/or private agencies?

Answer “yes” or “no”

Answer: _____

B. To make application for, to consent to, and to enroll in public and private residential care facilities?

Answer “yes” or “no”

Answer: _____

C. To apply for, arrange for, and consent to any and all psychological and psychiatric tests and evaluations including, but not limited to, comprehensive diagnoses and evaluations?

Answer “yes” or “no”

Answer: _____

D. To consent to the disclosure of his/her psychological records and medical records?

Answer “yes” or “no”

Answer: _____

E. To consent to major medical and dental treatment and testing, including surgery, psychotropic drugs, and the choice of physicians or dentists?

Answer “yes” or “no”

Answer: _____

F. To propose or to contest the proposed transfer or discharge from a care facility?

Answer “yes” or “no”

Answer: _____

G. To operate a motor vehicle?

Answer “yes” or “no”

Answer: _____

H. To apply for and to consent to governmental services?

Answer “yes” or “no”

Answer: _____

If your answer to Question Nos. _____, _____, _____, _____ or _____ is “yes,” answer Question No. _____. If not, do not answer the following question.

QUESTION NO. _____

Do you find by a preponderance of the evidence that a guardianship is the least restrictive alternative for _____?

Answer “yes” or “no”

Answer: _____

INSTRUCTION:

A Court may appoint a guardian with full or limited authority over an incapacitated person as indicated by the person’s actual mental or physical limitations and only as necessary to promote and protect the well-being of the person.

(There is no case law on this question or instruction.)

QUESTION NO. _____

Do you find by a preponderance of the evidence that _____ is eligible to act as guardian of the person of _____?

Answer "yes" or "no"

Answer: _____

**(may try to get grounds for disqualification
or
an instruction here.)**

QUESTION NO. _____

Do you find by a preponderance of the evidence that _____ is eligible to act as guardian of the estate of _____?

Answer "yes" or "no"

Answer: _____

**(may try to get grounds for disqualification
or
an instruction here.)**

(More than one Applicant choice)

If you answered “yes” to Question Nos. ____ and ____, then answer the following question:

QUESTION NO. ____

Who do you find by a preponderance of the evidence is the proper person to act as guardian of the person of _____?

Answer “yes” or “no”

_____ (yes or no)

A neutral third party _____ (yes or no)

INSTRUCTION:

You are instructed that only one person in this situation may be appointed guardian of a person.

If you answered "yes" to Question Nos. ____ and ____, then answer the following question:

QUESTION NO. ____

Who do you find by a preponderance of the evidence is the proper person to act as guardian of the estate of _____?

Answer "yes" or "no"

_____ (yes or no)

A corporate, neutral third party _____ (yes or no)

INSTRUCTION:

You are instructed that in this situation, only one person may be appointed guardian of the estate.

Question No. ____

Did _____ act in good faith and with just cause in the filing and prosecution of the Application for Appointment of Guardianship of the Person and Estate of _____?

Answer “yes” or “no”

Answer: _____

Source: TEX. PROB. CODE ANN. Section 665B

INSTRUCTION:

“Good faith” means an action which is prompted by honesty of intention or a reasonable belief that the action was probably correct.

“With just cause” means the actions of _____ in this proceeding were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

If you answered Question No. ____ “Yes,” then answer the following question.

Question No. ____

State in dollars and cents the amount, if any, of the attorneys fees, expenses and costs incurred by _____ that were reasonably and necessarily incurred in pursuing the request for the appointment of a Guardian.

ANSWER IN DOLLARS AND CENTS.

Answer: \$ _____

Source: Tex. Prob. Code Ann. Section 665B

DETAILED BREACH OF FIDUCIARY CHARGE

NO. _____

IN RE:	X	IN THE _____ COURT
	X	
THE _____	X	
FAMILY TRUST OF	X	NUMBER ****
	X	
_____	X	_____ COUNTY, TEXAS

LADES AND GENTLEMEN OF THE JURY:

Charge of the Court

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this Charge. In discharging your responsibility on this Jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the Charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of [ten] or more members of the Jury. The same [ten] or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than [ten] jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire Jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7. You have been allowed to take notes during the trial of this case. You may have those notes with you in the jury room during your deliberations. The notes you have taken are not evidence. Your personal recollection of the evidence takes precedence over any notes you have taken. You should base your verdict only on the evidence presented during the trial. You may not display your notes or disclose the contents of your notes to any other juror during your deliberations. To do so is a violation of these instructions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted. The presiding juror or any other who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again. When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term 'preponderance of the evidence' means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

In answering a question based on a preponderance of the evidence, a fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proven.

As used in this Charge, "preponderance of the evidence" means the greater weight and degree of credible evidence and testimony introduced and admitted in this case. You therefore have the right to take into consideration the demeanor of the witnesses and to determine the credibility of each witness under all of the facts and surrounding circumstances. The preponderance of the evidence is not to be determined solely by the number of witnesses testifying about a particular event or state of facts.

When a witness is called as an expert in a particular field of technical knowledge or learning and is allowed to express opinions on matters within that field, such opinions are offered for your aid and assistance, but not for the purpose of invading your function finding facts. You are not bound to find facts according to expert testimony, but such testimony should be considered by you just like the other evidence in the case and given such weight as you believe that it deserves.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying.

You are further instructed that an expert witness does not determine what the law is in any particular area. Only the judge in this case may determine the correct statement of the law which applies to this case. You should apply the law as it is explained to you by the judge, and not by any testimony of any expert witness in this case.

As used in this charge, the term "plaintiffs" refers to _____.

The terms "defendant" and/or "the Trustee" refers to _____.

The term "Trusts" refers to the _____ [describe the trust instrument, dates, etc.]

The term "Trust Instrument" refers to the instrument creating the Trusts.

The trustee owes fiduciary duties to the beneficiaries of a trust. Fiduciary duties are the highest duties known to the law. Texas law requires of a fiduciary a high standard of ethical and moral conduct and the highest duty of loyalty and honesty in reference to the beneficiaries and their interests. A person acting as trustee consents as a matter of law to having his/her/its conduct judged by the strict standards of a court of equity.

"Trustee" means the person holding the property in trust.

"Beneficiary" means a person for whose benefit the property is held in trust.

The Trust Instrument of a trust may relieve a trustee from many of the duties, liabilities, and restrictions imposed upon a trustee by the Texas Trust Act and the Texas Trust Code, including those related to self-dealing. It is permissible, under the terms of the Trust, for the Trustee to deal with him/her/itself or those identified with him/her/it. Those self-dealing transactions must be proven by the Trustee to be fair.

As Trustee, _____ has full and absolute control of the assets of the Trust, and complete power, control and discretion over the management and control of Trust property, subject to the common law duties set forth in this charge.

The Trust Instrument requires that _____ make investments in good faith.

Successful investment performance is not a defense to an action for breach of fiduciary duty.

The amount of compensation taken, not taken, or claimed to be reasonable by the trustee is not a defense to an action for breach of fiduciary duty.

The fact that a family relationship exists between the trustee and a beneficiary does not eliminate the fiduciary relationship between the trustee and the beneficiary.

QUESTION NO. _____

Do you find that _____ materially violated or attempted to violate the terms of the Trust Instrument?

Answer "Yes" or "No"

Answer: _____

INSTRUCTION:

"Material" in the context of a violation means that to which a reasonable person would attach importance under the circumstances.

If you answered Question No. _____ “Yes,” then answer Question No. _____.

QUESTION NO. ____

Do you find that the violation or attempted violation resulted in a material financial loss to the Trust(s)?

Answer “Yes” or “No”

Answer: _____

INSTRUCTION:

In determining whether there has been material financial loss, you may consider all the circumstances concerning a transaction in question, including, among other things, the nature and purpose of the transaction, and the size of the loss in relation to the total value of the trust assets.

If you have answered Question No. _____ “Yes”, then answer the following question. Otherwise, do not answer Question No. _____ and go to Question No. _____.

QUESTION NO. _____

Do you find that a material violation of the terms of the Trust Instrument or attempted violation by _____ was dishonest or a willful breach of trust?

ANSWER “Yes” or “No”

Answer: _____

INSTRUCTION:

A “willful violation” means a knowing, intentional, and deliberate violation of the Trust Instrument.

An action is “willful” if it is committed either (a) without legal ground to believe the act or conduct to be lawful; or (b) with conscious or reckless indifference to the rights or welfare of the persons affected by it. An act need not be malicious to be willful.

QUESTION NO. _____

Did _____ breach one or more of his common law fiduciary duties?

ANSWER “Yes” or “No”

Answer: _____

INSTRUCTION:

A trustee owes the beneficiaries of a trust the following common law fiduciary duties, none of which have been waived or modified by the Trust Instrument in this case.

A. The Duty of Loyalty

A trustee may not use his position of trust to obtain an advantage by action inconsistent with the trustee’s duties and detrimental to the trust.

A trustee owes the duty of loyalty to the beneficiaries to administer the affairs of the trust in the interest of the beneficiaries alone, and to exclude from consideration his own advantage as well as the welfare of third persons. A trustee may not make a profit other than reasonable compensation.

The duty of loyalty required of a trustee forbids the trustee from placing himself in a situation, other than serving as an officer or director of a corporation, where there is nor could be a conflict of interest between his personal self-interest and his duty to the beneficiaries.

B. The Duty of Fairness

In determining if the transaction is fair, you should consider whether:

- (1) The trustee made a full and truthful disclosure;
- (2) The consideration (if any) was adequate;
- (3) The beneficiaries had the benefit of independent advice;
- (4) The trustee acted in good faith; and
- (5) The trustee dealt with Trust property and the beneficiaries in a way that connotes fair dealing, good faith, fidelity, and integrity.

C. The Duty of Disclosure

A trustee owes beneficiaries a fiduciary duty of full disclosure of all material facts known to the trustee that affects the beneficiaries' rights. A trustee has a duty to keep accurate trust records.

D. The Duty to Preserve and Protect the Assets of the Trust Estate

A trustee owes a fiduciary duty to preserve and protect the assets of the trust estate.

E. The Duty to Uphold and Defend the Trust

A trustee owes a fiduciary duty to uphold and defend the trust. A trustee breaches the duty by altering an irrevocable trust instrument or by repudiating the trust.

A trustee who intends or attempts to appropriate trust property for his own right has repudiated the trust whether he is successful or not.

F. The Duty Not to Retaliate

A trustee may not use the office of trustee to in any way punish a beneficiary for exercising any legal right held by the beneficiary or for taking legal action against the trustee.

QUESTION NO _____

Do you find that _____ breached his fiduciary duty to account?

Answer "Yes" or "No"

Answer: _____

INSTRUCTION:

Upon request, a trustee must provide to the beneficiaries an accounting that sets forth:

- (1) All trust property that has come into the trustee's knowledge or into the trustee's possession and that has not been previously listed or inventoried as property of the trust;
- (2) A complete account of receipts, disbursements, and other transactions regarding trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;
- (3) A listing of all property being administered, with an adequate description of each such asset;
- (4) The cash balance on hand and the name and location of the depository where the balance is kept; and
- (5) All known liabilities owed by the trust.

QUESTION NO. _____

Do you find that _____ has become hostile towards or harbors ill will against the beneficiaries such that it has affected or will affect his ability to fulfill his required duties as Trustee of the Trust(s)?

Answer "Yes" or "No"

Answer: _____

INSTRUCTION:

A beneficiary cannot generate hostility or ill will for the purpose of effectuating the removal of the Trustee.

QUESTION NO. ____

Do you find that, because of the circumstances not known to or anticipated by the Grantor, _____, compliance with the terms of the Trust(s) would defeat or substantially impair the accomplishment of the purposes of the Trust(s)?

Answer "Yes" or "No"

Answer: _____

QUESTION NO. __

What some of money, if any, would be a reasonable and necessary attorney's fee, including expenses, for the work done by the attorneys for the following Plaintiffs in this case?

Answer each separately in DOLLARS and CENTS, if any, or NONE, with respect to each of the following elements:

1. Party No. 1

a. For services rendered in the preparation and trial of this case:

Answer: \$ _____

b. For services to be rendered if this case is appealed to the Court of Civil Appeals?

Answer: \$ _____

c. For services to be rendered for making or responding to an application for Writ of Error, if any, filed with the Texas Supreme Court; and

Answer: \$ _____

d. For services to be rendered if an Application for Writ of Error is granted by the Texas Supreme Court.

Answer: \$ _____

2. Party No. 2

a. For services rendered in the preparation and trial of this case:

Answer: \$ _____

b. For services to be rendered if this case is appealed to the Court of Civil Appeals?

Answer: \$ _____

c. For services to be rendered for making or responding to an application for Writ of Error, if any, filed with the Texas Supreme Court; and

Answer: \$ _____

d. For series to be rendered if an Application for Writ of Error is granted by the Texas Supreme Court.

Answer:\$ _____

A reasonable fee may be determined by considering the following factors:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in _____ County, Texas for similar legal services.
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client; and
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this entire charge read aloud and then you will deliberate upon your answers to the questions asked. It is the duty of the presiding juror:

1. To preside during your deliberations;
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;
4. To vote on the question;
5. To write your answers to the questions in spaces provided; and
6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of that fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

Judge Presiding

INSTRUCTIONS, DEFINITIONS & JURY CHARGE ISSUES

BREACH OF FIDUCIARY DUTY, NEGLIGENCE, GROSS NEGLIGENCE, SELF-DEALING , CONSPIRACY, AND DAMAGES

(ESTATE or TRUST)

"Fiduciary duty" for an _____ means the duty to manage the assets in accordance with the provisions of the Texas (Trust or Probate) Code, and in connection with such management, to exercise the highest degree of honesty and fair dealing; to act with the utmost good faith for the sole benefit of the beneficiaries; to make full disclosure of all material facts to the beneficiaries of the estate. A fiduciary has a duty to provide for the accuracy of the information disclosed. The duty to disclose material facts encompasses required accountings. A fiduciary also

has a duty to maintain adequate records to support all estate expenditures and to make a full accounting of all funds belonging to the _____ as required by law. An _____ may not delegate or transfer his fiduciary duties, responsibilities or obligations to others.

"Self-dealing" when used in this charge means any conduct by the _____ which violates fiduciary duty by taking advantage of the _____'s position as fiduciary to benefit the fiduciary or some third person which the fiduciary desires to be benefited; any breach of the duty of loyalty the fiduciary holds to all of the beneficiaries to administer the affairs of the _____ in the interest of the beneficiaries alone; failure to exclude from consideration his own advantage or the welfare of third persons; or breach of the fiduciary's duty of fidelity by placing himself in a situation where there is or could be a conflict between his self-interest and his duty to all of the beneficiaries.

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

QUESTION NO. _____

Did _____ breach his fiduciary duties as an administrator/executor/trustee?

Answer "yes" or "no"

Answer: _____

QUESTION NO. _____

Did _____ act in good faith and without gross negligence as administrator/executor/trustee?

INSTRUCTION

“Good faith” means that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.

“Gross negligence” means more than momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of actual, conscious indifference to the rights, welfare or safety of the persons affected by it. The finding of mere negligence will not support an affirmative response to this question.

Answer “yes” or “no”

Answer: _____

QUESTION NO. _____

Did _____ engage in self-dealing with the assets of the Estate/Trust?

Answer "yes" or "no"

Answer: _____

If you answered Questions No. _____ or _____ "yes," then answer Question No. _____.

QUESTION NO. _____

What sum of money, if any, would fairly and reasonably compensate the Plaintiffs for their damages proximately caused by the breach of fiduciary duties, if any, you have found in your answer to Question No. _____ or the self-dealing, if any, you have found in answer to Question No. _____?

INSTRUCTION

A fiduciary who commits a breach of a fiduciary duty or who self deals is chargeable with any damages resulting from such breaches of fiduciary duties or self-dealings, including, but not limited to:

- (1) any loss or depreciation in value of the (estate or trust) as a result of the self-dealing breach of fiduciary duty or self-dealing;
- (2) any profit made by the fiduciary through the breach of fiduciary duty or self-dealing; or
- (3) any profit that would have accrued to the _____ if there had been no breach of fiduciary duty or self-dealing.

"Profit" as used herein means the value of money, property or rights obtained by _____, if any, other than the compensation he was entitled to receive as _____ before any breach of fiduciary duty or self-dealing.

Answer in dollars and cents, if any, as to each of the following:

Answer:

_____ \$ _____
_____ \$ _____

If you answered Questions No. _____ and _____ "yes," then answer Question No. _____.

QUESTION NO. _____

Did _____ breach his fiduciary duties or self-deal willfully, or with conscious disregard for the rights the beneficiaries of the _____?

INSTRUCT ION

You are instructed that a person acts "willfully" when his actions are knowing or intentional, and are motivated by spite, ill will, evil motive, or personal hatred intending to injure the beneficiaries of the estate/trust.

Answer "yes" or "no"

Answer: _____

QUESTION NO. _____

What sum of money, if any, should be assessed against _____ for his breach of fiduciary duties or self-dealing as exemplary damages?

INSTRUCTION

“Exemplary damages” means an amount which you may, in your discretion, award as an example to others and as a penalty or by way of punishment. Exemplary damages or punitive damages may be awarded in addition to any amount which may be or has been found by you as actual damages.

Answer in dollars and cents, if any.

Answer \$ _____

QUESTION _____

Did _____ engage in a conspiracy which caused damage to the beneficiaries of the estate/trust?

INSTRUCTION

You are instructed that a conspiracy is a combination of two or more persons or entities to accomplish either an unlawful purpose by lawful means or to accomplish a lawful purpose through unlawful means. To find that a conspiracy existed, you must find each of the following:

- (1) The involvement of two or more persons or entities;
- (2) An object to be accomplished;
- (3) A meeting of the minds on the object or course of action;
- (4) One or more overt acts; and
- (5) Damages as the proximate result.

You are further instructed that a conspiracy may be proven by circumstantial evidence. This is because civil conspiracies are conceived in secrecy and executed in such a manner as to avoid detection and exposure, thus, direct evidence of a conspiracy may not exist. A conspiracy may also be established through inferences from the nature of the acts complained of; the individual and collective interests of the alleged conspirators; the situation and relation of else parties at the time of the commission of the acts; the motives which produce them; and all the surrounding circumstances preceding and attending the culmination of the common plan or design.

Answer "yes" or "no"

Answer: _____

QUESTION _____

Do you find that _____ made misrepresentations to the beneficiaries regarding the _____, or failed to disclose material facts about the _____ to the beneficiaries?

Answer "yes" or "no"

Answer: _____

If you answered Question No. _____ "yes," then answer Question No. _____.

QUESTION NO _____

Did the beneficiaries rely upon such statements or omissions?

Answer "yes" or "no"

Answer: _____

If you answered Question No. _____ "yes," then answer Question No. _____.

QUESTION NO. _____

Did the material misrepresentations or the failure to disclose material facts proximately cause damages to the beneficiaries?

Answer "yes" or "no"

Answer: _____

QUESTION NO. _____

Was _____ negligent in his handling of the estate/trust?

INSTRUCTION

"Negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

A failure to comply with a statutory duty is negligence in itself, unless excused. A failure to comply with a statutory duty is excused if:

- (1) The failure is reasonable because of the actor's incapacity;
- (2) The actor neither knows nor should know of the occasion for compliance;
- (3) The actor is unable after reasonable diligence or care to comply;
- (4) The actor is confronted by an emergency not due to his own misconduct;
- (5) Compliance would involve a greater risk of harm to the actor or others.

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer "yes" or "no"

Answer: _____

If you answered Question No. _____ "yes," then answer Question No. _____.

QUESTION _____

Was _____ grossly negligent in his handling of the estate/trust?

INSTRUCTION

"Gross negligence" means more than momentary thoughtlessness, inadvertence or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of actual conscious indifference to the rights, welfare or safety of the persons affected by it.

The finding of mere negligence will not support an affirmative response to this question.

Answer "yes" or "no"

Answer: _____

**FRAUD, COMPLIANCE WITH FIDUCIARY DUTIES, ATTORNEY'S
FEES, AND THE DISCOVERY RULE**

If you answered Question No. _____ in the affirmative, then answer Question
No. _____.

QUESTION NO. _____

Did [trustee, executor, decedent, etc] commit fraud upon _____?

INSTRUCTION:

Fraud occurs when:

- a. a party makes a material misrepresentation;
- b. the misrepresentation is made with knowledge of the falsity or made recklessly without any knowledge of the truth and as a positive assertion,
- c. the misrepresentation is made with the intention that it should be acted upon by the other party, and
- d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

“Misrepresentation” means a promise of future performance made with an intent not to perform as promised.

Answer “Yes” or “No”

Answer: _____

If you answered Question No. _____ in the affirmative, then answer Question No. _____.

QUESTION NO. _____

What sum of money, if any, if paid now in cash would fairly and reasonably compensate _____ for his damages, if any, proximately caused by the fraud committed by decedent?

The measure of damages for fraud is the difference between the actual value of that which _____ received and the value of that which he would have received but for the fraud.

Do not include any amount for interest, if any.

Answer in dollars and cents, if any.

Answer \$ _____

QUESTION NO. _____

["comply with" as opposed to "breach"]

Did _____ comply with his fiduciary duties to _____ with regard to any of the following transactions:

You are instructed as that because of their relationship of trust and confidence, _____ owed _____ a fiduciary duty. To prove he complied with his duty, _____ must show:

- a. the transactions in question were fair and equitable to _____.
- b. _____ made reasonable use of the confidence that _____ placed in him;
- c. _____ acted in the utmost good faith and with utmost honesty toward _____;
- d. _____ placed the interests of _____ before his own, did not use the advantage of his position to gain a benefit for himself at the expense of decedent, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary; and
- e. _____ fully and fairly disclosed all important information to _____ concerning the transactions.

Answer "Yes" or "No" as to each transaction.

Answer:

- | | |
|----------|----------|
| a. _____ | a. _____ |
| b. _____ | b. _____ |
| c. _____ | c. _____ |

QUESTION NO. _____

On what date did _____ discover, or should he have discovered in the exercise of ordinary diligence, that _____ had committed fraud against him?

Answer by stating the date:

Answer: _____

QUESTION NO. _____

What sum of money, if any, do you find from a preponderance of the evidence to be the necessary expenses and disbursements, including reasonable attorneys' fees, expenses and costs including fees paid to expert witnesses, incurred by _____ in defending his actions as a fiduciary ?

INSTRUCTION:

In answering this question, you may consider the following factors as guides for determining a reasonable attorney's fee:

- a. time and labor required;
- b. the novelty and difficulty of the questions involved;
- c. the requisite skills to perform the legal services properly;
- d. the fee customarily charged in _____ County for similar legal services;
- e. the experience, reputation, and ability of the lawyers performing the services; and
- f. the nature of the fee arrangement between the party and their counsel.

Answer in dollars and cents, if any, for each of the following:

Answer:

- 1. For legal services rendered for trial? _____
- 2. For legal services on appeal to the Court of Appeals? _____
- 3. For legal services on appeal to the Texas Supreme Court? _____

OTHER FIDUCIARY JURY ISSUES

CONVERSION AND DAMAGES

QUESTION NUMBER _____

Do you find that _____ converted assets from the trust/estate?

Answer "Yes" or "No"

Answer: _____

INSTRUCTION:

You are instructed that a person converts property when he takes the property without the owner's consent. In a conversion one party wrongfully and without authority assumes and exercises dominion and control over the personal property of another to the exclusion of, or inconsistent with, the owner's rights. Such party may not escape liability by showing that he acted in good faith or under a mistaken belief as to his rights. It is not necessary that there be a physical taking of the property by such party, although there must be such active interference with the owner's right of possession or control as will deprive him of the free use and enjoyment of his property. One who received benefits from a conversion or aided another in the conversion of property is also liable for the conversion.

If you answered Question No. _____ “yes”, then answer Question No. _____.

QUESTION NUMBER _____

What sum of money will adequately compensate the estate/trust for property that was converted by _____?

Answer in dollars and cents.

Answer: \$ _____

SELF-DEALING ISSUE

QUESTION _____

Did _____ breach their fiduciary duty by obtaining any of the following from the trust/estate?

Answer "Yes" or "no" as to each of the following:

A. The _____ [ranch, etc]?

ANSWER: _____

B. The [amount of money taken, for example] from account # _____?

ANSWER: _____

C. The [description of a car, for example?]

ANSWER: _____

D. The [naming of their son as beneficiary of an estate/trust account?]

ANSWER: _____

QUESTION NO. _____

If you answered Question No. ____ "Yes", then answer Question No. _____. If not, do not answer it.

What sum of money, if any, will adequately compensate the estate/trust for _____ obtaining the items from the estate/trust?

Answer in dollars and cents.

Answer _____

(You could do a separate sum of damage for each item gained by self-dealing and allow a value to each)

OTHER MISCELLANEOUS FIDUCIARY ISSUES

CIVIL CONSPIRACY ISSUE

QUESTION NO. _____

Did _____ engage in a civil conspiracy with _____,
_____ and/or _____, to breach his/her/its fiduciary duties to
_____, and was such conspiracy, if any, a proximate cause of damages to the
_____?

The term "Civil Conspiracy" means a combination by two or more persons or entities to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essential elements are:

- (1) two or more persons or entities;
- (2) an object to be accomplished;
- (3) a meeting of minds on the object or course or action;
- (4) one or more overt acts; and
- (5) damages as the proximate result.

Answer "Yes" or "No"

Answer: _____

If you answered Question No. _____ "Yes," then answer Question No. _____.

QUESTION _____

What are the amount of damage was suffered by _____ as a result of the civil conspiracy of _____?

Answer in dollars and cents, if any.

ANSWER: \$ _____

BIFURCATED TRIAL - SECOND PHASE

DEFINITIONS & ISSUES:

EXEMPLARY and ADDITIONAL DAMAGES

DEFINITIONS

1. The term "Exemplary Damages " means an amount that you may in your discretion assess to serve as an example to others as a penalty or by way of punishment.
2. The term "Additional Damages" means an amount that you may in your discretion assess to serve as an example to others and as a penalty or by way of punishment, in addition to any amount you may have found as actual damages.

QUESTION NO. _____

What sum of money, if any, if paid now in cash, should be assessed against Defendant _____ and awarded to the Plaintiff(s) as exemplary damages, if any, (for the conduct you have found in your answers to Question Nos. _____, _____, and _____?)

In determining the amount of exemplary damages, if any, you may consider:

- a. the nature of the wrong;
- b. the character of the conduct involved;
- c. the degree of culpability of the wrongdoer;
- d. the situation and sensibilities of the parties concerned;
- e. the extent to which such conduct offends a public sense of justice and propriety, and
- f. the net worth of the wrongdoer.

Answer in dollars and cents, if any.

Answer: \$ _____

QUESTION NO. _____

What sum of money, if any, if paid now in cash, should be assessed against Defendant _____ and awarded to the Plaintiff(s) as additional damages, if any, (because the conduct you have found in your answers to Question Nos. _____ and _____ was committed knowingly?)

In determining the amount of additional damages, if any, you may consider:

- a. the nature of the wrong;
- b. the character of the conduct involved;
- c. the degree of culpability of the wrongdoer;
- d. the situation and sensibilities of the parties concerned;
- e. the extent to which such conduct offends a public sense of justice and propriety; and
- f. the net worth of the wrongdoer.

Answer in dollars and cents, if any.

Answer: \$ _____

NO. _____

IN RE: ESTATE OF

DECEASED

§
§
§
§
§

IN PROBATE COURT NO. ____

OF

_____ COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this Charge. In discharging your responsibility on this Jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the Charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions and do not discuss nor concern yourselves with the effect of your answers.
5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree

to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the Jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire Jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7. You have been allowed to take notes during the trial of this case. You may have those notes with you in the jury room during your deliberations. The notes you have taken are not evidence. Your personal recollection of the evidence takes precedence over any notes you have taken. You should base your verdict only on the evidence presented during the trial. You may not display your notes or disclose the contents of your notes to any other juror during your deliberations. To do so is a violation of these instructions.

These instructions are given to you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct, and it may require another trial by another jury; then all of our time will have been wasted. The presiding juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again. When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

It is the duty of the presiding juror:

1. to preside during your deliberations;

2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. to write out and hand to the bailiff any communication concerning the case which you desire to have delivered to the judge;
4. to conduct the vote on the questions and participate in that vote;
5. to write your answers to the questions in the spaces provided; and
6. to certify your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the judge, and your presiding juror has placed your answers in the spaces provided, and signed the verdict as presiding juror or obtained the signatures, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

Signed this _____ day of _____, 20____.

INSTRUCTIONS

By the term preponderance of the evidence as used in this charge, is meant the greater weight and degree of credible evidence before you. Whenever a question requires other than a “Yes” or “No” answer, your answer must be based on a preponderance of the evidence.

Fact may be established by direct evidence, by circumstantial evidence, or by both. Direct evidence is the testimony of witnesses who saw the act done or heard the words spoken or is something tangible like a writing or an object. Circumstantial evidence is what may be fairly and reasonably inferred from other facts proved.

Clear and convincing evidence means the measure or degree of proof which will produce in the mind a firm belief or conviction as to the truth of the allegations.

Additional instructions are contained among the questions. They are of equal importance with these general instructions.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

If you answer questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party’s ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at time of judgment.

QUESTION NO. 1

Do you find from a preponderance of the evidence that _____ had testamentary capacity at the time he allegedly executed the Will dated _____?

ANSWER: “He did have testamentary capacity” or
“He did not have testamentary capacity”

ANSWER:

INSTRUCTION:

You are instructed that the person has “testamentary capacity” when he has sufficient mental ability to:

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

You are further instructed that the proper inquiry which you should make in answering the above question is whether or not _____ had testamentary capacity on the day the Will was executed.

Evidence attempting to show _____’s state of mind at times other than the date on which the Will was executed may be considered only if it demonstrates that a condition affecting _____’s testamentary capacity was persistent and likely present at the time the Will was executed.

QUESTION NO. 2

Do you find from a preponderance of the evidence that _____ and/or _____ prosecuted this proceeding to probate the Will executed by _____ on _____ in good faith and with just cause?

INSTRUCTION:

You are instructed that “good faith” means an action which is prompted by honesty of intention, or a reasonable belief that the action was probably correct.

You are further instructed that “with just cause” means that the action of _____ and/or _____ in this proceeding must be based on reasonable ground and there must have been a fair and honest cause of action for said reasons.

ANSWER: “We do” or
“We do not”

ANSWER:

QUESTION NO. 3

What sums of money, if any, do you find from a preponderance of the evidence to be the necessary expenses and disbursements, including reasonable attorney's fees, incurred and to be incurred by _____ and/or _____ in prosecuting this proceeding, for the purpose of having the Will dated _____ admitted to probate, for the following services by their attorneys, _____?

1. For legal services rendered in the preparation and trial of this cause in this court?

Answer in Dollars and Cents:

2. For legal services if the cause is appealed to the Court of Appeals?

Answer in Dollars and Cents:

3. For legal services if this case is appealed to the Supreme Court of Texas?

- a. to file or respond to a petition for review?

Answer in Dollars and Cents:

- b. to prepare a brief or reply brief and present oral argument, if oral argument is permitted, if petition for review is granted.

Answer in Dollars and Cents:

INSTRUCTION:

You may consider the following factors as guides for determining a reasonable fee for the value of attorney's services:

1. The time and labor required, the novelty and difficult of the questions involved, and the skill required to perform the legal services properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation and ability of the lawyer or lawyers performing the services;

8. Whether the fee is fixed or contingent;
9. The complexities of the particular litigation;
10. The time involved, including trial time; and
11. Expenses and disbursements.

QUESTION NO. 4

Do you find from a preponderance of the evidence that _____ and/or _____ intentionally interfered with the inheritance rights of _____ without just cause or excuse?

Answer "Yes" or "No" for each party.

Answer for each:

_____: _____
_____: _____

INSTRUCTION:

Tortious interference with inheritance occurs when:

- a. a party has an expectancy of inheritance or gift;
- b. there is a reasonable certainty that the expectancy would have been realized, but for the interference;
- c. the interference with the expectancy is intentional and without just cause or excuse;
- d. the interference takes the form of conduct such as fraud, duress or undue influence; and
- e. damages result from the interference.

If you answered Question No. 4 “Yes”, then answer Question No. 5.

QUESTION NO. 5

What sum of money, if paid now in cash by _____ and/or _____, would fairly and reasonably compensate _____ for damages, if any, proximately caused by _____ and/or _____ for any intentional interference found by you in your answer to Question No. 4?

You may consider the following elements of damages and no others:

- a. Actual pecuniary losses caused by the interference;
- b. Consequential loss caused by the interference; and
- c. Emotional distress reasonably expected to be caused by the interference.

Answer in Dollars and Cents, if any, for each party:

Answer:

_____ : _____
_____ : _____

INSTRUCTION:

“Proximate cause” means that cause which, in a natural and continuous sequence, produces and event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

If you answered Question No. 4 “Yes”, then answer Question No. 6.

QUESTION NO. 6

Do you find by clear and convincing evidence that the tortious interference with inheritance rights found by you in answer to Question No. 4, if any, was committed by _____ and/or _____ with malice?

Answer:

_____: _____
_____: _____

INSTRUCTION:

“Malice”: means ill will, spite, evil motive, or purpose to injure another.

Answer “Yes” or “No” for each party.

If you answered Question No. + “Yes”, then answer Question No. 7.

QUESTION NO. 7

What sum of money, if any, should be awarded as exemplary damages to _____ against _____ and/or _____ for the conduct found by you in Question No. 6?

Answer in Dollars and Cents, if any, for each party:

_____ : \$ _____

_____ : \$ _____

INSTRUCTION:

“Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

- a. The nature of the wrong;
- b. The character of the conduct involved;
- c. The degree of culpability of the wrongdoer;
- d. The situation and sensibilities of the parties concerned;
- e. The extent to which such conduct offends a public sense of justice and propriety; and
- f. The size of an award needed to deter similar conduct in the future.

QUESTION NO. 8

Do you find from a preponderance of the evidence that _____ intentionally interfered with the inheritance rights of _____ without just cause or excuse?

Answer “Yes” or “No”

Answer: _____

INSTRUCTION:

Tortious interference with inheritance occurs when:

- a. a party has an expectancy of inheritance or gift;
- b. there is a reasonable certainty that the expectancy would have been realized, but for the interference;
- c. the interference with the expectancy is intentional and without just cause or excuse;
- d. the interference takes the form of conduct such as fraud, duress or undue influence; and
- e. damages result from the interference.

If you answered Question No. 8 “Yes”, then answer Question No. 9.

QUESTION NO. 9

What sum of money, if paid now in cash by _____, would fairly and reasonably compensate _____ for damages, if any, proximately caused by any intentional interference found by you in your answer to Question No. 8?

You may consider the following elements of damage and no others:

- a. Actual pecuniary losses caused by the interference;
- b. Consequential loss caused by the interference; and
- c. Emotional distress reasonably expected to be caused by the interference.

Answer in Dollars and Cents, if any:

Answer: \$ _____

INSTRUCTION:

“Proximate cause” means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

If you answered Question No. 8 “Yes”, then answer Question No. 10.

QUESTION NO. 10

Do you find by clear and convincing evidence that the tortious interference with inheritance rights found by you in answer to Question No. 8, if any, was committed by _____ with malice?

Answer “Yes” or “No”:

Answer: _____

INSTRUCTION:

“Malice”: means ill will, spite, evil motive, or purpose to injure another.

If you answered Question No. 10 “Yes”, then answer Question No. 11.

QUESTION NO. 11

What sum of money, if any, should be awarded as exemplary damages to _____ against _____ for the conduct found by you in Question No. 10?

Answer in Dollars and Cents, if any:

Answer: \$ _____

INSTRUCTION:

“Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

- a. The nature of the wrong;
- b. The character of the conduct involved;
- c. The degree of culpability of the wrongdoer;
- d. The situation and sensibilities of the parties concerned;
- e. The extent to which such conduct offends a public sense of justice and propriety; and
- f. The size of an award needed to deter similar conduct in the future.

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

To be signed by the presiding juror if unanimous:

Presiding Juror

To be signed by those rendering the verdict if not unanimous:

