

**STATUTES OF LIMITATIONS IN
PROBATE AND TRUST LITIGATION**

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STATUTES OF LIMITATIONS IN PROBATE AND TRUST LITIGATION

I. INTRODUCTION

Statutes of limitations in probate present traps for the unwary practitioner and the unwary client. Everyone is presumed to know the law. Buchner v. Buchner, 815 S.W.2d 877 (Tex. App. – Tyler 1999, no writ).

Probate records are public records. Persons interested in estates are “charged with notice of the contents of probate records.” Estate of Ross, 672 S.W.2d 315, 318 (Tex. App. – Eastland 1984, writ ref’d n.r.e.). Nevertheless, many practitioners have been confronted with the distraught widower who didn’t know that Mom’s will needed to be probated until he decided to sell the ranch and learned a few days before closing that he had a title problem; the creditor who received statutory notice to present a claim to the estate’s administrator, didn’t do so, and is shocked to find the claim is barred; the adoptee who discovers the identity of her natural parent after the parent’s death and wants a share of the estate; or the trust beneficiary who decides to assert her rights years after the alleged breach.

“Statutes of limitations preclude claimants from sleeping on their rights.” Little v. Smith, 943 S.W.2d 414, 418 (Tex. 1997). They provide plaintiffs with a reasonable time to present their claims and they impose finality. *Id.* at 417. Furthermore, they prevent a plaintiff from pursuing a case in which “the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise.” S. V. v. R. V., 993 S.W.2d 1, 3 (Tex. 1996) (quoting Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826 (Tex. 1990)).

When the unhappy potential client with a potential cause of action appears at your door, one of the first things to ascertain is when the complained of action occurred, for while statutes of limitations are “statutes of repose,” it is important to ascertain whether the client has been reposing too long. Furr v. Young, 590 S.W.2d 532, 536 (Tex. Civ. App. – Fort Worth 1979, no writ).

II. PERIOD FOR PROBATE: FOUR YEARS

A will must be admitted to probate within four years of the death of the testator unless the applicant can show he was not in default in presenting the will within the four year time period. Tex. Prob. Code Ann. §73(a) (Vernon 1980).¹ The unhappy surviving spouse who sits on her rights and does not probate a decedent spouse’s will within four years of the decedent’s death, although she had it in her possession, and under its terms inherited all of his property, may discover that the decedent’s property passes as if the decedent had died intestate.

Section 73(a) provides as follows:

(a) No will shall be admitted to probate after the lapse of four years from the death of the testator unless it be shown by proof that the party applying for such probate is not in default in failing to present the same for probate within the four years aforesaid, and in no case shall letters testamentary be issued where a will is admitted to probate after the lapse of four years from the death of the testator.

(b) If any person shall purchase real or personal property from the heirs of a decedent more than four years from the date of the death of the decedent, for value, in good faith, and without knowledge of the existence of a will, such purchaser shall be held to have good title to the interest which such heir or heirs would have had in the absence of a will, as against the claims of any devisees or legatees under any will which may thereafter be offered for probate.

Tex. Prob. Code Ann. § 73(a) (Vernon 1980).

A. Muniment of Title

Prior to the 1997 legislative changes to the Code, wills clearly could be probated as

¹ All references to the Code are to the Texas Probate Code unless otherwise indicated.

muniments of title after four years had elapsed from the testator's date of death. While the legislative history of the 1997 changes indicates that no changes to the probate of wills as muniments of title were intended, Code Section 89B may unintentionally have brought a different result. Section 89B(a)(1) requires that an applicant seeking to probate a will as a muniment of title must prove "that four years have not elapsed since the person's death and prior to the application. . . ." Tex. Prob. Code § 89B(a)(1) (Supp. 2000). Section 89B, however, is in apparent conflict with § 73(a) which permits an applicant to show he was not in default in failing to present the will within the four-year time period. To the best of this writer's knowledge, there is no Texas case law under § 89B which reconciles the conflict with § 73(a).

In 1999, a new section was added to the Code, § 128B, which provided support to those who practice in a county where a probate judge may not be familiar with the history of the 1997 changes and read § 89B(a)(1) literally. Section 128B requires that a decedent's heirs be given notice if an applicant seeks to probate a decedent's will under § 73 of the Code more than four years after the date of the decedent's death unless the heir has delivered an affidavit to the court that he does not object to the probate, acknowledge that the property will pass to the heirs of the will is not admitted, and that the person offering the will may not be in default for failing to present the will within the 4 years.

B. Default

"Default" means "a failure due to the absence of reasonable diligence on the part of the party offering the instrument." Kamoos v. Woodward, 570 S.W.2d 6, 8 (Tex. Civ. App. – San Antonio 1978, writ ref'd n.r.e.).

1. Burden of Proof

The burden of proof is on the proponent of the will to show that he was not in default in presenting the will for probate at the proper time. Brown v. Byrd, 512 S.W.2d 758, 759 (Tex. Civ. App. – Tyler 1974, no writ).

2. Fact Issue

Whether the proponent is in default in failing to present the will for probate within the

four year period is a fact issue to be determined by the court or jury. Farr v. Bell, 460 S.W.2d 431, 435 (Tex. Civ. App. – Dallas 1970, writ ref'd n.r.e.), precluding summary judgment. Chovanec v. Chovanec, 881 S.W.2d 135, 138 (Tex. App. – Waco 1994, no writ). In Chovanec, a husband offered deceased wife's will for probate as a muniment of title thirteen years after her death. She left all of her property to her husband. Their son challenged the probate and the trial court granted summary judgment for the son, on the grounds that more than four years had elapsed since Mom's death; Dad argued there was fact issue concerning whether limitations had run. Dad believed property in Fayette County was his separate property because his parents, who didn't know his wife, had gifted it to him, and unknown to him, his wife's name appeared on the deed. The court reversed and remanded.

C. Applicants Not in Default: Good Excuses

There is a long history of Texas case law where courts have permitted wills to be admitted to probate after the passage of the statutory period to establish a link in the chain of title to property passing under the terms of a will. Even wills offered for probate many years after the testator's death have been admitted for such purpose. In re: Estate of McGraw, 960 S.W.2d (Tex. App. – Tyler 1995, writ den) (will admitted 16 years after the death of the testator); Allen v. Bolton, 416 S.W.2d 906 (Tex. Civ. App. – Corpus Christi 1967, no writ) (will admitted 9½ years after the death of the testator).

1. "There Wasn't Much, and I Thought It Was All Community"

In Kamoos v. Woodward, *supra*, the court upheld the probate of a will as a muniment of title where the decedent's wife was unaware of her deceased husband's right to oil and gas royalties until she was contacted by an oil company advising her to probate the will. She believed the estate consisted only of approximately \$4,000 in assets, all community property. The wife offered the will for probate within a few weeks of being notified by the oil company, approximately 5 years after the date of her husband's death.

2. “I Found Mom’s Unprobated Will After Dad Died”

In Owens v. Felty, 227 S.W.2d 379 (Tex. Civ. App. – Eastland 1950, writ ref’d), the court upheld the probate of a will seven years after the testator’s death to establish a link in the chain of title to real property. The wife died in 1941. Her husband and sole beneficiary died in 1948 without ever having offered his wife’s will for probate. The husband had sole custody of the will. After the husband’s death, the couple’s daughter discovered the will among the husband’s papers and offered it for probate, joined by parties who purchased property from the husband, and who also had no knowledge of the existence of the will. The court admitted the will to probate to establish a link in the chain of title.

3. “I Didn’t Know A Later Will Existed”

In Strasburger v. Compton, 324 S.W.2d 951 (Tex. Civ. App. – Fort Worth 1959, writ ref’d n.r.e.), the testator’s niece learned that her aunt had executed a will later than the one which had been offered for probate. However, the niece did not have sufficient information about its execution and contents to probate it as a lost will. After she discovered the will among her deceased mother’s things, she sued to set aside the probate of the first will and have the second one admitted. The court held the niece was not in default in not offering the second will for probate within the four year period, and found that the execution of the later will revoked the former will.

The court also opined that limitations did not run against one of the proponents of the second will because she was under the disability of marriage at all material times. Id. at 955. The applicable statutes relating to the disability of married women have been repealed, so this writer does not recommend offering marriage, without more, as an excuse, at least for the failure to probate a lost will.

4. “The Sins of the Mother Shall Not Be Visited Upon the Son”

The failure of one proponent does not necessarily bar another proponent not in default from presenting a will. In Fortinberry v. Fortinberry, 326 S.W.2d 717 (Tex. Civ. App. – Waco 1959, no writ), the father died in 1937 leaving a wife and two sons. He left all of his

property to his wife and mother of their two sons. Mom had possession of the will but did not offer it for probate. In 1946, Mom sold some of the real property disposed of in the will to one of her sons. The son recorded his deed, obtained Dad’s will, and probated it as a muniment of title six days after Dad deeded to him in order to perfect his title to the property. Mom died in 1954. In 1958, the second son contested the probate of Dad’s will on the grounds that it could not be probated more than four years after Dad’s death and that absent probate, he has an interest in the property. The court found that the widow’s failure to offer the decedent’s will for probate did not cut off the right of their son to offer his father’s will for probate nine years after the father’s death, provided the son was not in default, id. at 719, and that “a purchaser from devisee is entitled to have a will probated when same constitutes an essential link in his title.” Id.

The court further found that Section 93 of the Code discussed infra, precluded second son from filing of suit more than two years after the probate of a will, or in the event of fraud, two years after the discovery of the fraud. Id. At 720. See also, Lutz v. Howard, 181 S.W.2d 869 (Tex. Civ. App. – Eastland 1944, no writ) (where Mom was in default in failing to offer Dad’s will for probate until more than seven years had elapsed from the date of Dad’s death, daughter who joined with Mom in the application was not in default in offering the will to clear title to community property Mom had deeded to daughter in consideration for caring for, maintaining and supporting Mom). But see Section II.D.2., below for a contra opinion.

5. “I’m an Innocent Purchaser of Property and I Need to Establish Link in Chain of Title”

In Hayden v. Middleton, 135 S.W.2d 281 (Tex. Civ. App. – Beaumont 1940, no writ), the testator’s will was admitted to probate twenty-three years after the testator’s death where the applicant for probate purchased property from the testator’s widow shortly before the widow’s own death. The testator had devised the property to the widow under the terms of the will. The widow and most of the testator’s children signed the deed conveying the property. The purchaser discovered the testator’s will after the widow’s death (at about

the same time he discovered the existence of the testator's first set of children) and offered it for probate shortly after he found the will.

6. “Don't Worry, Honey, It's all Ours Anyway” (Fraud)

Texas courts will admit a will to probate after the statutory period if the failure to file the will to probate was a result of a material misrepresentation concerning the effects of failure to probate a will, and the misrepresentation prevented the proponent from filing the will.

In Buckner v. Buckner, 815 S.W.2d 877 (Tex. App. – Tyler 1991, no writ), the appellate court upheld the trial court's admitting a will to probate five and one-half years after the testator's death due to a material misrepresentation on the part of the testator's son. The testator left his land one-half to his wife and one-half to his son and daughter-in-law, share and share alike. The daughter-in-law wanted to probate the will, but the son insisted they not do so, claiming the land was “ours anyway.” *Id.* at 88. Because a confidential relationship exists between husband and wife, the court opined that the husband owed his wife the highest fiduciary duty and permitted the will to be probated as a muniment of title. Absent probate, the land would have passed by intestacy, and the son would have received the land subject to his mother's life estate and full remainder interest upon his mother's death. Under the will, the widow received one-half of the land, the son one-fourth, and the daughter-in-law, one-fourth.

D. Applicants in Default: Bad Excuses

1. “Grandpa's Been Dead for 39 Years, Mom Agreed Not to Probate, and I've Known About the Will for 20 Years” Brown v. Byrd, *supra*, at 760. ‘Nuf said.

2. “The Sins of the Mother Shall Be Visited Upon the Children”

The testator's widow survived him by twenty years, had possession of her husband's will, which devised all of the testator's property to her, and failed to probate it. Faris v. Faris, 138 S.W.2d 830 (Tex. Civ. App. – Dallas 1940, writ *ref'd*). After Mom's death, Mom's principal devisee and another offered Mom's will to probate, and offered Dad's will for

probate as a muniment of title. Other children contested the probate of Dad's will. Evidence established that the proponent knew of Dad's will. The trial court denied probate of Dad's will and the proponents appealed, contending they are “not chargeable with the laches of their ancestor.” *Id.* at 832. The appellate court disagreed, opining that the children were “merely devisees of a devisee.” *Id.*

3. Uncorroborated Testimony of an Interested Witness

In Farr v. Bell, *supra*, the testatrix purportedly left all of her property to her children in her holographic will dated February 13, 1965. The children sold Mom's home to Farr without having probated Mom's will. Farr died and Farr's administrator, individually and in her representative capacity, offered the handwritten will for probate to complete the chain of title alleging she did not come into possession of the will until the day it was offered for probate and therefore was not in default (Mom's grandchildren contested the probate of their grandmother's will). The court found that the uncorroborated testimony of an interested witness was insufficient to admit the will to probate as a muniment of title.

III. PERIOD FOR ISSUANCE OF LETTERS TESTAMENTARY: 4 YEARS

Section 73(a) provides that letters testamentary shall not be issued where a will is admitted to probate after four years have elapsed from the date of the testator's death. Tex. Prob. Code Ann. § 73(a) (Vernon 1980). Section 74 reiterates the four-year limitation for the grant of letters but provides an exception “in any case where administration is necessary in order to receive or recover funds due to the estate of the decedent.” Tex. Prob. Code Ann. § 74 (Vernon 1980).

As a practical matter, it is often difficult to convince transfer agents to transfer stock absent letters testamentary or letters of administration. The practitioner will have to convince the transfer agent that an order admitting a will to probate as a muniment of title constitutes sufficient legal authority to all persons having custody of the decedent's property to transfer such property to the devisee named in a will admitted and that no letters are necessary. The practitioner may have to furnish

out-of-state transfer agents and others copies of Code § 89C(c) which provides:

(c) The order admitting a will to probate as a muniment of title shall constitute sufficient legal authority to all persons owing any money to the estate of the decedent, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, and to persons purchasing from or otherwise dealing with the estate, for payment or transfer, without liability, to the persons described in such will as entitled to receive the particular asset without administration. The person or persons entitled to property under the provisions of such wills shall be entitled to deal with and treat the properties to which they are so entitled in the same manner as if the record of title thereof were vested in their names.

Tex. Prob. Code Ann. § 89C (Vernon Supp. 1999).

If a will is admitted as a muniment of title prior to the expiration of the four-year limitation period for the probate of wills, the executor named in the will is not entitled to letters because there is no necessity for an administration of the decedent's estate. The court must be satisfied that there are no unpaid debts other than those secured by real estate and for other reasons there is no necessity for an administration of the estate. Tex. Prob. Code Ann. § 89C(a) (Vernon Supp. 1999). Washington v. Law, 519 S.W.2d 953, 954 (Tex. Civ. App. – Houston [14th Dist.] 1975, writ ref'd n.r.e.). See also, In Re: Estate of Hodges, 725 S.W.2d 265 (Tex. App. – Amarillo 1986, writ ref'd n.r.e.) (where executor named in a will had no pecuniary interest in will and will was admitted to probate as a muniment of title only pursuant to a family settlement agreement, named executor was not entitled to issuance of letters testamentary).

It should be noted that while Section 89C permits probating a will as a muniment of title if there are unpaid debts, if the court finds for other reasons there is a necessity for

administration, Sections 89A and 89B, as added in 1997, require pleading and proof that there are no unpaid debts except those secured by real estate. See, Tex. Prob. Code Ann. §§ 89A(a)7, 89B(a)(4) and 89C(a).

IV. PERIOD FOR FILING WILL: 30 DAYS

Section 178(b) of the Code provides that when an executor named in a will neglects to file the will for probate within 30 days of the testator's death, administration of the estate with will annexed shall be granted if administration is necessary. Tex. Prob. Code § 178(b) (Vernon 1980). As a practical matter, courts have not strictly construed this statute and the executor named in a will generally is appointed absent other reasons for disqualification pursuant to Probate Code § 78, which includes in its list of persons disqualified an incapacitated person, a convicted felon, a nonresident who hasn't appointed a resident agent for service of process, a corporation not authorized to act as a fiduciary in Texas, or a person whom the court finds unsuitable. Tex. Prob. Code Ann. § 78(b) (Vernon 1980). In the case Alford v. Alford, 601 S.W.2d 408 (Tex. Civ. App. – Houston [14th Dist.] 1980, no writ), the court found that if an executor named in a will comes forward within the four-year statutory period for probate, the court has no discretion to refuse to issue letters unless the executor is otherwise disqualified. "Any other action would illegally thwart the express intent of the testator." Id. at 410.

V. PERIOD FOR FILING WILL CONTESTS: 2 YEARS

Section 93 of the Code provides that an interested person may contest the validity of a will within two years after the will has been admitted to probate. Interested persons include heirs, devisees, spouses, creditors, or other persons having a property right in the estate. Tex. Prob. Code Ann. § 3(r) (Vernon 1980 & Supp. 1999). The term "interested person" has further been defined as "one who has a legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired, benefited, or in some manner materially affected by the probate of the will." Abbot v. Foy, 662 S.W.2d 629, 631 (Tex. App. – Houston [14th Dist.] 1983, writ ref'd n.r.e.).

If, however, an interested person discovers fraud or forgery, he or she may institute a suit to set aside the will for forgery or fraud within two years after the discovery of the forgery or fraud. Furthermore, interested persons who are non compos mentos may institute suit within two years after the removal of their disabilities. Tex. Prob. Code Ann. § 93 (Vernon 1980).

“[A] will contest is a direct attack upon a decree admitting a will to probate.” Estate of Morris, 577 S.W.2d 748, 752 (Tex. Civ. App. – Amarillo 1979, writ ref’d n.r.e.). “A direct attack is an attempt to change a decree in a proceeding brought for that purpose.” Id.

A. Necessary Parties Must be Joined Within the Limitations Period

Section 93 of the Code does not designate those persons who should be included as defendants in a suit contesting the validity of a will which has been admitted to probate; nor does it state who shall be notified in a will contest. Tex. Prob. Code Ann. § 93 (Vernon 1980). See also, Jennings v. Srp, 521 S.W.2d 326 (Tex. Civ. App. – Corpus Christi 1975, no writ). Therefore, the practitioner needs to comply with Rule 39 of the Texas Rules of Civil Procedure and join those parties whose interest in the estate will be impaired in their absence. All beneficiaries under a will are indispensable parties to a suit to construe a will or partition an estate. Pampell v. Pampell, 554 S.W.2d 20, 21 (Tex. Civ. App. – Austin 1977, no writ). Failure to join necessary parties within the limitations period will be fatal to the contest.

If the beneficiaries are not all joined within the limitations period, the suit will be barred. In Klein v. Dimock, 705 S.W.2d 405, 407 (Tex. App. – Fort Worth 1986, writ ref’d n.r.e.), the contestant timely filed his suit complaining of the probate of a 1981 will admitted to probate on August 11, 1981. All of the beneficiaries were not joined in the contest until close to two and one-half years from the date the will was admitted to probate. The trial court entered judgment barring the will contest since more than two years had elapsed from the date of the order admitting the will to probate to the date necessary and indispensable parties were joined in the lawsuit. The appellate court affirmed. Id. at 408.

B. Exception to Two-Year Period for Admission of Wills: Reconciling Sections 73, 83(b) and 93

Section 93 of the Code establishes a two-year period from the date of the testator’s death during which a will may be admitted to probate, except in circumstances of forgery or fraud. Nevertheless, under certain circumstances, absent forgery or fraud, a will may be admitted after two years have elapsed from the death of the testator. This occurs when a *later* will is discovered after an *earlier* will has been admitted to probate.. Section 83(b) of the Code provides:

If, after a will has been admitted to probate, an application for the probate of a will not theretofore presented for probate, is filed, the court shall determine whether the former probate should be set aside, and whether such other will should be admitted to probate, or whether the decedent died intestate.

Tex. Prob. Code Ann. § 83(b) (Vernon 1980).

In a companion case to Klein v. Dimock, discussed supra, contestants sought to set aside the probate of a 1981 will and applied to have a 1961 will admitted. The decedent had died on July 27, 1981. The 1981 will was admitted on August 11, 1981. The 1961 will was filed on December 28, 1983, more than two years from the date of the decedent’s death. Klein v. Dimock, 705 S.W.2d 408, 410 (Tex. App. – Fort Worth 1986, writ ref’d), referred to here as Dimock 2. In Dimock 2, the court opined that by trying to probate a 1961 will after the 1981 will had been admitted, the contestants were challenging the admission of the later, 1981 will, by direct attack and, accordingly, the two-year statute of limitations as provided in § 93 of the Code controlled.

However, in Estate of Morris, supra, the court found that where a proponent sought to have a 1968 will admitted to probate and to set aside a 1965 will previously admitted, the four-year statute for admission of wills, § 73 of the Code controlled. The filing of the later will was not a contest to the earlier will, id. at 752, and thus is not barred by the two-year statute. Rather, the probate of a later will has the effect

of *revoking* the former probate because the later will revoked all others and was timely filed within the four-year period prescribed by Section 73. *Id.* The *Morris* court opined: “to say that the interplay of Sections 73, 83(b) and 93 converts any timely application for the probate of a later will into a contest of the validity of any earlier will admitted to probate more than two years previously, and, thereby bars probate of the last will would . . . destroy the right and power specifically given to one to make dispositions of property by a valid last will and testament. *Id.*”

In summary, if a will has been admitted to probate and a *later* will revoking all prior wills is discovered, the four-year statute of limitations (§ 73) controls. If, however, a will has been admitted to probate and an *earlier* will is discovered, the application to admit the earlier will constitutes a contest to the later will, and the two-year statute of limitations (§ 93) controls.

C. Fraud

Within two years after the discovery of fraud or forgery, an interested person may contest the admission of a will to probate. Tex. Prob. Code Ann. § 93 (Vernon 1980). Nevertheless, if a litigant is negligent in discovering the fraud, the claim may be defeated. *Escontrias v. Apodaca*, 629 S.W.2d 697 (Tex. 1982) (contestant’s claim barred and two-year statute was not tolled where evidence established contestants had knowledge of essential facts on which they relied to establish fraud and waited three and one-half years to file their suit.

In *Mooney v. Harlin*, 622 S.W.2d 83, 84 (Tex. 1981) over five years after the decedent’s will had been admitted to probate, the decedent’s lifetime companion, confidante and lover, who had been left out of his will, filed suit for fraud and misrepresentation, alleging she had lived with and cared for the decedent in exchange for the decedent’s promise to provide for her in his will, which he failed to do; she had constructive notice of the public records of the probate court and limitations began to run from the time the fraud could have been discovered by the exercise of ordinary diligence.

D. Forgery

In a case where a litigant alleges forgery, the statute of limitations begins to run from the date the litigants discover the forgery, or from the date the litigants should have learned of the forgery. *Aston v. Lyons*, 577 S.W.2d 516, 519 (Tex. Civ. App. – Texarkana 1979, no writ). In *Aston*, the court reversed the trial court’s granting of summary judgment against the contestants brought eight years after the will was admitted to probate, opining that the case was not subject to summary judgment due to the disputed factual question of when the contestants should have discovered the forgery. *Id.* at 518.

In *Niell v. Yett*, 746 S.W.2d 32 (Tex. App. – Austin 1988, writ denied), the decedent’s granddaughter contested the validity of grandpa’s will more than three years after it had been admitted to probate based on “fraud on the court” and tortious interference with an “inheritance expectancy,” among other causes of action. To avoid a statute of limitations defined under § 93, the contestant had to plead and prove “extrinsic fraud” rather than “intrinsic fraud.” *Id.* at 35. “Intrinsic” fraud pertains to acts that could have been litigated in the original suit, i.e., whether the testator was unduly influenced, while “extrinsic” fraud occurs when the fraudulent act prevents a party from having a trial or an opportunity to be heard. *Id.* In this case, the proponent of the will took no act to delay the filing of a will contest within the statutory period.

E. Minority, Unsound Mind

Limitations does not apply to persons who are minors or of unsound mind at the time the will was probated. *Cloud v. Cloud*, 139 S.W.2d 826, 828 (Tex. Civ. App. – Fort Worth 1940, no writ) (where a will was admitted in 1933 and the next friend of a person of unsound mind sued on his behalf in 1938, limitations would not apply to the n.c.m. or to interested parties who were minors at the time the will was probated).

Moreover, the appointment of a guardian ad litem for a minor in a probate proceeding *will not* preclude a will contest after the minor attains his majority and within the two years’ limitations period. Where a guardian ad litem appointed for a twelve-year-old whose father sought to probate the mother’s holographic will six years after her death failed

to institute or join in a contest to the probate of the mother's will and did not seek a de novo review of the probate order, the minor, upon attaining his majority instituted a will contest. His contest constituted a direct attack which he was entitled to bring "under the broad and unrestricted language of Section 93 pertaining to minors." Ladehoff v. Ladehoff, 436 S.W.2d 334, 338 (Tex. 1968). Moreover, the court opined, "There is no proviso which would eliminate that right by the appointment of a guardian ad litem." Id. at 339. Section 93 keeps a judgment as to a minor voidable and subject to attack. Id. at 340.

VI. PERIOD FOR FILING STATUTORY BILLS OF REVIEW: 2 YEARS

Both Sections 93 and 31 provide the means by which an interested person may institute suits to contest a court's order admitting a will to probate. The applicable limitations period for both statutes is two years. Section 93, however, is limited to contests regarding the validity of a will and the cancellation of a will due to forgery or fraud. Tex. Prob. Code Ann. § 93 (Vernon 1980). Section 31 may be used to attack any decision, order, or judgment of the probate court. Tex. Prob. Code Ann. § 31 (Vernon Supp. 1999). Section 657 is the companion statute to § 31; in guardianship proceedings, it permits a disabled person two years after the removal of disabilities to apply for a bill of review. Tex. Prob. Code Ann. § 657 (Vernon Supp. 1999). Stanley Johanson has commented in Johanson's Texas Probate Code Annotated that "[A]s a functional matter, § 31 deals with dependent administrations, while § 93 deals with the probate of wills."

In Ladehoff v. Ladehoff, discussed, supra, the petitioner brought suit within two years after reaching his majority to contest the admission of his mother's will to probate, alleging that §§ 31 and 93 of the Code afforded him methods to make direct attacks on the probate court's judgment. Ladehoff, supra, at 335. The court stated that the petitioner's action was a "contest under Section 93 rather than an attack in the nature of a bill of review under Section 31." Id. at 336. The court tried to distinguish between the two sections of the Code.

Section 31 authorizes statutory bills of review in the court in which probate proceedings were had. Minors must institute a bill of review within two years after the removal of their disabilities. Section 93 provides a means to contest a will that has been admitted to probate by the institution of suit by an interested party within two years from the order admitting it to probate. Minors are given two years from the removal of their disabilities within which to commence such a contest.

Id. at 337.

A. Limited to Probate Proceedings

A statutory bill of review is expressly limited to probate proceedings. Podgoursky v. Frost, 394 S.W.2d 185 (Tex. Civ. App. – San Antonio 1965, writ ref'd n.r.e.). It is not necessary for a statutory bill of review to conform to the restrictions of an equitable bill of review. McDonald v. Carroll, 783 S.W.2d 286, 288 (Tex. App. – Dallas 1989, writ denied). It is necessary only to allege and prove substantial errors by the trial court; it is not necessary that errors appear on the face of the record or to file a motion for a new trial or appeal the trial court's judgment. Id. Errors may be proven at trial. Hamilton v. Jones, 521 S.W. 350 (Tex. Civ. App. – Houston [1st Dist.] 1975, writ ref'd n.r.e.).

B. Successful Litigants

In McDonald, supra, where an intestate's son received less than half the community estate and signed a receipt and release upon the disbursement of estate funds to him, the court found that the release was not supported by legal consideration and a statutory bill of review was the proper vehicle to attack the error in the trial court's order approving the disproportionate distribution of the estate to him. McDonald, supra, at 288.

In Hamilton, supra, the probate court properly set aside its previous order determining heirship and declaring an allegedly adopted daughter to be the sole heir of the decedent after the decedent's brother, sister and niece filed a bill of review alleging that the "adopted daughter" never had been formally adopted; nor

was there any agreement to adopt her. Moreover, although the “daughter” knew of the existence and whereabouts of the decedent’s brother, sister and niece, she did not furnish notice as required by § 50 of the Probate Code when she filed the application to determine heirship. The errors of the judgment obviously were not apparent from the record; the applicants for the bill of review were able to prove their allegations at trial.

The State of Texas filed a bill of review in Tindal v. State, 656 S.W.2d 176 (Tex. App. – San Antonio, writ ref’d n.r.e.) in a guardianship matter in which the trial court authorized transfer of the ward’s assets to a trust. The ward was a patient at a state hospital. The court found that the state, as a creditor, was an interested party entitled to reimbursement for the ward’s care and entitled to notice of hearing at which the ward’s assets were transferred to a trust.

C. Unsuccessful Litigants

To prevail on a bill of review, the applicant must allege facts in his petition for a bill of review. Legal conclusions are insufficient. “[I]t is necessary to specifically allege and prove substantial errors by the trial court. Hamilton, supra, at 353. Thus, where the applicant for a bill of review contended that his sworn pleadings constituted conclusive proof and offered no witnesses or evidence, the court found the applicant failed to establish his allegation. Hoover v. Sims, supra, at 173.

A landlord who had been restored to competence sought a bill of review to have an order of the court which authorized a lease with option to purchase declared null and void. The landlord’s guardian had executed the lease during the landlord’s incapacity. After she was restored, the landlord brought an action for a bill of review to set aside the lease. The court found that the former ward accepted payments under the lease, was fully aware of the terms of the lease, and ratified and affirmed the lease and therefore waived any right of rescission. Oram v. General Am. Oil Co. of Texas, 513 S.W.2d 533 (Tex. 1974).

VII. DETERMINING HEIRSHIP AND ESTATE ADMINISTRATION: 4 YEARS

There is no express limitations period in the Probate Code for bringing an application

to determine heirship. Therefore, the residual four-year limitations period of § 16.051 of the Texas Civil Practice & Remedies Code applies. Smith v. Little, 903 S.W.2d 780, 787 (Tex. App. – Dallas 1995, aff’d in part, reversed in part 943 S.W.2d 414 (Tex. 1997)).

In Little v. Smith, 943 S.W.2d 414 (Tex. 1997), an adoptee sought to be declared an heir of the decedent (who died testate) and to avail herself of the discovery rule. The court concluded that the discovery rule was unavailable to adopted persons who wished to assert their inheritance rights on the basis that it would be unwise to “hold open estates for years or even decades . . . on the chance that adoptees may learn the identities of their biological relatives.” Little v. Smith, supra, at 420. This writer believes, however, that a determination of heirship may be brought at any time and the four-year limitations period of Little v. Smith is limited to heirship proceedings involving adoptees when heirship previously has been declared. Otherwise, there would be numerous pieces of real property around the state without owners.

Section 48(b) of the Probate Code also provides that if an application to determine heirship is filed within four years of the date of the decedent’s death, the applicant may request that the court determine whether the necessity for administration of the estate exists, hear evidence on the issue and make a determination. Tex. Prob. Code Ann. § 48(b) (Vernon 1980).

VIII. STATUTES OF LIMITATIONS IN FAMILY CODE AFFECTING PROBATE

There are several sections of the Family Code about which probate practitioners need to be aware: those pertaining to informal or common law marriages, and those pertaining to the establishment of paternity.

Common law marriage often becomes an issue in probate and guardianship matters. An alleged common law spouse may seek to become the guardian of an incapacitated spouse; may assert community property rights in an estate pursuing under a will or by intestacy; seek to become community administrator of an incapacitated spouse’s community estate; seek a family allowance, and so on.

Paternity often becomes an issue in probate and guardianship matters in cases where a child

seeks to be declared an heir of one whom he claims is his deceased father; in guardianships where the guardian is under an obligation to obtain support for the minor ward from the alleged biological father; and where an applicant for guardianship may have to seek waivers from the minor child's parents in order to become guardian.

A. Informal Marriages

The Family Code provides a statute of limitations for proving up informal marriages. If a proceeding to prove certain informal marriages "is not commenced before the second anniversary of the date which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter an agreement to be married." Tex. Fam. Code Ann. § 2.401(b) (Vernon 1996).

Therefore, if a common law marriage is terminated by the death of one of the spouses, the surviving spouse has two years from the date of death to prove common law marriage. Time limits for asserting common law spouse status were deemed to support the state's reasonable interest in facilitating probate and divorce proceedings. Dannelley v. Almond as Next Friend of Almond, 827 S.W.2d 582, 586 (Tex. App. – Houston [14th Dist.] 1982, no writ) (where alleged common law spouse sought to assert her common law status after the running of limitations, the court held that the one-year limitation period, under the prior statute, in proving common law status did not violate the open courts provision of the Texas Constitution or the principles of equal protection).

The inheritance rights of a surviving common law spouse are the same as a spouse married ceremonially, "whether those rights pertain to the control or disposition of the separate property, the community property or whether they affect its descent." In Re: Glasco, 619 S.W.2d 567, 571 (Tex. Civ. App. – San Antonio 1981, no writ). Thus, a woman who was successful in her suit to establish a common law marriage in an heirship proceeding was entitled to all of the community property under § 45 of the Probate Code and one-half of the separate real property under Section 38 of the Probate Code. "The rights of . . . the common law wife of [the] decedent are in all respects the same as though the marriage had been duly solemnized . . . whether those rights pertain to

the control or disposition of separate property, the community property, or whether they affects its descent." Id.

Furthermore, a common law spouse is entitled to administer the decedent's estate. See, Cain v. Whitlock, 741 S.W.2d 528, 530 (Tex. App. – Houston [14th Dist.] 1987, no writ), and Smith v. Smith, 257 S.W.2d 335 (Tex. Civ. App. – Waco 1953, writ ref'd n.r.e.). Both Cain v. Whitlock and Smith v. Smith also addressed the issue of whether the dead man's statute precluded the admission of testimony concerning common law status. Both cases concluded that such testimony was not precluded. The Cain court found that Rule 601 (b) of the Texas Rules of Evidence did not apply because it is limited to actions by or against executors, administrators or guardians where judgment might be tendered for or against them. Cain, supra at 530. Moreover, "[g]reat difficulty could exist in proving whether a common law marriage was created without allowing testimony as to the purported oral statements of the deceased purported spouse." Id. The matter before each court was suit for the determination of heirship and appointment of an administrator.

B. Paternity

Section 160.002 of the Texas Family Code limits the time during which a child may file suit to determine parentage; if the child doesn't file suit to determine parentage by the child's twentieth birthday, the suit is barred. Tex. Fam. Code Ann. § 160.001(a) (Vernon Supp. 1999). Thus, an adult has a right to establish paternity for a limited time, two years, after his status as a child ends. Voluntary paternity, however, may be established at any time. Tex. Fam. Code Ann. § 160.002(c) (Vernon Supp. 1999). These actions, nevertheless, do not address the situation where a child seeks to establish paternity *after* the putative father's death.

In Manuel v. Spector, 712 S.W.2d 219, 222 (Tex. App. – San Antonio 1986, no writ), the court held that an action to determine paternity may be held after the father's death. On the other hand, in In the Interest of George, 794 S.W.2d 875 (Tex. App. – Tyler 1990, no writ), the mother of a posthumous child sought a determination of paternity. The court concluded that a suit to establish paternity under

the *Family Code* does not survive the death of the putative father. The court recommended that an illegitimate child seeking recognition as an heir follow the procedures set forth in the *Probate Code*, discussion, *infra* at IX.

In a 1996 case involving the same issue, *In the Interest of A.S.L.*, 923 S.W.2d 814 (Tex. App. – Amarillo 1996, no writ), the court opined: “Since the death of a putative father is not included among specific instances in which a suit to establish paternity is time barred, such a suit to establish paternity after a biological father’s death may be maintained. *Id.* at 817.

In a 1995 case, *In the Interest of Sicko*, 900 S.W.2d 863 (Tex. App. – Corpus Christi 1995, no writ), a 57-year-old plaintiff brought suit merely to determine the identity of his biological living father. While the *Sicko* court found the suit was time barred under the residual four-year statute of limitations provided in the Texas Civil Practice and Remedies Code, it opined that “barring the paternity suit does not totally disinherit the plaintiff from paternal inheritance,” permitted by § 42(b) of the Probate Code. *Id.* at 866. Thus, after his father’s death, Sicko could again seek to establish paternity.

IX. DETERMINING RIGHT TO PATERNAL INHERITANCE: 4 YEARS

Section 42(b) of the Texas Probate Code sets forth four methods by which a child may inherit from a biological deceased father:

- proof that the child was born or conceived prior to or during the marriage of the mother and father as provided in § 151.002 of the Family Code;
- proof that the child was legitimized by court order as provided in Chapter 160 of the Family Code;
- the father’s written statement stating the child is his biological child as provided in § 160.202 of the Family Code; or
- a determination from the probate court that a child has a right to inherit.

Tex. Prob. Code Ann. § 42(b) (Vernon Supp. 1999).

The last method was added in 1987 when § 42(b) was amended following the decision of the United States Supreme Court in *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986). It provides illegitimates a right to establish paternity during probate. Section 42(b), however, provides no specific time limit for obtaining a determination from the probate court as to the child’s right to paternal inheritance.

Two statutes offer guidance. First, when no specific statute of limitation applies, the residual statute of limitations, § 16.051 of the Texas Civil Practice & Remedies Code, applies. *Cantu v. Sapenter*, 937 S.W.2d, 550, 552 (Tex. App. – San Antonio 1997, writ denied); *Smith v. Little*, 903 S.W.2d 780, 787 (Tex. App. – Dallas 1995, aff’d in part, reversed in part 943 S.W.2d 414 (Tex. 1997)). Furthermore, § 55 of the Probate Code provides that a challenge to a determination of heirship may be brought within four years of the date of the judgment determining heirship provided the heir was not served with citation, or upon proof of actual fraud, at any time. Tex. Prob. Code Ann. § 55(a) (Vernon 1980). See, *Turner v. Nesby*, 848 S.W.2d 872 (Tex. App. – Austin 1993, no writ) (illegitimate child who filed bill of review seven years after the entry of a judgment declaring heirship was barred by limitations); *Henson v. Jarmon*, 758 S.W.2d 368 (Tex. App. – Tyler 1988, no writ) (where intestate’s brothers, sisters, nephews and niece appealed probate court’s judgment that decedent’s two illegitimate daughters were decedent’s heirs, appellate court upheld trial court’s judgment applying § 42(b) retroactively and relying upon the *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986), in which § 42 of the Texas Probate Code, as it existed prior to the 1987 amendments would have denied the daughters equal protection had it been applied).

Thus, an illegitimate person has two opportunities to establish paternity for the purposes of inheritance. He may do so up until his 20th birthday pursuant to § 160.002 of the Family Code. If, however, he is barred by the limitations period of § 160.002, he may wait until Dad’s death and establish paternity under

§ 42(b) of the Probate Code, provided he is not barred by the general four-year statute of limitations or the four-year limitations period of § 55(a) of the Probate Code. In recent unpublished slip opinion, Estate of Chavana, 1999 WL 248959 (Tex. App. – San Antonio 1999, no writ history), the San Antonio court, citing Sicko, supra, opined that the provisions of the Probate Code for establishing paternity are independent from paternity suits authorized by the Family Code. Since heirship only may be asserted when someone dies, § 42(b) should be read in conjunction with § 55(a) providing a four-year limitations period to establish paternity.

X. CLAIMS

The settlement and payment of claims against a decedent's estate is one of the primary functions of the estate's personal representative. An estate vests at death *subject to* the debts of the testator or intestate. Tex. Prob. Code Ann. § 37 (Vernon 1980 & Supp. 1999). In the absence of the decedent's debts, there rarely is a need for an estate administration. Tex. Prob. Code Ann. §§ 89A(a)(7) and 89B(4) (Vernon Supp. 1999). If there are two or more debts against the estate, a necessity for an administration exists. Tex. Prob. Code Ann. § 178(b) (Vernon 1980). The Code, however, "does not mandate the existence of two or more debts, but rather, provides that when two or more debts exist, a necessity for administration shall be deemed." Nelson v. Neal, 787 S.W.2d 343, 344 (Tex. 1990). If, however, the debt is barred by limitations, an executor or administrator is not permitted to pay the debt, and "[t]o do so is a fraud upon the estate." Pinkston v. Pinkston, 266 S.W.2d 515, 519 (Tex. Civ. App. – Waco 1954, writ ref'd n.r.e.).

Accordingly, it is necessary for both the personal representative and the creditor to determine when indebtedness is barred by limitations. Note, however, that a limitations defense maneuvered by a personal representative to avoid the efforts of a creditor to collect his debt will not be successful. See Rooke v. Jensen, 838 S.W.2d 229 (Tex. 1992). "The statute of limitations was not created to provide a log behind which opportunistic defendants could snugly lay for two years and then emerge solemnly proclaiming their statutory rights. . . ." Id. at 230, quoting Castro

v. Harris County, 663 S.W.2d 502, 506 (Tex. App. – Houston [1st Dist.] 1983, writ dismd').

The personal representative shall not allow any claims against a decedent's estate:

- barred by the general statutes of limitation;
- of an unsecured creditor not presented within 4 months of receipt of permissive statutory notice as permitted in Section 294(d) of the Code;
- barred by an unsecured creditor's failure to file suit in a rejected claim within 90 days of the rejection; or
- in the case of a claim of a personal representative, barred by the personal representative's failure to file a claim within 6 months of qualification.

Tex. Prob. Code Ann. § 298 (Vernon 1980 & Supp. 1999).

A. Statutes of Limitations Tolloed for Up to One Year After Decedent's Death

A person's death essentially provides a grace period of up to one year, suspending the statutes of limitations against whom or in whose favor a cause of action exists. Tex. Civ. Prac. & Rem. Code § 16.062 (Vernon 1997). Section 16.062 provides as follows:

(a) The death of a person against whom or in whose favor there may be a cause of action suspends the running of an applicable statute of limitations for 12 months after the death.

(b) If an executor or administrator of a decedent's estate qualifies before the expiration of the period provided by this section, the statute of limitations begins to run at the time of the qualification.

Tex. Civ. Prac. & Rem. Code § 16.062 (Vernon 1997).

If a cause of action would have been barred by limitations prior to the decedent's death, the decedent's death does not revive or extend limitations. See, Mullens v. Bailey, 374 S.W.2d 455, 457 (Tex. Civ. App. – Corpus Christi 1964, no writ) (where the cause of action on vendor's lien notes was barred at the time of death, statute pertaining to the tolling of limitations for 12 months after the date of death did not apply). "A claim may be presented to the personal representative at any time before the estate is closed if suit on the claim has not been barred by the general statutes of limitation." Tex. Prob. Code Ann. § 298(a) (Vernon Supp. 1999). Accordingly, a claim filed 16 years after the cause of action accrued was barred by limitations. Furr v. Young, *supra* at 536.

B. When Unsecured Creditors' Claims May Be Barred

Even though the general statute of limitations as provided in the Texas Civil Practice and Remedies Code has not run, a creditor who has a valid claim against a decedent's estate may discover that the claim has been barred because the creditor failed to comply with the statutory requirements for presenting claims to the estate's personal representative.

1. Notice to Unsecured Creditors

Section 294(d) of the Code provides that the personal representative *may* give notice to unsecured creditors having a money claim against the decedent's estate at any time before the estate is closed. The notice must advise the creditor to present its claim within four months of the receipt of the notice or it will be barred. Notice must:

- be by registered or certified mail;
- include the date of issuance of letters;
- include address at which the claim must be presented;
- include an instruction as to whom the claim must be presented; and
- include a statement that the claim must be presented within four months of receipt or the claim is barred.

Tex. Prob. Code Ann. § 294(d) (Vernon Supp. 1999). If the claim is not present within *four months* following the date the creditor receives the notice, the claim is barred. Tex. Prob. Code Ann. § 298(a) (Vernon Supp. 1999). A creditor's claim may be filed with the clerk who then advises the representative of the estate or the representative's attorney that its claim has been filed. Tex. Prob. Code Ann. § 308. (Vernon Supp. 1999).

If the creditor with a money claim presents its claim within the four month period allowed by § 294(d), the creditor must comply with the provisions of § 301: the claim must be supported by affidavit that it is just and that all legal offsets, payments and credits have been allowed. If the claim is not based on a written instrument, the affidavit shall state the basis for the claim. Vouchers and exhibits to prove the claim should be attached. Tex. Prob. Code Ann. § 301 (Vernon Supp. 1999).

2. Personal Representative Must Act on Presented Claim Within 30 Days

Once the money claim has been presented, the personal representative has 30 days in which to accept the claim, in whole or in part, or reject it. If the personal representative does neither, the claim is rejected by operation of law. Tex. Prob. Code Ann. §§ 309, 310 (Vernon Supp. 1999). The claimant then must file suit within 90 days of the date of rejection, or the claim is barred. Tex. Prob. Code Ann. § 313 (Vernon Supp. 1999).

After the personal representative allows or disallows the claim, in whole or in part, the court either approves in whole or in part or rejects the claim and also classifies the claim. Tex. Prob. Code § 312(c) (Vernon Supp. 1999). The court, however, cannot disapprove a claim which has been rejected – it has the right to hear only approved claims and any order rejecting a claim which the administrator has not approved is a nullity. Small v. Small, 434 S.W.2d 940, 942 (Tex. Civ. App. – Waco 1968, writ ref'd n.r.e.). Nor can the court approve a claim which was not presented to the administrator. Butler v. Summers, 253 S.W.2d 418 (Tex. 1952).

3. Suit on Rejected Claim Must be Filed Within 90 Days of Rejection

Counsel representing a creditor should check with the clerk's office to ascertain whether a claim has been accepted or rejected. There is no provision in the Code for notification requirements to a creditor. "The statutes contemplate that a creditor will keep himself informed as to the status of his claim and take the steps required by law to reduce the same to judgment." Russell v. Dobbs, 354 S.W.2d 373, 376 (Tex. 1962).

If a creditor does not file suit on a rejected claim within 90 days of rejection, the suit is barred. Tex. Prob. Code Ann. § 313 (Vernon Supp. 1999). The 90-day requirement was not suspended where the lawyer for the administratrix led the claimant to believe that the claim would be accepted. Id. In State v. Estate of Brown, 802 S.W.2d 898 (Tex. App. – San Antonio 1991, no writ), the State Comptroller submitted a claim for sales and use taxes in excess of \$400,000. The administratrix rejected the claim. The Comptroller then filed state tax liens and the administratrix filed a motion to release the tax liens on the basis that the liens were barred by limitations inasmuch as the Comptroller failed to file suit within the 90 day period permitted by Section 313 of the Code. The estate was not liable and the liens were ordered released. Id. at 899.

However, if a claimant fails to file suit within 90 days after rejection of a claim, all may not be lost. In Albiar v. Arguello, 612 S.W.2d 219 (Tex. Civ. App. – Eastland 1980, no writ), the holders of a promissory note filed a claim against the administrator of the estate co-maker of the note. The claim was rejected by operation of law and the holders of the note did not file suit within 90 days. Nevertheless, the administrator, the co-maker and husband of the decedent, was liable for the full amount of the note in his individual capacity.

a. Improperly Presented Claims

If a claim has been improperly presented, the 90-day statute of limitations is not activated. Boney v. Harris, 557 S.W.2d 376 (Tex. Civ. App. – Houston [1st Dist.] 1972, no writ) (where the affidavit is not in substantial compliance with the statute, 90 day limitations period could not run against a void claim). See also Small v. Small, supra at 942

(where a claimant presented a claim without proper verification, the transaction is a nullity and the administrator's allowance has no effect whatsoever).

However, defects of form of the claim or in sufficiency of exhibits are deemed waived unless the personal representative objects in writing and files the objection with the clerk within 30 days after the claim has been presented. Tex. Prob. Code Ann. § 302 (Vernon 1980). City of Houston v. Aguilar, 607 S.W.2d 310 (Tex. Civ. App. – Austin 1980, no writ).

b. Suits on Partially Rejected Claims

If the administrator partially allows the claim, the creditor has a choice: it may accept the amount allowed or file suit on the entire amount of the claim. Clads v. Newberry, 453 S.W.2d 243, 247 (Tex. Civ. App. – Fort Worth 1970, no writ).

C. **Claims of the Personal Representative**

1. Personal Representative's Own Claims: 6 Months

The personal representative of a decedent's estate shall file his own verified claim with the court granting letters within six months after the representative has qualified or the claim is barred. Tex. Prob. Code Ann. § 317(a) (Vernon Supp. 1999). It is not necessary for the personal representative to first present the claim to himself. For a personal representative to prevent a claim to himself would place "the personal representative . . . in the peculiar position of being required to written objections to his own claim. . . ." Anderson v. Oden, 780 S.W.2d 463, 466 (Tex. App. – Texarkana 1989, no writ). The purpose of § 317 is to prevent a personal representative from deciding on the propriety of his own claims against the estate and the representative's contracts made on behalf of the estate. This avoids conflicts of interest. See, Ullrich v. Estate of Anderson, 740 S.W.2d 481, 483 (Tex. App. – Houston [1st Dist.] 1987, no writ). If the claim is filed within the required time, it is entered on the court's claims docket and acted upon in the same manner as other claims. Tex. Prob. Code § 317(b) (Vernon Supp. 1999).

2. Claims Procedure Inapplicable to Independent Administrators

In all likelihood, § 317 does not apply to independent executors although the statute refers to “personal representative,” which, under §3(aa), includes independent executors. Tex. Prob. Code Ann. § 3(aa) (Vernon 1980 & Supp. 1999). Prior to the 1995 amendments, § 313 referred to the claims of executors or administrators rather than personal representatives. See also, Deane v. Driscoll, 56 S.W. 503 (Tex. Civ. App. – San Antonio 1933, writ dismissed); and Kitchens v. Culhane, 398 S.W.2d 165, 166 (Tex. Civ. App. – San Antonio 1965, writ refused n.r.e.) (Section 317 inapplicable to independent administration).

3. Expenses of Administration

Claims accruing against the estate after letters have been granted are not governed by the claims procedures of § 294 et. seq. Tex. Prob. Code Ann. § 317(c) (Vernon 1980 & Supp. 1999). In Ullrich v. Anderson, *supra*, the claim of an accountant who provided accounting services to an estate was submitted to the probate court; the administrator had no authority to review the claim against the estate for which he had contracted and for which he could be personally liable.

D. Claims of Secured Creditors

Creditors having claims for money secured by real or personal property must be given notice by the personal representative within two months after the personal representative receives letters. Tex. Prob. Code Ann. § 295 (Vernon 1980 & Supp. 1999). This provision applies to independent executors. Tex. Prob. Code Ann. § 146(a) (Vernon 1980 & Supp. 1999).

If the personal representative later learns of the existence of other secured creditors, the personal representative must give notice to them within a reasonable time after learning of their existence. *Id.* The personal representative and the surety are liable for damages that result from a personal representative’s failure to give notice, provided that the creditor did not otherwise have notice. Tex. Prob. Code Ann. § 297 (Vernon 1980 & Supp. 1999).

In presenting its claim, the secured creditor needs to elect whether to have the claim treated as a matured secured claim to be paid in the due course of administration, or as a preferred debt and lien against the specific property securing the debt, to be paid in accordance with the terms of the contract. Tex. Prob. Code Ann. § 306(a) (Vernon 1980 & Supp. 1999).

If the secured creditor does not present its claim within four months of its receipt of notice required under § 295, or six months after letters were granted, whichever occurs *later*, he will be deemed to have elected preferred debt and lien status. If no election is made, the claim will be treated as a preferred debt and lien. Tex. Prob. Code Ann. § 306 (Vernon 1980 & Supp. 1999). As a preferred debt and lien creditor, the creditor may look only to the collateral for payment of the claim. Cessna Finance Corp. v. Morrison, 667 S.W.2d 580, 586 (Tex. App. – Houston [1st Dist.] 1984, no writ). If the collateral declines in value or is insufficient to pay the debt, the creditor is out of luck and cannot recover any deficiency as an unsecured creditor.

E. Claims in Guardianship Estate

The statutes of limitations with respect to guardianship estates are similar to those of dependent administrations. Unless the claim is barred by the general statutes of limitations, it can be presented at any time prior to the closing of the guardianship estate. Tex. Prob. Code Ann. § 786 (Vernon Supp. 1999). This Code section is substantially similar to § 298. Limitations are tolled by the filing of a claim legally allowed and approved, or by bringing suit on a rejected claim within 90 days after rejection. Tex. Prob. Code Ann. § 786 (Vernon Supp. 1999).

Section 796 requires the guardian to allow or reject the claim within 90 days, and is similar to § 309. Section 797, similar to § 310, provides that the claim is deemed rejected by operation of law if the guardian fails to allow or reject the claim within 30 days after presentation. Under § 800, similar to § 313, suits on rejected claims must be brought within 90 days after rejection, or they are barred.

However, claims of guardians, unlike those of personal representatives, do not need to be filed with the court within six months after

the appointment of the guardian. Tex. Prob. Code Ann. § 802 (Vernon Supp. 1999). The guardian may present his claim to the court at any time during the pendency of the guardianship unless the claim is barred by the general statutes of limitations.

F. Independent Administrations

The claims procedures in the Probate Code applicable to dependent administrations generally are inapplicable to independent administrations. Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968). If the creditor's claim is not paid, the creditor may file suit against the independent executor or independent administrator. Tex. Prob. Code Ann. § 147 (Vernon 1980).

The independent executor or independent administrator, however, is still required to give creditors notice by publication, and notice to secured creditors, and may give permissive notice to unsecured creditors. Tex. Prob. Code Ann. § 146 (Vernon 1980 & Supp. 1999). If the unsecured creditor received permissive notice in accordance with Probate Code § 294(d), and fails to give notice of the claim to the independent executor not later than 120 days after the date he receives notice from the independent executor, he will find his claim barred by limitations. Tex. Prob. Code Ann. § 146(d) (Vernon 1980 & Supp. 1999).

XI. STATUTES OF LIMITATIONS IN TRUST LITIGATION

Neither the Probate Code nor the Property (Trust) Code provides a limitations period for fiduciary misconduct. "Statutes of limitations usually begin to run on the date the cause of action accrues." Farias v. Laredo Nat. Bank, 985 S.W.2d 465, 470 (Tex. App. – San Antonio 1997, no writ history). The definition of "accrues" is occasionally defined by statute. For example, the Texas Civil Practice & Remedies Code § 16.003(b), a two-year statute of limitations for wrongful death, instructs that "[t]he cause of action accrues on the death of the injured person." Tex. Civ. Prac. & Rem. Code Ann. § 16.003(b) (Vernon 1986). In most instances, however, courts have defined the accrual date of a cause of action as the date at which "the defendant's wrongful act effects some injury." Trinity River Auth. V. URS Consultants, 889 S.W.2d 259, 262 (Tex. 1964).

A. Discovery Rule

The discovery rule is an exception to this general rule of accrual; under the discovery rule, "the cause of action is deemed not to accrue until the injury becomes discoverable. . . ." *id.*, or "until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injuries." S. V. v. R. V., 933 S.W.2d 1, 4 (Tex. 1996). The phrase "discovery rule" is generally used in instances where accrual of the cause of action is deferred until the plaintiff knew or should have known of his injuries, and the beginning of the limitations period is accordingly delayed. *Id.*

The discovery rule is applicable to breach of fiduciary duty actions. Slay v. Burnett Trust, 187 S.W.2d 377, 394 (Tex. 1945). Nevertheless, as several courts have opined, "[W]hen . . . there is a fiduciary relationship between the parties, diligence on the part of the defrauded party does not require as prompt or as searching an inquiry into the conduct of the other as when parties are strangers or are dealing at arm's length." Rowe v. Rowe, 887 S.W.2d 191, 201 (Tex. App. – Dallas 1994, writ denied). See also, Lang v. Lee, 777 S.W.2d 158, 164 (Tex. App. – Dallas 1989, no writ). Moreover, as the court in Farias, *supra*, noted "[a] fiduciary's duty is inherently undiscoverable because the person to whom a fiduciary duty is owed is either unable to inquire into the fiduciary's actions or unaware of the need to do so." Farias, *supra*, at 472. This was not the case in Farias, however.

In Farias, the court determined the plaintiff was able to make inquiry many years before she brought suit. The trustee bank sold trust property in 1968. The beneficiaries were aware of the sale. Twenty-eight months later, the purchaser resold the property and realized a 300% profit. Eighteen years later, in October, 1986, the daughter of one of the first generation of beneficiaries, herself a trust beneficiary, learned there may have been "something fishy" about the sale – that the sale was not done properly, that it was an insider sale, and so on. The daughter began investigating, sometimes vigorously and sometimes in a desultory fashion. Finally, in December 1990, the daughter filed suit. Five years later she was awarded \$2.2 million in damages. The trial court, however,

entered a j.n.o.v. and the appellate court agreed. The court discussed whether the discovery rule or fraudulent concealment deferred accrual of the cause of action. The appellate court found the beneficiary could have sued the trustee four years after the sale, in 1972 and thus was barred by limitations. In this case, even an ongoing fiduciary relationship did not stop the running of the statute.

B. Repudiation

Several courts held that the discovery rule does not begin to run in the trustee's favor until the trustee unequivocally repudiates the trust and the beneficiary has notice of the repudiation. Flowers v. Collins, 357 S.W.2d 179, 181 (Tex. Civ. App. – Austin 1962, writ dismissed); Manning v. Bonham, 359 S.W.2d 927, 931 (Tex. Civ. App. – Houston 1962, writ ref'd n.r.e.).

These courts have held that there must be a clear, unmistakable and open repudiation of the trust by the trustee, and the beneficiary must know of the repudiation before limitations will run against the beneficiary. Thus, in Langford v. Shamburger, 417 S.W.2d 438, 445 (Tex. Civ. App. – Fort Worth 1967, writ ref'd n.r.e.), the court found that where a trust beneficiary had knowledge for at least four years that trust funds were not bearing interest and trustee failed to invest trust funds, limitations did *not* run against the beneficiary absent the trustee's unequivocal revocation of the trust. The trustee stated unequivocally that he had not repudiated the trust. Similarly, in Hatton v. Turner, 622 S.W.2d 450, 459 (Tex. App. – Tyler 1981, no writ), limitations did not run against the plaintiffs where the defendant repeatedly assured them he was holding property for their benefit as heirs to their parents' estate.

C. Limitations

While no specific statute establishes a limitations period for fiduciary misconduct, the residual four-year period of § 16.051 of the Texas Civil Practice & Remedies Code is applied in most cases.

Some courts, however, apply a two-year tort statute of limitations as set out in § 16.003(a) of the Texas Civil Practice & Remedies Code, classifying breach of fiduciary duty as a "personal injury." See, Estate of

Degley v. Vega, 797 S.W.2d 299, 302 (Tex. App. – Corpus Christi 1990, no writ) (holding that legal malpractice, breach of fiduciary duty, and overreaching are classified as personal injuries under § 16.003(a) and thus the two-year statute of limitations applies); Farias, supra at 471 (breach of fiduciary duty subject to a two-year statute of limitations); Smith v. Chapman, 897 S.W.2d 399, 402 (Tex. App. – Eastland, no writ) (breach of fiduciary duty subject to two-year statute of limitation). In 1945, the Texas Supreme Court indicated a two-year statute was applicable in the case of an express trust. Slay v. Burnett Trust, 187 S.W.2d 337, 394 (Tex. 1945).

The Texas Supreme Court appeared to adopt the four-year limitations period in Peek v. Berry, 184 S.W.2d 272, 275 (Tex. 1944), holding that the four-year statute generally applies to suits arising out of a breach of trust. Unlike Slay, Peek involved a constructive trust. See also, Blum v. Elkins, 369 S.W.2d 810, 814 (Tex. Civ. App. – Waco 1963, no writ) (holding "it is well settled in Texas that where there is a trust relationship, the four-year statute of limitations is applicable."). Some courts have classified fraud, a form of breach of fiduciary duty, as a debt, and thus is governed by the four-year limitations period found in § 16.004 (a)(3) of the Texas Civil Practice & Remedies Code. See, Estate of Degley, supra, at 303; Farias, supra, at 471; and Williams v. Khalat, 802 S.W.2d 651, 658 (Tex. 1990). In Williams v. Kahlaf, the court held that all fraud actions, whether characterized as suits upon debts or equitable actions in which, for example, a plaintiff who sought rescission of a contract, would have a four-year limitations period, regardless of the remedy sought. Several courts have found that breaches of fiduciary duty subsume claims of constructive fraud and therefore are governed by the residual four-year statute of limitations. See, In Re Estate of Herring, 970 S.W.2d 583, 587 (Tex. App. – Corpus Christi 1998, no writ) (where decedent's husband brought suit against estate of deceased wife and her son by a prior marriage for fraudulent transfer of community assets on the son, court found four-year residual statute applied); Perez v. Gulley, 829 S.W.2d 388 (Tex. App. – Corpus Christi 1992, writ denied); Spangler v. Jones, 797 S.W.2d 125 (Tex. App. – Dallas 1990, writ denied).

Thus, it appears that to some extent, statutes of limitations in suits against trustees may be dependent upon the characterization of the wrongdoing, raising questions regarding the applicable limitations period. Representative Hartnett has sponsored HB

2456 which would amend § 16.004(a) of the Civil Practice & Remedies Code to provide a four-year statute of limitation for breaches of fiduciary duty and fraud. As of this writing, the fate of HB 2456 is uncertain.