

**PUBLICATION UPDATE**

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# Dorsaneo, Texas Litigation Guide

Publication 719    Release 94

August 2009

## HIGHLIGHTS

- **Specific performance.** Merely pleading an offer to perform at the time a suit for specific performance is filed does not satisfy or replace the need to demonstrate the ability to perform at the relevant time. See *Digiuseppe v. Lawler*, 269 S.W.3d 588, 600 (Tex. 2008). See Ch. 21, *Damages in Contract*, § 21.02[2]; see also Ch. 51, *Specific Performance*, §§ 51.03[4][a]; 51.200[1][b][ii], [2].
- **Preemption of DTPA.** The Federal Cigarette Labeling and Advertising Act [15 U.S.C. § 1331 et seq.] (FCLAA) does not expressly or implicitly preempt an action by cigarette smokers claiming that a cigarette manufacturer's "light" and "lowered tar and nicotine" advertising claims were misrepresentations that violated the state's unfair trade practices act. See *Altria Group, Inc. v. Good*, — U.S. —, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008). See Ch. 220, *Deceptive Trade Practices*, § 220.01[4][b][i].

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### Pretrial, Trial, and Appellate Practice

Significant cases in the area of pretrial, trial, and appellate practice include:

**Texas Supreme Court Jurisdiction.** In *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008), the Texas Supreme Court held that it has jurisdiction over a case if the court of appeal's decision conflicts with a United States Supreme Court decision. See Ch. 2, *Jurisdiction of Texas courts*, § 2.01[1][a].

**Interlocutory Appeal When Expert Report Not Filed.** In *Badiga v. Lopez*, 274 S.W.3d 681, 684–685 (Tex. 2009), the Texas Supreme Court held that a medical

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provider may pursue an interlocutory appeal of the denial of a motion to dismiss when no expert report has been timely served, whether or not the trial court grants an extension of time. See Ch. 2, *Jurisdiction of Texas courts*, § 2.01[1][b][ii][I].

**Unconscionable to Charge Client Fees for Withdrawal From Case.** In *Lee v. Daniels & Daniels*, 264 S.W.3d 273, 280–282 (Tex. App.—San Antonio 2008, pet. filed), the court of appeal held that it was unconscionable for an attorney to charge a client for fees incurred with withdrawal from representing that client. See Ch. 3, *Professional Responsibility*, § 3.04[2][a].

**Attorney-Client Contract Not Construed Against Attorney.** In *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 469–472 (Tex. App.—Houston [14th Dist.] 2008, pet. filed), the court of appeal held that an ambiguous attorney-client contract is not necessarily construed against the attorney. Courts should look to the surrounding circumstances, such as the client's sophistication and experience, the parties' past practice, and whether the contract terms were negotiated or imposed unilaterally. See Ch. 3, *Professional Responsibility*, § 3.04[2][c].

**Party Must Object When Court Fails to Specify Basis for Sanctions.** In *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex. App.—Austin 2008, no pet.), the court of appeal held that although a trial court abuses its discretion when it fails to specify the basis for Tex. R. Civ. P. 13 sanctions with particularity, the error may be waived if the party fails to object. See Ch. 3, *Professional Responsibility*, § 3.07[1][c][vii].

**Burdens of proof and Attorney's Fees.** In *Shin-Con Development v. I.P. Invest.,*

*Ltd.*, 270 S.W.3d 739, 768 (Tex. App.—Dallas 2008, pet. filed), the court of appeal held that while it is the claimant's burden to plead and prove presentment in order to recover attorney's fees, a claimant may plead generally that all conditions precedent to recovery have been performed. See Ch. 22, *Attorney's Fees*, § 22.20[3][a][i].

**Specific performance.** Merely pleading an offer to perform at the time a suit for specific performance is filed does not satisfy or replace the need to demonstrate the ability to perform at the relevant time. See *Digiuseppe v. Lawler*, 269 S.W.3d 588, 600 (Tex. 2008). See Ch. 21, *Damages in Contract*, § 21.02[2]; See also Ch. 51, *Specific Performance*, §§ 51.03[4][a]; 51.200[1][b][ii], [2].

**Owning Real Property in Texas Likely to Subject One to Texas Jurisdiction.** In *Retamco Operating, Inc. v. Republic Drilling Company*, 278 S.W.3d 333, 52 Tex. Sup. Ct. J. 395 (Tex. 2009), the Texas Supreme Court held that when a nonresident defendant purchases and owns real property in Texas, the nonresident may be subject to personal jurisdiction in Texas. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.04[1][a].

**Forum non conveniens.** The Texas Supreme Court ruled that the factors set out in the forum non conveniens statute applicable to personal injury and wrongful death actions (Tex. Civ. Prac. & Rem. Code § 71.051) are mandatory and control whether the court may dismiss a case in the interest of justice and for the convenience of the parties. See *In re General Elec. Co.*, 271 S.W.3d 681, 685–687 (Tex. 2008). See Ch. 61, *Venue*, § 61.30[3][b].

**Statutes of repose.** The San Antonio Court of Appeals held that the statute of repose applicable to health care liability

claims (Tex. Civ.Prac. & Rem. Code § 74.251(b)) was invalid as applied in a particular case because application of the statute violated the open courts provision of the Texas Constitution. See *Rankin v. Methodist Healthcare Sys.*, 261 S.W.3d 93, 97–103 (Tex. App.—San Antonio 2008, no pet. h.). See Ch. 72, *Limitation of Actions*, § 72.03[3][d].

**Intervention.** The Texas Supreme Court clarified the procedures a court must follow in ruling on a motion to strike an intervention. See *In re Union Carbide Corp.*, 273 S.W.3d 152, 156 (Tex. 2008). See Ch. 82, *Intervention*, § 82.10[4].

**Appellate jurisdiction.** The Texas Supreme Court reaffirmed that its conflicts jurisdiction extends to cases in which there is a conflict between a decision of a court of appeals and a decision of the U.S. Supreme Court. See *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 665–667 (Tex. 2008). See Ch. 151, *Appellate Proceedings in Supreme Court*, § 151.02[2][a][ii][B].

#### **Business Entities and Relationships**

Significant cases in the area of business entities and relationships include:

**Claims not governed by collective bargaining agreement.** Firefighters' claims against the city that employed them that the city had not paid them seniority pay when serving temporarily in higher classifications were not governed by their collective bargaining agreement and the administrative remedies within that agreement did not apply. See *Lowell v. City of Baytown*, 264 S.W.3d 31, 38 (Tex. App.—Houston [1st Dist.] 2007, no pet. h.). See Ch. 202, *Labor Unions*, § 202.01[2][d][iii].

**Arbitration under U-4.** The employer is an intended third-party beneficiary of the Uniform Application for Securities Indus-

try Registration or Transfer (U-4), executed by its employees, and may compel arbitration in accordance with the terms of that agreement, even though it is not a signatory to that agreement. See *In re Next Financial Group, Inc.*, 271 S.W.3d 263, 267 (Tex. 2008). See Ch. 203, *Employer-Employee Relations*, § 203.46.

**Arbitration agreement binding on survivors.** An arbitration provision in an employment agreement requires an employee's wrongful death beneficiaries to arbitrate their wrongful death claims against the employer, even though they did not sign the agreement. See *In re Labatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009) and *In re Jindal Saw Ltd.*, 264 S.W.3d 755 (Tex. 2009). See Ch. 203, *Employer-Employee Relations*, § 203.48[8].

**Title VII retaliation claim.** An employee can “oppose” discrimination in the workplace and, thus, come under the protection of the “opposition clause” by responding to someone else's question about the discrimination. The “opposition clause” protects not only an employee who reports discrimination on his or her own initiative, but also one who reports discrimination when questioned by the employer. See *Crawford v. Metropolitan Government of Nashville*, — U.S. —, 129 S. Ct. 846, 850–851, 172 L. Ed. 2d 650 (2009). See Ch. 203A, *Employment Litigation*, § 203A.08[2][a].

**Section 1983.** Municipal liability for a civil rights violation under Section 1983 is based on causation, not respondeat superior. The fact that the violation was committed by a municipality's employee or agent is not sufficient to hold the municipality liable. See *Bolton v. City of Dallas*, Tex., 541 F.3d 545, 548 (5th Cir. [Tex.] 2008). See Ch. 203A, *Employment Litiga-*

tion, § 203A.12[1][a].

**Uniformed Services Employment and Reemployment Rights Act.** The Act does not confer jurisdiction on federal courts to hear an action by a person against a state as the employer because the Act, which provides that such an action may be brought in a state court of competent jurisdiction, does not evince an unmistakably clear intention by Congress to abrogate state sovereign immunity. See *McIntosh v. Partridge*, 540 F.3d 315, 319 (5th Cir. [Tex.] 2008). See Ch. 203A, *Employment Litigation*, § 203A.17.

### **Commercial Litigation**

Significant cases in the area of commercial litigation include:

**Undue influence.** The elements of undue influence may be proved by circumstantial, as well as direct, evidence, but the exertion of undue influence cannot be inferred by opportunity alone. See *Turner v. Hendon*, 269 S.W.3d 243, 253 (Tex. App.—El Paso 2008, pet. denied). See Ch. 210A, *Contracts*, § 210A.04[3][d].

**Essential contract terms specified.** A written retainer agreement for an attorney's representation of a client in a civil appeal was sufficiently clear to demonstrate a meeting of the minds between the parties as to all essential contract terms, as required for a binding contract, even though the agreement did not specify an exact total price for the attorney's services. See *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008). See Ch. 210A, *Contracts*, § 210A.05[1][b].

**Ambiguous contract not construed against drafter.** An ambiguity in a contingency fee agreement regarding whether an attorney contracted for himself individually or for his law firm was not construed against the attorney as the drafter in the

former client's lawsuit seeking a declaration that it did not owe the attorney the contingency fees, when the client was sophisticated and experienced and the agreement was not presented to the client on a take-it-or-leave-it basis. See *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 267 S.W.3d 454, 467-468 (Tex. App.—Houston [14th Dist.] 2008, pet. filed). See Ch. 210A, *Contracts*, § 210A.28[2].

**Preemption of DTPA.** The Federal Cigarette Labeling and Advertising Act [15 U.S.C. § 1331 et seq.] (FCLAA) does not expressly or implicitly preempt an action by cigarette smokers claiming that a cigarette manufacturer's "light" and "lowered tar and nicotine" advertising claims were misrepresentations that violated the state's unfair trade practices act. See *Altria Group, Inc. v. Good*, — U.S. —, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008). See Ch. 220, *Deceptive Trade Practices*, § 220.01[4][b][i].

### **Real Estate Litigation**

Significant cases in the area of real estate litigation include:

**Specific Performance.** In *DiGiuseppe v. Lawler*, 269 S.W.3d 588 (Tex. 2008), the Texas Supreme Court held that a prospective purchaser under a real estate sales contract must plead and prove that the plaintiff was ready, willing, and able to perform at time the contract was to have closed in order to obtain specific performance, even if tender of performance was made or was excused by the seller's repudiation of the contract. See Ch. 252, *Real Estate Sales Contract*, §§ 252.20, 252.51, 252.100[1]. Two companion cases, both titled *Exxon Corp. v. Emerald Oil & Gas Co.*, 52 Tex. Sup. Ct. J. 462 (Tex. 2009) and 52 Tex. Sup. Ct. J. 467 (Tex. 2009), in which the Texas Supreme Court applied

Tex. Nat. Res. Code § 85.321, which provides that a person who suffers property damage due to an oil and gas operator's violation of a conservation law or a Railroad Commission rule or order may sue for damages and other relief, and held: (1) the statute creates a private cause of action for an owner whose property is damaged by one of the specified violations; (2) the claim is available only to a plaintiff who owns an interest in the damaged property at the time of the injury, so that a subsequent lessee who had no interest in the minerals at the time of a prior operator's violation does not have standing to sue; (3) the claim is subject to the two-year limitations period of Tex. Civ. Prac. & Rem. Code 16.003(a); (4) the claim accrues when the owner is on notice of the injury and has the opportunity to seek a judicial remedy, so when the undisputed evidence showed that the royalty interest owners had actual knowledge of the injury more than two years before bringing suit, the action was barred. See Ch. 283, *Oil and Gas Leases*, §§ 283.03[5][c], 283.18.

**Polling Agreement.** In *Wagner & Brown v. Turner*, 52 Tex. Sup. Ct. J. 130 (Tex. 2008), the Texas Supreme Court held that when lands themselves are pooled, not merely the oil and gas leases on those lands, the termination of a lease of an owner within the unit does not terminate that land's inclusion in the unit unless the polling agreement so provides. See Ch. 283, *Oil and Gas Leases*, § 283.03[11].

**Condemnation actions and Venue.** In *re Transcontinental Realty Investors*, 271 S.W.3d 270 (Tex. 2008) (per curiam), the Texas Supreme Court held that: (1) Tex. Prop. Code § 21.013(a) governing venue of a condemnation action is a mandatory venue statute, and therefore enforceable by mandamus; and (2) if a corporation is the owner of the condemned property, it may

require suit in its county of residence when part of the property is located in that county. See Ch. 261, *Condemnation*, §§ 261.02[1], 261.100[1].

**Claim for Inverse Condemnation.** In *Southwestern Bell Tel., L.P. v. Harris County Toll Road Auth.*, 52 Tex. Sup. Ct. J. 579 (Tex. 2009), the Texas Supreme Court held that when a utility has a mere statutory right of access to a public right-of-way, but not a vested property right such as an easement, the utility does not have a claim for inverse condemnation when required to relocate its facilities within the right-of-way. See Ch. 261, *Condemnation*, § 261.03[1].

#### **Personal Injury Litigation.**

Significant cases in the area of personal injury litigation include:

**Indemnification.** In *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444 (Tex. 2008), the Texas Supreme Court once again applied the indemnity provisions of Chapter 82 of the Civil Practices and Remedies Code and held: (1) an importer that merely accepts and distributes a product, without any involvement in designing or making the product, is not a "manufacturer" of that product; (2) the common law "apparent manufacturer" doctrine cannot be applicable because it is inconsistent with the statutory definition of "manufacturer" found in Tex. Civ. Prac. & Rem. Code § 82.001(4); and (3) a mere importer of a product cannot be liable for statutory indemnity on the theory that the importer and the actual manufacturer of the product constitute a "single business enterprise". See Ch. 291, *Proportionate Responsibility; Contribution and Indemnity*, § 291.05[2][c]; See also Ch. 320, *Products Liability*, § 320.10[2].

**Worker's Compensation.** In *Entergy Gulf States, Inc. v. Summers*, 52 Tex. Sup.

Ct. J. 511 (Tex. 2009), the Texas Supreme Court held that when a premises owner procures work on its property and provides workers' compensation benefits to its contractors, the owner is a "general contractor" under Tex. Lab. Code § 406.121(1), and was therefore a statutory employer that could invoke the exclusive remedy provision of the worker's compensation laws to bar a negligence suit by an employee of a contractor. See Ch. 340, *Worker's Compensation*, § 340.03[6].

**Statutory Employer under Worker's Compensation Laws.** In *HCBeck, Ltd. v. Rice*, 52 Tex. Sup. Ct. J. 555 (Tex. 2009), the Texas Supreme Court held that when a general contractor makes a contractual commitment to provide worker's compensation coverage to a subcontractor's employees, it "provides" that coverage under Tex. Lab. Code § 406.123(a), (e) and is a statutory employer even if the contractor does not pay for the coverage. See Ch. 340, *Worker's Compensation*, § 340.03[6].

**Mandamus Review and Expert Reports.** In *Badiga v. Lopez*, 274 S.W.3d 681 (Tex. 2009), the Texas Supreme Court held that when a trial court denies a motion to dismiss for the failure to serve a timely pretrial expert report in a medical malpractice action, the order is subject to interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 51.014(a)(9), and the court's erroneous inclusion of an extension order does not insulate the order from appellate review. Moreover, *In re Watkins*, 52 Tex. Sup. Ct. J. 309 (Tex. 2009) held that because an interlocutory appeal is available under these circumstances, it is the exclusive avenue of review, and mandamus is not available to review an unauthorized extension order. See Ch. 321, *Medical Malpractice*, § 321.15[6], [7].

**Insurance Liability Cap.** In *Phillips v.*

*Bramlett*, 52 Tex. Sup. Ct. J. 422 (Tex. 2009), the Texas Supreme Court applied the former insurance liability cap for medical malpractice claims under repealed art. 4590i, and held the former law (1) does not lift the damages cap as to the claims against the insured, but (2) does expose the insurer to liability in excess of the cap when the insurer violated the *Stowers* doctrine See Ch. 321, *Medical Malpractice*, § 321.13[4].

**Default Judgment and Expert Reports.** In *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669 (Tex. 2008) (per curiam), the Texas Supreme Court applied the pretrial expert report requirement for medical malpractice claims in the context of a default judgment and held that: (1) a report is not required as to a defendant who has effectively admitted the merit of the claims through default judgment; but (2) if the default judgment is set aside, the time for serving the report is tolled for the time that the judgment was in effect, and the period begins to run again after the default judgment is set aside and the defendant serves an answer. See Ch. 321, *Medical Malpractice*, § 321.15[1][a].

**"Eight Corners" Rule.** In *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 52 Tex. Sup. Ct. J. 348 (Tex. 2009), Texas Supreme Court held that the "eight corners" rule applied to determine an insurer's duty to defend applies not only in the context of the insurer's efforts to *refute* the duty, but also to the insured's efforts to *trigger* the duty, so that an insured may not offer extrinsic evidence that contradicts the pleadings in an attempt to make the claims fall within that duty. See Ch. 341, *Liability Insurance*, § 341.04[3][b].

**Notice of a claim.** In *Prodigy Communications Corp. v. Agricultural Excess & Surplus Ins. Co.*, 52 Tex. Sup. Ct. J. 475 (Tex. 2009), which concerned a claims-

made insurance policy requiring notice of the claim both within 90 days of the end of the policy, and “as soon as practicable” the Texas Supreme Court held that if notice was timely, but the insurer intends to deny coverage on the ground that notice was not provided “as soon as practicable,” the insurer must show prejudice from the insured’s delay in providing notice. See Ch. 341, *Liability Insurance*, § 341.05[1][b].

**Distinction between single insurance policy and separate policies.** In *Progressive Cty. Mutual Ins. Co. v. Kelley*, 52 Tex. Sup. Ct. J. 488 (Tex. 2009) (per curiam), the Texas Supreme Court held that an ambiguity as to whether multiple documents constituted a single insurance policy or separate policies required resolution by the trier of fact. See Ch. 341, *Liability Insurance*, § 341.06[2].

**Waiver of objections to compensability.** In *Southwestern Bell Tel. Co. v. Mitchell*, 52 Tex. Sup. Ct. J. 202 (Tex. 2008), the Texas Supreme Court overruled its own decision in *Continental Cas. Co. v. Downs*, 81 S.W.3d 803 (Tex. 2002), and held that a worker’s compensation carrier’s failure to contest compensability of an injury within initial 15-day “pay or dispute” deadline of Tex. Lab. Code § 409.021(a) does not waive the carrier’s objections to compensability irrespective of the date of the injury or the claim. See Ch. 340, *Worker’s Compensation*, § 340.21.

**Uninsured Motorist Coverage.** In *United States Fidelity & Guar. Co. v. Goudeau*, 272 S.W.3d 603 (Tex. 2009), an uninsured motorist case in which the Texas Supreme Court held that: (1) a driver who has exited the vehicle but then comes into contact with it again due to the force of a collision is not “occupying” the vehicle; and (2) when an insurer appears in different capacities in the same action to represent

competing interests, an admission of coverage made by the insurer is binding only in the specific capacity in which it is made. See Ch. 342, *Uninsured Motorist Coverage*, § 342.02[4].

**Wrongful death claims and arbitration clauses.** In *In re Labatt Food Serv., L.P.*, 52 Tex. Sup. Ct. J. 352 (Tex. 2009), the Texas Supreme Court held that due to the derivative nature of wrongful death claims, a valid arbitration clause between a decedent and the defendant requires arbitration of the wrongful death claims of the decedent’s beneficiaries. See Ch. 292, *Death Actions*, § 292.02[1]; See also Ch. 340, *Worker’s Compensation*, § 340.41.

**“Special Defect” under the Tort Claims Act.** In *Tex. DOT v. York*, 52 Tex. Sup. Ct. J. 175 (Tex. 2008) (per curiam), the Texas Supreme Court held that a layer of loose gravel on a road is not similar to an obstruction or excavation and is therefore not a “special defect” under the Tort Claims Act as a matter of law. See Ch. 293, *Claims Against Governmental Entities*, § 293.10[5][g].

**Discharge of an owner’s duty to invitee.** In *TXI Operations, L.P. v. Perry*, 52 Tex. Sup. Ct. J. 388 (Tex. 2008), a premises liability case in which the Texas Supreme Court held that an adequate warning of a condition or the risk posed by a condition may discharge the owner’s duty to an invitee, provided it warns of the specific risk or condition involved, and a general warning to invitee to be wary cannot be sufficient to discharge the owner’s duty as a matter of law. See Ch. 310, *Premises Liability*, § 310.05[2].

**Breach of a settlement agreement.** In *Ford Motor Co. v. Castillo*, 52 Tex. Sup. Ct. J. 570 (Tex. 2009), the Texas Supreme Court agreed that a claim of breach of a settlement agreement that resolved a prior

action may be made by motion in the same cause number as the original case; however, the motion is not sufficient to decide the claim because breach of a settlement requires pleading and proof like any other breach of contract claim. See Ch. 102, *Settlement*, § 102.04[2].

**Reliance and fraud.** In *Exxon Corp. v. Emerald Oil & Gas Co.*, 52 Tex. Sup. Ct. J. 467 (Tex. 2009), the Texas Supreme Court held that when an oil and gas company abandoning a lease knew that the royalty owners were actively seeking a replacement lessee, and the company received offer to purchase the lease interest, there was an “especial likelihood” that parties would rely on the company’s required reports to state officials, and sufficient evidence of the intent to induce action to support a fraud claim. See Ch. 336, *Fraud*, §§ 336.04[4], 336.06[1].

**Malicious prosecution and bankruptcy.** In *Graber v. Fuqua*, 52 Tex. Sup. Ct. J. 249 (Tex. 2009), the Texas Supreme Court held that the institution of an adversary proceeding in a federal bankruptcy action may be the basis of a later state law claim of malicious prosecution of that proceeding, and federal bankruptcy law does not preclude or preempt such a claim. See Ch. 332, *Malicious Prosecution*, § 332.02.

#### **Family Code Litigation**

Significant cases in the area of family code litigation include:

**Characterization.** When a corporation is dissolved, distributions received in exchange for the cancellation of stock retain the character of the stock. See Ch. 363, *Division of Property*, § 363.57[3].

**Valuation.** Texas courts of appeals have taken different approaches to the task of valuing a divorcing spouse’s partnership interest in a professional partnership. See

Ch. 363, *Division of Property*, § 363.57[4].

**Transfer.** Family Code Section 155.201(b) does not require that the children *currently reside* in the other county when the modification suit is filed, only that they *have resided* there for six months or longer. See Ch. 370, *SAPCR Procedures*, § 370.05[1][c].

**Prevention of International Child Abduction.** A court of appeals addresses the findings necessary for imposition of prevention measures under the statutes designed to prevent international child abduction by a parent. See Ch. 370, *SAPCR Procedures*, § 370.14[2], [3].

**UCCJEA.** A high level of physical presence in Texas is not necessary to satisfy the significant-connection standard for jurisdiction under the UCCJEA. See Ch. 374, *Interstate Issues in SAPCR Cases*, § 374.03[1][c].

**Parentage.** Only a signatory may initiate a proceeding challenging the validity of an acknowledgment of paternity. See Ch. 380, *Paternity*, § 380.03[4].

**Termination of parental rights.** For purposes of the statute authorizing termination on the ground that the parent’s mental illness renders the parent unable to care for the child, DFPS has made reasonable efforts to return the child to the parent if it prepares a service plan designed to help the parent regain custody of his or her child. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.03[2][a].

#### **Probate Code Litigation**

Significant cases in the area of probate code litigation include:

**Appealable orders.** An order denying an individual’s application to serve as independent executor is a final and appealable order because it is a determination of a substantial right. See *In re Estate of Boren*,



268 S.W.3d 841, 845–846 (Tex. App.—Texarkana 2008, pet. filed). See Ch. 393, *Appointment of Personal Representatives*, § 393.09[2][b].

**Disclaimers.** Until disclaimers are properly filed, they remain revocable. See *In re Estate of Boren*, 268 S.W.3d 841, 849 (Tex. App.—Texarkana 2008, pet. filed). See Ch. 394, *Will Construction*, § 394.06[1][b].

**Family settlement agreement.** The beneficiaries may enter into an agreement not to probate the will and to divide the assets of the estate in a different manner than that provided by the will. See *In re Estate of Webb*, 266 S.W.3d 544, 550 (Tex. App.—Fort Worth 2008, no pet. h.). See Ch. 394, *Will Construction*, § 394.06[6].

**Family allowance.** Life insurance proceeds and the husband's retirement benefits that became the wife's separate property on

his death were not "separate property," precluding a family allowance if the survivor has adequate separate property, even though the proceeds exceeded the requested allowance. See *Estate of Wolfe*, 268 S.W.3d 780, 783 (Tex. App.—Fort Worth 2008, no pet. h.). See Ch. 402, *Exemptions and Allowances*, § 402.21[2].

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Publication 719 Release 94

August 2009

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<input type="checkbox"/>	13-49 thru 13-50.1 . . . . .	13-49 thru 13-50.1

## VOLUME 2

### Revision

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	20-46.25 thru 20-50.2(1). . . . .	20-47 thru 20-50.2(11)
<input type="checkbox"/>	21-17 thru 21-19 . . . . .	21-17 thru 21-20.1
<input type="checkbox"/>	21-49 thru 21-50.5 . . . . .	21-49 thru 21-50.5
<input type="checkbox"/>	21A-15 thru 21A-17. . . . .	21A-15 thru 21A-17
<input type="checkbox"/>	22-9 thru 22-29 . . . . .	22-9 thru 22-30.1
<input type="checkbox"/>	22-69 thru 22-73 . . . . .	22-69 thru 22-74.1
<input type="checkbox"/>	22-111 thru 22-115 . . . . .	22-111 thru 22-116.1
<input type="checkbox"/>	30-17. . . . .	30-17 thru 30-18.1
<input type="checkbox"/>	31-27 thru 31-31 . . . . .	31-27 thru 31-31
<input type="checkbox"/>	31-65. . . . .	31-65
<input type="checkbox"/>	31-109 . . . . .	31-109 thru 31-110.1
<input type="checkbox"/>	32-13 thru 32-19 . . . . .	32-13 thru 32-20.1
<input type="checkbox"/>	32-31 thru 32-42.1 . . . . .	32-31 thru 32-42.1
<input type="checkbox"/>	32-51 thru 32-57 . . . . .	32-51 thru 32-57
<input type="checkbox"/>	32-127 . . . . .	32-127 thru 32-128.1

Check  
As  
Done

Remove Old  
Pages Numbered

Insert New  
Pages Numbered

### VOLUME 3

#### Revision

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	42-39. . . . .	42-39
<input type="checkbox"/>	44-9 thru 44-62.5 . . . . .	44-9 thru 44-62.5
<input type="checkbox"/>	44-135 thru 44-139 . . . . .	44-135 thru 44-139
<input type="checkbox"/>	44-171 . . . . .	44-171 thru 44-173
<input type="checkbox"/>	45-5 thru 45-28.1 . . . . .	45-5 thru 45-28.1
<input type="checkbox"/>	45-81 thru 45-83 . . . . .	45-81 thru 45-84.1
<input type="checkbox"/>	46-7 . . . . .	46-7
<input type="checkbox"/>	46-17. . . . .	46-17
<input type="checkbox"/>	46-41 thru 46-45 . . . . .	46-41 thru 46-45
<input type="checkbox"/>	46-55. . . . .	46-55

### VOLUME 4

#### Revision

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<input type="checkbox"/>	51-49 thru 51-53 . . . . .	51-49 thru 51-53
<input type="checkbox"/>	51-75. . . . .	51-75

### VOLUME 5

#### Revision

<input type="checkbox"/>	Title page. . . . .	Title page
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<input type="checkbox"/>	61-65 thru 61-66.3 . . . . .	61-65 thru 61-66.4(1)
<input type="checkbox"/>	62-25 thru 62-33 . . . . .	62-25 thru 62-33
<input type="checkbox"/>	72-57. . . . .	72-57 thru 72-58.1
<input type="checkbox"/>	72-97 thru 72-99 . . . . .	72-97 thru 72-99
<input type="checkbox"/>	82-5 . . . . .	82-5
<input type="checkbox"/>	82-17. . . . .	82-17
<input type="checkbox"/>	82-55. . . . .	82-55 thru 82-57

### VOLUME 6

#### Revision

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	90-19 thru 90-21 . . . . .	90-19 thru 90-21

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<input type="checkbox"/>	90-31 thru 90-32.1 . . . . .	90-31 thru 90-32.1
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<input type="checkbox"/>	98-43 thru 98-44.5 . . . . .	98-43 thru 98-44.5

**VOLUME 7**

**Revision**

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<input type="checkbox"/>	101-11 . . . . .	101-11
<input type="checkbox"/>	101-37 thru 101-38.3 . . . . .	101-37 thru 101-38.3
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<input type="checkbox"/>	113-31 . . . . .	113-31
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<input type="checkbox"/>	114-73 thru 114-77 . . . . .	114-73 thru 114-77

**VOLUME 8**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	120-47 thru 120-49 . . . . .	120-47 thru 120-49
<input type="checkbox"/>	121-15 . . . . .	121-15
<input type="checkbox"/>	123-31 . . . . .	123-31 thru 123-32.1

**VOLUME 9**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	131-39 . . . . .	131-39
<input type="checkbox"/>	132-25 . . . . .	132-25
<input type="checkbox"/>	132-139 . . . . .	132-139

**VOLUME 10**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	140-19 . . . . .	140-19
<input type="checkbox"/>	140-34.5 . . . . .	140-34.5

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<input type="checkbox"/>	151-119 . . . . .	151-119
<input type="checkbox"/>	152-23 . . . . .	152-23 thru 152-24.1
<input type="checkbox"/>	152-40.5 . . . . .	152-40.5
<input type="checkbox"/>	152-61 . . . . .	152-61 thru 152-62.1
<input type="checkbox"/>	153-27 . . . . .	153-27 thru 153-28.1
<input type="checkbox"/>	154-19 thru 154-20.1 . . . . .	154-19 thru 154-20.1

**VOLUME 11**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	165-11 thru 165-13 . . . . .	165-11 thru 165-14.1

**VOLUME 13**

**Revision**

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<input type="checkbox"/>	203-53 . . . . .	203-53
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<input type="checkbox"/>	203A-57 thru 203A-83 . . . . .	203A-57 thru 203A-84.5
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<input type="checkbox"/>	205-29 thru 205-35 . . . . .	205-29 thru 205-35

**VOLUME 14**

**Revision**

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<input type="checkbox"/>	210A-11 thru 210A-59. . . . .	210A-11 thru 210A-60.5
<input type="checkbox"/>	210A-77 thru 210A-95 . . . . .	210A-77 thru 210A-96.1
<input type="checkbox"/>	210A-105 thru 210A-128.1 . . . . .	210A-105 thru 210A-128.3
<input type="checkbox"/>	210A-141 thru 210A-142.1 . . . . .	210A-141 thru 210A-142.1

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<input type="checkbox"/>	210A-155. . . . .	210A-155
<input type="checkbox"/>	213-5. . . . .	213-5 thru 213-6.1
<input type="checkbox"/>	214-9 thru 214-11. . . . .	214-9 thru 214-11
<input type="checkbox"/>	216-5 thru 216-23. . . . .	216-5 thru 216-24.1
<input type="checkbox"/>	220-11 . . . . .	220-11
<input type="checkbox"/>	220-33 thru 220-35 . . . . .	220-33 thru 220-35
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<input type="checkbox"/>	220-67 thru 220-71 . . . . .	220-67 thru 220-71
<input type="checkbox"/>	220-80.5 . . . . .	220-80.5

**VOLUME 15**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	230-29 thru 230-31 . . . . .	230-29 thru 230-31

**VOLUME 16**

**Revision**

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<input type="checkbox"/>	240-45 . . . . .	240-45 thru 240-46.1
<input type="checkbox"/>	242-37 . . . . .	242-37

**VOLUME 17**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	252-3 thru 252-4.1 . . . . .	252-3 thru 252-4.1
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<input type="checkbox"/>	252-73 . . . . .	252-73
<input type="checkbox"/>	252-81 thru 252-83 . . . . .	252-81 thru 252-84.3
<input type="checkbox"/>	252-107 thru 252-109 . . . . .	252-107 thru 252-109
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<input type="checkbox"/>	254-19 thru 254-28.3 . . . . .	254-19 thru 254-28.1
<input type="checkbox"/>	254-63 thru 254-64.1 . . . . .	254-63 thru 254-64.1
<input type="checkbox"/>	255-19 thru 255-24.1 . . . . .	255-19 thru 255-24.1
<input type="checkbox"/>	255-33 thru 255-34.3 . . . . .	255-33 thru 255-34.4(1)
<input type="checkbox"/>	255-55 thru 255-60.1 . . . . .	255-55 thru 255-60.1
<input type="checkbox"/>	257-19 . . . . .	257-19
<input type="checkbox"/>	257-25 thru 257-29 . . . . .	257-25 thru 257-30.1
<input type="checkbox"/>	260-7. . . . .	260-7 thru 260-8.1
<input type="checkbox"/>	260-37 . . . . .	260-37
<input type="checkbox"/>	260-49 . . . . .	260-49 thru 260-50.1



<b>Check As Done</b>	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	260-54.5 . . . . .	260-54.5 thru 260-54.6(1)
<input type="checkbox"/>	260-57 thru 260-58.1 . . . . .	260-57 thru 260-58.1
<input type="checkbox"/>	260-65 . . . . .	260-65 thru 260-66.1
<input type="checkbox"/>	260-74.9 . . . . .	260-74.9 thru 260-74.10(1)
<input type="checkbox"/>	260-75 . . . . .	260-75
<input type="checkbox"/>	261-23 . . . . .	261-23 thru 261-24.1
<input type="checkbox"/>	261-37 thru 261-41 . . . . .	261-37 thru 261-42.1
<input type="checkbox"/>	261-66.9 thru 261-66.11 . . . . .	261-66.9 thru 261-66.13
<input type="checkbox"/>	261-68.5 thru 261-68.6(2)(a) . . . . .	261-68.5 thru 261-68.6(2)(a)
<input type="checkbox"/>	261-73 thru 261-74.1 . . . . .	261-73 thru 261-74.1

**VOLUME 18**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	270-17 thru 270-18.1 . . . . .	270-17 thru 270-18.1
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<input type="checkbox"/>	271-43 . . . . .	271-43 thru 271-44.1
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<input type="checkbox"/>	282-82.15 thru 282-87 . . . . .	282-83 thru 282-88.3
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<input type="checkbox"/>	283-33 . . . . .	283-33 thru 283-34.1
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<input type="checkbox"/>	283-87 thru 283-88.3 . . . . .	283-87 thru 283-88.4(1)
<input type="checkbox"/>	283-137 thru 283-143 . . . . .	283-137 thru 283-141
<input type="checkbox"/>	285-11 thru 285-12.1 . . . . .	285-11 thru 285-12.1
<input type="checkbox"/>	285-25 thru 285-26.3 . . . . .	285-25 thru 285-26.3
<input type="checkbox"/>	285-37 . . . . .	285-37 thru 285-38.1

**VOLUME 19**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	290-77 thru 290-85 . . . . .	290-77 thru 290-83
<input type="checkbox"/>	291-3 thru 291-13 . . . . .	291-3 thru 291-14.1
<input type="checkbox"/>	291-23 thru 291-30.1 . . . . .	291-23 thru 291-30.3
<input type="checkbox"/>	291-57 thru 291-66.5 . . . . .	291-57 thru 291-66.9
<input type="checkbox"/>	291-135 . . . . .	291-135 thru 291-136.1
<input type="checkbox"/>	292-5 thru 292-8.1 . . . . .	292-5 thru 292-8.1

<b>Check As Done</b>	<i>Remove Old Pages Numbered</i>	<i>Insert New Pages Numbered</i>
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<input type="checkbox"/>	293-41 thru 293-42.1 . . . . .	293-41 thru 293-42.1
<input type="checkbox"/>	293-61 thru 293-77 . . . . .	293-61 thru 293-78.1
<input type="checkbox"/>	293-93 thru 293-94.1 . . . . .	293-93 thru 293-94.1
<input type="checkbox"/>	293-129 thru 293-136.4(3) . . . . .	293-129 thru 293-136.4(9)
<input type="checkbox"/>	293-177 . . . . .	293-177 thru 293-178.1
<input type="checkbox"/>	310-21 thru 310-22.3 . . . . .	310-21 thru 310-22.3
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<input type="checkbox"/>	310-109 thru 310-110.1 . . . . .	310-109 thru 310-110.1
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**VOLUME 20**

**Revision**

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<input type="checkbox"/>	320-3. . . . .	320-3 thru 320-4.1
<input type="checkbox"/>	320-57 thru 320-64.13. . . . .	320-57 thru 320-64.19
<input type="checkbox"/>	320-117 . . . . .	320-117 thru 320-118.1
<input type="checkbox"/>	321-13 thru 321-21 . . . . .	321-13 thru 321-22.3
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<input type="checkbox"/>	321-53 thru 321-54.3 . . . . .	321-53 thru 321-54.3
<input type="checkbox"/>	321-75 thru 321-104.5. . . . .	321-75 thru 321-104.15
<input type="checkbox"/>	321-179 thru 321-181 . . . . .	321-179 thru 321-181
<input type="checkbox"/>	322-13 thru 322-32.1 . . . . .	322-13 thru 322-32.1
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<input type="checkbox"/>	335A-57 thru 335A-71 . . . . .	335A-57 thru 335A-71
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**VOLUME 21**

**Revision**

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<input type="checkbox"/>	345-93 thru 345-94.3 . . . . .	345-93 thru 345-94.3
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<input type="checkbox"/>	351-41 thru 351-43 . . . . .	351-41 thru 351-44.1
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<input type="checkbox"/>	351-50.19 thru 351-55. . . . .	351-51 thru 351-56.1
<input type="checkbox"/>	351-67 thru 351-73 . . . . .	351-67 thru 351-73

**VOLUME 22**

**Revision**

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<input type="checkbox"/>	363-55 thru 363-57 . . . . .	363-55 thru 363-57
<input type="checkbox"/>	363-121 thru 363-123 . . . . .	363-121 thru 363-124.1
<input type="checkbox"/>	370-9 thru 370-13. . . . .	370-9 thru 370-14.1
<input type="checkbox"/>	370-25 thru 370-28.3 . . . . .	370-25 thru 370-28.3
<input type="checkbox"/>	370-59 thru 370-61 . . . . .	370-59 thru 370-62.9
<input type="checkbox"/>	371A-29 thru 371A-43 . . . . .	371A-29 thru 371A-43

**VOLUME 23**

**Revision**

<input type="checkbox"/>	Title page. . . . .	Title page
<input type="checkbox"/>	372-91 thru 372-92.1 . . . . .	372-91 thru 372-92.2(1)

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<input type="checkbox"/>	373-61 thru 373-63 . . . . .	373-61 thru 373-64.1
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<input type="checkbox"/>	381-15 thru 381-23 . . . . .	381-15 thru 381-23
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**VOLUME 24**

**Revision**

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<input type="checkbox"/>	392-61 . . . . .	392-61
<input type="checkbox"/>	392-75 . . . . .	392-75
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<input type="checkbox"/>	410-36.3 . . . . .	410-36.3
<input type="checkbox"/>	415-33 . . . . .	415-33

**VOLUME 25**

**Revision**

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<input type="checkbox"/>	421-7 thru 421-9 . . . . .	421-7 thru 421-9
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<input type="checkbox"/>	422-7. . . . .	422-7
<input type="checkbox"/>	422-29 . . . . .	422-29
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