EVIDENTIARY ISSUES IN PROBATE AND FIDUCIARY LITIGATION

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I. INTRODUCTION. This Article discusses selected rules of evidence that arise in probate, guardianship and fiduciary litigation. The areas covered include authentication, relevance, personal knowledge, hearsay, the “Dead Man’s Statute”, best evidence rule, expert testimony, judicial notice, and other miscellaneous matters. This article does not address the discovery or presentation of evidence or attempt to be comprehensive, but is intended only to alert and inform probate attorneys regarding some of the common evidentiary issues involved in the practice area.

II. DEFINITIONS.

TRE refers to the Texas Rules of Evidence (effective 3/1/98).

TRCP refers to the Texas Rules of Civil Procedure.

PC refers Texas Probate Code.

CPRC refers to the Texas Civil Practice and Remedies Code.

III. APPLICATION OF TEXAS RULES OF EVIDENCE.

A. PC §§ 22, 649. In proceedings arising under the Probate Code, including decedent’s estates and guardianships, the rules relating to witnesses and evidence that govern in the District Court shall apply so far as practicable. Pursuant to these provisions, the Texas Rules of Evidence generally apply to probate proceedings and litigation in the probate courts and other courts exercising probate jurisdiction. See also TRE §101(b)(“Except as otherwise provided by statute, these rules [of evidence] govern civil and criminal proceedings in all courts of Texas, except small claims courts.”).

B. Exception for Testimony of Witness to Will by Deposition on Written Questions. PC § 22 and § 84(d) prescribe a special procedure to obtain the deposition testimony of a subscribing witness to establish a will where there is no will contest. In such case, service of interrogatories may be had by posting notice of intention to take a deposition by written questions of the witness must be filed with a copy of the deposition questions for a period of ten (10) days. At the expiration of ten (10) days, the Clerk will issue a commission may issue for taking the depositions. The judge may file cross-interrogatories where no one appears, if desired. The commission,
containing the deposition questions and instructions for taking the deposition, is sent to a notary or court reporter to ask the questions and record the answers. The sworn answers must be returned to the Clerk’s Office and then may be used in the hearing to establish the Will. A sample Notice of Intention to Apply For Commission to Take Written Deposition, with questions, is attached as Appendix A.

**Query:** Could this provision be used to conduct discovery in administrations where there is no pending contested probate proceeding or lawsuit? Possibly, but TRCP 202, Depositions Before Suit or to Investigate Claims, may be more appropriate.

### IV. AUTHENTICATION.

#### A. TRE 901. Authentication is the process required to show that something is genuine. Authentication is a condition precedent to the admissibility of any evidence. TRE 901(a). No evidence is admissible unless it has been authenticated. The authentication requirement is satisfied by “sufficient” evidence to show that the matter in question is what its proponent claims it to be. *Matter of G.F.O.*, 874 S.W.2d 729, 731 (Tex. App.--Houston [1st Dist.] 1994, no writ). Authentication involves a fact issue of genuineness. When the authenticity of evidence is challenged, the question of admissibility is a preliminary question to be determined by the court. TRE 104(a). This determination should be conducted outside the presence of the jury “when the interests of justice so require.” TRE 104(c).

#### B. Methods of Authentication. TRE 901(b) contains a nonexclusive list of examples of authentication methods, including:

1. Testimony of a witness with knowledge that the matter is what it is claimed to be. Testimony may be live or through deposition (oral or written). TRCP § 203.6(b); TRE 801(e)(3).

2. Non-expert opinion on handwriting based on familiarity with the person’s handwriting. *See In re Estate of Watson*, 720 S.W.2d 806, 808 (Tex. 1986) (witness could testify that letters were written by her sister).

3. Voice identification based on familiarity.

4. Public records or reports. *E.g.*, certified copies of recorded or filed documents. *See* TRE 902(4) and 1005.

5. Methods provided by statute or rule.
C. Relationship to Relevancy. Authentication is an aspect of relevancy. For example, a document is relevant only if it relates to a material issue and is what its proponent claims it to be.

D. Self-Authenticated Documents. Certain documents are self-authenticated, which means that no evidence is required to prove that they are genuine.

1. TRE 902. Extrinsic evidence of authenticity is not required with respect to certain documents, including public documents under seal, attested public documents, certified copies of public records, official publications, newspapers and periodicals, acknowledged documents, and business records accompanied by a “business records affidavit.”


   b. Certified death certificate offered to prove the event of death should be self-authenticating. See Campbell v. State, 632 S.W.2d 165 (Tex. App.--Waco 1982, no writ). However, statements therein regarding cause of death, marital status, etc., if controverted, may be inadmissible as hearsay or for some other reason. See Employers Mutual Liability Ins. v. Hunter, 503 S.W.2d 820 (Tex. App.--Beaumont 1973, writ ref’d n.r.e); Burk v. Mata, 529 S.W.2d 591 (Tex. App.--San Antonio 1975, writ ref’d n.r.e); and Armstrong v. Employers Casualty Co., 357 S.W.2d 168 (Tex. App. -- Waco 1962, no writ).

2. TRCP 193.7. Documents produced by a party in litigation in response to written discovery are automatically authenticated against the producing party for pretrial purposes or trial if:

   a. The party desiring to use the document has provided notice to the producing party of an intent to use the document at a hearing or trial at least ten (10) days in advance, and

   b. The producing party does not object to the authenticity of the document. An objection must be on the record or in writing and have a good faith factual and legal basis.

In order to take advantage of this rule, it is important to bates label all documents received in discovery in a manner that indicates which party produced the documents.

3. Business Records Accompanied by Affidavit. Records prepared at or near the time by a person with knowledge and kept in the course of a regularly
conducted business activity may be authenticated by an affidavit of the custodian of such records that complies with TRE 902(10). The affidavit and records must be filed with the Court, and notice given to all parties, at least fourteen (14) days before trial. TRE 902(10)(a). A form of Affidavit is contained in TRE 902(10)(b). Although records accompanied by a Business Records Affidavit meet the requirements for authentication of such records and an exception to hearsay, statements within the records still may be inadmissible hearsay or under some other rule of evidence.

E. Authentication Does Not Mean Admissibility. Documents (or the contents thereof) that have been authenticated still may be inadmissible under some other evidentiary rule such as hearsay, lack of personal knowledge, etc. See, e.g., TRE 402; Wright v. Lewis, 777 S.W.2d 520, 524 (Tex. App.--Corpus Christi 1989, writ denied) (although authenticated, letter inadmissible under hearsay rule).

F. Admission as Authentication. A party’s admission against interest may be sufficient to authenticate a document. E.P. Operating Co. v. Sonora Exploration Corp., 862 S.W.2d 149, 154 (Tex. App.--Houston [1st Dist.] 1993, writ denied) (admission that a harmful letter was an “internal document” was sufficient authentication).

G. PC § 59. The use of a self-proving affidavit to authenticate a will, in lieu of testimony by the witness, is a statutory exception to the authentication requirements. If the self-proving affidavit is not in substantially the form provided in PC § 59, the will is not self-proved but is still admissible upon proof of its due execution. Cutler v. Ament, 726 S.W.2d 605 (Tex. App.--Houston [14th Dist.] 1987, writ ref’d nre).

H. Altered Document. A document that has been altered after its execution cannot be properly authenticated as an original document because it is not genuine and not what the proponent claims it to be. There are few cases on this point presumably because the concept is so obvious. In Crow v. Willard, 110 S.W.2d 161, 165-66 (Tex. App.–Amarillo 1937, no writ), the issue related to promissory notes that, when signed, had a different name as the payee. After the notes were signed, the payee’s name originally in the document was blotted out and a different name inserted. The Court held that the notes should not have been admitted into evidence. The Court stated that “when the instrument is introduced in evidence and objected to, it becomes [the plaintiff’s] duty to explain the apparent alteration . . . , and, if he fails to do so, the objection to its introduction should be sustained. See also Meiners v. Texas Osage Cooperative Royalty Pool, 309 S.W.2d 898, 903 (Tex. App.--El Paso 1958, writ ref’d nre) (objection to admissibility of document on the basis that it had been materially altered after it was signed was not sustained due to lack of evidence of alteration).
V. RELEVANCE.

A. General Rules. “Relevant evidence” is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. To be relevant, the evidence must have some logical connection to the fact to be proved. TRE 401. All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is inadmissible. TRE 402; Lyondell Petro Chemical Co. v. Fluor Daniel, Inc., 888 S.W.2d 547, 555 (Tex. App. -- Houston [1st Dist.] 1994, writ denied).

B. Exclusion on Special Grounds. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. TRE 403.

C. Photographs and Videotapes. Pictures, photographs and videotapes that are relevant to any issue in the case generally are admissible unless their probative value is outweighed by prejudicial effect. Fibreboard Corp. v. Pool, 813 S.W.2d 658, 695 (Tex. App.--Texarkana 1991, writ denied), cert. denied, 509 U.S. 923, 113 S.Ct. 3037 (1993); Mathews v. State, 40 S.W.3d 179 (Tex. App.-- Texarkana 200, writ ref'd) (videotape).

D. Controlling Issue. Evidence may be excluded under Rule 401 if it does not reach a controlling issue.

1. Bohatch v. Butler & Binion, 905 S.W.2d 597, 607 (Tex. App. -- Houston [14th Dist.] 1995), aff'd, 977 S.W.2d 543 (Tex. 1998) (in suit for breach of partnership and fiduciary duty against a law firm, whether state bar rules had been violated by partners in dealing with clients was not controlling and, thus, not relevant).

2. Murphy v. Seabarge, Ltd., 868 S.W.2d 929, 932 (Tex. App.--Houston [14th Dist.] 1994, writ denied) (in breach of fiduciary duty suit regarding payment of management fees, memorandum outlining management fees to be paid the sole general partner was relevant to issue of excessive fees.)

E. Settlement Negotiations. Evidence of conduct or statements made in compromise negotiations is not admissible to prove liability for or invalidity of the claim or its amount. TRE 408. Such evidence is not excluded by this rule when offered for another purpose. Otherwise discoverable evidence is not excluded merely because it was obtained during settlement negotiations. See Avary v. Bank of America, 72
S.W.3d 779 (Tex. App.--Dallas 2002). A repudiated settlement agreement is admissible in a suit to enforce settlement agreement. It is often difficult to determine whether a statement constitutes a settlement offer. To be a settlement offer, (1) a dispute must have existed at the time the offer was made, and (2) the statement must have been a concession to buy peace. See Tatem v. Progressive Polymers, Inc., 881 S.W.2d 835, 837 (Tex. App.--Tyler 1994, no writ). Demands that are more in the nature of an ultimatum, rather than an offer and compromise, may not be inadmissible. Mercedes-Benz of North America, Inc. v. Dickinson, 720 S.W.2d 844, 857 (Tex. App.--Fort Worth 1986, no writ).

**Query:** Would an independent executor’s offer to distribute estate assets to the beneficiaries in exchange for a release constitute a settlement offer within the meaning of TRE 408? PC § 151(d) provides that an independent executor shall not require a waiver or release from the distributee as a condition of delivering property to the distributee. Thus, the executor’s offer would be a breach of fiduciary duty, not a concession.

F. Net Worth. In connection with a punitive damages claim, evidence of the defendant’s net worth is relevant because one of the major purposes of awarding punitive damages is to punish and deter wrongful conduct. CPRC § 41.011(a)(6) (in determining amount of exemplary damages, trier of fact shall consider evidence relating to ... net worth of defendant); Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988); and Parker v. Parker, 897 S.W.2d 918, 929-31 (Tex. App.--Fort Worth, 1995, writ denied). If the trial is bifurcated between liability and damages, evidence relating only to the amount of exemplary damages that may be awarded is not relevant during the first phase of the bifurcated trial. See CPRC § 41.009.

VI. **PERSONAL KNOWLEDGE.**

A. **TRE 602.** A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

B. **Objections.** Objections to testimony on the basis of lack of personal knowledge should be made where the witness attempts to offer speculation of fact, opinion or what others have told him (in addition to a hearsay objection). Personal knowledge is often the flip side of hearsay, i.e., a witness does not have personal knowledge of some fact because it was told to him by someone else.

C. **Take Witness on Voir Dire.** If there is a question regarding a witness’ personal knowledge, the opposing counsel usually will be permitted to take the witness on voir dire to examine personal knowledge requirement. See TRE 611.
D. Exceptions to Personal Knowledge Requirement. Expert opinion testimony can be based on hearsay if of a type reasonably relied upon by other experts in the same field (TRE 703) and personal knowledge is not required for admissions by party opponents (TRE 803(e)(2)).

E. Statements in Medical or Other Business Records. Statements or entries in medical or other business records may be inadmissible based on lack of personal knowledge by the person making the statement or entry, even if such records are accompanied by a “business records” affidavit that complies with TRE 902(10). See discussion below in Section VIII.F. regarding hearsay rules.

VII. BEST EVIDENCE RULE

A. TRE 1002. The “best evidence rule” provides that to prove the contents of a writing, recording or photograph, the original must be used, unless otherwise provided by law. This rule does not require that only original documents are admissible in evidence. It applies only where the contents are sought to be proved. See White v. Bath, 825 S.W.2d 227 (Tex. App.--Houston [14th Dist.] 1992, writ denied), cert. denied, 507 U.S. 1039 (1993). The rule primarily prohibits oral testimony attempting to characterize or summarize writings, recordings or photographs.

B. Exceptions. Originals are not required to prove contents thereof in the following instances:

1. A duplicate may be used unless a question is raised as to the authenticity of the original, or if it would be unfair to admit the duplicate in lieu of the original. TRE 1003.

2. Other evidence of the contents (e.g., a copy or oral testimony) is admissible if the original is lost or destroyed, unless the proponent lost or destroyed it in bad faith; the original is not obtainable; the original is located outside of Texas; the original is in the possession of the opposing party; or the writing relates to a collateral matter. TRE 1004.

3. The contents of public records can be proved by a certified copy under TRE 902 or the testimony of a witness who has compared the copy with the original. TRE1005.

4. A summary of the contents of documents would violate the best evidence rule. TRE 1006 creates an exception for summaries of the contents of voluminous writings, recordings or photographs, otherwise admissible, which cannot conveniently be examined in court. The originals, or duplicates, must
be made available for examination and/or copying by other parties at a reasonable time and place. *Black Lake Pipe Line Co. v. Union Construction Co., Inc.*, 538 S.W.2d 80, 92 (Tex. 1976) (a proper predicate, as business records, must be laid for the admission of the underlying records used to prepare a summary). The underlying records must be admissible for the summary to be admissible.

5. A copy of an original Will that has been lost or for some other reason cannot be produced in court in order to prove the contents of the Will. P.C. § 85. To be admissible, the cause of the non-production of the original Will must be proved, and such cause must be sufficient to satisfy the court that it cannot by any reasonable diligence be produced. *See Bracewell v. Braceywell*, 20 S.W.3d 14, 26 (Tex.App. - Houston[ 14th Dist] 2000, no writ).

### VIII. HEARSAY.

A. Definitions. “Hearsay” is a statement, other than one made by the declarant (witness) while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. TRE 801(d). Certain statements are defined as not constituting hearsay: are (1) a prior statement by a witness, and (2) a party’s admission. TRE 801(e).

B. Hearsay Rule. Hearsay is not admissible except as provided by statute or rules. Inadmissible hearsay admitted without objection is not denied probative value. TRE 802.

C. Exceptions to Hearsay Rule. TRE 803 contains 24 exceptions to the hearsay rule which apply whether or not the declarant is available. TRE 804 contains 3 exceptions to the hearsay rule which apply only if the declarant is unavailable. If one of these exceptions is met, the declarant does not have to come into court to testify, and what the declarant said can be proved either by the testimony of another witness or documentary evidence. Some of the typical exceptions that may arise in probate and fiduciary litigation include:

1. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant’s will. TRE 803 (e). *E.g.*, “The testator stated that he wanted to change his will to exclude his son.”
a. This exception may allow testimony as to statements made by a decedent showing his testamentary plan, intent or capacity (subject to application of the Dead Man’s Statute discussed in Section IX, infra).

b. Where evidence is excluded on the ground of hearsay, and the proponent wishes to meet the “state of mind” exception to the hearsay rule, the proponent must re-offer the evidence for the limited purpose of showing state of mind. Absent such a limited offer, the proponent cannot argue on appeal that it was error to exclude the evidence. *Wal-mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied).

2. Statements made for purposes of medical diagnosis or treatment. *E.g.*, “The testator stated [to the psychiatrist] that he had been having memory problems.”

3. Records of vital statistics, including birth certificates, death certificates, marriage certificates. TRE 803(9) & (12).

4. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like. TRE 803(13).

5. Reputation concerning personal or family history regarding birth, adoption, marriage, divorce, death, legitimacy, ancestry, or other similar fact of personal or family history. TRE 803(19).

6. Records of regularly conducted business activity “as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” The term “business” includes any and every kind of regular organized activity whether conducted for profit or not.

a. Bank and Other Financial Records. These records generally are authenticated by a Rule 902(10) business records affidavit. It may be possible, however, to admit bank or financial records through the testimony of a witness other than the custodian of records under some circumstances. *See Texmarc Conveyor Co. v. Arts*, 857 S.W.2d 743, 748-49 (Tex. App.--Houston [14th Dist.] 1993, writ denied)(President of corporation had personal knowledge of corporation’s bank statement).
7. If the declarant is unavailable as a witness, testimony given at another hearing or in a deposition under certain circumstances. TRE 804(b)(1).

8. If the declarant is unavailable as a witness, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be impending death. TRE 804(b)(2).

9. If the declarant is unavailable as a witness, statements concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship, ancestry or other similar fact of personal or family history. TRE 804(b)(3).

D. Indirect Hearsay. Sometimes parties will attempt to circumvent the hearsay rule by offering indirect proof of an out-of-court statement. For example, in Head v. State, 4 S.W. 3d 258 (Tex. Crim. App. 1999), a witness was asked what he did in response to a statement, and the witness said that he began looking for a black male, with a ski mask. The court determined that the testimony violated the hearsay rule because the content of the out-of-court statement was an “inescapable inference” from the description of subsequent behavior, and admitting the subsequent behavior violated the hearsay rule. The Court stated the rule as follows:

[W]here there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom, a party may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly. In short, “statement” as defined in [Rule 801(a)] necessarily includes proof of the statement whether the proof is direct or indirect.

Whether testimony violates the hearsay rule turns on how strongly the content of the out-of-court statement can be inferred from the context. See also Burks v. State, 876 S.W.2d 877, 898 (Tex. Crim. App. 1994).

E. Hearsay Within Hearsay. TRE 805 provides that hearsay included within hearsay is not excluded under the hearsay rule if each statements conforms with an exception to the hearsay rule. See Almarez v. Burke, 827 S.W.2d 80, 82-83 (Tex. App.--Ft. Worth 1992, writ denied) (court admitted excited utterance within an excited utterance).

F. Medical Records. Medical records accompanied by a business records affidavit that comply with TRE 902(10) meet both the authentication requirement and the hearsay exception under TRE 803(6). However, all statements contained in the medical
records must meet an exception to the hearsay rule (and be otherwise admissible under other rules), or be redacted from the records. Many statements contained in medical records will be admissible as:

a. as an act, event, condition, opinion or diagnoses made by a person with knowledge, or from information transmitted by a person with knowledge, and kept in the course of a regularly conducted business activity (TRE 803 (6));

b. a statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain or bodily health) (TRE 803(3));

c. a statement made for purposes of medical diagnosis or treatment (TRE 803(4));

d. a statement against the declarant’s interest when made (TRE 803 (24));

e. if the declarant is unavailable, a dying declaration (TRE 804(b)(2)); and

f. if the declarant is unavailable, a statement of the declarant’s own personal or family history.

For example, statements or entries in medical records made by a doctor or nurse as to whether a patient had lacerations, the patient’s blood pressure or pulse rate, and as to things that happened in the hospital are within the doctor’s or nurse’s personal knowledge and are admissible through a business records affidavit or testimony of the custodian of records or the witness. Statements as to how an accident happened, where it happened, age, marital status, medical history, etc., are not within the personal knowledge of the doctor or nurse and should be excluded unless they are admissible under some other rule, such as party admission, or made for the purpose of medical treatment or diagnosis. In Skillern & Sons v. Rosen, 359 S.W.2d 298 (Tex. 1962), the medical records which were accompanied by a business records affidavit, contained a statement that “the patient slipped yesterday at 5:30 while walking in the slushy snow in front of a local drug store.” The Court stated that the statement was not automatically admissible because the hospital employee did not have personal knowledge of the facts contained in the statement. However, if the employee had personal knowledge of the fact that the statement was made by the injured person, and the record reflected such knowledge, the record would be admissible as an admission of the party. If the record does not reflect from whom the information was obtained, it would not be admissible as an admission of a party. See
also Cornelison v. Aggregate Haulers, Inc., 777 S.W. 2d 542, 545 (Tex. App.--Fort Worth 1989, writ denied)(statements contained in medical record as to how or where accident happened, age, medical history, etc., are not admissible as a business-record exception to the hearsay rule because the party making the entry in the record does not have personal knowledge as to those matters).

Statements in medical records referring to an individual as the decedent’s “wife” should be inadmissible based on lack of personal knowledge in a common law marriage case unless the records establish that the reference is not based on speculation or inadmissible hearsay.

**Caution Regarding Stipulation of Business Records.** Be careful about stipulating that business records are “admissible” unless you want every statement in the records to be admissible. It is safer to stipulate only that such records are admissible to the extent that they would be if accompanied by a business records affidavit. This will preserve the right to object to inadmissible statements within the records.

**G. Doctor’s Letter Concerning Opinion Regarding Proposed Ward.**

1. PC § 87 provides that the Probate Court may not create a guardianship for an incapacitated person “unless the applicant presents to the Court a written letter or certificate from a physician licensed in this state . . . based on an examination [of the proposed ward] the physician performed” containing specified information regarding the proposed ward’s incapacity.

2. The required letter or certificate from a physician constitutes hearsay under TRE 801 and is inadmissible under TRE 802 unless it is admissible “as provided by statute.” PC § 687 does not require that the physician appear in person, and the letter could be authenticated by the recipient. Under TRE 802, the letter would have probative value if admitted without objection. Attaching the letter to an affidavit by the physician would not cure the hearsay problem because affidavit testimony, if objected to, is inadmissible hearsay. *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243, 247 (Tex. App.--Houston [1st Dist.], writ ref’d n.r.e).

**IX. THE “DEAD MAN’S STATUTE”.**

**A. TRE 601(b).** Commonly known as the “Dead Man’s Statute”, TRE 601(b) provides as follows:

In civil actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any
oral statement by the testator, intestate, or ward, unless that testimony
to the oral statement is corroborated or unless the witness is called at
the trial to testify thereto by the opposite party; and, the provisions of
this article shall extend to and include all actions by or against the
heirs or legal representatives of a decedent based in whole or in part
on such oral statement. Except for the foregoing, a witness is not
precluded from giving evidence of or concerning any transaction
with, any conversations with, any admissions of, or statement by, a
deceased or insane party or person merely because the witness is a
party to the action or a person interested in the event thereof. The
trial court shall, in a proper case, where this rule prohibits an
interested party or witness from testifying, instruct the jury that such
person is not permitted by the law to give evidence relating to any
oral statements by the deceased or ward unless the oral statement is
corroborated or unless the party or witness is called at the trial by the
opposite party.

This rule contains five elements which must be met before evidence will be
excluded:

1. The suit must be filed by or against an executor, administrator, guardian,
   personal representative, or heir and must be based on uncorroborated oral
   statements by a decedent;

2. The witness must be a party;

3. The witness must be testifying adversely to the objecting party;

4. The statement must be uncorroborated; and

5. The objecting party must not have waived the rule.

The Dead Man’s Statute is narrowly construed and will be applied only if every part
of its test is satisfied. Quita v. Fossati, 808 S.W.2d 636, 641 (Tex. App.--Corpus

B. Type of Suit.

1. TRE 601(b) expressly applies:

In civil actions by or against executors, administrators, or guardians,
in which judgment may be rendered for or against them as such . . .
and the provisions of this article shall extend to and include all
actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement.

2. Will Contests. The Dead Man’s Statute has been applied to will contests both before and after probate. See, e.g., Denbo v. Butler, 523 S.W.2d 458 (Tex. App.–Houston [1st Dist] 1975, no writ) (will contest before probate); Kellner v. Blaschke, 334 S.W.2d 315 (Tex. App.--Austin 1960, writ ref’d nre) (will contest after probate); Miller v. Miller, 285 S.W.2d 373 (Tex. App.--Eastland 1956, no writ) (will contest before probate); Johnson v. Poe, 210 S.W.2d 264 (Tex. App.--Galveston 1948, writ ref’d nre) (will contest before probate).


a. Rule Applies. The majority of cases have held that the Dead Man’s Statute applies in common law marriage suits. See e.g., Kettler v. Stephens, 424 S.W.2d 454, 456 (Tex. App.--Texarkana 1968, writ ref’d nre) (person claiming to be common law wife of testator “was definitely precluded from testifying under [Dead Man’s Statute as] she was ‘claiming’ an interest in testator’s estate’); and Adams v. Adams, 132 S.W.2d 497 (Tex. App.--Beaumont 1939, no writ) (testimony of alleged common-law wife as to agreement with deceased to live as husband and wife was inadmissible in heirship proceeding under Dead Man’s Statute).

In Russell v. Russell, 865 S.W.2d 929 (Tex. 1993), two consolidated divorce cases involving common law marriage claims, the Texas Supreme Court stated in dicta that: “If one of the parties is dead, the survivor will be required to meet the limitation imposed by Evidence Rule 601(b) by providing corroboration of an alleged transaction with decedent.”

b. Purpose of Rule. The above-cited cases are consistent with the purpose of the Dead Man’s Statute, as stated in Adams v. Barry, 560 S.W.2d 935 (Tex. 1978):

The statute is a rule insuring fairness between the litigants. . . . Its purpose is to exclude the testimony of a living party pertaining to a transaction with or statement by the deceased whose death precludes rebuttal. . . . [D]eath having sealed the lips of one of the parties, the
law, for reasons founded upon public policy, seals the lips of the other.

c. Rule Does Not Apply. In *Cain v. Whitlock*, 741 S.W.2d 528 (Tex. App.--Houston [14th Dist.] 1987, no writ), an alleged common law wife was seeking appointment as executrix and a determination of heirship. The Court stated that the Dead Man’s Statute did not apply because the action was not “by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such,” since the suit was seeking the appointment of an executrix, determination of heirship and determination of common law spouse status. The Court further justified its analysis by the observation that “great difficulty could result in proving whether a common-law marriage was created without allowing testimony as to the oral statements of the deceased purported spouse.” Finally, however, the Court held that the testimony presented was corroborated and therefore admissible even if the Dead Man’s Statute applied.

The Court in *Cain* cited *Smith v. Smith*, 257 S.W.2d 335, 338 (Tex. App.--Waco 1953, writ ref’d n.r.e.), in which the alleged common law wife sought appointment as the administratrix of the decedent’s estate. In that case, the Court permitted the alleged common law wife to testify regarding statements made by the deceased relating to the alleged common law marriage, on the basis that a proceeding for the appointment of an administrator is not within the language of the Dead Man’s Statute. Rather, “it is a contest between the parties for the right to administer upon the estate,” and her right to administer the estate grows out of her relation to the deceased as surviving wife, and not as an “heir.” The object of the lawsuit was not to divide property of the deceased, but to determine who was entitled to administer it. Thus, it was not a suit by or against an heir or legal representative of the deceased, or an executor, administrator or guardian. The decedent’s children were not claiming the right to be appointed administrator as “heirs” but, rather, as “next of kin”. However, the Court also concluded that the opposing parties had waived their objections under the Dead Man’s Statute due to their detailed cross-examination.

4. Heirship Proceedings. *Defoeldvar v. Defoeldvar*, 666 S.W.2d 668 (Tex. App.--Fort Worth 1984, no writ), involved an heirship proceeding instituted by the decedent’s surviving spouse. The Court held that the Dead Man’s Statute applied to prevent the decedent’s children from testifying as to uncorroborated oral statements by the decedent.
5. **Other Suits.** In *Quitta v. Fossati*, 808 S.W.2d 636 (Tex. App.--Corpus Christi 1991, writ denied) (Dead Man’s Statute not applicable to suit to recover rent and one party was deceased); *Tramel v. Estate of Billings*, 699 S.W.2d 259 (Tex. App.--San Antonio 1985, no writ) (Dead Man’s Statute not applicable to interpleader action brought by insurance company to determine beneficiary); *Seymour v. American Engine Co.*, 956 S.W.2d 49 (Tex. App.--Houston [14th Dist.] 1996, writ denied) (Dead Man’s Statute does apply to suit to determine whether family insurance trust or corporation was entitled to proceeds of “key man” life insurance policy, where deceased employee’s widow was party in her capacity as executrix of husband’s estate).

**C. Who Are Parties?** The Dead Man’s Statute only prohibits testimony by a “party”. A “party” has been held to mean “a person who has a direct and substantial interest in the issue to which the testimony relates and who is either an actual party to the suit or who will be bound by any judgment entered therein.” *Defoeldvar v. Defoeldvar*, 666 S.W.2d 668 (Tex. App.--Ft. Worth 1984, no writ); *Chandler v. Welborn*, 294 S.W.2d 801 (Tex. 1956); *Rozelle v. Smith*, 324 S.W.2d 627 (Tex. App.--Ft. Worth 1959, writ ref’d nre). Numerous cases have considered whether a person is a “party” for purposes of the Dead Man’s Statute:

1. **Named Executor.** Person named as the executor in a will is an “executor” for purposes of the Dead Man’s Statute in a proceeding before the will is probated. *McKibban v. Scott*, 114 S.W.2d 213 (Tex. 1938).

2. **Heirs.** The Dead Man’s Statute applied to persons who would be the decedent’s heirs at law in a will contest where intestacy was a possible outcome. *Denbo v. Butler*, 523 S.W.2d 458 (Tex. App.--Houston [1st Dist.] 1975, no writ).

3. **Spouse of Party.** The Dead Man’s Statute was applied to the spouse of a party in a suit to set aside a deed from a decedent where the property was presumed to be community property. *Miller v. Pierce*, 361 S.W.2d 623 (Tex. App.--Eastland 1962, no writ). The rule did not apply to the spouse of a party where the property was the party’s separate property. *Rozelle v. Smith*, 324 S.W.2d 627, 630-31 (Tex. App.--Ft. Worth 1959, writ ref’d nre).

4. **Dual Capacities.** The Dead Man’s Statute applied to the testimony of a person who was a party in both her individual capacity and as administratrix of decedent’s estate. *Chandler v. Welborn*, 294 S.W.2d 801 (Tex. 1956).

5. **Trustee.** The Dead Man’s Statute applied to a co-trustee of a testamentary trust although not named as a party in a suit against the Independent Executor

6. **Relatives of a Party.** The Dead Man’s Statute does not automatically apply to the relatives of a party if they are not heirs at law or do not have an interest in the estate.

7. **Parent of Party.** The Dead Man’s Statute does not necessarily apply to a party’s mother. *Ragsdale v. Ragsdale*, 179 S.W.2d 291 (Tex. 1943).

8. **Disclaimed Interest.** The Dead Man’s Statute does not apply to an otherwise interested party who disclaims or is divested of his entire interest in the estate. *May v. Brown*, 190 S.W.2d 715 (Tex. 1945); *Monger v. Monger*, 390 S.W.2d 815 (Tex. App.--Waco 1965, writ ref’d n.r.e); *Bennett v. Hood*, 238 S.W.2d 587 (Tex. App.--Beaumont 1951, no writ); and *Ragsdale v. Ragsdale*, 179 S.W.2d 291 (Tex. 1943).

D. **Oral Statements.** The Dead Man’s Statute applies only to “oral statements” by a deceased or incapacitated person, and does not cover written statements, conduct or other transactions. Testimony regarding a decedent’s identity, handwriting and signature did not fall under the rule. *In re: Estate of Watson*, 720 S.W.2d 806 (Tex. 1986); *Donaldson v. Taylor*, 713 S.W.2d 716 (Tex. App.--Beaumont 1986, no writ). Prior wills executed by a decedent are not barred by this rule. *Powers v. McDaniel*, 785 S.W.2d 915, 920 (Tex. App.--San Antonio 1990, writ denied). Before its amendment in 1983, the Dead Man’s Statute (Tex. Rev. Civ. Stat. Ann. art. 3716 (Vernon 1926)) applied “to any transaction with or statement by, the testator.”

E. **Corroboration.** The Dead Man’s Statute prohibits testimony only of uncorroborated oral statements of a deceased or incapacitated person. Corroborating evidence may be in any form. *Powers v. McDaniel*, 785 S.W.2d 915, 920 (Tex. App.--San Antonio 1990, writ denied) (cancelled checks endorsed by the decedent and an executed will admitted as corroboration). Corroborating evidence need only be “generally consistent with testimony concerning the deceased’s statements,” and need not be sufficient to support a verdict as long as it tends to confirm, strengthen and show the probability of the truth of the decedent’s tendered oral statement. *Quitta v. Fossati*, 808 S.W.2d 636, 641; *Powers v. McDaniel*, 785 S.W.2d 915, 920; *Escamilla v. Estate of Escamilla*, 921 S.W.2d 723 (Tex. App.--Corpus Christi 1996, writ denied); *Bobbit v. Bass*, 713 S.W.2d 217 (Tex. App.--El Paso 1986, no writ); *Donaldson v. Taylor*, 713 S.W.2d 716 (Tex. App.--Beaumont 1986, no writ). “However, corroboration of an interested party may not emanate from him or depend on his credibility.” *Tramel v. Estate of Billings*, 699 S.W.2d 259, 262 (Tex. App.--San Antonio 1985, no writ), citing Annot., 21 A.L.R.2d 1026 (1952). Corroborating evidence generally should be admitted before testimony of oral statements by a
F. Waiver. An objection based on the Dead Man’s Statute is waived by the party inquiring into related matters. Mortenson v. Trammell, 604 S.W.2d 269 (Tex. App.--Corpus Christi 1980, writ ref’d n.r.e). Care must be taken not to “open the door” to testimony that would otherwise be inadmissible under the Dead Man’s Statute. An objection also will be waived if not timely made at trial. Evans v. May, 923 S.W.2d 712 (Tex. App.--Houston [1st Dist.] 1996, writ denied).

G. Jury Instruction. Rule 601(b) states as follows:

The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

The language of the rule is mandatory. If evidence or testimony is ruled inadmissible based on the Dead Man’s Statute, the court must inform the jury of the effect of the rule at the time the testimony is elicited and the objection is sustained. Consequently, it may be inappropriate to include in a motion in limine a request to exclude all evidence based on the Dead Man’s Statute because it would deprive a party of the required jury instruction.

H. A practical and useful article regarding the hearsay rule by James W. McElhaney was published in the March, 2003 ABA Journal.

X. JUDICIAL NOTICE. A Court may take judicial notice of facts pursuant to TRE 201. No evidence is required of a fact that is judicially noticed. A Court may take judicial notice of facts that are not subject to reasonable dispute because they are either:

1. generally known within the territorial jurisdiction of the trial court, or
2. capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

A court has discretion to take judicial notice, whether requested or not. A Court must take judicial notice of a fact if requested by a party and supplied with the necessary information.
An opposing party is entitled to an opportunity to be heard as to the propriety of taking judicial notice. The Court is required to instruct the jury to accept as conclusive any fact judicially noticed. The Court may take judicial notice of records in its own court in a case concerning the same subject matter and between the same or practically the same parties, but the Court may not judicially notice records of another court. *National County Mutual Fire Ins. Co. v. Hood*, 693 S.W.2d 638 (Tex. App.-- Houston [14th Dist.] 1985, no writ); and *Tschirhart v. Tschirhart*, 876 S.W.2d 507 (Tex. App. -- Austin 1994, no writ) (court may take judicial notice of its own records, including judicial notice that pleading has been filed in cause, but may not take judicial notice of truth of allegations in its records).

XI. **THE RULE OF OPTIONAL COMPLETENESS.** Under TRE 106, when a writing or a recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered could contemporaneously with it. “Writing or recorded statement” includes depositions. Under this rule, if one party attempts to read only a portion of deposition testimony and additional portions of the deposition, or other documents, are necessary for a complete understanding of the statement and the context in which it was given, the opposing party can insist that the additional testimony or evidence be presented at that time or later.

XII. **EXPERT WITNESSES.**

A. **TRE 702.** TRE 702 provides that if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

B. **Predicates for Application.** The predicates for expert testimony are:

1. The expert’s qualifications;
2. The expert’s methodology;
3. The relevance of the expert’s opinion as to the facts at issue in the case;
4. Whether the opinions will assist the trier of fact; and
5. The legitimacy of facts or data underlying the expert’s opinions.

C. **Expert Qualifications.** Under TRE 702, a person may testify as an expert only if such person has knowledge, skill, experience, training or education that would assist the trier of fact in deciding an issue in the case. *Broders v. Heise*, 924 S.W.2 148, 149 (Tex. 1996). This involves the expert’s “qualifications.” The party offering the
testimony bears the burden of proving that the witness is qualified under Rule 702. *Broders v. Heise*, 924 S.W.2d 151.

D. Reliability of Expert’s Methodology - Daubert/Robinson.

1. In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the U.S. Supreme Court held that Rule 702 of the Federal Rules of Evidence requires expert testimony to be: (1) “scientific knowledge”, (2) which will “assist the trier of fact to understand the evidence or to determine a fact issue.” *Id.* at 589. To constitute “scientific knowledge”, the proffered testimony must be reliable. In addition, to be helpful to the trier of fact, the evidence must be relevant. Scientific evidence is relevant when there is a “valid scientific connection to the pertinent inquiry as a precondition to admissibility.” *Id.* at 592.

2. In *E.I. Du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995), the Texas Supreme Court adopted the *Daubert* holding by finding that TRE 702 also requires a proponent of scientific expert testimony to demonstrate that such evidence is relevant and reliable before it can be admitted. The Texas Supreme Court listed the following factors for the trial court to consider regarding reliability

   a. The extent to which the theory has been or can be tested;
   
   b. The extent to which the technique relies upon the subjective interpretation of the expert;
   
   c. Whether the theory has been subjected to peer review and/or publication;
   
   d. The techniques potential rate of error;
   
   e. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
   
   f. The non-judicial uses which have been made of the theory or technique.

*Robinson*, 923 S.W.2d at 557.

3. The burden is on the party offering the evidence to establish the reliability underlying such scientific evidence. *Robinson* at 557.
4. In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the Texas Supreme Court announced that the reliability and relevance requirements of *Robinson* apply to all types of expert testimony, whether or not it is based on science. Recognizing that the reliability and relevancy criteria listed in *Daubert* may not apply to experts in certain fields, the Texas Supreme Court noted that nevertheless there are reliability criteria of some kind that must be applied, stating that:

> even if the specific factors set out in *Daubert* for assessing the reliability and relevance of scientific testimony do not fit other expert testimony, the Court is not relieved of its responsibility to evaluate the reliability of the testimony in determining its admissibility.

*Gammill*, 972 S.W.2d at 724.

5. In *America West Air Line, Inc. v. Tope*, 935 S.W.2d 908 (Tex App. -- El Paso 1996, no writ), the Court found that somewhat unorthodox methods used by a mental health worker in arriving at DSM-III-R diagnosis did not meet the admissibility requirements of *Robinson*.

6. In *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996), the Texas Supreme Court affirmed the exclusion of an emergency room doctor’s testimony offered to establish the relationship between a patient’s head injury and death. The Court noted that a neurologist was better suited to opine on such matters. The Court also noted that medical experts are not automatically qualified simply because they possess a medical degree. Rather, the offering party must show that “the expert has the ‘knowledge, skill, experience, training or education’ regarding the specific issue before the Court which would qualify the expert to give an opinion in that particular subject.” *Id.*, at 153 (citing *Ponder v. Texarkana Memorial Hosp.*, 840 S.W.2d 476, 477-78 (Tex. App -- Houston [14th Dist.] 1991, writ denied).

E. **Determinations Made Under TRE 104.** TRE 104 provides that the Court shall determine preliminary questions concerning the qualification of a person to be a witness or the admissibility of evidence. In making its determination, the trial court is not bound by the rules of evidence other than with respect to privileges. TRE 104(a). Such a preliminary proceeding must be conducted out of the hearing of the jury, “when the interests of justice so require.” TRE 104(c). *Daubert* states that determinations regarding an expert should be determined at the outset pursuant to Rule 104(a). *See also U.S. v. Downing*, 753 F.2d 1224, 1241 (3d Cir. 1985). In Texas, a motion in limine alone is not an adequate vehicle to preserve error regarding
a Daubert challenge. Texas cases have made it clear that a ruling on a motion in limine cannot itself be reversible error. See In Hartford Accident & Indemnity Co. v. McCordell, 369 S.W.2d 331, 335 (Tex. 1963); Keene Corp. v. Kirk, 870 S.W.2d 573, 581 (Tex. App.--Dallas 1993, no writ); Waldon v. City of Longview, 855 S.W.2d 875, 880 (Tex. App.--Tyler 1993, no writ). Thus, if a motion in limine is used to bring a Daubert challenge, and the challenge is upheld, the proposing party will have to approach the Court during trial and indicate a desire to offer the evidence, and if that request is denied, then an offer of proof or bill of exception must be made outside the presence of the jury. If the motion in limine based on Daubert is overruled, the opposing party will have to object when the evidence is offered during trial.

F. Opinion on Ultimate Issue. Although expert witnesses previously were not allowed to express an opinion on whether a decedent had “testamentary capacity” at the time the will was executed (see Lindley v. Lindley, 384 S.W.2d 676, 782 (Tex. 1965), under TRE 704, which allows opinion testimony on an ultimate issue of fact, an expert should now be able to express an opinion on testamentary capacity.

XIII. OPINION TESTIMONY BY LAY WITNESS.

A. TRE 701. A non-expert witness may testify in the form of opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.

B. Opinion Regarding Decedent’s Mental Condition. A lay witness may express an opinion regarding a decedent’s mental condition if the witness has had a sufficient opportunity to form an opinion based on first-hand knowledge of the Decedent’s condition. Reynolds v. Park, 485 S.W.2d 807, 811 (Tex. App.--Amarillo 1972, writ ref’d nre). A variety of lay witnesses may be called on to testify regarding the decedent’s mental condition in a will contest. Crumb v. Porter, 152 S.W.2d 495, 497 (Tex. App.--San Antonio 1941, writ ref’d ) (attorney who prepared the will); Campbell v. Groves, 774 S.W.2d 717, 719 (Tex. App.--El Paso 1989, writ denied) (witnesses to the will); Pinchback v. Pinchback, 352 S.W.2d 151, 154 (Tex. App.--Waco 1961, writ ref’d nre) (family members); In Re: Hardwick’s Estate, 278 S.W.2d 258-61 (Tex. App.--Amarillo 1954, writ ref’d nre) (business associates); and Williford v. Masten, 521 S.W.2d 878, 888 (Tex. App.--Amarillo 1975, writ ref’d nre) (friends and neighbors).