TEXAS PATTERN JURY CHARGES

STATE BAR OF TEXAS
Created in 1939

Family & Probate

2020

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Prepared by the
COMMITTEE
on
PATTERN JURY CHARGES
of the
STATE BAR OF TEXAS

Austin 2020

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The use of the masculine gender throughout this publication is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

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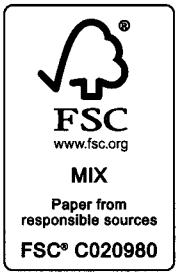

Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.

—Judge Jack Pope, in *Lemos v. Montez*,
680 S.W.2d 798, 801 (Tex. 1984)

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[Chapter 234 is reserved for expansion.]

PREFACE

Texas Pattern Jury Charges, volume 5, was begun and completed in less than two years. In August 1987, then President Joe H. Nagy (1987–88), responding to a request from the immediate past chairman of the Council of the Family Law Section, Harry L. Tindall, appointed a committee to prepare this first edition of a family law pattern jury charge book. The Committee's work on this publication was finished during the tenure of President James B. Sales (1988–89), who had reappointed the Committee intact to ensure the stability and continuity vital to a committee responsible for a publication.

With only a couple of exceptions, the Committee met monthly from October 1987 through March 1989. The meetings almost invariably began early Friday afternoon and adjourned early to mid-Saturday afternoon (with time out for dinner, during which "discussions" continued unabated). We vigorously discussed the contents of this volume, augmenting these discussions with individual research in an effort to achieve the ambitious goal of producing a PJC volume in record time. In this we were successful, thanks in great part to the fact that a clear trail had been blazed for us by our predecessor volumes of PJCs, especially the second edition of volume 1.

The staff of the State Bar was uniformly helpful and cooperative in every respect. But this project could never have been completed, to say nothing of the expeditious manner by which we proceeded, without the dedication of Susannah R. Mills, the project legal editor and the Director of Books and Systems for the State Bar of Texas.

A special note of thanks is also due to Charles G. Childress, Assistant Attorney General, for his extraordinary efforts on our behalf, which enabled us to complete the instructions and questions relating to the complex subject of paternity suits and legitimacy. Similar thanks for their input go to the members of the Family Law Council, chaired throughout by Larry H. Schwartz of El Paso, and especially to David N. Gray of Houston, who served as the liaison to the Committee from the Council. Further, several members of the Committee participated in a wide range of CLE activities, in part to solicit suggestions from bench and bar. These were forthcoming in considerable number and proved to be very useful in completing our task.

Finally, I personally want to thank all the members of the Committee for giving me a great, free-of-charge, education.

—John J. Sampson, *Chairman*

PREFACE TO THE 2020 EDITION

The Committee for *Texas Pattern Jury Charges—Family & Probate* is pleased to offer this 2020 edition to the family and probate attorneys and judges of Texas. The dedicated members of the two subcommittees responsible for the volume have reviewed pertinent case law and 2019 legislation and incorporated needed changes in this new edition.

Our family subcommittee was headed in 2018–19 by JoAl Cannon Sheridan, who was also chair of the full Committee in that same period, and in 2019–20 by me, Stewart W. Gagnon, chair of the full Committee in 2019–20. Members were Thomas L. Ausley, Becky Beaver, Kristy Blanchard, Wendy Burgower, Vance Christopher, Roxie Williams Cluck, Hon. Dennise Garcia, Chetammia Holmes, Jessica Janicek, Aimee Pingenot Key, Kathryn J. Murphy, Chris Nickelson, Susan Elizabeth Oehl, David W. Simpson, Dennis Slate, Kristal Cordova Thomson, Cindy Tisdale, Nicole Voyles, Hon. Alicia Franklin York, and Trey Yates.

Our probate subcommittee was headed by Mary C. Burdette, vice-chair of the full Committee in 2018–19, and by Hon. Polly Spencer, vice-chair of the full Committee in 2019–20. Members were Ryan Cantrell, Larry A. Flournoy, Jr., Hon. Guy Herman, Lisa H. Jamieson, Derbha Jones, W. Cameron McCulloch, Jr., Hon. Sandee Bryan Marion, R. Hal Moorman, J. Barrett Shipp, and Hon. Robert C. Wilmoth.

We hope you will continue to find this volume a valuable resource in your work. We welcome your comments and suggestions, which may be e-mailed to **books@texasbar.com**. My thanks to all the hardworking members of the Committee for their contributions to this important project—and especially to Judge Garcia for her gifted leadership as chair from 2014 to 2017.

—Stewart W. Gagnon, *Chair*

CHANGES IN THE 2020 EDITION

The 2020 edition of *Texas Pattern Jury Charges—Family & Probate* includes the following changes from the 2018 edition:

1. Introduction—Deleted discussion of historical development of broad-form submission

2. Admonitory Instructions—
   a. Revised comment on instructions to deadlocked jury (200.9)
   b. Revised instruction on party assertion of privilege (200.10)
   c. Added new instruction on party assertion of Fifth Amendment privilege (200.11)
   d. Renumbered following PJC

3. Dissolution of Marriage—
   a. Revised instructions on divorce (201.1)
   b. Revised comment on existence of informal marriage (201.4)

4. Disregarding Corporate Form—Revised comment on other unfair device (205.2)

5. Suits Affecting the Parent-Child Relationship—
   a. Revised instruction on rights of parent appointed conservator (215.6)
   b. Revised instruction and comment on sole managing conservator—parent (215.11)
   c. Revised instruction on managing conservator—nonparent (215.12)

6. Conservatorship and Support—Original Suits—Revised comment on sole or joint managing conservatorship (216.1)

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8. Termination of Parent-Child Relationship—
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a. Revised comment on burden of proof (230.1)

b. Revised comment on testamentary capacity to execute will (230.2)

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11. Removal of Personal Representative—

a. Revised comment on removal of personal representative—dependent administration (233.1)

b. Revised comment on removal of personal representative—independent administration (233.2)

12. Express Trusts—

a. Revised comment on breach of duty by trustee—self-dealing—duties not modified or eliminated by trust (235.10)

b. Revised comment on remedies for breach of fiduciary duty (235.13)

13. Attorney's fees—

a. Revised instruction and comment on attorney's fees—family (250.1)

b. Revised instruction and comment on attorney's fees and costs—will prosecution or defense (250.3)

c. Revised instruction and comment on attorney's fees—trusts (250.4)

d. Revised instruction and comment on attorney's fees—guardianship—application (250.5)

e. Revised instruction and comment on guardianship—representation of ward in restoration or modification (250.6)

f. Revised instruction and comment on attorney's fees and costs—defense for removal of independent personal representative (250.7)

14. Preservation of Charge Error—
    a. Revised comment on preservation of charge error (251.1)
    b. Revised comment on broad-form issues and the *Casteel* doctrine (251.2)

INTRODUCTION

1. Purpose of Publication

The purpose of this volume is to assist the bench and bar in preparing the court's charge in jury cases. It provides definitions, instructions, and questions needed to submit jury charges in family law, probate, guardianship, trust, and involuntary commitment cases. The pattern charges are suggestions and guides to be used by a trial court if they are applicable and proper in a specific case. Of course, the exercise of professional judgment by the attorneys and the judge is necessary to resolve disputes in individual cases.

2. Scope of Pattern Charges

It is impossible to prepare pattern charges for every factual setting that could arise in a family law case or a case involving probate, guardianship, trusts, or involuntary commitments. The Committee has tried to prepare charges that will serve as guides in most situations frequently encountered in these cases. However, a charge should conform to the pleadings and evidence of the particular case, and occasions will arise for the use of questions and instructions not specifically addressed here.

The Committee believes the submission of advisory jury questions, which may unduly lengthen the court's charge, is generally inappropriate. For this reason, the Committee has not formulated jury questions or instructions seeking advisory opinions.

Certain topics that are conceptually difficult or of remote usefulness have been reserved for possible future coverage. These topics include alimony, putative marriage, homestead, most actions involving third parties, wills not produced in court, and most intrafamily torts.

Coverage of parentage actions, formerly contained in chapter 219 of this book, has been deleted to reflect 1999 amendments to the Texas Family Code providing that a party may not demand a jury trial in a suit to determine parentage under chapter 160 of the Code. Tex. Fam. Code § 105.002(b)(2). Section 105.002(b)(2) was enacted in response to 42 U.S.C. § 666(a)(5)(I), which provides that, to satisfy requirements relating to federal child support subsidies, states must have in effect laws requiring the use of procedures "providing that the parties to an action to establish paternity are not entitled to a trial by jury."

3. Use of Accepted Precedents

The Committee has avoided recommending changes in the law and has based this material on what it perceives the present law to be. Of course, trial judges and practitioners should recognize that the Committee may be in error in its perceptions and that its recommendations may be affected by future appellate decisions and statutory changes.

4. PRINCIPLES OF STYLE

a. *Basic philosophy.* The Committee has sought to follow the admonition expressed by the supreme court in *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984): "Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges."

b. *Broad-form questions to be used whenever feasible.* Tex. R. Civ. P. 277 provides that "the court shall, whenever feasible, submit the cause upon broad-form questions." Accordingly, the basic questions are designed to be accompanied by one or more instructions. *See Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). For further discussion, see PJC 251.2 regarding broad-form issues and the *Casteel* doctrine.

c. *Definitions and instructions.* The Supreme Court of Texas has disapproved the practice of embellishing standard definitions and instructions, *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984), or adding unnecessary instructions, *First International Bank v. Roper Corp.*, 686 S.W.2d 602 (Tex. 1985). The Committee has endeavored to adhere to standard definitions and instructions, based whenever possible on applicable sections of the Texas Family Code, Texas Estates Code, Texas Property Code, and Texas Health and Safety Code. Most instructions and definitions are stated in general terms rather than in terms of the particular parties and facts of the case. If an instruction in general terms would be unduly complicated and confusing, however, reference to specific parties and facts is suggested.

d. *Placement of definitions and instructions in the charge.* Definitions of terms and instructions that apply to a number of questions should be given immediately after the general instructions required by Tex. R. Civ. P. 226a. *See Woods v. Crane Carrier Co.*, 693 S.W.2d 377 (Tex. 1985). If a definition or instruction applies to only one question or group of questions, however, it should be placed with that question or group.

e. *Burden of proof.* As authorized by Tex. R. Civ. P. 277, it is recommended that the burden of proof be placed by instruction rather than by inclusion in each question. When the burden is placed by instruction, it is not necessary that each question begin: "Do you find from a preponderance of the evidence that . . ." The admonitory instructions contain a general instruction that the jury is to answer all questions "Yes" or "No" unless otherwise instructed. That statement is followed by the basic directive that the burden of proof is by a preponderance of the evidence, together with a definition of that term. Certain questions may arise in cases covered by this volume that require answers based on clear and convincing evidence rather than a preponderance of the evidence. The definition of "clear and convincing evidence," which should be given in conjunction with the specific question to which it relates, is provided in each relevant PJC.

f. *Hypothetical examples.* Hypothetical facts have been italicized to indicate that the facts of the particular case should be substituted. Because it seemed impossible to avoid the suggestion of gender bias otherwise, the Committee has departed from the

style of earlier *Texas Pattern Jury Charges* volumes in identifying parties. Hypothetical names like *Paul Payne* and *Don Davis* have given way to designations like *CHILD*, *NONPARENT*, *PARTY B*, *TRUSTEE*, and *DECEDENT*. Such a designation, printed in all uppercase italic letters, should always be replaced by the appropriate person's name. This use of terms in uppercase italic letters must be distinguished from the use of terms in lowercase italic letters: the latter use indicates a term that may be replaced, if appropriate, by another term rather than by a person's name (e.g., the word *child* may be replaced by the word *children*).

5. Comments and Citations of Authority

The comments to each PJC provide a ready reference to the law that serves as a foundation for the charge. Of course, this volume is not a legal treatise, so further research will invariably be required to develop any legal issue fully. The primary authorities cited in this volume are the Texas Family Code, the Texas Estates Code, the Texas Property Code, the Texas Health and Safety Code, and Texas case law. Some comments also include variations of the recommended forms and references to additional instructions and questions.

6. Using the Pattern Charges

Matters on which the evidence is undisputed should not be submitted by either instruction or question. Conversely, questions, instructions, and definitions not included in this volume may sometimes become necessary. Finally, preparation of a proper charge requires careful legal analysis and sound judgment by those directly involved in the case in determining which pattern charges to adopt *in toto*, which to amend, and which to discard.

7. Claims Not Covered in This Volume

Other volumes in the *Texas Pattern Jury Charges* series may be helpful in drafting charges covering tort issues that occasionally arise in cases covered by this volume. For ease of reference, the tables of contents of the other volumes in the series are reproduced as the appendix to this volume.

8. Installing the Digital Download

The complimentary downloadable version of *Texas Pattern Jury Charges—Family & Probate* (2020 edition) contains the entire text of the printed book. To install the digital download—

1. log in to **www.texasbarcle.com**,
2. go to **www.texasbarcle.com/pjc-family-2020**, and
3. install the version of the digital download you want.

Use of the digital download is subject to the terms of the license and limited warranty included in the documentation at the end of this book and on the digital download web pages. By accessing the digital download, you waive all refund privileges for this publication.

9. FUTURE REVISIONS

The contents of questions, instructions, and definitions in the court's charge depend on the underlying substantive law relevant to the case.

This volume as updated reflects all amendments to Texas statutes enacted through 2019.

The Committee expects to update this volume to reflect changes and new developments in the law as necessary.

PJC 200.1 Instructions to Jury Panel before Voir Dire Examination

[Brackets indicate optional, alternative, or instructive text.]

MEMBERS OF THE JURY PANEL:

Thank you for being here. We are here to select a jury. Twelve [six] of you will be chosen for the jury. Even if you are not chosen for the jury, you are performing a valuable service that is your right and duty as a citizen of a free country.

Before we begin: Turn off all phones and other electronic devices. While you are in the courtroom, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not record or photograph any part of these court proceedings, because it is prohibited by law.

If you are chosen for the jury, your role as jurors will be to decide the disputed facts in this case. My role will be to ensure that this case is tried in accordance with the rules of law.

Here is some background about this case. This is a civil case. It is a lawsuit that is not a criminal case. The parties are as follows: The plaintiff is _____, and the defendant is _____. Representing the plaintiff is _____, and representing the defendant is _____. They will ask you some questions during jury selection. But before their questions begin, I must give you some instructions for jury selection.

Every juror must obey these instructions. You may be called into court to testify about any violations of these instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial.

These are the instructions.

1. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to

follow these instructions too, so you should not be offended when they follow the instructions.

2. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

3. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

4. The parties, through their attorneys, have the right to ask you questions about your background, experiences, and attitudes. They are not trying to meddle in your affairs. They are just being thorough and trying to choose fair jurors who do not have any bias or prejudice in this particular case.

5. Remember that you took an oath that you will tell the truth, so be truthful when the lawyers ask you questions, and always give complete answers. If you do not answer a question that applies to you, that violates your oath. Sometimes a lawyer will ask a question of the whole panel instead of just one person. If the question applies to you, raise your hand and keep it raised until you are called on.

Do you understand these instructions? If you do not, please tell me now.

The lawyers will now begin to ask their questions.

COMMENT

When to use. The foregoing oral instructions are prescribed in Tex. R. Civ. P. 226a. The instructions, "with such modifications as the circumstances of the particular case may require," are to be given to the jury panel "after they have been sworn in as provided in Rule 226 and before the voir dire examination."

Rewording regarding investigation by jurors. In an appropriate case, the sentence "Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty" may be added in the second paragraph of this instruction, and the instructions admonishing against independent investigation by the jurors contained in item 6 of PJC 200.2 may be included in the instruction.

PJC 200.2 Instructions to Jury after Jury Selection

[Brackets indicate optional or instructive text.]

[Oral Instructions]

MEMBERS OF THE JURY:

You have been chosen to serve on this jury. Because of the oath you have taken and your selection for the jury, you become officials of this court and active participants in our justice system.

[Hand out the written instructions.]

You have each received a set of written instructions. I am going to read them with you now. Some of them you have heard before and some are new.

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

2. To avoid looking like you are friendly with one side of the case, do not mingle or talk with the lawyers, witnesses, parties, or anyone else involved in the case. You may exchange casual greetings like "hello" and "good morning." Other than that, do not talk with them at all. They have to follow these instructions too, so you should not be offended when they follow the instructions.

3. Do not accept any favors from the lawyers, witnesses, parties, or anyone else involved in the case, and do not do any favors for them. This includes favors such as giving rides and food.

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, email message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your

hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

5. Do not discuss this case with anyone during the trial, not even with the other jurors, until the end of the trial. You should not discuss the case with your fellow jurors until the end of the trial so that you do not form opinions about the case before you have heard everything.

After you have heard all the evidence, received all of my instructions, and heard all of the lawyers' arguments, you will then go to the jury room to discuss the case with the other jurors and reach a verdict.

6. Do not investigate this case on your own. For example, do not:

   a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;

   b. go to places mentioned in the case to inspect the places;

   c. inspect items mentioned in this case unless they are presented as evidence in court;

   d. look anything up in a law book, dictionary, or public record to try to learn more about the case;

   e. look anything up on the Internet to try to learn more about the case; or

   f. let anyone else do any of these things for you.

This rule is very important because we want a trial based only on evidence admitted in open court. Your conclusions about this case must be based only on what you see and hear in this courtroom because the law does not permit you to base your conclusions on information that has not been presented to you in open court. All the information must be presented in open court so the parties and their lawyers can test it and object to it. Information from other sources, like the Internet, will not go through this important process in the courtroom. In addition, information from other sources could be completely unreliable. As a result, if you investigate this case on your own, you could compromise the fairness to all parties in this case and jeopardize the results of this trial.

7. Do not tell other jurors about your own experiences or other people's experiences. For example, you may have special knowledge of something in the case, such as business, technical, or professional information. You may even have expert knowledge or opinions, or you may know what

happened in this case or another similar case. Do not tell the other jurors about it. Telling other jurors about it is wrong because it means the jury will be considering things that were not admitted in court.

8. Do not consider attorneys' fees unless I tell you to. Do not guess about attorneys' fees.

9. Do not consider or guess whether any party is covered by insurance unless I tell you to.

10. During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.

You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.

[You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.]

When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

11. I will decide matters of law in this case. It is your duty to listen to and consider the evidence and to determine fact issues that I may submit to you at the end of the trial. After you have heard all the evidence, I will give you instructions to follow as you make your decision. The instructions also will have questions for you to answer. You will not be asked and you should not consider which side will win. Instead, you will need to answer the specific questions I give you.

Every juror must obey my instructions. If you do not follow these instructions, you will be guilty of juror misconduct, and I may have to order a new trial and start this process over again. This would waste your time and the par-

ties' money, and would require the taxpayers of this county to pay for another trial.

Do you understand these instructions? If you do not, please tell me now.

Please keep these instructions and review them as we go through this case. If anyone does not follow these instructions, tell me.

COMMENT

When to use. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a. The instructions, "with such modifications as the circumstances of the particular case may require," are to be given to the jury "immediately after the jurors are selected for the case."

If no tort claim is involved. Item 9 should be deleted from the foregoing instructions unless a tort claim is involved in the case.

PJC 200.3 Charge of the Court

PJC 200.3A Charge of the Court—Twelve-Member Jury

[Brackets indicate optional or instructive text.]

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

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

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least ten of the twelve jurors. The same ten jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here.]

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict.

If eleven jurors agree on every answer, those eleven jurors sign the verdict.

If all twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

4. *[Added if the charge requires some unanimity.]* There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all twelve of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____
JUDGE PRESIDING

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

_____ _____
Signature of Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	Signature	Name Printed
1.	_____	_____
2.	_____	_____

3. _____ _____

4. _____ _____

5. _____ _____

6. _____ _____

7. _____ _____

8. _____ _____

9. _____ _____

10. _____ _____

11. _____ _____

If you have answered Question No. _____ [*the exemplary damages amount*], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers.]

I certify that the jury was unanimous in answering the following questions. All twelve of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

PJC 200.3B Charge of the Court—Six-Member Jury

[Brackets indicate optional or instructive text.]

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. [I will give you a number where others may contact you in case of an emergency.]

[Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.]

[You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.]

Here are the instructions for answering the questions.

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

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence [unless

you are told otherwise]. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence [unless you are told otherwise].

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. [Unless otherwise instructed] The answers to the questions must be based on the decision of at least five of the six jurors. The same five jurors must agree on every answer. Do not agree to be bound by a vote of anything less than five jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

[Definitions, questions, and special instructions given to the jury will be transcribed here.]

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. [Unless otherwise instructed] You may answer the questions on a vote of five jurors. The same five jurors must agree on every answer in the charge. This means you may not have one group of five jurors agree on one answer and a different group of five jurors agree on another answer.

2. If five jurors agree on every answer, those five jurors sign the verdict.

If all six of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all six of you agreeing on some answers, while only five of you agree on other answers. But when you sign the verdict, only those five who agree on every answer will sign the verdict.

4. *[Added if the charge requires some unanimity.]* There are some special instructions before Questions _____ explaining how to answer those questions. Please follow the instructions. If all six of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

_____
JUDGE PRESIDING

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All six of us have agreed to each and every answer. The presiding juror has signed the certificate for all six of us.

_____ _____
Signature of Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Five of us have agreed to each and every answer and have signed the certificate below.

	Signature	Name Printed
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____

If you have answered Question No. _____ [*the exemplary damages amount*], then you must sign this certificate also.

Additional Certificate

[Used when some questions require unanimous answers.]

I certify that the jury was unanimous in answering the following questions. All six of us agreed to each of the answers. The presiding juror has signed the certificate for all six of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

Signature of Presiding Juror

Printed Name of Presiding Juror

COMMENT

When to use. The above charge of the court includes the written instructions prescribed in Tex. R. Civ. P. 226a. The court must provide each member of the jury a copy of the charge, including the written instructions, "with such modifications as the circumstances of the particular case may require" before closing arguments begin.

Exemplary damages. Exemplary damages may be sought under certain circumstances in a family law or probate case. See, for example, the comments in PJC 206.5 and PJC 235.13. In such a case, consult one of the other volumes in the *Texas Pattern Jury Charges* series for help in formulating the appropriate damages submission.

PJC 200.4 Additional Instruction for Bifurcated Trial

[Brackets indicate optional, alternative, or instructive text.]

MEMBERS OF THE JURY:

In discharging your responsibility on this jury, you will observe all the instructions that have been previously given you.

_____
JUDGE PRESIDING

Certificate

I certify that the jury was unanimous in answering the following questions. All twelve [six] of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve [six] of us.

[Judge to list questions that require a unanimous answer, including the predicate liability question.]

_____ _____
Signature of Presiding Juror Printed Name of Presiding Juror

COMMENT

When to use. PJC 200.4 should be used as an instruction for the second phase of a bifurcated trial pursuant to *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994), or Tex. Civ. Prac. & Rem. Code § 41.009. If questions that do not require unanimity are submitted in the second phase of a trial, use the verdict certificate in PJC 200.3.

Source of instruction. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a.

Actions filed before September 1, 2003. For actions filed before September 1, 2003, add the following instruction derived from *Hyman Farm Service, Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452 (Tex. App.—Amarillo 1996, no writ), along with signature lines for jurors to use if the verdict is not unanimous:

> I shall now give you additional instructions that you should carefully and strictly follow during your deliberations.

All jurors have the right and the responsibility to deliberate on [*this*] [*these*] question[*s*], but at least ten [five] of those who agreed to the verdict in the first phase of this trial must agree to this answer and sign this verdict accordingly. If your first verdict was unanimous, this second verdict may be rendered by the vote of at least ten [five] of you.

PJC 200.5 Instructions to Jury after Verdict

Thank you for your verdict.

I have told you that the only time you may discuss the case is with the other jurors in the jury room. I now release you from jury duty. Now you may discuss the case with anyone. But you may also choose not to discuss the case; that is your right.

After you are released from jury duty, the lawyers and others may ask you questions to see if the jury followed the instructions, and they may ask you to give a sworn statement. You are free to discuss the case with them and to give a sworn statement. But you may choose not to discuss the case and not to give a sworn statement; that is your right.

COMMENT

When to use. The foregoing instructions are prescribed in Tex. R. Civ. P. 226a. The instructions are to be given orally to the jury "after the verdict has been accepted by the court and before the jurors are released from jury duty."

PJC 200.6 Instruction to Jury If Permitted to Separate

You are again instructed that it is your duty not to communicate with, or permit yourselves to be addressed by, any other person about any subject relating to the case.

COMMENT

When to use. The foregoing instruction is required by Tex. R. Civ. P. 284 "[i]f jurors are permitted to separate before they are released from jury duty, either during the trial or after the case is submitted to them."

PJC 200.7 Instruction If Jury Disagrees about Testimony

[Brackets indicate instructive text.]

MEMBERS OF THE JURY:

You have made the following request in writing:

[Insert copy of request.]

Your request is governed by the following rule:

> "If the jury disagree as to the statement of any witness, they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness' testimony on the point in dispute . . . ."

If you report that you disagree concerning the statement of a witness and specify the point on which you disagree, the court reporter will search his notes and read to you the testimony of the witness on the point.

_____
JUDGE PRESIDING

COMMENT

When to use. This written instruction is based on Tex. R. Civ. P. 287 and is to be used if the jurors request that testimony from the court reporter's notes be read to them.

PJC 200.8 Circumstantial Evidence (Optional)

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

COMMENT

When to use. PJC 200.8 may be used when there is circumstantial evidence in the case. It would be placed in the charge of the court (PJC 200.3) after the instruction on preponderance of the evidence and immediately before the definitions, questions, and special instructions. For cases defining circumstantial evidence, see *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995) (per curiam), and *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993). It is not error to give or to refuse an instruction on circumstantial evidence. *Larson v. Ellison*, 217 S.W.2d 420 (Tex. 1949); *Johnson v. Zurich General Accident & Liability Insurance Co.*, 205 S.W.2d 353 (Tex. 1947); *Adams v. Valley Federal Credit Union*, 848 S.W.2d 182, 188 (Tex. App.—Corpus Christi 1992, writ denied).

PJC 200.9 Instructions to Deadlocked Jury

I have your note that you are deadlocked. In the interest of justice, if you could end this litigation by your verdict, you should do so.

I do not mean to say that any individual juror should yield his or her own conscience and positive conviction, but I do mean that when you are in the jury room, you should discuss this matter carefully, listen to each other, and try, if you can, to reach a conclusion on the questions. It is your duty as a juror to keep your mind open and free to every reasonable argument that may be presented by your fellow jurors so that this jury may arrive at a verdict that justly answers the consciences of the individuals making up this jury. You should not have any pride of opinion and should avoid hastily forming or expressing an opinion. At the same time, you should not surrender any conscientious views founded on the evidence unless convinced of your error by your fellow jurors.

If you fail to reach a verdict, this case may have to be tried before another jury. Then all of our time will have been wasted.

Accordingly, I return you to your deliberations.

COMMENT

Source. The foregoing instructions are modeled on the charge in *Stevens v. Travelers Insurance Co.*, 563 S.W.2d 223 (Tex. 1978), and on Tex. R. Civ. P. 226a.

For use in civil trials only. The above charge is recommended for use in civil cases. For a sample instruction for use in criminal cases, see the current edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions* CPJC 10.01 (Instruction—*Allen* Charge).

PJC 200.10 Privilege—Generally No Inference

[Brackets indicate instructive text.]

You are instructed that you must not infer anything by [*name of invoking party*]'s refusal to answer questions because of [*name of invoking party*]'s claim of [*privilege asserted*] privilege.

COMMENT

When to use. This instruction should be used in situations other than a claim of Fifth Amendment privilege. See PJC 200.11. On request by any party against whom the jury might draw any inference from a claim of privilege, the court must instruct the jury that no inference may be drawn therefrom. Tex. R. Evid. 513(d).

PJC 200.11 Fifth Amendment Privilege—Adverse Inference May Be Considered

[Brackets indicate instructive text.]

[*Name of invoking party*] refused to answer certain questions on the grounds that it may tend to incriminate *him*. A person has a constitutional right to decline to answer on the grounds that it may tend to incriminate *him*. You may, but are not required to, infer by such refusal that the answers would have been adverse to [*name of invoking party*]'s interests.

COMMENT

When to use. On request by any party after another party has invoked his Fifth Amendment privilege against self-incrimination in the present case, the above instruction may be given at the court's discretion, as controlling authorities neither require nor prohibit its inclusion in the written charge of the court. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007); *Texas Department of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995).

Nonparty witness. The Committee expresses no opinion as to the propriety of such an instruction when a nonparty witness asserts a privilege.

PJC 200.12 Instruction on Spoliation

[Brackets indicate optional, alternative, or instructive text.]

[*Name of spoliating party*] [*destroyed/failed to preserve/destroyed or failed to preserve*] [*describe evidence*]. You [*must/may*] consider that this evidence would have been unfavorable to [*name of spoliating party*] on the issue of [*describe issue(s) to which evidence would have been relevant*].

COMMENT

When to use. The above instruction is recommended for the adverse inference resulting from spoliation. In *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014), the Texas Supreme Court clarified the standards governing spoliation and the parameters of a trial court's discretion to impose spoliation remedies based on the facts of the case. After the trial court has determined that a party has spoliated evidence, it has broad discretion to impose a remedy that is proportionate to the conduct, including, under appropriate circumstances, a spoliation instruction to the jury. *Brookshire Bros.*, 438 S.W.3d at 23–26. A spoliation instruction is a severe sanction the court may use to remedy an act of intentional spoliation that prejudices the nonspoliating party. *Brookshire Bros.*, 438 S.W.3d at 23. To find intentional spoliation, the spoliator must have "acted with the subjective purpose of concealing or destroying discoverable evidence." *Brookshire Bros.*, 438 S.W.3d at 24. To submit a spoliation instruction the trial court must find that "(1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense." *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015). Moreover, the court must find that a less severe remedy would be insufficient to reduce the prejudice caused by the spoliation. *Brookshire Bros.*, 438 S.W.3d at 25.

On rare occasions the negligent breach of the duty to reasonably preserve evidence may support the submission of a spoliation instruction. Where the spoliation "so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense," the court has discretion to remedy the extreme prejudice by submitting a spoliation instruction. *Brookshire Bros.*, 438 S.W.3d at 26.

Caveat. Because the imposition of a spoliation instruction is considered extremely severe, it should be used cautiously, as the wrongful submission of an instruction may result in a reversal of the case. *Brookshire Bros.*, 438 S.W.3d at 17 (citing *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003) ("[I]f a spoliation instruction should not have been given, the likelihood of harm from the erroneous instruction is substantial, particularly when the case is closely contested.")).

Required findings by the court. Whether a spoliation instruction is appropriate is a question of law for the court. *Brookshire Bros.*, 438 S.W.3d at 20 (citing *Trevino v. Ortega*, 969 S.W.2d 950, 954–55, 960 (Tex. 1998) (Baker, J., concurring)). Before considering whether to instruct the jury on spoliation as a remedy for the loss, alteration, or unavailability of certain evidence, a court must consider—

1. whether there was a duty to preserve the evidence at issue,
2. whether the alleged spoliator breached that duty, and
3. prejudice.

Brookshire Bros., 438 S.W.3d at 20.

In evaluating prejudice the court must analyze—

1. relevance of the spoliated evidence to key issues in the case;
2. the harmful effect of the evidence on the spoliating party's case (or conversely, whether the evidence would be helpful to the nonspoliating party's case); and
3. whether the spoliated evidence was cumulative.

Brookshire Bros., 438 S.W.3d at 20; *see also Petroleum Solutions, Inc. v. Head*, 454 S.W.3d 482 (Tex. 2014). Because the imposition of a spoliation instruction is such a severe sanction, courts must first determine whether a direct relationship exists between the conduct, the offender, and the sanction imposed, and the sanction must not be more severe than necessary. *Petroleum Solutions, Inc.*, 454 S.W.3d at 489 (citing *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991)).

Use of "may" or "must." In *Brookshire Bros.*, the majority does not articulate the specific language that should be included in the instruction, particularly whether the jury "may" or "must" consider that the missing evidence would have been unfavorable to the spoliator. The dissent in *Brookshire Bros.* interpreted the majority as requiring the use of the term *must*. *Brookshire Bros.*, 438 S.W.3d at 34. The overarching guideline, as with any sanction, remains proportionality. "Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive." *Brookshire Bros.*, 438 S.W.3d at 14. Whether *may* or *must* is used should be based on the facts applied to the standards articulated above.

PJC 201.1 Divorce

PJC 201.1A Divorce—Insupportability Ground—Instruction

A divorce may be granted without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.

PJC 201.1B Divorce—Fault Ground—Instruction

A divorce may be granted in favor of one spouse if *the other spouse has committed adultery.*

PJC 201.1C Divorce—Insupportability and Fault Grounds—Instruction

A divorce may be granted without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.

A divorce may be granted in favor of one spouse if *the other spouse has committed adultery.*

PJC 201.1D Divorce—Question

QUESTION 1

Do grounds exist for divorce?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing instructions and question are based on Tex. Fam. Code §§ 6.001–.007.

When to use. The instruction in PJC 201.1A is appropriate if the only ground pleaded in the case is insupportability. The instruction in PJC 201.1B is appropriate if

only fault grounds are pleaded. The instruction in PJC 201.1C is appropriate if both insupportability and fault grounds are pleaded. The question in PJC 201.1D may be used no matter how many grounds are pleaded by the parties.

Rewording for other fault grounds. The fault instruction given in PJC 201.1B and 201.1C as an example is based on Tex. Fam. Code § 6.003. If appropriate, instructions based on Tex. Fam. Code § 6.002 and §§ 6.004–.007 should be substituted for or given in addition to that instruction.

Condonation. Condonation is a defense only if the court finds that there is a reasonable expectation of reconciliation. Tex. Fam. Code § 6.008(b). Because lack of a reasonable expectation of reconciliation is part of the insupportability ground for divorce under Tex. Fam. Code § 6.001, condonation is not a defense to a suit based on insupportability. If only fault grounds are pleaded and condonation is a possible defense, the facts required to demonstrate condonation vary with the ground for divorce being asserted. Because of this variance and the fact that condonation is so rarely asserted as a defense, no pattern instruction is included in this volume. If condonation is raised by the evidence, an instruction tailored to the facts and to the ground for divorce asserted in the particular case should be included in the charge.

PJC 201.2 Annulment

A marriage may be annulled if *at the time of the marriage the party seeking the annulment was under the influence of alcoholic beverages or narcotics and as a result did not have the capacity to consent to the marriage and that party has not voluntarily cohabited with the other party to the marriage since the effects of the alcoholic beverages or narcotics ended.*

QUESTION 1

Do grounds exist for annulment of the marriage?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Fam. Code §§ 6.105–.110.

Rewording for other grounds. The instruction given above as an example is based on Tex. Fam. Code § 6.105. If appropriate, an instruction based on Tex. Fam. Code §§ 6.106–.110 should be substituted for or given in addition to that instruction. (Annulments sought under Tex. Fam. Code § 6.102 on the ground that a party was underage are not subject to jury trial. Tex. Fam. Code §§ 6.104(a), 6.703.)

Alternative cause of action for divorce. If divorce is pleaded as an alternative to annulment, appropriate portions of PJC 201.1 (divorce) should be submitted conditioned on a "No" answer to Question 1 above.

Proceeding after death of a spouse. The standards of Tex. Fam. Code § 6.108(a) apply if a proceeding to void a marriage based on lack of mental capacity is pending on a spouse's death. Tex. Est. Code § 123.101. If such a proceeding is not pending on the spouse's death, the standards of Tex. Est. Code § 123.103 apply. In such a case, the instruction should be reworded accordingly.

PJC 201.3 Void Marriage

A marriage is void if *entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse. However, the marriage becomes valid when the prior marriage is dissolved or terminated if, after the date of the dissolution or termination, the parties have lived together as spouses and represented themselves to others as being married.*

QUESTION 1

Is the marriage void?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Fam. Code §§ 6.201–.202, 6.205–.206. In the instruction, the phrase "as spouses" is used in place of the phrase "as husband and wife" that appears in Tex. Fam. Code § 6.202; the substitution is based on the ruling of the Supreme Court of the United States in *Obergefell v. Hodges*, 135 S. Ct. 2584(2015).

Rewording for other grounds. The instruction given above as an example is based on Tex. Fam. Code § 6.202. If appropriate, an instruction based on Tex. Fam. Code §§ 6.201, 6.205, or 6.206 should be substituted.

Alternative cause of action for divorce. If divorce is pleaded as an alternative to a declaration that the marriage is void, appropriate portions of PJC 201.1 (divorce) should be submitted conditioned on a "No" answer to Question 1 above.

Proceeding after death of a spouse. If the proceeding is brought after the death of one or both spouses, replace the word "Is" with the word "Was" in the question.

PJC 201.4 Existence of Informal Marriage

PJC 201.4A Existence of Informal Marriage—Instruction

Two people are married if they agreed to be married and after the agreement they lived together in Texas as spouses and there represented to others that they were married.

PJC 201.4B Existence of Informal Marriage—Jury Determination of Date—Question

QUESTION 1

Are *PARTY A* and *PARTY B* married?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

When were *PARTY A* and *PARTY B* married?

Answer by stating the date of the marriage.

Answer: _____

PJC 201.4C Existence of Informal Marriage—Specific Date or Event—Question

QUESTION 1

Are *PARTY A* and *PARTY B* married?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Were *PARTY A* and *PARTY B* married *by January 3, 1995*?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Fam. Code § 2.401(a)(2). In PJC 201.4A, the phrases "two people" and "as spouses" are used in place of the phrases "a man and a woman" and "as husband and wife" that appear in Tex. Fam. Code § 2.401(a)(2); the substitution is based on the ruling of the Supreme Court of the United States in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The Committee expresses no opinion on the retroactive effect of the *Obergefell* decision on informal marriages in same-sex relationships. *See generally Ranolls v. Dewling*, 223 F. Supp. 3d 613, 619–22, 624 (E.D. Tex. 2016) (examining the retroactivity of *Obergefell* and finding Texas's prohibition against same-sex informal marriages unconstitutional).

No instruction regarding declaration of informal marriage. No instruction based on Tex. Fam. Code § 2.401(a)(1), regarding proof of an informal marriage by evidence that a declaration of marriage has been executed as provided by Tex. Fam. Code § 2.402, has been provided, since the existence of such proof would virtually never be a jury question.

When to use. The two questions in PJC 201.4B should be used if it is appropriate under the evidence to ask the jury whether the parties are presently married and, if so, on what date they were married. In some cases, however, the state of the evidence may make it unlikely that the jury will be able to agree on a particular date on which the marriage occurred; the relevant inquiry may be whether the marriage existed on a particular known date or on the occurrence of a particular event, such as the purchase of a house. In such a case, the questions in PJC 201.4C should be used.

Rewording question. In appropriate cases, the second question in PJC 201.4C may be reworded to reflect a particular event instead of a particular date: for example, "Were *PARTY A* and *PARTY B* married *when they acquired the property at 10 Acorn Lane in Houston, Texas*?" In some cases, the second question should be expanded into a series of questions inquiring about the existence of the marriage on various specific dates, events, or both; the dates and events should be listed in chronological order, beginning with the earliest, and each question should be conditioned on a "No" answer to the previous one.

Separate trials. The Committee suggests that if a suit involves not only whether and when the parties were married but also the ownership and characterization of sig-

nificant property, the court should consider separate trials for these questions. *See* Tex. R. Civ. P. 174(b); *Winfield v. Renfro*, 821 S.W.2d 640, 652–53 (Tex. App.—Houston [1st Dist.] 1991, writ denied). If all the probable questions are tried together, it will be necessary to submit multiple sets of contingent questions concerning ownership and characterization of property; the jury will be directed to answer one of these sets depending on their answers to whether the parties are married and, if so, the date on which they were married. For example, if the jury answers that the parties were married as of a certain date, a particular item of property may clearly be community property; if, on the other hand, the jury answers in the negative for that date, the jury might be required to determine whether that same item of property is the separate property of the purchaser, the parties are co-owners of the property, or the purchaser holds the property in constructive trust for the other party. With multiple items of property and multiple dates of possible informal marriage, the number of questions may increase almost geometrically. The efficient use of court and jury time also militates in favor of dividing these issues into separate trials. The litigants must advance multiple theories and produce evidence supporting those theories when so many contingencies are involved. On the other hand, if the determination of the existence of the marriage is made first, only the evidence supporting the applicable theory must be introduced.

Proceeding after death of a spouse. If the proceeding is brought after the death of one or both spouses, replace the word "Are" in Question 1 in PJC 201.4B and PJC 201.4C with the word "Were."

CHAPTER 202 CHARACTERIZATION OF PROPERTY

PJC 202.1 Separate and Community Property

The property of a spouse is characterized as either separate property or community property. *Unless it has been converted to community property by agreement of the spouses, [a/A]* spouse's separate property consists of—

[Use only the items that are relevant in the particular case.]

1. The property owned *or claimed* by the spouse before marriage.

2. The property acquired by the spouse during marriage by gift, devise, or descent.

3. The recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

4. The property set aside to the spouse by a premarital agreement.

5. The property set aside to the spouse by a partition or exchange agreement.

6. The property set aside to the spouse by an agreement between the spouses concerning income or property derived from separate property.

Community property consists of all property, other than separate property, acquired by either spouse during marriage.

COMMENT

Source. The definition of "separate property" in the foregoing instruction is based on Tex. Const. art. XVI, § 15, and Tex. Fam. Code §§ 3.001, 4.003, 4.102, 4.103, 4.201–.206. The definition of "community property" is based on Tex. Fam. Code § 3.002.

When to use. The portions of the foregoing basic definition that are relevant in the particular case should be given in cases in which characterization of property is in issue. Other instructions contained in PJC 202.2–202.10 also relate to the characterization of property; appropriate portions of those definitions and instructions should be given if relevant to the particular case. See PJC 202.11 and 202.12 for jury questions to be submitted on the subject of characterization of property.

The phrase *Unless it has been converted to community property by agreement of the spouses*, in the second sentence of the first paragraph, should be omitted if such an agreement is not in evidence.

The words *or claimed* in item 1 should be omitted if inception of title is not in issue.

No instruction should be given on the presumption, contained in Tex. Fam. Code § 3.003, that property possessed by either spouse during or on dissolution of marriage is presumed to be community property. The sole purpose of a presumption is to fix the burden of producing evidence. *McGuire v. Brown*, 580 S.W.2d 425 (Tex. App.—Austin 1979, writ ref'd n.r.e.); *Sanders v. Davila*, 593 S.W.2d 127 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.). An instruction on the presumption may also constitute an impermissible comment on the weight of the evidence. *Glover v. Henry*, 749 S.W.2d 502 (Tex. App.—Eastland 1988, no writ).

No instruction regarding "quasi-community property" should be given, because property, wherever found, that is not found to be separate property is generally divisible as community property. Tex. Fam. Code § 7.002(a); *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982). Because of federal preemption, however, some property may not be divided by a divorce court. *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981).

If validity of property agreement is disputed. The foregoing instruction is worded on the assumption that there is no dispute about the validity of any premarital agreement, partition or exchange agreement, or agreement between the spouses concerning income or property derived from separate property mentioned in items 4, 5, and 6 of the instruction or of any agreement to convert separate property to community property. If the validity of such an agreement is in dispute, see PJC 207.1–207.5.

PJC 202.2 Inception of Title

Property is "claimed before marriage" if the right to acquire or own the property arises before marriage, even if title to the property is acquired during marriage.

COMMENT

Source. The foregoing instruction is derived from *Creamer v. Briscoe*, 109 S.W. 911 (Tex. 1908); *Welder v. Lambert*, 44 S.W. 281 (Tex. 1898); and *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. App.—Waco 1963, writ ref'd).

When to use. If inception of title is in issue, the foregoing instruction should be given with PJC 202.1 (separate and community property).

PJC 202.3 Gift, Devise, and Descent

"Gift" means a voluntary and gratuitous transfer of property coupled with delivery, acceptance, and the intent to make a gift.

A third person may make a gift to one spouse or to both spouses. If the gift is made to one spouse, that spouse owns the gift as separate property. If the gift is made to both spouses, each spouse owns an equal undivided separate-property interest in the gift.

A spouse may make a gift to the other spouse, in which event the gift includes all the income and property that may arise from that gift unless the evidence establishes a different intent of the donor at the time of the gift.

"Devise" means acquisition of property by last will and testament.

"Descent" means acquisition of property by inheritance without a will.

COMMENT

Source. The definition of the word "gift" in the first paragraph of the foregoing instruction is derived from *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1961), and *Kiel v. Brinkman*, 668 S.W.2d 926 (Tex. App.—Houston [14th Dist.] 1984, no writ). The instructions in the second paragraph are based on *White v. White*, 590 S.W.2d 587 (Tex. App.—Houston [1st Dist.] 1979, no writ). The third paragraph is based on Tex. Const. art. XVI, § 15, and Tex. Fam. Code § 3.005. Definitions of the terms "devise" and "descent" are based on common usage.

When to use. If property acquired by gift, devise, or descent is in issue, the portions of the foregoing instruction that are relevant to the particular case should be given with PJC 202.1 (separate and community property).

Unequal gift. The foregoing instruction does not address the situation in which the issue is whether the donor made an unequal gift to the two parties.

PJC 202.4 Tracing

The character of separate property is not changed by the sale, exchange, or change in form of the separate property. If separate property can be definitely traced and identified, it remains separate property regardless of the fact that the separate property may undergo mutations or changes in form.

COMMENT

Source. The foregoing instruction is derived from *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965), and *Rose v. Houston*, 11 Tex. 323 (1854).

Commingling. No specific instruction is provided regarding "commingling." The term is descriptive only, and its application in characterizing property is incorporated in the instructions and definitions contained in PJC 202.1–202.6.

When to use. If tracing of separate property is in issue, the foregoing instruction should be given with PJC 202.1 (separate and community property).

PJC 202.5 Property Acquired on Credit

Funds or property acquired on credit during marriage is community property unless the creditor, at the time of the extension of credit, agrees to look solely to the separate estate of the borrower for payment of the debt.

COMMENT

Source. The foregoing instruction is derived from *Broussard v. Tian*, 295 S.W.2d 405 (Tex. 1956), and *Gleich v. Bongio*, 99 S.W.2d 881 (Tex. 1937).

When to use. If property acquired on credit is in issue, the foregoing instruction should be given with PJC 202.1 (separate and community property).

PJC 202.6 Property with Mixed Characterization

An item of property may be—

1. Community property.
2. Separate property of one spouse.
3. Separate property of the other spouse.
4. Any combination of these.

The part that is separate property is the percentage of the purchase price paid with separate property or separate credit. To calculate a separate-property interest, divide the separate-property contribution by the total purchase price. The interest remaining after all separate-property interests have been deducted is community property.

Property may be acquired partly by *gift* and partly by purchase. In such a case, the portion acquired by *gift* is always separate property. The portion acquired by purchase is separate, community, or both, depending on the source of the funds or credit used to make the purchase, in accordance with the definitions and instructions regarding separate and community property given in this charge.

COMMENT

Source. The foregoing instruction is derived from *Gleich v. Bongio*, 99 S.W.2d 881 (Tex. 1937).

When to use. If property with mixed characterization is in issue, the portions of the foregoing instruction that are relevant in the particular case should be given with PJC 202.1 (separate and community property). If credit is involved, PJC 202.5 (property acquired on credit) should be included in the charge.

Rewording. The term *devise* or the term *descent*, or both, may be substituted for or added to the term *gift* in the third paragraph of the foregoing instruction, as appropriate.

PJC 202.7 Premarital Agreement

A premarital agreement is an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage. A premarital agreement must be in writing and signed by both parties.

Parties to a premarital agreement may contract with respect to—

1. The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.

2. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.

3. The disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.

4. The modification or elimination of spousal support.

5. The making of a will, trust, or other arrangement to carry out the provisions of the agreement.

6. The ownership rights in and disposition of the death benefit from a life insurance policy.

7. The choice of law governing the construction of the agreement.

8. Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

"Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

If an item of property set aside as separate property by a premarital agreement can be traced to other property and identified, the property will remain separate property even if the property has changed form.

COMMENT

Source. The first three paragraphs of the foregoing instruction are based on Tex. Fam. Code §§ 4.001–.003. The fourth paragraph is based on *Love v. Robertson*, 7 Tex. 6 (1851).

When to use. If a separate-property claim is based on the terms of a premarital agreement, the foregoing instruction should be given with PJC 202.1 (separate and community property).

If enforceability of agreement is disputed. If the enforceability of a premarital agreement is disputed, additional instructions and questions must be submitted to resolve that issue. See chapter 207, "Enforceability of Property Agreements."

PJC 202.8 Partition or Exchange Agreement

At any time, spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as they may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. A partition or exchange agreement must be in writing and signed by both parties.

"Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

COMMENT

Source. The first paragraph of the foregoing instruction is based on Tex. Const. art. XVI, § 15, and Tex. Fam. Code §§ 4.102, 4.104. The second paragraph is based on Tex. Fam. Code §§ 4.001, 4.101.

When to use. If a separate-property claim is based on the terms of a partition or exchange agreement, the foregoing instruction should be given with PJC 202.1 (separate and community property).

If enforceability of agreement is disputed. If the enforceability of a partition or exchange agreement is disputed, additional instructions and questions must be submitted to resolve that issue. See chapter 207, "Enforceability of Property Agreements."

PJC 202.9 Agreement Concerning Income or Property Derived from Separate Property

At any time, spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner. Such an agreement must be in writing and signed by both parties.

"Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

If an item of property set aside as separate property by such an agreement can be traced to other property and identified, it will remain separate property even if the property has changed form.

COMMENT

Source. The first paragraph of the foregoing instruction is based on Tex. Fam. Code §§ 4.103, 4.104. The second paragraph is based on Tex. Fam. Code §§ 4.001, 4.101. The third paragraph is based on *Love v. Robertson*, 7 Tex. 6 (1851).

When to use. If a separate-property claim is based on the terms of an agreement between spouses concerning income or property derived from separate property, the foregoing instruction should be given with PJC 202.1 (separate and community property).

If enforceability of agreement is disputed. If the enforceability of an agreement between spouses concerning income or property derived from separate property is disputed, additional instructions and questions must be submitted to resolve that issue. See chapter 207, "Enforceability of Property Agreements."

PJC 202.10 Agreement to Convert Separate Property to Community Property

At any time, spouses may agree that all or part of the separate property owned by either or both of them is converted to community property. Such an agreement must—

1. be in writing, and
2. be signed by both spouses, and
3. identify the property being converted, and
4. specify that the property is being converted to the spouses' community property.

The mere transfer of a spouse's separate property to the name of the other spouse or to the name of both spouses is not sufficient to convert the property to community property.

"Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

COMMENT

Source. The first paragraph of the foregoing instruction is based on Tex. Fam. Code §§ 4.202–.203(a). The second paragraph is based on Tex. Fam. Code § 4.203(b). The third paragraph is based on Tex. Fam. Code §§ 4.001, 4.201.

When to use. If a community-property claim is based on the terms of an agreement to convert separate property to community property, the foregoing instruction should be given with PJC 202.1 (separate and community property). If the transfer of a spouse's separate property to the name of the other spouse or both spouses is not in issue, the second paragraph should be omitted.

If enforceability of agreement is disputed. If the enforceability of an agreement to convert separate property to community property is disputed, additional instructions and questions must be submitted to resolve that issue. See chapter 207, "Enforceability of Property Agreements."

PJC 202.11 Separate Property—One Party Claiming Separate Interest (Question)

QUESTION _____

What percentage, if any, of *each of the following items* is the separate property of *SPOUSE A* and what percentage, if any, is the community property of the parties?

Answer by stating the percentage that is the separate property of *SPOUSE A* and the percentage that is community property. The percentages in your answer must total 100 percent for each item. To find all or part of *an* item to be the separate property of *SPOUSE A*, you must do so by clear and convincing evidence. "Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true. Any percentage of *an* item that is not the separate property of *SPOUSE A* is community property.

	SPOUSE A's Separate Property		Community Property	
PROPERTY A	_____%	+	_____%	= 100%
PROPERTY B	_____%	+	_____%	= 100%
PROPERTY C	_____%	+	_____%	= 100%

COMMENT

Source. The foregoing question is based on Tex. Fam. Code § 3.003. The definition of "clear and convincing evidence" in the second paragraph is based on Tex. Fam. Code § 101.007.

When to use. The foregoing question should be used if only one party asserts a claim of separate property. If both parties assert separate-property claims, the question in PJC 202.12 (separate property—both parties claiming separate interests) should be used. See the comments below entitled "If corporate form is disputed" and "Third-party ownership claims are not covered."

Include these additional instructions. Applicable portions of the instructions in PJC 202.1 (separate and community property) through PJC 202.10 (agreement to convert separate property to community property) should be used with this question.

If only one item of property is in issue. If the characterization of only one item of property is in issue, the phrase *the following item* should be substituted for the phrase *each of the following items* in the foregoing question, the phrase "for each item" should be omitted from the second sentence in the second paragraph, and the word *the* should be substituted for the word *an* in the third and fifth sentences of the second paragraph.

If corporate form is disputed. Chapter 205, "Disregarding Corporate Form," includes instructions and questions to be used if a claim has been raised that the corporate identity of a corporation should be disregarded. In such a situation, the property at issue—the corporation and its assets—should not be included in the list of items inquired about in the question in PJC 202.11 above; inquiry about this property is made in PJC 205.3 (disregarding corporate identity of corporation owned entirely by spouses). Duplicate inquiries about the corporation and its property could result in conflicting answers.

Third-party ownership claims are not covered. The foregoing submission assumes that total ownership of the property is in one or both of the spouses and that no third party is asserting ownership rights. Disputes between the spouses and their creditors or others claiming ownership interests are beyond the scope of this book.

PJC 202.12 Separate Property—Both Parties Claiming Separate Interests (Question)

QUESTION _____

What percentage, if any, of *each of the following items* is the separate property of *SPOUSE A*, of *SPOUSE B*, or of both, and what percentage, if any, is community property? An item may be community property, separate property of one spouse, separate property of the other spouse, or any combination of these.

Answer by stating the percentage that is the separate property of *SPOUSE A*, the percentage that is the separate property of *SPOUSE B*, and the percentage that is community property. The percentages in your answer must total 100 percent for each item. To find all or part of *an* item to be the separate property of a party, you must do so by clear and convincing evidence. "Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true. Any percentage of *an* item that is not the separate property of a party is community property.

	SPOUSE A's Separate Property		*SPOUSE B*'s Separate Property		Community Property	
PROPERTY A	_____%	+	_____%	+	_____%	= 100%
PROPERTY B	_____%	+	_____%	+	_____%	= 100%
PROPERTY C	_____%	+	_____%	+	_____%	= 100%

COMMENT

Source. The foregoing question is based on Tex. Fam. Code § 3.003. The definition of "clear and convincing evidence" in the second paragraph is based on Tex. Fam. Code § 101.007.

When to use. The foregoing question should be used if both parties assert separate-property claims. If only one party asserts a claim of separate property, the question in PJC 202.11 (separate property—one party claiming separate interest) should be used. See the comments below entitled "If corporate form is disputed" and "Third-party ownership claims are not covered."

Include these additional instructions. Applicable portions of the instructions in PJC 202.1 (separate and community property) through PJC 202.10 (agreement to convert separate property to community property) should be used with this question.

If only one item of property is in issue. If the characterization of only one item of property is in issue, the phrase *the following item* should be substituted for the phrase *each of the following items* in the foregoing question, the phrase "for each item" should be omitted from the second sentence in the second paragraph, and the word *the* should be substituted for the word *an* in the third and fifth sentences of the second paragraph.

If corporate form is disputed. Chapter 205, "Disregarding Corporate Form," includes instructions and questions to be used if a claim has been raised that the corporate identity of a corporation should be disregarded. In such a situation, the property at issue—the corporation and its assets—should *not* be included in the list of items inquired about in the question in PJC 202.12 above; inquiry about this property is made in PJC 205.3 (disregarding corporate identity of corporation owned entirely by spouses). Duplicate inquiries about the corporation and its property could result in conflicting answers.

Third-party ownership claims are not covered. The foregoing submission assumes that total ownership of the property is in one or both of the spouses and that no third party is asserting ownership rights. Disputes between the spouses and their creditors or others claiming ownership interests are beyond the scope of this book.

PJC 202.13 Property Division—Advisory Questions (Comment)

The Committee believes the submission of advisory jury questions, which may unduly lengthen the court's charge, is generally inappropriate. For this reason, the Committee has formulated neither instructions nor jury questions seeking advisory opinions on the manner and method by which the community estate should be divided.

PJC 202.14 Management, Control, and Disposition of Marital Property

During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including but not limited to personal earnings, revenue from separate property, recoveries for personal injuries, and the increase and mutations of and the revenue from all property subject to the spouse's sole management, control, and disposition.

Unless the agreement of the spouses to convert separate property to community property specifies otherwise, property converted to community property by such an agreement is subject to—

1. The sole management, control, and disposition of the spouse in whose name the property is held.

2. The sole management, control, and disposition of the spouse who transferred the property if the property is not subject to evidence of ownership.

3. The joint management, control, and disposition of the spouses if the property is held in the name of both spouses.

4. The joint management, control, and disposition of the spouses if the property is not subject to evidence of ownership and was owned by both spouses before the property was converted to community property.

All other community property is subject to the joint management, control, and disposition of the spouses, unless they provide otherwise by power of attorney in writing or other agreement.

If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.

Each spouse has the sole management, control, and disposition of that spouse's separate property.

COMMENT

Source. The first paragraph of the foregoing instruction is based on Tex. Fam. Code § 3.102(a). The second paragraph is based on Tex. Fam. Code § 4.204. The third paragraph is based on Tex. Fam. Code § 3.102(c). The fourth paragraph is based on Tex. Fam. Code § 3.102(b). The fifth paragraph is based on Tex. Fam. Code § 3.101.

When to use. If management, control, or disposition of marital property is in issue, the foregoing instruction should be given with PJC 202.1 (separate and community property). If property converted to community property by agreement of the spouses is not in issue, the second paragraph of the instruction should be omitted. If management, control, or disposition of separate property is not in issue, the fifth paragraph of the instruction should be omitted.

PJC 202.15 Personal and Marital Property Liability

A person is personally liable for the acts of the person's spouse only if the spouse acts as an agent for the person or the spouse incurs a debt for necessaries. A spouse does not act as an agent for the other spouse solely based on the existence of the marriage relationship.

Unless both spouses are personally liable as described in the paragraph above, the community property subject to a spouse's sole management, control, and disposition is not subject to any liabilities that the other spouse incurred before marriage or any nontortious liabilities that the other spouse incurs during marriage.

The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by that spouse before or during marriage.

All community property is subject to tortious liability of either spouse incurred during marriage.

Except as provided above, community property is not subject to a liability that arises from an act of a spouse.

A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law.

COMMENT

Source. The first paragraph of the foregoing instruction is based on Tex. Fam. Code § 3.201(a), (c). The second, third, fourth, and fifth paragraphs are based on Tex. Fam. Code §§ 3.201(b), 3.202(b)–(d). The sixth paragraph is based on Tex. Fam. Code § 3.202(a).

When to use. If there is an issue whether a spouse is personally liable or whether certain marital property is subject to liability, relevant portions of the foregoing instruction should be given with PJC 202.1 (separate and community property) and, if appropriate, PJC 202.14 (management, control, and disposition of marital property).

PJC 203.1 Value

The value of an asset is its fair market value unless it has no fair market value.

"Fair market value" means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

If an asset has no fair market value, its value is the value of its current ownership as determined from the evidence.

In valuing an asset to be received in the future, you are to find its present value as determined from the evidence.

COMMENT

Source. The foregoing definition of "fair market value" is based on *City of Pearland v. Alexander*, 483 S.W.2d 244 (Tex. 1972), and *Wendlandt v. Wendlandt*, 596 S.W.2d 323, 325 (Tex. App.—Houston [1st Dist.] 1980, no writ). The instruction on value of ownership is derived from *Crisp v. Security National Insurance Co.*, 369 S.W.2d 326 (Tex. 1963) (uses the phrase "actual value to the owner"); *see also Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002).

When to use. Relevant portions of the foregoing instruction should be used with the question in PJC 203.3 (value of property).

If all assets have fair market value. The phrase "unless it has no fair market value" and the third paragraph should be omitted if it is uncontested that *all* assets have a fair market value. Most cases, however, will involve household goods, clothing, and personal effects, which may not have a recognized market value. *See Crisp*, 369 S.W.2d 326.

PJC 203.2 Factors to Be Excluded for Valuation of Business

"Personal goodwill" is the goodwill that is attributable to an individual's skills, abilities, and reputation.

In determining the value of *SPOUSE A*'s *medical practice*, you are not to include the value of personal goodwill or the value of time and labor to be expended after the divorce. However, you may consider the commercial goodwill, if any, of the *practice* that is separate and apart from personal goodwill.

COMMENT

Source. The Supreme Court of Texas has said that, in valuing the practice of an unincorporated professional for purposes of divorce, the court cannot include the value of goodwill that has accrued to the individual and that is not separate and apart from that individual's person or that individual's ability to practice the profession. *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972). Since *Nail*, courts of appeals have considered the question of goodwill of a professional medical corporation, *Geesbreght v. Geesbreght*, 570 S.W.2d 427 (Tex. App.—Fort Worth 1978, writ dism'd); goodwill of a law partnership, *Finn v. Finn*, 658 S.W.2d 735 (Tex. App.—Dallas 1983, no writ); and proceeds from the sale of an accounting practice, including sums paid for goodwill, *Austin v. Austin*, 619 S.W.2d 290 (Tex. App.—Austin 1981, no writ). These and other cases suggest that goodwill that exists separate and apart from the individual professional is property that can be considered and divided on divorce. Some courts have applied this rationale to nonprofessionals. *See Rathmell v. Morrison*, 732 S.W.2d 6, 18 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Finch v. Finch*, 825 S.W.2d 218, 224 (Tex. App.—Houston [1st Dist.] 1992, no writ). In *Rathmell*, the court suggested that the jury be instructed, in connection with valuing the business, to disregard the personal goodwill of the spouse; the time, toil, and talent of the spouse to be expended after the divorce; and the spouse's willingness not to compete with the business. The composition of commercial goodwill varies from case to case, depending on the nature of the business entity or professional practice.

When to use. The foregoing instruction should be used with the question in PJC 203.3 (value of property) in cases requiring valuation of a business or a professional firm or partnership in which one of the parties is a participant.

Rewording instruction. In an appropriate case, suitably descriptive terms should be substituted for the phrase *medical practice* and the word *practice* in the foregoing instruction.

PJC 203.3 Value of Property (Question)

QUESTION _____

State in dollars the value of *each of the following items*:

PROPERTY A _____

PROPERTY B _____

PROPERTY C _____

COMMENT

Include these additional definitions and instructions. The definitions and instructions in PJC 203.1 (value) and 203.2 (factors to be excluded for valuation of business) should be used with this question as appropriate.

If only one item of property is in issue. If valuation of only one item of property is in issue, the description of the item should be substituted for the phrase *each of the following items* in the foregoing question.

If corporate form is disputed. Chapter 205, "Disregarding Corporate Form," includes instructions and questions to be used if a claim has been raised that the separate identity of a corporation should be disregarded. In such a situation, the property at issue—the corporation and its assets—should *not* be included in the list of items inquired about in the question in PJC 203.3 above; inquiry about the value of the appropriate property is made in PJC 205.3 (disregarding corporate identity of corporation owned entirely by spouses). Duplicate inquiries about the corporation and its property could result in conflicting answers.

No valuation of separate property. If it is undisputed that an item is separate property, that item should not be included in the list of properties inquired about in the foregoing question.

PJC 204.1 Reimbursement

Texas law recognizes three marital estates: the community property owned by the spouses together and referred to as the community estate; the separate property owned individually by one spouse and referred to as a separate estate; and the separate property owned individually by the other spouse, also referred to as a separate estate.

A claim for reimbursement for funds expended by an estate to pay debts, taxes, interest, or insurance for the property of another estate is measured by the amount paid. An offset against a claim for reimbursement for funds expended by an estate to pay debts, taxes, interest, or insurance for the property of another estate is measured by the value of any related benefit received by the paying estate, such as the fair value of the use of the property by the paying estate, income received by the paying estate from the property, and any reduction in the amount of any income tax obligation of the paying estate by virtue of the paying estate's claiming tax-deductible items relating to the property, such as depreciation, interest, taxes, maintenance, and other deductible payments, except that an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by a separate estate against contributions made by the community estate to the separate estate is not to be a part of such measurement.

A claim for reimbursement of funds expended by an estate for capital improvements to property of another estate is measured by the enhancement in value to the receiving estate resulting from such expenditures. An offset against a claim for reimbursement for capital improvements to property of another estate is measured by the value of any related benefit received by the paying estate, such as the fair value of the use of the property by the paying estate, income received by the paying estate from the property, and any reduction in the amount of any income tax obligation of the paying estate by virtue of the paying estate's claiming tax-deductible items relating to the property, such as depreciation, interest, taxes, maintenance, and other deductible payments, except that an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by a separate estate against contributions made by the community estate to the separate estate is not to be a part of such measurement.

A claim for reimbursement to the community estate for the spouses' time, toil, talent, or effort expended to enhance a spouse's separate estate is measured by the value of such community time, toil, talent, and effort other than that reasonably necessary to manage and preserve the separate estate. An offset against

a claim for reimbursement for the spouses' time, toil, talent, or effort expended to enhance a spouse's separate estate is measured by the compensation paid to the community in the form of *salary, bonuses, dividends, and other fringe benefits.*

Texas law does not recognize a marital estate's claim for reimbursement for the payment of child support, alimony, or spousal maintenance; for living expenses of a spouse or child of a spouse; for contributions of property of nominal value; for the payment of a liability of a nominal amount; or for a student loan owed by a spouse.

A spouse seeking reimbursement has the burden of proving each element of the claim by a preponderance of the evidence. However, a spouse seeking reimbursement to a separate estate must prove by clear and convincing evidence that the funds expended were separate property. "Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true. The amount of the claim is measured as of the time of trial.

A spouse seeking an offset against a claim for reimbursement has the burden of proving each element of the claim by a preponderance of the evidence. The amount of the offset is measured as of the time of trial.

QUESTION 1

State in dollars the amount of the reimbursement claim, if any, proved in favor of—

1. *the community estate* against *SPOUSE A's separate estate* Answer: _____
2. *SPOUSE A's separate estate* against *SPOUSE B's separate estate* Answer: _____

If you inserted a sum of money in answer to Question 1, answer *the corresponding part of* Question 2. Otherwise, do not answer Question 2.

QUESTION 2

State in dollars the amount of the offset against such reimbursement claim, if any, proved in favor of—

1. *SPOUSE A's separate estate* Answer: _____
2. *SPOUSE B's separate estate* Answer: _____

COMMENT

Source. Certain claims for reimbursement are listed in Tex. Fam. Code § 3.402(a). Use of the term "includes" in that section indicates that types of claims other than those listed in that section may be cognizable as claims for reimbursement (Tex. Gov't Code § 311.005(13)). The Committee has concluded that section 3.402(a) does not prohibit the more expansive interpretation set forth in the foregoing instruction, which includes claims established under case law discussed below.

In *Penick v. Penick*, 783 S.W.2d 194, 197–98 (Tex. 1988), the Supreme Court of Texas set forth its position on offsetting benefits to claims for reimbursement and emphasized the equitable nature of reimbursement. The court stated that it was "difficult to announce a single formula which will balance the equities between each marital estate in every situation and for every kind of property and contribution." The supreme court concluded that a court should use the same discretion in evaluating a claim for reimbursement as in making a "just and right" division of the community property. The court must resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate. Tex. Fam. Code § 3.402(b).

The instruction on debts, taxes, interest, and insurance is derived from *Penick*, 783 S.W.2d 194, and *Colden v. Alexander*, 171 S.W.2d 328 (Tex. 1943). A claim for reimbursement for funds expended by an estate to pay debts, taxes, interest, or insurance for the property of another estate is measured by the amount paid. An offset against such a claim for reimbursement is measured by the value of any related benefit received by the paying estate, such as the fair value of the use of the property by the paying estate except under certain circumstances (see comment below entitled "Offset for use and enjoyment of residence"), income received by the paying estate from the property, and any reduction in the amount of any income tax obligation of the paying estate by virtue of the paying estate's claiming tax-deductible items relating to the property, such as depreciation, interest, taxes, maintenance, and other deductible payments. *See Penick*, 783 S.W.2d at 197–98.

The Texas Family Code provides that a claim for reimbursement includes payment by one marital estate of the unsecured liabilities of another marital estate (Tex. Fam. Code § 3.402(a)(1)) and the reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses (Tex. Fam. Code § 3.402(a)(9)). If such a claim involves the payment of debt or liabilities that are not related to property, the following instruction should be included:

> A claim for reimbursement for funds expended by an estate to pay unsecured debt or liabilities of another estate is measured by the amount paid. An offset against a claim for reimbursement for funds expended by an estate to pay unsecured debt or liabilities of another

estate is measured by the value of any related benefit received by the paying estate.

Certain claims regarding debt are not described by any subsection of Tex. Fam. Code § 3.402(a). (For example, the community takes a loan secured by a second lien on a house owned by the community, using the proceeds to pay children's college expenses; the loan is later repaid with funds inherited by one spouse.) Similarly, subsections (a)(3) through (a)(7) of Code section 3.402 are cast in terms of the reduction of the principal amount of debt. Because use of the term "includes" in section 3.402(a) indicates that other types of claims may also be cognizable as claims for reimbursement (Tex. Gov't Code § 311.005(13)), the Committee has concluded that section 3.402(a) does not prohibit recognition of such claims.

The instruction on capital improvements to property is based on Tex. Fam. Code § 3.402(a)(8), (d), and *Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985). A claim for reimbursement of funds expended by an estate for capital improvements to property of another estate, other than by incurring debt, is measured by the enhancement in value to the receiving estate resulting from such expenditures. *Anderson*, 684 S.W.2d 673. An offset against such a claim for reimbursement is measured by the value of any related benefit received by the paying estate, such as the fair value of the use of the property by the paying estate except under certain circumstances (see comment below entitled "Offset for use and enjoyment of residence"), income received by the paying estate from the property, and any reduction in the amount of any income tax obligation of the paying estate by virtue of the paying estate's claiming tax-deductible items relating to the property, such as depreciation, interest, taxes, maintenance, and other deductible payments. *See Penick*, 783 S.W.2d at 197–98.

The instruction on the spouses' time, toil, talent, or effort is based on *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984). The words *salary, bonuses, dividends, and other fringe benefits* should be replaced with terms appropriate to the particular case. The submission does not contain all the elements stated in Tex. Fam. Code § 3.402(a)(2), which provides that a claim for reimbursement includes "inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse." Because use of the term "includes" in section 3.402(a) indicates that other types of claims may also be cognizable as claims for reimbursement (Tex. Gov't Code § 311.005(13)), the Committee has concluded that section 3.402(a)(2) does not alter the requirements for a *Jensen* claim as set forth in the foregoing submission.

The instruction on the three marital estates is based on Tex. Fam. Code § 3.401(4).

The phrases "one spouse" and "the other spouse" are used in place of the phrases "the husband" and "the wife" that appear in Tex. Fam. Code § 3.401(4)(B), (4)(C); the substitution is based on the ruling of the Supreme Court of the United States in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The instruction on claims that may not be recognized is based on Tex. Fam. Code § 3.409.

The instruction on burden of proof by clear and convincing evidence for reimbursement to a separate estate is based on Tex. Fam. Code § 3.003. The definition of "clear and convincing evidence" is based on Tex. Fam. Code § 101.007.

The instruction on burden of proof on an offset to a reimbursement claim is based on Tex. Fam. Code § 3.402(e), which provides that the party seeking an offset has the burden of proof with regard to the offset.

When to use. The foregoing instruction and questions may be used to submit the claim for reimbursement of one estate against another. Only the portions of the instruction that are relevant in the particular case should be given.

If no separate-property reimbursement is asserted. If no claim for reimbursement to a separate estate is asserted, the second and third sentences of the sixth paragraph should be omitted.

If no offset is asserted. If no offset to a claim for reimbursement is asserted, the seventh paragraph should be omitted.

Characterization of property. Any instructions and questions necessary for establishing the characterization of relevant property should be given to the jury before these instructions and the questions concerning reimbursement are given. See PJC 202.1–202.15 regarding characterization of property. If characterization of property is in dispute, see PJC 204.3 (reimbursement—separate trials (comment)).

Rewording questions for specific claims. The itemized listing given as an example in the questions above should be reworded as appropriate to submit the particular claims that are in issue in the case. The list can be worded to resolve claims of reimbursement in any of the following situations:

1. *SPOUSE A* is seeking reimbursement to the community estate from *SPOUSE B*'s separate estate.

2. *SPOUSE B* is seeking reimbursement to the community estate from *SPOUSE A*'s separate estate.

3. *SPOUSE A* is seeking reimbursement to his or her separate estate from the community estate.

4. *SPOUSE B* is seeking reimbursement to his or her separate estate from the community estate.

5. *SPOUSE A* is seeking reimbursement to his or her separate estate from *SPOUSE B*'s separate estate.

6. *SPOUSE B* is seeking reimbursement to his or her separate estate from *SPOUSE A*'s separate estate.

In Question 1, only the estate or estates seeking reimbursement should be listed in the answer portion.

In the conditioning instruction preceding Question 2, omit the words *the corresponding part of* if only one estate seeks reimbursement.

Offset for use and enjoyment of residence. Question 2 should not be submitted as to a claim for offset for use and enjoyment of a primary or secondary residence owned wholly or partly by a separate estate against contributions made by the community estate to the separate estate. Tex. Fam. Code § 3.402(c).

Marital dissolution cases filed or deaths occurring before September 1, 2009. Many claims for reimbursement in cases for dissolution of a marriage filed before September 1, 2009, or arising from the death of a spouse before that date may be subject to statutory provisions differing from those reflected in the instructions in PJC 204.1. Consult earlier editions of this book for appropriate instructions and questions for such suits.

PJC 204.2 Reimbursement—Advisory Questions (Comment)

The Committee believes the submission of advisory jury questions, which may unduly lengthen the court's charge, is generally inappropriate. For this reason, the Committee has formulated neither instructions nor jury questions seeking advisory opinions on whether reimbursement should actually be awarded and, if so, to what extent and the manner and method by which this result should be accomplished.

PJC 204.3 Reimbursement—Separate Trials (Comment)

The Committee suggests that, if a claim of reimbursement involves a dispute over the characterization of property, the court should consider a separate trial to determine this issue. Tex. R. Civ. P. 174(b). Otherwise, the sets of alternative instructions on reimbursement will be unnecessarily confusing. Additionally, if characterization and reimbursement are tried together, the litigants will have to advance alternative theories and produce evidence supporting those theories. On the other hand, if the determination of the characterization of the property is made first, the presentation of evidence and the jury's task are greatly simplified. For questions and instructions regarding the characterization of property, see PJC 202.1–202.15.

PJC 205.1 Mere Tool or Business Conduit (Alter Ego)

A corporation is an entity distinct from its shareholders. However, the distinct corporate identity of the corporation may be disregarded if there is such unity between the corporation and *a shareholder* that the separateness of the corporation has ceased and the *shareholder's* improper use of the corporation has damaged the community estate.

In deciding whether there is such unity between a corporation and *a shareholder* that the separateness of the corporation has ceased, you are to consider the total dealings of the corporation and the *shareholder*, including—

1. The degree to which the corporation's property has been kept separate from that of the *shareholder*.

2. The amount of financial interest, ownership, and control the *shareholder maintains* over the corporation.

3. Whether the corporation has been used for personal purposes.

It is not necessary that each of the factors be present or that each be given equal weight; rather, you should determine from the totality of the circumstances whether the distinct corporate identity of the corporation should be disregarded. Mere domination of corporate affairs by a sole shareholder or financial unity between shareholder and corporation will not justify a disregard of the corporate identity.

COMMENT

Source. The foregoing instruction is derived from *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986), and *Lifshutz v. Lifshutz*, 61 S.W.3d 511 (Tex. App.—San Antonio 2001, pet. denied). The language of *Castleberry* has been modified to reflect the provisions of Tex. Bus. Corp. Act art. 2.21(A)(3) (expired Jan. 1, 2010, subsequently codified as Tex. Bus. Orgs. Code § 21.223(a)(3)), which eliminated the failure to observe corporate formalities as a consideration for piercing the corporate veil.

The court in *Lifshutz*, 61 S.W.3d at 517, stated one of the requirements for disregarding the corporate identity to be that "the spouse's improper use of the corporation damaged the community estate beyond that which might be remedied by a claim for reimbursement." The words "beyond that which might be remedied by a claim for reimbursement" have been omitted from the charge because it is for the court to determine whether the damage to the community exceeds that which might be remedied by reimbursement.

When to use. The foregoing instruction should be used with the question in PJC 205.3 (disregarding corporate identity of corporation owned entirely by spouses) if a party claims that the corporate form should be disregarded on the basis of alter ego. See the comments below entitled "Other bases for disregarding corporate identity" and "Caveat" and the comment in PJC 205.3 entitled "Not for corporations with third-party owners or to affect creditors' claims."

Rewording instruction. In an appropriate case, the phrase *the shareholders* should be substituted for the phrase *a shareholder* in the foregoing instruction, the word *shareholders* should be substituted for the word *shareholder*, the word *shareholders'* should be substituted for the word *shareholder's*, and the phrase *shareholders maintain* should be substituted for the phrase *shareholder maintains*.

Other bases for disregarding corporate identity. The Supreme Court of Texas in *Castleberry*, 721 S.W.2d at 272, listed six circumstances under which the corporate fiction has historically been disregarded. The basis used in the foregoing instruction, alter ego, "is only one of the bases for disregarding the corporate fiction: 'where a corporation is organized and operated as a mere tool or business conduit of another corporation.'" *Castleberry*, 721 S.W.2d at 272. The other bases, which are separate from alter ego, are reflected in PJC 205.2 (other unfair device) in this chapter.

Caveat. There are differences between the instructions and basic question found in chapter 108 (Piercing the Corporate Veil) in the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* and those found in this chapter 205 (Disregarding Corporate Form). In the context of marital dissolution, "reverse piercing" is sought to allow the trial court to move assets out of the corporation and divide them between the spouses as a part of the community estate. *See Lifshutz*, 61 S.W.3d at 516. The Committee believes that this instruction may also be used in the context of a probate proceeding. The Committee expresses no opinion on whether this instruction could be adapted for use in a non–family or non–probate law case.

PJC 205.2 Other Unfair Device

A corporation is an entity distinct from its shareholders. However, the distinct corporate identity of the corporation may be disregarded even though the corporate formalities have been observed and even though corporate assets have been kept separated from individual property if one or more of the following has occurred and if recognizing the distinct corporate identity would damage the community:

[Use only the items that are relevant in the particular case.]

1. The corporate form has been used as a sham to perpetrate a fraud; or

2. The corporate form has been resorted to as a means of evading an existing legal obligation; or

3. The corporate form has been employed to achieve or perpetrate a monopoly; or

4. The corporate form has been used to circumvent a statute; or

5. The corporate form has been relied on as a protection of crime or to justify wrong.

COMMENT

Source. The foregoing instruction is derived from *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986), and *Lifshutz v. Lifshutz*, 61 S.W.3d 511 (Tex. App.—San Antonio 2001, pet. denied).

The court in *Lifshutz*, 61 S.W.3d at 517, stated one of the requirements for disregarding the corporate identity to be that "the spouse's improper use of the corporation damaged the community estate beyond that which might be remedied by a claim for reimbursement." The words "beyond that which might be remedied by a claim for reimbursement" have been omitted from the charge because it is for the court to determine whether the damage to the community exceeds that which might be remedied by reimbursement.

When to use. The foregoing instruction should be used with the question in PJC 205.3 (disregarding corporate identity of corporation owned entirely by spouses) if a party claims that the corporate form should be disregarded because "the corporate form has been used as part of a basically unfair device to achieve an inequitable result." *Castleberry*, 721 S.W.2d at 271. See the comment below entitled "Caveat" and

the comment in PJC 205.3 entitled "Not for corporations with third-party owners or to affect creditors' claims."

This instruction should not be used to assert alter ego as the basis for disregarding the corporate form. The court in *Castleberry* listed six circumstances under which the corporate fiction has historically been disregarded. Alter ego "is only one of the bases for disregarding the corporate fiction: 'where a corporation is organized and operated as a mere tool or business conduit of another corporation.'" *Castleberry*, 721 S.W.2d at 272. The alter ego basis for disregarding the corporate form is reflected in PJC 205.1 (mere tool or business conduit (alter ego)) in this chapter, and the other five bases are reflected in this PJC 205.2.

Use of "or." The items in the list above are separated by the word *or* because a finding that any of the listed items has occurred with regard to a particular corporation (together with the requisite harm to the community estate) would support an affirmative answer to Question 1 in PJC 205.3 as to that corporation.

Rewording instruction. Include only those of the listed items that are appropriate in the particular case. If only one item is appropriate for inclusion, the following form may be used, substituting the wording from the relevant item for the words *the corporate form has been used as a sham to perpetrate a fraud* in the instruction below:

> A corporation is an entity distinct from its shareholders. However, the distinct corporate identity of the corporation may be disregarded even though the corporate formalities have been observed and even though corporate assets have been kept separated from individual property if *the corporate form has been used as a sham to perpetrate a fraud* and if recognizing the distinct corporate identity would damage the community estate.

Additional instruction. If use of the corporate form as a sham to perpetrate a fraud is included in the charge, the following instruction should be included:

> "Fraud" is the breach of some legal or equitable duty that, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.

This definition is based on *Castleberry*, 721 S.W.2d at 273.

Caveat. There are differences between the instructions and basic question found in chapter 108 (Piercing the Corporate Veil) in the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* and those found in this chapter 205 (Disregarding Corporate Form). In the context of marital dissolution, "reverse piercing" is sought to allow the trial court to move assets out of the corporation and divide them between the spouses as a part of the community estate. *See Lif-*

shutz, 61 S.W.3d at 516. In marital dissolution reverse-piercing situations, a finding of either constructive or actual fraud is sufficient to establish a sham to perpetrate a fraud, in contrast to the question on sham to perpetrate a fraud found in chapter 108, because the fraud committed in reverse-piercing cases is on the community estate, and such fraud may be proved by a finding of either constructive or actual fraud. *See Lifshutz*, 61 S.W.3d at 516–17; *Mazique v. Mazique*, 742 S.W.2d 805, 807–08 (Tex. App.—Houston [1st Dist.] 1987, no writ); *Horlock v. Horlock*, 533 S.W.2d 52, 55 (Tex. App.—Houston [14th Dist.] 1975, writ dism'd w.o.j.). The Committee believes that this instruction may also be used in the context of a probate proceeding. The Committee expresses no opinion on whether this instruction could be adapted for use in a non–family or non–probate law case.

PJC 205.3 Disregarding Corporate Identity of Corporation Owned Entirely by Spouses (Question)

QUESTION 1

Should the distinct corporate identity of *CORPORATION* be disregarded?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Questions 2 and 3 and do not answer Question 4 or 5. If you answered "No" to Question 1, then answer Question 4 and do not answer Question 2 or 3.

QUESTION 2

What percentage, if any, of *each of the following assets of CORPORATION* is the separate property of *SPOUSE A*?

When the distinct corporate identity of a corporation is disregarded, the assets nominally owned by the corporation are owned by a party or by the parties.

Answer by stating the percentage that is the separate property of *SPOUSE A* and the percentage that is community property. The percentages in your answer must total 100 percent for each asset. To find all or part of *an* asset to be the separate property of *SPOUSE A*, you must do so by clear and convincing evidence. "Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true. Any percentage of *an* asset that is not the separate property of *SPOUSE A* is community property.

	SPOUSE A's Separate Property		Community Property	
ASSET A	_____%	+	_____%	= 100%
ASSET B	_____%	+	_____%	= 100%
ASSET C	_____%	+	_____%	= 100%

QUESTION 3

State in dollars the value of *each of the following assets*:

ASSET A _____

ASSET B _____

ASSET C _____

Do not answer Question 4 or 5 unless you answered "No" to Question 1.

QUESTION 4

What percentage, if any, of the interest in the ownership of *CORPORATION* is the separate property of *SPOUSE A*?

Answer by stating the percentage that is the separate property of *SPOUSE A* and the percentage that is community property. The percentages in your answer must total 100 percent. To find all or part of the interest to be the separate property of *SPOUSE A*, you must do so by clear and convincing evidence. "Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true. Any percentage of the interest that is not the separate property of *SPOUSE A* is community property.

SPOUSE A's Separate Property		Community Property	
_____%	+	_____%	= 100%

If your answer to Question 4 reflects any community property, then answer Question 5. Otherwise, do not answer Question 5.

QUESTION 5

State in dollars the value of the community-property interest in the ownership of *CORPORATION*.

Answer: _____

COMMENT

When to use. The foregoing series of questions should be used if a party claims that the corporate form should be disregarded on the basis of alter ego or because the corporation has been used as part of a basically unfair device to achieve an inequitable result.

Not for corporations with third-party owners or to affect creditors' claims. These questions and instructions are written only for situations involving closely held corporations owned entirely by the spouses. They are not designed for use in situations in which any third party owns an interest, whether that ownership interest is nominal or significant, nor are they intended to affect the interests of creditors or other persons with security interests in corporate property. The variety of situations possible when persons other than the spouses may assert a claim is too great to be comprehensively covered in this book.

Include these additional instructions. The foregoing questions should be accompanied by the instruction in PJC 205.1 (mere tool or business conduit (alter ego)), the instruction in PJC 205.2 (other unfair device), or both. Applicable portions of the instructions in PJC 202.1 (separate and community property) through PJC 202.10 (agreement to convert separate property to community property) should be included in the charge.

If only one asset is in issue. If the characterization of only one corporate asset is in issue, the description of the asset should be substituted for the phrase *each of the following assets* in Questions 2 and 3. In such a case, the phrase "for each asset" should be omitted from the second sentence of the third paragraph in Question 2, and the word *the* should be substituted for the word *an* in the third and fifth sentences of that paragraph.

If both parties assert separate-property claims. Questions 2 and 4 are written for situations in which only one of the parties asserts a claim that the corporation or its assets constitute that party's separate property. If both parties assert separate-property claims, the questions, instructions, and answer blanks can be appropriately modified; see PJC 202.12 (separate property—both parties claiming separate interests).

PJC 205.4 Disregarding Corporate Identity of Corporation—Additional Instructions and Questions (Comment)

Claims that the distinct identity of a corporation should be disregarded can arise in a number of fact situations that require the submission of additional instructions and jury questions. These situations present too wide a variety of possibilities to be comprehensively covered in this book.

PJC 206.1 Confidence and Trust Relationship between Spouses

A relationship of confidence and trust exists between spouses with regard to that portion of the community property that each controls. This relationship requires that the spouses use the utmost good faith and frankness in their dealings with each other.

Because of the nature of the spousal relationship, conduct of a spouse affecting the property rights of the other spouse may be fraudulent even though identical conduct would not be fraudulent as between nonspouses.

COMMENT

Source. The foregoing instructions are modeled on *Weir v. King*, 166 S.W.2d 187 (Tex. App.—Dallas 1942, writ ref'd w.o.m.); *see Buckner v. Buckner*, 815 S.W.2d 877 (Tex. App.—Tyler 1991, n.w.h.); *cf. Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

Fiduciary relationship with regard to separate property. The duty described in the foregoing instruction regarding the community property managed by a spouse could apply as well if one spouse manages the separate property of the other spouse.

PJC 206.2 Actual Fraud by Spouse against Community Estate

PJC 206.2A Actual Fraud by Spouse against Community Estate—Instruction

A spouse commits fraud if *that spouse transfers community property or expends community funds for the primary purpose of depriving the other spouse of the use and enjoyment of the assets involved in the transaction.* Such fraud involves dishonesty of purpose or intent to deceive.

PJC 206.2B Actual Fraud by Spouse against Community Estate—Questions

QUESTION 1

Did *SPOUSE A* commit fraud with respect to the community-property rights of *SPOUSE B*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

State in dollars the value, if any, by which the community estate was depleted as a result of *SPOUSE A*'s fraud.

Answer: _____

COMMENT

Source. The instruction in PJC 206.2A is derived from *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); and *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. App.—Houston [14th Dist.] 1975, writ dism'd). Such fraud could involve the incurring of an indebtedness rather than a direct transfer of property or expenditure of funds. Question 2 is based on Tex. Fam. Code § 7.009(b)(1).

Other actual fraud theories. The foregoing submission reflects only one of many theories of actual fraud that might be presented in a case involving spouses. *See,*

e.g., Stone v. Lawyers Title Insurance Corp., 554 S.W.2d 183 (Tex. 1977); Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013. The variety of possible theories is too great to be comprehensively covered in this book, but the submission may be altered to present other theories.

No independent cause of action. A spouse has no independent cause of action in a divorce proceeding against the other spouse for actual fraud on the community, but the court may consider such fraud in arriving at a "just and right" division of the community estate. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998). The court shall calculate the value of the reconstituted estate—the total value of the community estate that would exist if fraud on the community had not occurred—and divide the value of the reconstituted estate between the parties in a manner the court deems just and right by granting any necessary legal or equitable relief. Tex. Fam. Code § 7.009.

Include this additional instruction. The instruction in PJC 206.1 (confidence and trust relationship between spouses) should be given with the foregoing instruction and questions.

PJC 206.3 Actual Fraud by Spouse against Separate Estate

PJC 206.3A Actual Fraud by Spouse against Separate Estate—Instruction

A spouse commits fraud if *that spouse transfers separate property of the other spouse or expends separate funds of the other spouse for the primary purpose of depriving the other spouse of the use and enjoyment of that property or those funds*. Such fraud involves dishonesty of purpose or intent to deceive.

PJC 206.3B Actual Fraud by Spouse against Separate Estate—Questions

QUESTION 1

Did *SPOUSE A* commit fraud with respect to the separate-property rights of *SPOUSE B*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

What sum of money, if paid now in cash, would fairly and reasonably compensate the separate estate of *SPOUSE B* for the damages, if any, resulting from the fraud of *SPOUSE A*?

Answer in dollars.

Answer: _____

COMMENT

Source. The instruction in PJC 206.3A is derived from *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); and *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. App.—Houston [14th Dist.] 1975, writ dism'd). Such fraud could involve the incurring of an indebtedness rather than a direct transfer of property or expenditure of funds.

Other actual fraud theories. The foregoing submission reflects only one of many theories of actual fraud that might be presented in a case involving spouses. *See, e.g., Stone v. Lawyers Title Insurance Corp.*, 554 S.W.2d 183 (Tex. 1977); Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013. The variety of possible theories is too great to be comprehensively covered in this book, but the submission may be altered to present other theories.

Include this additional instruction. The instruction in PJC 206.1 (confidence and trust relationship between spouses) should be given with the foregoing instruction and questions.

PJC 206.4 Constructive Fraud by Spouse against Community Estate

PJC 206.4A Constructive Fraud by Spouse against Community Estate—Instruction

A spouse may make moderate gifts, transfers, or expenditures of community property for just causes to a third party. However, a gift, transfer, or expenditure of community property that is capricious, excessive, or arbitrary is unfair to the other spouse. Factors to be considered in determining the fairness of a gift, transfer, or expenditure are—

1. The relationship between the spouse making the gift, transfer, or expenditure and the recipient.

2. Whether there were any special circumstances tending to justify the gift, transfer, or expenditure.

3. Whether the community funds used for the gift, transfer, or expenditure were reasonable in proportion to the community estate remaining.

PJC 206.4B Constructive Fraud by Spouse against Community Estate—Questions

QUESTION 1

Was the *transfer made by SPOUSE A to THIRD PARTY* fair?

Answer "Yes" or "No."

Answer: _____

If you answered "No" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

State in dollars the value, if any, by which the community estate was depleted as a result of the *transfer made by SPOUSE A to THIRD PARTY.*

Answer: _____

COMMENT

Source. The instruction in PJC 206.4A is modeled on *Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), and *Carnes v. Meador*, 533 S.W.2d 365 (Tex. App.—Dallas 1975, writ ref'd n.r.e.). Question 2 is based on Tex. Fam. Code § 7.009(b)(1).

Other constructive fraud theories. The foregoing submission reflects only one of many constructive fraud theories that might be presented in a case involving spouses. The variety of possible theories is too great to be comprehensively covered in this book, but the submission may be altered to present other theories.

No independent cause of action for fraud against community estate. A spouse has no independent cause of action against the other spouse for constructive fraud on the community estate in a divorce proceeding, but the court may consider such fraud in arriving at a "just and right" division of the community estate. *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998). The court shall calculate the value of the reconstituted estate—the total value of the community estate that would exist if fraud on the community had not occurred—and divide the value of the reconstituted estate between the parties in a manner the court deems just and right by granting any necessary legal or equitable relief. Tex. Fam. Code § 7.009.

Include this additional instruction. The instruction in PJC 206.1 (confidence and trust relationship between spouses) should be given with the foregoing instruction and questions.

If transaction is disputed. The instruction as written assumes that there is no dispute that the gift, transfer, or expenditure of community property was made. If the transaction is in dispute, the foregoing submission should be conditioned on a finding that the transaction occurred.

If separate estate was defrauded. If constructive fraud by a spouse against the other spouse's separate estate is in issue, Question 2 should be submitted as follows:

> What sum of money, if paid now in cash, would fairly and reasonably compensate the separate estate of *SPOUSE B* for the damages, if any, resulting from *the transfer made by SPOUSE A to THIRD PARTY*?
>
> Answer in dollars.
>
> Answer: _____

PJC 206.5 Fraud Action against Nonspouse Party

PJC 206.5A Fraud Action against Nonspouse Party—Instruction

A person commits fraud if *that person participates with a spouse in a transfer of community property for the primary purpose of depriving the other spouse of the use and enjoyment of the assets involved in the transaction.* Such fraud involves dishonesty of purpose or intent to deceive.

PJC 206.5B Fraud Action against Nonspouse Party—Questions

QUESTION 1

Did *NONSPOUSE PARTY* commit fraud with respect to the *community*-property rights of *SPOUSE B*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

What sum of money, if paid now in cash, would fairly and reasonably compensate the *community estate* for the damages, if any, resulting from *NONSPOUSE PARTY*'s fraud?

Answer in dollars.

Answer: _____

COMMENT

Source. The instruction in PJC 206.5A is derived from *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); and *Horlock v. Horlock*, 533 S.W.2d 52 (Tex. App.—Houston [14th Dist.] 1975, writ dism'd). Such fraud could involve the incurring of an indebtedness rather than a direct transfer of property or expenditure of funds; similarly, it could involve separate, rather than community, property.

A judgment for fraud against a third party was affirmed in *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998), but the supreme court did not reach the question of

whether the tort should be abolished. However, a third party who knowingly participates in the breach of a fiduciary duty may be liable. *Osuna v. Quintana*, 993 S.W.2d 201 (Tex. App.—Corpus Christi 1999, n.w.h.); *Connell v. Connell*, 889 S.W.2d 534 (Tex. App.—San Antonio 1994, writ denied).

Other fraud theories. The foregoing submission reflects only one of many theories of actual fraud that might be presented in a case involving spouses. *See, e.g., Stone v. Lawyers Title Insurance Corp.*, 554 S.W.2d 183 (Tex. 1977); *J. Michael Putman, M.D.P.A. Money Purchase Pension Plan v. Stephenson*, 805 S.W.2d 16 (Tex. App.—Dallas 1991, no writ); Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code §§ 24.001–.013. Many theories of constructive fraud might also be presented in a case involving spouses. *See, e.g., Mazique v. Mazique*, 742 S.W.2d 805 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), and *Carnes v. Meador*, 533 S.W.2d 365 (Tex. App.—Dallas 1975, writ ref'd n.r.e.). The variety of possible theories is too great to be comprehensively covered in this book, but the submission may be altered to present other theories.

If separate estate was defrauded. In an appropriate case, the word *community* should be replaced with the word *separate* in Question 1 in PJC 206.5B, and the phrase *community estate* should be replaced with the phrase *separate estate of SPOUSE B* in Question 2.

Exemplary damages. Exemplary damages may be available in appropriate circumstances. *See* Tex. Civ. Prac. & Rem. Code ch. 41. Reference to damages submissions suggested for other types of cases that are contained in other volumes of the *Texas Pattern Jury Charges* series may be helpful in formulating an appropriate submission for the particular case.

PJC 207.1 Enforceability of Property Agreements—Separate Trials (Comment)

The Committee suggests that, if a suit involves the question of the enforceability of a premarital agreement, a partition or exchange agreement, an agreement between spouses concerning income or property derived from separate property, or an agreement to convert separate property to community property, the court should consider a separate trial to determine the validity of the agreement. *See* Tex. R. Civ. P. 174(b). Otherwise, the sets of alternative instructions on marital property will be unnecessarily confusing. Additionally, if enforceability and property issues are tried together, the litigants will have to advance alternative theories and produce evidence supporting those theories. On the other hand, if the determination of the enforceability of the property agreements is made first, the presentation of evidence and the jury's task are greatly simplified.

PJC 207.2 Enforceability of Premarital Agreement

PJC 207.2A Enforceability of Premarital Agreement—Definition

A premarital agreement is an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage. A premarital agreement must be in writing and signed by both parties.

PJC 207.2B Enforceability of Premarital Agreement—Voluntariness

A premarital agreement is unenforceable if the party against whom enforcement is requested proves that he or she did not sign the agreement voluntarily.

PJC 207.2C Enforceability of Premarital Agreement—Knowledge and Disclosure

A premarital agreement is unenforceable if the party against whom enforcement is requested proves that, before signing the agreement, that party—

1. was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and

2. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

3. did not have and reasonably could not have had adequate knowledge of the property or financial obligations of the other party.

PJC 207.2D Enforceability of Premarital Agreement—Question

QUESTION 1

Is the premarital agreement unenforceable?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The instruction in PJC 207.2A is based on Tex. Fam. Code §§ 4.001(1), 4.002. The instruction in PJC 207.2B is based on Tex. Fam. Code § 4.006(a)(1). The instruction in PJC 207.2C is based on Tex. Fam. Code § 4.006(a)(2)(A)–(C). The part of Tex. Fam. Code § 4.006(a)(2) dealing with unconscionability has been omitted from PJC 207.2C; see the comment below entitled "Unconscionability." In item 3 of PJC 207.2C, the conjunctive phrase "did not have and reasonably could not have had" is used in place of the disjunctive phrase "did not have or reasonably could not have had" that appears in Tex. Fam. Code § 4.006(a)(2)(C); in the context, it was the apparent intent of the legislature that the party opposing enforcement must prove both elements.

When to use. The foregoing submission should be used if the enforceability of a premarital agreement is in dispute. PJC 207.2B should be used only if lack of voluntariness is in issue. Similarly, PJC 207.2C should be used only if lack of disclosure and knowledge is in issue.

See PJC 207.1 (enforceability of property agreements—separate trials) for the Committee's suggestion that the trial court consider a separate trial for enforceability issues. If the characterization of property is in issue in the same trial, the instructions in PJC 202.1 (separate and community property) and PJC 202.7 (premarital agreement) should also be submitted. (In such a case, PJC 207.2A should be omitted, because it is identical to the first paragraph of PJC 202.7.)

Unconscionability. The instruction in PJC 207.2C should be submitted only if the court has found as a matter of law that the agreement was unconscionable when it was signed. Tex. Fam. Code § 4.006(a)(2), (b).

Only for Texas contracts. The foregoing submission is written for use only for premarital agreements clearly governed by Texas law. Premarital agreements executed in another state may involve difficult issues of conflict of laws that are beyond the scope of this book.

Execution undisputed. The instruction in PJC 207.2B assumes that there is no dispute that the premarital agreement was executed by the party against whom enforcement is sought.

Remedies and defenses. Effective September 1, 1993, the remedies and defenses provided in section 4.006 are the exclusive remedies or defenses, including common-law remedies or defenses. The enabling section of the 1993 Act provides: "This Act takes effect on September 1, 1993, and applies only to an agreement executed on or after that date. An agreement executed before that date is governed by the law in effect at the time the agreement was executed, and the former law is continued in effect for that purpose." Tex. Fam. Code § 4.006(c).

PJC 207.3 Enforceability of Partition or Exchange Agreement

PJC 207.3A Enforceability of Partition or Exchange Agreement—Definition

At any time, spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired, as they may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. A partition or exchange agreement must be in writing and signed by both parties.

PJC 207.3B Enforceability of Partition or Exchange Agreement—Voluntariness

A partition or exchange agreement is unenforceable if the party against whom enforcement is requested proves that he or she did not sign the agreement voluntarily.

PJC 207.3C Enforceability of Partition or Exchange Agreement—Knowledge and Disclosure

A partition or exchange agreement is unenforceable if the party against whom enforcement is requested proves that, before execution of the agreement, that party—

1. was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and

2. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

3. did not have and reasonably could not have had adequate knowledge of the property or financial obligations of the other party.

PJC 207.3D Enforceability of Partition or Exchange Agreement—Question

QUESTION 1

Is the partition or exchange agreement unenforceable?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The instruction in PJC 207.3A is based on Tex. Fam. Code §§ 4.102, 4.104. The instruction in PJC 207.3B is based on Tex. Fam. Code § 4.105(a)(1). The instruction in PJC 207.3C is based on Tex. Fam. Code § 4.105(a)(2)(A)–(C). The part of Tex. Fam. Code § 4.105(a)(2) dealing with unconscionability has been omitted from PJC 207.3C; see the comment below entitled "Unconscionability." In item 3 of PJC 207.3C, the conjunctive phrase "did not have and reasonably could not have had" is used in place of the disjunctive phrase "did not have or reasonably could not have had" that appears in Tex. Fam. Code § 4.105(a)(2)(C); in the context, it was the apparent intent of the legislature that the party opposing enforcement must prove both elements.

When to use. The foregoing submission should be used if the enforceability of a partition or exchange agreement is in dispute. PJC 207.3B should be used only if lack of voluntariness is in issue. Similarly, PJC 207.3C should be used only if lack of disclosure and knowledge is in issue.

See PJC 207.1 (enforceability of property agreements—separate trials) for the Committee's suggestion that the trial court consider a separate trial for enforceability issues. If the characterization of property is in issue in the same trial, the instructions in PJC 202.1 (separate and community property) and PJC 202.8 (partition or exchange agreement) should also be submitted. (In such a case, PJC 207.3A should be omitted, because it is identical to the first paragraph of PJC 202.8.)

Unconscionability. The instruction in PJC 207.3C should be submitted only if the court has found as a matter of law that the agreement was unconscionable when it was signed. Tex. Fam. Code § 4.105(a)(2), (b).

Only for Texas contracts. The foregoing submission is written for use only for partition or exchange agreements clearly governed by Texas law. Agreements executed in another state may involve difficult issues of conflict of laws that are beyond the scope of this book.

Execution undisputed. The instruction in PJC 207.3B assumes that there is no dispute that the partition or exchange agreement was executed by the party against whom enforcement is sought.

Remedies and defenses. Effective September 1, 1993, the remedies and defenses provided in section 4.105 are the exclusive remedies or defenses, including common-law remedies or defenses. The enabling section of the 1993 Act provides: "This Act takes effect on September 1, 1993, and applies only to an agreement executed on or after that date. An agreement executed before that date is governed by the law in effect

at the time the agreement was executed, and the former law is continued in effect for that purpose." Tex. Fam. Code § 4.105(c).

PJC 207.4 Enforceability of Agreement Concerning Income or Property Derived from Separate Property

PJC 207.4A Enforceability of Agreement Concerning Income or Property Derived from Separate Property—Definition

At any time, spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner. Such an agreement must be in writing and signed by both parties.

PJC 207.4B Enforceability of Agreement Concerning Income or Property Derived from Separate Property—Voluntariness

An agreement concerning income or property derived from separate property is unenforceable if the party against whom enforcement is requested proves that he or she did not sign the agreement voluntarily.

PJC 207.4C Enforceability of Agreement Concerning Income or Property Derived from Separate Property—Knowledge and Disclosure

An agreement concerning income or property derived from separate property is unenforceable if the party against whom enforcement is requested proves that, before execution of the agreement, that party—

1. was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and

2. did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

3. did not have and reasonably could not have had adequate knowledge of the property or financial obligations of the other party.

PJC 207.4D Enforceability of Agreement Concerning Income or Property Derived from Separate Property—Question

QUESTION 1

Is the agreement concerning income or property derived from separate property unenforceable?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The instruction in PJC 207.4A is based on Tex. Fam. Code §§ 4.103, 4.104. The instruction in PJC 207.4B is based on Tex. Fam. Code § 4.105(a)(1). The instruction in PJC 207.4C is based on Tex. Fam. Code § 4.105(a)(2)(A)–(C). Tex. Fam. Code § 4.105 deals specifically with partition and exchange agreements; although, apparently through oversight, that section does not expressly cover agreements concerning income or property derived from separate property, the Committee believes that the same standard for enforceability should apply to both types of agreement. *See Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.—Houston [1st Dist.] 1989, no writ). The part of Tex. Fam. Code § 4.105(a)(2) dealing with unconscionability has been omitted from PJC 207.4C; see the comment below entitled "Unconscionability." In item 3 of PJC 207.4C, the conjunctive phrase "did not have and reasonably could not have had" is used in place of the disjunctive phrase "did not have or reasonably could not have had" that appears in Tex. Fam. Code § 4.105(a)(2)(C); in the context, it was the apparent intent of the legislature that the party opposing enforcement must prove both elements.

When to use. The foregoing submission should be used if the enforceability of an agreement concerning income or property derived from separate property is in dispute. PJC 207.4B should be used only if lack of voluntariness is in issue. Similarly, PJC 207.4C should be used only if lack of disclosure and knowledge is in issue.

See PJC 207.1 (enforceability of property agreements—separate trials) for the Committee's suggestion that the trial court consider a separate trial for enforceability issues. If the characterization of property is in issue in the same trial, the instructions in PJC 202.1 (separate and community property) and PJC 202.9 (agreement concerning income or property derived from separate property) should also be submitted. (In such a case, PJC 207.4A should be omitted, because it is identical to the first paragraph of PJC 202.9.)

Unconscionability. The instruction in PJC 207.4C should be submitted only if the court has found as a matter of law that the agreement was unconscionable when it was signed. Tex. Fam. Code § 4.105(a)(2), (b).

Only for Texas contracts. The foregoing submission is written for use only for agreements concerning income or property derived from separate property that are clearly governed by Texas law. Agreements executed in another state may involve difficult issues of conflict of laws that are beyond the scope of this book.

Execution undisputed. The instruction in PJC 207.4B assumes that there is no dispute that the agreement concerning income or property derived from separate property was executed by the party against whom enforcement is sought.

Remedies and defenses. Effective September 1, 1993, the remedies and defenses provided in section 4.105 are the exclusive remedies or defenses, including common-law remedies or defenses. The enabling section of the 1993 Act provides: "This Act takes effect on September 1, 1993, and applies only to an agreement executed on or after that date. An agreement executed before that date is governed by the law in effect at the time the agreement was executed, and the former law is continued in effect for that purpose." Tex. Fam. Code § 4.105(c).

PJC 207.5 Enforceability of Agreement to Convert Separate Property to Community Property

PJC 207.5A Enforceability of Agreement to Convert Separate Property to Community Property—Definition

At any time, spouses may agree that all or part of the separate property owned by either or both of them is converted to community property. Such an agreement must—

1. be in writing, and
2. be signed by both spouses, and
3. identify the property being converted, and
4. specify that the property is being converted to the spouses' community property.

PJC 207.5B Enforceability of Agreement to Convert Separate Property to Community Property—Voluntariness

An agreement to convert property to community property is unenforceable if the spouse against whom enforcement is sought proves that he or she did not execute the agreement voluntarily.

PJC 207.5C Enforceability of Agreement to Convert Separate Property to Community Property—Disclosure

An agreement to convert property to community property is unenforceable if the spouse against whom enforcement is sought proves that he or she did not receive a fair and reasonable disclosure of the legal effect of converting the property to community property.

PJC 207.5D Enforceability of Agreement to Convert Separate Property to Community Property—Question

QUESTION 1

Is the agreement to convert separate property to community property unenforceable?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The instruction in PJC 207.5A is based on Tex. Fam. Code §§ 4.202–.203. The instruction in PJC 207.5B is based on Tex. Fam. Code § 4.205(a)(1). The instruction in PJC 207.5C is based on Tex. Fam. Code § 4.205(a)(2).

When to use. The foregoing submission should be used if the enforceability of an agreement to convert separate property to community property is in dispute. PJC 207.5B should be used only if lack of voluntariness is in issue. Similarly, PJC 207.5C should be used only if lack of disclosure is in issue.

See PJC 207.1 (enforceability of property agreements—separate trials) for the Committee's suggestion that the trial court consider a separate trial for enforceability issues. If the characterization of property is in issue in the same trial, the instructions in PJC 202.1 (separate and community property) and PJC 202.10 (agreement to convert separate property to community property) should also be submitted. (In such a case, the first paragraph of PJC 202.10, which is identical to PJC 207.5A, should be omitted.)

No instruction on presumption. No instruction should be given on the presumption, contained in Tex. Fam. Code § 4.205(b), that an agreement containing certain wording is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting property to community property. The sole purpose of a presumption is to fix the burden of producing evidence. *Sanders v. Davila*, 593 S.W.2d 127 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.); *McGuire v. Brown*, 580 S.W.2d 425 (Tex. App.—Austin 1979, writ ref'd n.r.e.). An instruction on the presumption may also constitute an impermissible comment on the weight of the evidence. *Glover v. Henry*, 749 S.W.2d 502 (Tex. App.—Eastland 1988, no writ).

Only for Texas contracts. The foregoing submission is written for use only for agreements to convert separate property to community property that are clearly governed by Texas law. Agreements executed in another state may involve difficult issues of conflict of laws that are beyond the scope of this book.

[Chapters 208–214 are reserved for expansion.]

PJC 215.1 Best Interest of Child

The best interest of the child shall always be the primary consideration in determining questions of conservatorship.

COMMENT

Source. The foregoing instruction is based on Tex. Fam. Code § 153.002. The words "and questions of possession of and access to the child" in section 153.002 have been omitted from the instruction because questions on these matters may not be submitted to the jury. *See* Tex. Fam. Code § 105.002(c)(2)(B).

No definition of "best interest." There is no statutory definition of "the best interest of the child." In *Hogge v. Kimbrow*, 631 S.W.2d 603 (Tex. App.—Beaumont 1982, no writ), the court held that "the best interest of the child" is not a legal term having a peculiar meaning unknown to the layperson. Texas case law has not developed a definition or list of factors that is more complete or more enlightening than the phrase itself.

In *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), the Supreme Court of Texas supplied a well-known list of factors that have been considered by appellate courts in determining best interest. *Holley* involves termination of parental rights. See PJC 218.1 (termination of parent-child relationship).

PJC 215.2 Evidence of Abusive Physical Force or Sexual Abuse

In determining whether to appoint a party sole or joint managing conservator, you shall consider *evidence of the intentional use of abusive physical force, or evidence of sexual abuse*, by a party directed against his or her spouse, against a parent of the child, or against any person younger than eighteen years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.

COMMENT

Source. The foregoing instruction is based on Tex. Fam. Code § 153.004(a).

If no evidence of intentional use of abusive physical force. If there is no evidence of intentional use of abusive physical force, the words *evidence of the intentional use of abusive physical force, or evidence of sexual abuse*, should be replaced by the words *evidence of sexual abuse.*

If no evidence of sexual abuse. If there is no evidence of sexual abuse, the words *evidence of the intentional use of abusive physical force, or evidence of sexual abuse*, should be replaced by the words *evidence of the intentional use of abusive physical force.*

PJC 215.3 Evidence of Abuse or Neglect—Joint Managing Conservatorship

A person may not be appointed a joint managing conservator if that person has a history or pattern of past or present child neglect or of physical or sexual abuse directed against a parent, a spouse, or a child, *including [set out conduct constituting a sexual assault in violation of the relevant Penal Code section] that results in the other parent's becoming pregnant with the child.*

COMMENT

Source. The foregoing instruction is based on Tex. Fam. Code § 153.004(b).

When to use. The foregoing instruction should be used if two conditions are present: (1) a jury question is submitted wherein it is possible that the jury could answer that joint managing conservatorship would be in the best interest of the child, and (2) credible evidence is admitted that one of the possible joint managing conservators has a history or pattern of past or present child neglect or physical or sexual abuse directed against a parent, a spouse, or a child.

Sexual assault. The italicized language concerning a sexual assault should be included only if credible evidence of such an offense is admitted. The bracketed statement should be replaced with the conduct in which the parent is alleged to have engaged that constitutes an offense—the criminal offenses of sexual assault and aggravated sexual assault—contained in Tex. Penal Code § 22.011 or 22.021 that is relevant in the particular case. Depending on the particular offenses that are relevant in the case, instructions regarding intention and knowledge may be needed, and additional instructions or definitions may be required.

PJC 215.4 History or Pattern of Family Violence, History or Pattern of Child Abuse or Neglect, or Protective Order

In determining whether to appoint a party sole or joint managing conservator, you shall consider whether *a party engaged in a history or pattern of family violence, a party engaged in a history or pattern of child abuse or child neglect, or a final protective order was rendered against a party.*

"Family violence" means *an act by a member of a family against another member of the family that is intended to result in physical harm.*

COMMENT

Source. The first paragraph of the foregoing instruction is based on Tex. Fam. Code § 153.005(c). The second paragraph is based on Tex. Fam. Code § 71.004.

If no evidence of history or pattern of family violence. If there is no evidence of a party's engaging in a history or pattern of family violence, the words *a party engaged in a history or pattern of family violence* should be omitted from the first paragraph of the instruction, and the second paragraph of the instruction should be omitted.

If no evidence of history or pattern of child abuse or child neglect. If there is no evidence of a party's engaging in a history or pattern of child abuse or child neglect, the words *a party engaged in a history or pattern of child abuse or child neglect* should be omitted from the first paragraph of the instruction. If there is evidence of a history or pattern of child abuse but not of child neglect, or of child neglect but not of child abuse, the language should be changed accordingly.

If no evidence of rendition of a final protective order. If there is no evidence that a final protective order has been rendered against a party, the words *a final protective order was rendered against a party* should be omitted from the instruction.

Definition of "family violence." The portions of the definition of family violence contained in Tex. Fam. Code § 71.004 that are relevant in the particular case should be substituted for the italicized language in the second paragraph of the instruction. If the matter is in issue, the definitions of "family," "household," and "member of a household" contained in Tex. Fam. Code §§ 71.003, 71.005, and 71.006 may be included as appropriate.

[PJC 215.5 is reserved for expansion.]

PJC 215.6 Rights of Parent Appointed Conservator

"Conservator," when that term is used alone, includes a sole managing conservator, a joint managing conservator, and a possessory conservator.

At all times, each parent appointed a conservator has the following rights, subject to any limitation imposed by court order:

1. To receive information from any other conservator concerning the health, education, and welfare of the child.

2. To confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child.

3. To have access to medical, dental, psychological, and educational records of the child.

4. To consult with a physician, dentist, or psychologist of the child.

5. To consult with school officials concerning the child's welfare and educational status, including school activities.

6. To attend school activities, including school lunches, performances, and field trips.

7. To be designated on the child's records as a person to be notified in case of an emergency.

8. To consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child.

9. To manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

During the period that a parent who is appointed a conservator has possession of the child, that parent retains the following rights and duties, subject to any limitation imposed by court order:

1. The duty of care, control, protection, and reasonable discipline of the child.

2. The duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure.

3. The right to consent for the child to medical and dental care not involving an invasive procedure.

4. The right to direct the moral and religious training of the child.

COMMENT

Source. The foregoing instruction, including the list of rights and duties of a parent who is appointed a conservator of a child, is based on Tex. Fam. Code §§ 153.073, 153.074.

If conservatorship not contested. If only parents are seeking conservatorship and conservatorship is not contested, the first paragraph of the instruction and the words "appointed a conservator" in the second and third paragraph should be omitted.

PJC 215.7 No Discrimination Based on Gender or Marital Status

In determining which party to appoint sole managing conservator, whether to appoint a party joint managing conservator, and the terms and conditions of conservatorship, you shall consider the qualifications of each party without regard to the gender of the party or the *child.*

In determining which party to appoint sole managing conservator, whether to appoint a party joint managing conservator, and the terms and conditions of conservatorship, you shall consider the qualifications of the parties without regard to their marital status.

COMMENT

Source. The foregoing instruction is based on Tex. Fam. Code § 153.003. The words "and possession of and access to the child" in section 153.003 have been omitted from the instruction because questions on these matters may not be submitted to the jury. *See* Tex. Fam. Code § 105.002(c)(2)(B).

Use only relevant portions. Only those portions of the foregoing instruction that are relevant in the particular case should be used.

Rewording instruction. If more than one child is involved, the word *child* should be replaced with the word *children.*

PJC 215.8 Preference for Appointment of Parent as Managing Conservator

PARENT A and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator, in preference to *NONPARENT*, unless appointment of the parent or parents would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development.

COMMENT

Source. The foregoing instruction is based on Tex. Fam. Code § 153.131(a); *see Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990).

When to use. This instruction should be used if one or more parents and one or more nonparents seek managing conservatorship and there is no assertion of voluntary relinquishment of custody under Tex. Fam. Code § 153.373. If voluntary relinquishment of custody by the parent or parents during the requisite period is alleged, the appropriate instruction from PJC 215.14 should be used.

Use of an instruction on the parental preference with a single question asking who should be appointed managing conservator conforms to the mandate for broad-form submission in Tex. R. Civ. P. 277. Such a procedure was approved in *Harrison v. Harrison*, 734 S.W.2d 737 (Tex. App.—Eastland 1987, no writ).

If joint conservatorship is not submitted. If no question on joint managing conservatorship is included in the charge, the instruction should be worded as follows:

> *PARENT A or PARENT B* shall be appointed sole managing conservator, in preference to *NONPARENT*, unless appointment of the parent would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development.

If only one parent. If the child has only one parent, or if only one parent is seeking managing conservatorship, the instruction should be worded as follows:

> *PARENT* shall be appointed sole managing conservator, in preference to *NONPARENT*, unless appointment of *PARENT* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development.

Evidence of abusive physical force or sexual abuse. In an appropriate case, relevant portions of PJC 215.2 (evidence of abusive physical force or sexual abuse) should be included in the charge.

Evidence of abuse or neglect. In an appropriate case, relevant portions of PJC 215.3 (evidence of abuse or neglect—joint managing conservatorship) should be included in the charge.

PJC 215.9 Joint Managing Conservators

"Joint managing conservatorship" means the sharing of the rights and duties of a parent by *two parties*, even if the exclusive right to make certain decisions is awarded to one party. If joint managing conservators are appointed, the court will specify the rights and duties of a parent that are to be exercised by each parent independently, by the joint agreement of the parents, and exclusively by one parent.

Joint managing conservatorship does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint conservators. If joint managing conservators are appointed, you will be asked to decide which joint managing conservator will have the exclusive right to designate the child's primary residence, whether a geographical restriction should be imposed on that residence, and, if so, what that geographical restriction will be.

A geographic restriction restricts the child's primary residence to a specified geographic area and prohibits the parties from relocating the child from the specified area for the purpose of changing the child's primary residence. If no geographic restriction is imposed, the joint managing conservator awarded the exclusive right to designate the child's primary residence has the sole discretion to change the child's primary residence without a court order or the agreement of the other joint managing *conservator.*

The appointment of joint managing conservators does not impair or limit the authority of the court to order one joint managing conservator to pay child support to the other.

COMMENT

Source. The first paragraph of the foregoing instruction is based on Tex. Fam. Code §§ 101.016, 153.071. The second paragraph is based on Tex. Fam. Code §§ 105.002(c)(1)(D)–(F), 153.134(b), 153.135. The third paragraph is based on *Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002). The fourth paragraph is based on Tex. Fam. Code § 153.138.

Nonparents. If *only* nonparents seek joint managing conservatorship, the last paragraph of the instruction should be omitted. If at least one parent and at least one nonparent seek joint managing conservatorship, that paragraph should be reworded as appropriate in view of the fact that only parents, not nonparents, can be ordered to pay child support.

Two parties. The foregoing instruction refers to "two parties," following the language of Tex. Fam. Code § 101.016. The appointment of more than two persons as joint managing conservators has been approved, however. *See Brook v. Brook*, 881 S.W.2d 297 (Tex. 1994). In an appropriate case, the phrase *two parties* in the instruction may be changed, and the last word in the third paragraph should be changed to *conservators*.

Primary residence. The second sentence in the second paragraph and the entire third paragraph should be omitted if all parties agree not to seek a jury verdict on the designation of the child's primary residence.

PJC 215.10 Best Interest of Child—Joint Managing Conservatorship

PJC 215.10A Best Interest of Child—Joint Managing Conservatorship—One Parent Seeks Joint Managing Conservatorship with Other Parent

You shall appoint both parents joint managing conservators unless you find that such an appointment is not in the best interest of the child. In making this determination, you shall consider all the following factors:

1. Whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators.

2. The ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest.

3. Whether each parent can encourage and accept a positive relationship between the child and the other parent.

4. Whether both parents participated in child-rearing before the filing of the suit.

5. The geographical proximity of the parents' residences.

6. If the child is twelve years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child.

7. Any other relevant factor.

PJC 215.10B Best Interest of Child—Joint Managing Conservatorship—One Parent and Nonparent(s) Contest Managing Conservatorship

In determining whether joint managing conservators should be appointed, you must find that such an appointment is in the best interest of the child. In making this determination, you shall consider all the following factors:

1. Whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators.

2. The ability of the persons to give first priority to the welfare of the child and reach shared decisions in the child's best interest.

3. Whether each person can encourage and accept a positive relationship between the child and the other person.

4. Whether both persons participated in child-rearing before the filing of the suit.

5. The geographical proximity of the persons' residences.

6. If the child is twelve years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child.

7. Any other relevant factor.

COMMENT

Source. PJC 215.10A is based on Tex. Fam. Code §§ 153.131, 153.134(a). PJC 215.10B is based on Tex. Fam. Code §§ 153.134(a), 153.372.

If only parents are involved. In the most frequently encountered cases, the two parents will be the only contestants for managing conservatorship. In such a case, if one parent seeks sole managing conservatorship and the other seeks joint managing conservatorship, the instruction in PJC 215.10A should be used.

If both parents seek joint managing conservatorship, no jury issue on managing conservatorship exists. If a joint managing conservatorship is an inappropriate agreement between the parties, the court has the power to reject that agreement. Tex. Fam. Code § 153.007(d). If both parents will be appointed joint managing conservators, the following instruction should be used with Question 2 (primary residence) in PJC 216.1A:

> The parents will be appointed joint managing conservators.

If both parents seek sole managing conservatorship and neither seeks joint managing conservatorship in the alternative, the foregoing instruction, which is based on the rebuttable presumption in Tex. Fam. Code § 153.131, is inappropriate.

If evidence of a history of family violence is admitted, include the following as item 7 in PJC 215.10A and renumber item 7 as item 8:

> 7. Whether there is a history of family violence involving the parents.

If nonparent(s) and parent(s) are involved. If one parent seeks a joint managing conservatorship with the other parent, the instruction in PJC 215.10A is appropriate without regard to whether the other parent seeks sole managing conservatorship or a joint managing conservatorship with a third party. (There is no jury issue about the

joint managing conservatorship between the parent and the third party; because there is no contest between aligned parties, no instruction regarding this joint managing conservatorship is appropriate.)

If only one parent and at least one nonparent contest managing conservatorship and at least one party seeks joint managing conservatorship, the instruction in PJC 215.10B should be given in conjunction with the instruction in PJC 215.8 or 215.14 (preference for appointment of parent as managing conservator).

If only nonparents seek managing conservatorship. The same requirement of a contest between opposing litigants applies when joint managing conservatorship is disputed between nonparents. When one nonparent seeks a joint managing conservatorship with another nonparent who opposes that outcome, the instruction in PJC 215.10B should be given.

If no child twelve or older. Item 6 in the list of factors should be omitted if there is no jury question concerning conservatorship of any child twelve years of age or older.

PJC 215.11 Sole Managing Conservator—Parent

A parent appointed the sole managing conservator of a child has the following exclusive rights [and duty], subject to any limitation imposed by court order:

1. The right to designate the primary residence of the child.

2. The right to consent to medical, dental, and surgical treatment involving invasive procedures.

3. The right to consent to psychiatric and psychological treatment.

4. The right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child.

5. The right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child.

6. The right to consent to marriage and to enlistment in the armed forces of the United States.

7. The right to make decisions concerning the child's education.

8. The right to the services and earnings of the child.

9. Except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

10. The right to apply for a passport for the child, renew the child's passport, and maintain possession of the child's passport.

[11. The duty to manage the estate of the child to the extent the estate has been created by community property or the joint property of the parents.]

COMMENT

Source. Items 1 through 10 in the list of rights of a sole managing conservator are taken from Tex. Fam. Code § 153.132. Optional item 11 is based on a parental duty listed in Tex. Fam. Code § 151.001(a)(4).

Altering instruction. If the court has decided before giving the charge to alter the rights that will be awarded to the conservators, the court should alter the foregoing instruction to reflect that decision.

PJC 215.12 Managing Conservator—Nonparent

A managing conservator who is not the parent of the child has the following rights and duties, subject to the rights and duties of a parent appointed a conservator, to those of a possessory conservator, and to any limitation imposed by court order:

1. The right to have physical possession and to direct the moral and religious training of the child.

2. The duty of care, control, protection, and reasonable discipline of the child.

3. The duty to provide the child with clothing, food, shelter, education, and medical, psychological, and dental care.

4. The right to consent for the child to medical, psychiatric, psychological, dental, and surgical treatment and to have access to the child's medical records.

5. The right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child.

6. The right to the services and earnings of the child.

7. The right to consent to marriage and to enlistment in the armed forces of the United States.

8. The right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child.

9. Except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

10. The right to designate the primary residence of the child and to make decisions regarding the child's education.

11. If the parent-child relationship has been terminated with respect to the parents or only living parent, or if there is no living parent, the right to consent to the adoption of the child and to make any other decision concerning the child that a parent could make.

12. The right to apply for a passport for the child, renew the child's passport, and maintain possession of the child's passport.

COMMENT

Source. The foregoing instruction, including the list of rights and duties of a non-parental managing conservator, is taken directly from Tex. Fam. Code § 153.371.

PJC 215.13 Possessory Conservator

PJC 215.13A Possessory Conservator—Parent vs. Parent—Possessory Conservatorship Not Contested

A parent who is not appointed sole or joint managing conservator will be appointed possessory conservator and granted possession of and access to the child under terms and conditions specified by the court.

PJC 215.13B Possessory Conservator—Possessory Conservatorship of Parent Contested

"Possessory conservator of a child" means the person or persons appointed to have possession of or access to the child at specified times and upon certain conditions. In addition to the rights and duties listed above that a parent named a conservator has at all times or during periods of possession of the child, subject to any limitations imposed by court order on those rights and duties, a parent appointed possessory conservator has any other right or duty of a managing conservator expressly granted to that parent in the decree appointing that parent a possessory conservator.

PJC 215.13C Possessory Conservator—Nonparent Seeking Conservatorship

"Possessory conservator of a child" means the person or persons appointed to have possession of or access to the child at specified times and upon certain conditions. A nonparent possessory conservator has the following rights and duties during the period of possession, subject to the rights of a parent named a conservator and to any limitations established by the court:

1. The duty of care, control, protection, and reasonable discipline of the child.

2. The duty to provide the child with clothing, food, and shelter.

3. The right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child.

A nonparent possessory conservator has any other right or duty expressly granted to the possessory conservator in the court decree.

A nonparent possessory conservator has the right of access to medical, dental, psychological, and educational records of the child to the same extent as the managing conservator.

COMMENT

Source. The instruction in PJC 215.13A is based on Tex. Fam. Code § 153.191.

The instruction in PJC 215.13B is based on Tex. Fam. Code §§ 153.073, 153.074, 153.192(a).

The first paragraph of the instruction in PJC 215.13C is based on Tex. Fam. Code §§ 153.006, 153.376(a). The second paragraph is based on Tex. Fam. Code § 153.376(b), and the third paragraph is based on Tex. Fam. Code § 153.377.

When to use. In most cases involving only parents, it will be uncontested that the parent not appointed managing conservator will be appointed possessory conservator. In such a case, the instruction in PJC 215.13A should be used.

The definitions in PJC 215.13B should be included in the charge only if the naming of a possessory conservator as well as a managing conservator is contested. The instructions in PJC 215.13C should be included only if a nonparent seeks possessory conservatorship.

If joint managing conservatorship is not submitted. The words "or joint" should be omitted from the instruction in PJC 215.13A if no question on joint managing conservatorship is included in the charge.

PJC 215.14 Preference for Appointment of Parent as Managing Conservator—Voluntary Relinquishment of Custody to Nonparent

PJC 215.14A Preference for Appointment of Parent as Managing Conservator—Voluntary Relinquishment of Custody to Nonparent—Undisputed for Both Parents

PARENT A and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator, in preference to *NONPARENT*, unless at least one of the following circumstances exists:

1. appointment of the parent or parents would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development or

2. appointment of *NONPARENT* would be in the best interest of *CHILD*.

PJC 215.14B Preference for Appointment of Parent as Managing Conservator—Voluntary Relinquishment of Custody to Nonparent—Not Alleged for One Parent and Undisputed for Other Parent

PARENT A and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator, in preference to *NONPARENT*, unless certain circumstances exist.

As between *PARENT A* and *NONPARENT*, *PARENT A* shall be appointed a joint or sole managing conservator unless appointment of *PARENT A* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development.

As between *PARENT B* and *NONPARENT*, *PARENT B* shall be appointed a joint or sole managing conservator unless at least one of the following circumstances exists:

1. appointment of *PARENT A* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development or

2. appointment of *NONPARENT* would be in the best interest of *CHILD*.

PJC 215.14C Preference for Appointment of Parent as Managing Conservator—Voluntary Relinquishment of Custody to Nonparent—Not Alleged for One Parent and Disputed for Other Parent

PARENT A and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator, in preference to *NONPARENT*, unless certain circumstances exist.

As between *PARENT A* and *NONPARENT*, *PARENT A* shall be appointed a joint or sole managing conservator unless appointment of *PARENT A* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development.

As between *PARENT B* and *NONPARENT*, *PARENT B* shall be appointed a joint or sole managing conservator unless one of the following circumstances exists:

1. appointment of *PARENT B* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development or

2. *PARENT B* has voluntarily relinquished possession and control of *CHILD* to *NONPARENT* for a period of one year or more, some part of which was after *DATE*, and the appointment of *NONPARENT* as managing conservator would be in the best interest of *CHILD*.

PJC 215.14D Preference for Appointment of Parent as Managing Conservator—Voluntary Relinquishment of Custody to Nonparent—Disputed for Both Parents

PARENT A and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator, in preference to *NONPARENT*, unless certain circumstances exist.

As between *PARENT A* and *NONPARENT*, *PARENT A* shall be appointed a joint or sole managing conservator unless one of the following circumstances exists:

1. appointment of *PARENT A* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development or

2. *PARENT A* has voluntarily relinquished possession and control of *CHILD* to *NONPARENT* for a period of one year or more, some part of which was after *DATE*, and the appointment of *NONPARENT* as managing conservator would be in the best interest of *CHILD*.

As between *PARENT B* and *NONPARENT*, *PARENT B* shall be appointed a joint or sole managing conservator unless one of the following circumstances exists:

1. appointment of *PARENT B* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development or

2. *PARENT B* has voluntarily relinquished possession and control of *CHILD* to *NONPARENT* for a period of one year or more, some part of which was after *DATE*, and the appointment of *NONPARENT* as managing conservator would be in the best interest of *CHILD*.

PJC 215.14E Preference for Appointment of Parent as Managing Conservator—Voluntary Relinquishment of Custody to Nonparent—Disputed for One Parent and Undisputed for Other Parent

PARENT A and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator, in preference to *NONPARENT*, unless certain circumstances exist.

As between *PARENT A* and *NONPARENT*, *PARENT A* shall be appointed a joint or sole managing conservator unless one of the following circumstances exists:

1. appointment of *PARENT A* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development or

2. *PARENT A* has voluntarily relinquished possession and control of *CHILD* to *NONPARENT* for a period of one year or more, some part of which was after *DATE*, and the appointment of *NONPARENT* as managing conservator would be in the best interest of *CHILD*.

As between *PARENT B* and *NONPARENT*, *PARENT B* shall be appointed a joint or sole managing conservator unless at least one of the following circumstances exists:

1. appointment of *PARENT A* would not be in the best interest of *CHILD* because the appointment would significantly impair *CHILD*'s physical health or emotional development or

2. appointment of *NONPARENT* would be in the best interest of *CHILD*.

COMMENT

Source. The foregoing instructions are based on Tex. Fam. Code §§ 153.131, 153.373; *see Lewelling v. Lewelling*, 796 S.W.2d 164 (Tex. 1990).

When to use. One of the instructions in PJC 215.14 should be used if one or more parents and one or more nonparents seek managing conservatorship and voluntary relinquishment of custody to a nonparent by one or more of the parents is asserted. PJC 215.14A should be used if voluntary relinquishment of custody by both parents or by the only parent during the requisite period is undisputed. PJC 215.14B should be used if such relinquishment is not alleged as to one parent and is undisputed as to the other parent. PJC 215.14C should be used if such relinquishment is not alleged as to one parent and is disputed as to the other parent. PJC 215.14D should be used if such relinquishment is disputed as to both parents or as to the only parent. PJC 215.14E should be used if such relinquishment is disputed as to one parent and undisputed as to the other parent.

The name of the nonparent seeking managing conservatorship to whom it is alleged or undisputed that the parent or parents have voluntarily relinquished custody of the child should be substituted for *NONPARENT* in the foregoing instructions. The date that is ninety-one days before the date on which the nonparent intervened in or commenced the suit or proceeding should be substituted for *DATE* in PJC 215.14C, 215.14D, and 215.14E.

Use of an instruction on the parental preference with a single question asking who should be appointed managing conservator conforms to the mandate for broad-form submission in Tex. R. Civ. P. 277. Such a procedure was approved in *Harrison v. Harrison*, 734 S.W.2d 737 (Tex. App.—Eastland 1987, no writ).

If joint managing conservatorship is not submitted. If no question on joint managing conservatorship is included in the charge, the clause "*PARENT A* and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator" should be changed to "*PARENT A* or *PARENT B* shall be appointed sole managing conservator" in the foregoing instructions, and the phrase "joint or" should be omitted.

If only one parent. If the child has only one parent, or if only one parent is seeking managing conservatorship, and voluntary relinquishment of custody by that parent

is undisputed, the clause "*PARENT A* and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator" should be changed to "*PARENT A* shall be appointed sole managing conservator" in PJC 215.14A, and the phrase "joint or" should be omitted.

If the child has only one parent, or if only one parent is seeking managing conservatorship, and voluntary relinquishment of custody by that parent is disputed, the clause "*PARENT A* and *PARENT B* shall be appointed joint managing conservators or one of them shall be appointed sole managing conservator" should be changed to "*PARENT A* shall be appointed sole managing conservator" in PJC 215.14D, the phrase "joint or" should be omitted from the second paragraph, and the third paragraph and its enumeration should be omitted.

Evidence of abusive physical force or sexual abuse. In an appropriate case, relevant portions of PJC 215.2 (evidence of abusive physical force or sexual abuse) should be included in the charge.

Evidence of abuse or neglect. In an appropriate case, relevant portions of PJC 215.3 (evidence of abuse or neglect—joint managing conservatorship) should be included in the charge.

PJC 216.1 Sole or Joint Managing Conservatorship

PJC 216.1A Sole or Joint Managing Conservatorship—One Child

QUESTION 1

Who should be appointed managing conservator of the child?

You may answer by naming one person sole managing conservator or by naming *two persons* joint managing conservators.

Answer by writing the name of the person who should be appointed sole managing conservator or by writing the names of the *two persons* who should be appointed joint managing conservators.

Answer: _____

If, in answer to Question 1, you named *two persons* joint managing conservators of the child, then answer Question 2 and Question 3. Otherwise, do not answer Question 2 or Question 3.

QUESTION 2

Which joint managing conservator should have the exclusive right to designate the primary residence of the child?

Answer by writing the name of the joint managing conservator.

Answer: _____

QUESTION 3

Should the joint managing conservator you named in Question 2 above be permitted to designate the primary residence of the child without regard to geographic location or with a geographic restriction?

Answer by writing "Without regard to geographic location" or "With a geographic restriction."

Answer: _____

If you answered Question 3 "With a geographic restriction," answer Question 4. Otherwise, do not answer Question 4.

QUESTION 4

State the geographic area within which the joint managing conservator must designate the child's primary residence.

Answer: _____

PJC 216.1B Sole or Joint Managing Conservatorship—More Than One Child—Agreement to Keep Children Together

QUESTION 1

Who should be appointed managing conservator of the children?

You may answer by naming one person sole managing conservator or by naming *two persons* joint managing conservators.

Answer by writing the name of the person who should be appointed sole managing conservator or by writing the names of the *two persons* who should be appointed joint managing conservators.

Answer: _____

If, in answer to Question 1, you named *two persons* joint managing conservators of the children, then answer Question 2 and Question 3. Otherwise, do not answer Question 2 or Question 3.

QUESTION 2

Which joint managing conservator should have the exclusive right to designate the primary residence of the children?

Answer by writing the name of the joint managing conservator.

Answer: _____

QUESTION 3

Should the joint managing conservator you named in Question 2 above be permitted to designate the primary residence of the children without regard to geographic location or with a geographic restriction?

Answer by writing "Without regard to geographic location" or "With a geographic restriction."

Answer: _____

If you answered Question 3 "With a geographic restriction," answer Question 4. Otherwise, do not answer Question 4.

QUESTION 4

State the geographic area within which the joint managing conservator must designate the primary residence of the children.

Answer: _____

PJC 216.1C Sole or Joint Managing Conservatorship—More Than One Child—Answer for Each

QUESTION 1

Who should be appointed managing conservator of the children named below?

You may answer by naming one person sole managing conservator or by naming *two persons* joint managing conservators.

Answer by writing on each line the name of the person who should be appointed sole managing conservator or the names of the *two persons* who should be appointed joint managing conservators of that child.

CHILD A _____

CHILD B _____

If, in answer to Question 1, you named *two persons* joint managing conservators of any of the children, then answer Question 2 and Question 3 with regard to each such child. Otherwise, do not answer Question 2 or Question 3.

QUESTION 2

Which joint managing conservator should have the exclusive right to designate the primary residence of the children named below?

Answer by writing beside the name of each child for whom you appointed joint managing conservators the name of the joint managing conservator who should have the exclusive right to designate that child's primary residence.

CHILD A _____

CHILD B _____

QUESTION 3

Should the joint managing conservator you named in Question 2 above for any child be permitted to designate the primary residence of that child without regard to geographic location or with a geographic restriction?

Answer by writing beside the name of each child for whom you appointed joint managing conservators "Without regard to geographic location" or "With a geographic restriction."

CHILD A _____

CHILD B _____

If you answered Question 3 "With a geographic restriction" with regard to any child, answer Question 4 for that child. Otherwise, do not answer Question 4.

QUESTION 4

State the geographic area within which the joint managing conservator must designate that child's primary residence.

CHILD A _____

CHILD B _____

COMMENT

Source. The questions designated Question 1 in PJC 216.1A, 216.1B, and 216.1C are based on Tex. Fam. Code § 153.005. The questions designated Questions 2, 3, and 4 are based on Tex. Fam. Code §§ 153.134(b)(1), 105.002(c).

Include these additional instructions. PJC 215.1 (best interest of child), PJC 215.6 (rights of parent appointed conservator), PJC 215.7 (no discrimination based on gender or marital status), PJC 215.9 (joint managing conservators), PJC 215.10A or 215.10B, as appropriate (best interest of child—joint managing conservatorship), and PJC 215.11 (sole managing conservator—parent) should be used with this submission.

If nonparent seeks managing conservatorship. If a nonparent seeks managing conservatorship, the appropriate instruction from PJC 215.8 or 215.14 (preference for appointment of parent as managing conservator) should be used with the foregoing question. In such a case, the instruction in PJC 215.12 (managing conservator—nonparent) should also be included.

Possessory conservatorship. If possessory conservatorship is in controversy, see PJC 216.3 (possessory conservatorship contested).

Evidence of abusive physical force or sexual abuse. In an appropriate case, relevant portions of PJC 215.2 (evidence of abusive physical force or sexual abuse) should be included in the charge.

Evidence of abuse or neglect. In an appropriate case, relevant portions of PJC 215.3 (evidence of abuse or neglect—joint managing conservatorship) should be included in the charge.

Evidence of family violence, child abuse or neglect, or rendition of protective order against party. In an appropriate case, relevant portions of PJC 215.4 (history or pattern of family violence, history or pattern of child abuse or neglect, or protective order) should be included in the charge.

More than two joint managing conservators. The appointment of more than two managing conservators has been approved. *See Brook v. Brook*, 881 S.W.2d 297 (Tex. 1994). In an appropriate case, the phrase *two persons* in the foregoing instructions may be changed.

Geographic restrictions apply only to joint managing conservators. The jury may decide only whether a joint managing conservator is subject to a geographic restriction; it may not impose any geographic restriction on a sole managing conservator. *See* Tex. Fam. Code § 105.002(c)(1)(E), (c)(2)(C).

PJC 216.2 Sole Managing Conservatorship

PJC 216.2A Sole Managing Conservatorship—One Child

QUESTION 1

Who should be appointed sole managing conservator of the child?

Answer by writing the name of the person.

Answer: _____

PJC 216.2B Sole Managing Conservatorship—More Than One Child—Agreement to Keep Children Together

QUESTION 1

Who should be appointed sole managing conservator of the children?

Answer by writing the name of the person.

Answer: _____

PJC 216.2C Sole Managing Conservatorship—More Than One Child—Answer for Each

QUESTION 1

Who should be appointed sole managing conservator of the children named below?

Answer by writing on each line the name of the person who should be appointed sole managing conservator of that child.

CHILD A _____

CHILD B _____

COMMENT

Source. The foregoing questions are based on Tex. Fam. Code § 153.005.

When to use. Use the foregoing question only when all parties seek sole managing conservatorship and no party seeks joint managing conservatorship.

Include these additional instructions. PJC 215.1 (best interest of child), PJC 215.6 (rights of parent appointed conservator), PJC 215.7 (no discrimination based on gender or marital status), and PJC 215.11 (sole managing conservator—parent) should be used with this question.

If nonparent seeks sole managing conservatorship. If a nonparent seeks sole managing conservatorship, the appropriate instruction from PJC 215.8 or 215.14 (preference for appointment of parent as managing conservator) should be used with the foregoing question. In such a case, the instruction in PJC 215.12 (managing conservator—nonparent) should also be used.

Possessory conservatorship. If possessory conservatorship is in controversy, see PJC 216.3 (possessory conservatorship contested).

Evidence of abusive physical force or sexual abuse. In an appropriate case, relevant portions of PJC 215.2 (evidence of abusive physical force or sexual abuse) should be included in the charge.

Evidence of family violence, child abuse or neglect, or rendition of protective order against party. In an appropriate case, relevant portions of PJC 215.4 (history or pattern of family violence, history or pattern of child abuse or neglect, or protective order) should be included in the charge.

PJC 216.3 Possessory Conservatorship Contested

PJC 216.3A Possessory Conservatorship Contested—For Only One Party

If, in answer to Question 1, you did not name *PARTY* managing conservator of the *child*, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Should *PARTY* be named possessory conservator of the *child*?

[Use the following paragraph only if the possessory conservatorship of a parent is contested.]

A parent who is not appointed managing conservator shall be appointed possessory conservator unless the appointment is not in the best interest of the child and possession or access by the parent would endanger the physical or emotional welfare of the child. A parent who is not appointed managing or possessory conservator may be ordered to perform other parental duties, including paying child support. Therefore, answer this question "Yes" unless you find from a preponderance of the evidence that appointment of *PARENT* is not in the best interest of the *child* and that possession or access by *PARENT* would endanger the physical or emotional welfare of the *child.*

Answer "Yes" or "No."

Answer: _____

PJC 216.3B Possessory Conservatorship Contested—For More Than One Party

QUESTION 2

Should any of the following persons be appointed possessory conservator of the *child*?

Do not name any person you named managing conservator in Question 1. Otherwise, you may name any, all, or none of the listed persons.

[Use the following paragraph only if the possessory conservatorship of a parent is contested.]

A parent who is not appointed managing conservator shall be appointed possessory conservator unless the appointment is not in the best interest of the child and possession or access by the parent would endanger the physical or emotional welfare of the child. A parent who is not appointed managing or possessory conservator may be ordered to perform other parental duties, including paying child support. Therefore, answer this question "Yes" with regard to *PARENT* unless you find from a preponderance of the evidence that appointment of *PARENT* is not in the best interest of the *child* and that possession or access by *PARENT* would endanger the physical or emotional welfare of the *child.*

Answer "Yes" by the name of the person or persons who should be appointed possessory conservator and "No" by the name of the person or persons who should not be appointed.

PARTY A _____

PARTY B _____

PARTY C _____

COMMENT

When to use. The foregoing questions should be used only if appointment of one or more parties as possessory conservator is contested. See PJC 215.13 Comment (possessory conservator).

If appointment of only one party as possessory conservator is contested, PJC 216.3A should be used. If that party is not seeking managing conservatorship as an alternative to possessory conservatorship, the conditioning instruction should be omitted from PJC 216.3A.

PJC 216.3B is appropriate for use if more than one party seeks possessory conservatorship. If none of these parties is seeking managing conservatorship as an alternative to possessory conservatorship, the instruction should be appropriately modified.

Instruction on denial of parent's possession of or access to child. The paragraph beginning "A parent who is not appointed managing conservator" is based on Tex. Fam. Code §§ 153.075, 153.191. If neither parent is a party whose possessory conservatorship is contested, that paragraph should be omitted from the instructions.

If more than one child. If more than one child is involved and there is an agreement to have one answer for all children, the word *child* should be replaced with the word *children* in the foregoing submissions. If a separate answer is desired for each child, the question should be repeated for each child.

Include these additional definitions and instructions. If one of the foregoing questions is submitted, the definitions and instructions in PJC 215.13B (possessory conservator—possessory conservatorship of parent contested), PJC 215.13C (possessory conservator—nonparent seeking conservatorship), or both, as appropriate, must be included in the charge.

PJC 216.4 Grandparental Possession or Access—Original Suit (Comment)

The Committee believes the submission of advisory jury questions, which may unduly lengthen the court's charge, is generally inappropriate. For this reason, the Committee has formulated neither instructions nor jury questions seeking advisory opinions about the granting of grandparental possession or access.

PJC 216.5 Terms and Conditions of Access, Support, and Conservatorship (Comment)

The court may not submit to the jury questions on the issues of support under Family Code chapter 154 (child support) or chapter 159 (UIFSA), a specific term or condition of possession of or access to the child, or any right or duty of a possessory or managing conservator other than the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child. Tex. Fam. Code § 105.002(c)(2).

PJC 217.1 Modification of Sole Managing Conservatorship to Another Sole Managing Conservator

PJC 217.1A Modification of Sole Managing Conservatorship to Another Sole Managing Conservator—Instruction

For the order that designates *PARTY A* sole managing conservator of *CHILD* to be modified to appoint a new sole managing conservator, it must be proved that—

1. *the circumstances of CHILD or of PARTY A or of PARTY B have materially and substantially changed since DATE* and

2. the appointment of *PARTY B* as sole managing conservator in place of *PARTY A* would be in the best interest of *CHILD*.

PJC 217.1B Modification of Sole Managing Conservatorship to Another Sole Managing Conservator—Question

QUESTION 1

Should the order that designates *PARTY A* sole managing conservator of *CHILD* be modified to appoint *PARTY B* sole managing conservator?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Fam. Code § 156.101.

Use only in two-party suits. The instruction and question in PJC 217.1 are appropriate if only one party seeks to replace the sole managing conservator. For cases in which more than one party seeks to replace the sole managing conservator, see PJC 217.5 (modification of conservatorship—multiple parties seeking conservatorship).

Date of order or agreement. The earlier of the date of rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based should be substituted for *DATE*.

Rewording for voluntary relinquishment ground. In an appropriate case, item 1 in the instruction in PJC 217.1A should be reworded *PARTY A has voluntarily relinquished the primary care and possession of CHILD to NAME for at least six months.*

Rewording for child's preference ground. No jury issue is presented by the ground in Tex. Fam. Code § 156.101(a)(2). If the case involves only that ground for modification, item 1 in the instruction in PJC 217.1A should be omitted and the instruction should be worded as follows:

> For the order that designates *PARTY A* sole managing conservator of *CHILD* to be modified to appoint a new sole managing conservator, it must be proved that the appointment of *PARTY B* as sole managing conservator in place of *PARTY A* would be in the best interest of *CHILD*.

Conviction or deferred adjudication of conservator for child abuse. If a conservator has been convicted of an offense involving continuous sexual abuse of a young child under section 21.02 of the Texas Penal Code or has been convicted or received an order of deferred adjudication for an offense involving the abuse of a child under section 21.11, 22.011, or 22.021 of the Texas Penal Code, item 1 in the instruction in PJC 217.1A should be omitted and the instruction should be worded as follows:

> For the order that designates *PARTY A* sole managing conservator of *CHILD* to be modified to appoint a new sole managing conservator, it must be proved that the appointment of *PARTY B* as sole managing conservator in place of *PARTY A* would be in the best interest of *CHILD*.

In such a case, the conviction or deferred adjudication order is a material and substantial change of circumstances sufficient to justify a modification of the existing order. Tex. Fam. Code § 156.104. The existence of an order of conviction or deferred adjudication is a question of law for court determination.

Include these additional instructions. PJC 215.6 (rights of parent appointed conservator), PJC 215.11 (sole managing conservator—parent), and PJC 215.12 (managing conservator—nonparent), as appropriate, should be used with this submission.

If more than one child. If the case involves more than one child and there is no agreement to keep the children together, Question 1 should be submitted as follows:

> QUESTION 1
>
> Should the order that designates *PARTY A* sole managing conservator be modified to appoint *PARTY B* sole managing conservator of the children named below?
>
> Answer "Yes" or "No" for each child.
>
> *CHILD A* _____
> *CHILD B* _____

Evidence of abusive physical force or sexual abuse. In an appropriate case, relevant portions of PJC 215.2 (evidence of abusive physical force or sexual abuse) should be included in the charge.

Evidence of family violence, child abuse or neglect, or rendition of protective order against party. In an appropriate case, relevant portions of PJC 215.4 (history or pattern of family violence, history or pattern of child abuse or neglect, or protective order) should be included in the charge.

PJC 217.2 Modification of Sole Managing Conservatorship to Joint Managing Conservatorship

PJC 217.2A Modification of Sole Managing Conservatorship to Joint Managing Conservatorship—Instruction

For the order that designates *PARTY A* sole managing conservator of *CHILD* to be modified to appoint joint managing conservators, it must be proved that—

1. *the circumstances of CHILD or of PARTY A or of PARTY B have materially and substantially changed since DATE* and

2. the appointment of *PARTY A* and *PARTY B* to serve as joint managing conservators would be in the best interest of *CHILD*.

PJC 217.2B Modification of Sole Managing Conservatorship to Joint Managing Conservatorship—Question

QUESTION 1

Should the order that designates *PARTY A* sole managing conservator of *CHILD* be modified to appoint *PARTY A* and *PARTY B* joint managing conservators?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2 and Question 3. Otherwise, do not answer Question 2 or Question 3.

QUESTION 2

Should *PARTY A* or *PARTY B* have the exclusive right to designate the primary residence of *CHILD*?

Answer by writing the name of the person.

Answer: _____

QUESTION 3

Should the person you named in Question 2 above be permitted to designate the primary residence of the child without regard to geographic location or with a geographic restriction?

Answer by writing "Without regard to geographic location" or "With a geographic restriction."

Answer: _____

If you answered Question 3 "With a geographic restriction," answer Question 4. Otherwise, do not answer Question 4.

QUESTION 4

State the geographic area within which the joint managing conservator must designate the child's primary residence.

Answer: _____

COMMENT

Source. The instruction in PJC 217.2A and Question 1 in PJC 217.2B are based on Tex. Fam. Code § 156.101. Questions 2, 3, and 4 in PJC 217.2B are based on Tex. Fam. Code §§ 153.134(b)(1), 105.002(c).

Use only in two-party suits. The instruction and questions in PJC 217.2 are appropriate if only one party seeks to join the current sole managing conservator in a joint managing conservatorship. For cases in which more than one party seeks to do so, see PJC 217.5 (modification of conservatorship—multiple parties seeking conservatorship).

Date of order or agreement. The earlier of the date of rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based should be substituted for *DATE*.

Rewording for voluntary relinquishment ground. In an appropriate case, item 1 in the instruction in PJC 217.2A should be reworded *PARTY A has voluntarily relinquished the primary care and possession of CHILD to NAME for at least six months.*

Rewording for child's preference ground. No jury issue is presented by the ground in Tex. Fam. Code § 156.101(a)(2). If the case involves only that ground for modification, item 1 in the instruction in PJC 217.2A should be omitted and the instruction should be worded as follows:

> For the order that designates *PARTY A* sole managing conservator of *CHILD* to be modified to appoint joint managing conservators, it must be proved that the appointment of *PARTY B* and *PARTY A* to serve as joint managing conservators would be in the best interest of *CHILD*.

Conviction or deferred adjudication of conservator for child abuse. If a conservator has been convicted of an offense involving continuous sexual abuse of a young child under section 21.02 of the Texas Penal Code or has been convicted or received an order of deferred adjudication for an offense involving the abuse of a child under section 21.11, 22.011, or 22.021 of the Texas Penal Code, item 1 in the instruction in PJC 217.2A should be omitted and the instruction should be worded as follows:

> For the order that designates *PARTY A* sole managing conservator of *CHILD* to be modified to appoint joint managing conservators, it must be proved that the appointment of *PARTY B* and *PARTY A* to serve as joint managing conservators would be in the best interest of *CHILD*.

In such a case, the conviction or deferred adjudication order is a material and substantial change of circumstances sufficient to justify a modification of the existing order. Tex. Fam. Code § 156.104. The existence of an order of conviction or deferred adjudication is a question of law for court determination.

Include these additional instructions. PJC 215.6 (rights of parent appointed conservator), PJC 215.9 (joint managing conservators), and PJC 215.10 (best interest of child—joint managing conservatorship) should be used with the foregoing submission. If the present sole managing conservator is a parent, PJC 215.11 (sole managing conservator—parent) should be included with this submission; if the present sole managing conservator is a nonparent, PJC 215.12 (managing conservator—nonparent) should be included.

If more than one child. If a separate answer regarding primary residence is sought for each child, Questions 2, 3, and 4 in PJC 217.2B may be submitted as follows:

> QUESTION 2
>
> Which party should have the exclusive right to designate the primary residence of the children named below?
>
> Answer by writing on each line the name of the party who should have the exclusive right to designate that child's primary residence.
>
> *CHILD A* _____
>
> *CHILD B* _____

QUESTION 3

Should the person you named in Question 2 above for a child be permitted to designate the primary residence of the child without regard to geographic location or with a geographic restriction?

Answer by writing on each line "Without regard to geographic location" or "With a geographic restriction."

CHILD A _____

CHILD B _____

If you answered Question 3 "With a geographic restriction" with regard to any child, answer Question 4 for that child. Otherwise, do not answer Question 4.

QUESTION 4

State the geographic area within which the joint managing conservator must designate that child's primary residence.

CHILD A _____

CHILD B _____

The Committee has decided not to formulate questions or instructions providing for joint managing conservatorship of some children of a marriage but not of others.

Evidence of abuse or neglect. In an appropriate case, relevant portions of PJC 215.3 (evidence of abuse or neglect—joint managing conservatorship) should be included in the charge.

Evidence of family violence, child abuse or neglect, or rendition of protective order against party. In an appropriate case, relevant portions of PJC 215.4 (history or pattern of family violence, history or pattern of child abuse or neglect, or protective order) should be included in the charge.

Geographic restrictions apply only to joint managing conservators. The jury may decide only whether a joint managing conservator is subject to a geographic restriction; it may not impose any geographic restriction on a sole managing conservator. *See* Tex. Fam. Code § 105.002(c)(1)(E), (c)(2)(C).

PJC 217.3 Modification of Joint Managing Conservatorship to Sole Managing Conservatorship

PJC 217.3A Modification of Joint Managing Conservatorship to Sole Managing Conservatorship—Instruction

For the joint managing conservatorship of *CHILD* to be replaced by a sole managing conservatorship, it must be proved that—

1. *the circumstances of CHILD or of PARTY A or of PARTY B have materially and substantially changed since DATE* and

2. the appointment of a sole managing conservator would be in the best interest of *CHILD*.

PJC 217.3B Modification of Joint Managing Conservatorship to Sole Managing Conservatorship—Question

QUESTION 1

Should the joint managing conservatorship be replaced by a sole managing conservatorship of *CHILD*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Who should be appointed sole managing conservator of *CHILD*?

Answer by writing the name of the person who should be appointed.

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Fam. Code § 156.101.

Use only in two-party suits. The instruction and questions in PJC 217.3 are appropriate if only one or both of the two current joint managing conservators seek to become the sole managing conservator. If other parties also seek sole managing con-

servatorship, see PJC 217.5 (modification of conservatorship—multiple parties seeking conservatorship).

Date of order or agreement. The earlier of the date of rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based should be substituted for *DATE*.

Rewording for voluntary relinquishment ground. In an appropriate case, item 1 in the instruction in PJC 217.3A should be reworded *PARTY A has voluntarily relinquished the primary care and possession of CHILD to NAME for at least six months.* In the instruction, *PARTY A* is the conservator who has the exclusive right to designate the child's primary residence.

Child's preference ground. Theoretically, a modification of a joint managing conservatorship to a sole managing conservatorship could be based on the child's preference, expressed to the court in chambers, that the other joint conservator have the right to designate the child's primary residence. The Committee believes it far more likely that a joint managing conservator who wishes to alter only the designation of the person who has the right to designate the child's residence would seek to effectuate the child's preference within the existing joint managing conservatorship rather than seek to terminate that joint managing conservatorship on the ground of the preference. For this reason, the Committee has not suggested rewording item 1 in the instruction in PJC 217.3A for the latter possibility.

Conviction or deferred adjudication of conservator for child abuse. If a conservator has been convicted of an offense involving continuous sexual abuse of a young child under section 21.02 of the Texas Penal Code or has been convicted or received an order of deferred adjudication for an offense involving the abuse of a child under section 21.11, 22.011, or 22.021 of the Texas Penal Code, item 1 in the instruction in PJC 217.3A should be omitted and the instruction should be worded as follows:

> For the joint managing conservatorship of *CHILD* to be replaced by a sole managing conservatorship, it must be proved that the appointment of a sole managing conservator would be in the best interest of *CHILD*.

In such a case, the conviction or deferred adjudication order is a material and substantial change of circumstances sufficient to justify a modification of the existing order. Tex. Fam. Code § 156.104. The existence of an order of conviction or deferred adjudication is a question of law for court determination.

Include these additional instructions. PJC 215.6 (rights of parent appointed conservator), PJC 215.7 (no discrimination based on gender or marital status), PJC 215.9 (joint managing conservators), and PJC 215.11 (sole managing conservator—parent) should be used with this submission. If one of the parties is a nonparent, PJC 215.12 (managing conservator—nonparent) should be included with this submission.

If more than one child. It is possible that, if separate questions are asked concerning each child, there may be a retention of joint managing conservatorship for some children and a change to sole managing conservatorship—perhaps with more than one sole managing conservator—for others. The Committee has decided not to formulate a submission involving separate questions for each child.

Evidence of abusive physical force or sexual abuse. In an appropriate case, relevant portions of PJC 215.2 (evidence of abusive physical force or sexual abuse) should be included in the charge.

Evidence of family violence, child abuse or neglect, or rendition of protective order against party. In an appropriate case, relevant portions of PJC 215.4 (history or pattern of family violence, history or pattern of child abuse or neglect, or protective order) should be included in the charge.

If parent vs. nonparent. The parental presumption (Tex. Fam. Code §§ 153.131(a), 153.373) does not apply in a modification suit. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000).

PJC 217.4 Modification of Conservatorship—Right to Designate Primary Residence

PJC 217.4A Modification of Conservatorship—Right to Designate Primary Residence—Instruction

For the order that designates *PARTY A* the conservator who has the exclusive right to designate the primary residence of *CHILD* to be modified to appoint a different conservator with that exclusive right, it must be proved that—

1. *the circumstances of CHILD or of PARTY A or of PARTY B have materially and substantially changed since DATE* and

2. the appointment of *PARTY B* as the conservator who has the exclusive right to designate the primary residence of *CHILD* in place of *PARTY A* would be in the best interest of *CHILD*.

PJC 217.4B Modification of Conservatorship—Right to Designate Primary Residence—Question

QUESTION 1

Should the order that designates *PARTY A* the conservator who has the exclusive right to designate the primary residence of *CHILD* be modified to designate *PARTY B* as the conservator who has that exclusive right?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Should *PARTY B* be permitted to designate the primary residence of the child without regard to geographic location or with a geographic restriction?

Answer by writing "Without regard to geographic location" or "With a geographic restriction."

Answer: _____

If you answered Question 2 "With a geographic restriction," answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

State the geographic area within which the joint managing conservator must designate the child's primary residence.

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Fam. Code §§ 156.101, 153.134(b)(1), 105.002(c).

Use only in two-party suits. The instruction and questions in PJC 217.4 are appropriate if only one party seeks to become the conservator who has the exclusive right to designate the child's primary residence. For cases in which more than one party seeks to become the conservator with that exclusive right, see PJC 217.5 (modification of conservatorship—multiple parties seeking conservatorship).

Date of order or agreement. The earlier of the date of rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based should be substituted for *DATE*.

Rewording for child's preference ground. No jury issue is presented by the ground in Tex. Fam. Code § 156.101(a)(2). If the case involves only that ground for modification, item 1 in the instruction in PJC 217.4A should be omitted and the instruction should be worded as follows:

> For the order that designates *PARTY A* the conservator who has the exclusive right to designate the primary residence of *CHILD* to be modified to appoint a different conservator with that exclusive right, it must be proved that the designation of *PARTY B* as the conservator who has the exclusive right to designate the primary residence of *CHILD* in place of *PARTY A* would be in the best interest of *CHILD*.

Rewording for voluntary relinquishment ground. In an appropriate case, item 1 in the instruction in PJC 217.4A should be reworded *PARTY A has voluntarily relinquished the primary care and possession of CHILD to NAME for at least six months.*

Conviction or deferred adjudication of conservator for child abuse. If a conservator has been convicted of an offense involving continuous sexual abuse of a young child under section 21.02 of the Texas Penal Code or has been convicted or received an order of deferred adjudication for an offense involving the abuse of a child

under section 21.11, 22.011, or 22.021 of the Texas Penal Code, item 1 in the instruction in PJC 217.4A should be omitted and the instruction should be worded as follows:

> For the order that designates *PARTY A* the conservator who has the exclusive right to designate the primary residence of *CHILD* to be modified to appoint a different conservator with that exclusive right, it must be proved that the designation of *PARTY B* as the conservator who has the exclusive right to designate the primary residence of *CHILD* in place of *PARTY A* would be in the best interest of *CHILD*.

In such a case, the conviction or deferred adjudication order is a material and substantial change of circumstances sufficient to justify a modification of the existing order. Tex. Fam. Code § 156.104. The existence of an order of conviction or deferred adjudication is a question of law for court determination.

If more than one child. If a separate answer is sought for each child, the questions in PJC 217.4B may be submitted as follows:

> QUESTION 1
>
> Should the order that designates *PARTY A* the conservator who has the exclusive right to designate the primary residence of the children named below be modified to appoint *PARTY B* the conservator who has that exclusive right?
>
> Answer "Yes" or "No" for each child.
>
> *CHILD A* _____
>
> *CHILD B* _____
>
> If you answered "Yes" to Question 1 with regard to a child, then answer Question 2 for that child. Otherwise, do not answer Question 2.
>
> QUESTION 2
>
> For each child for whom you answered "Yes" in Question 1, should *PARTY B* be permitted to designate the primary residence of the child without regard to geographic location or with a geographic restriction?
>
> Answer by writing on the line for each child for whom you have answered "Yes" in Question 1 "Without regard to geographic location" or "With a geographic restriction."

CHILD A _____

CHILD B _____

If you answered Question 2 "With a geographic restriction" with regard to a child, then answer Question 3 for that child. Otherwise, do not answer Question 3.

QUESTION 3

State the geographic area within which the joint managing conservator must designate that child's primary residence.

CHILD A _____

CHILD B _____

Evidence of abusive physical force or sexual abuse. In an appropriate case, relevant portions of PJC 215.2 (evidence of abusive physical force or sexual abuse) should be included in the charge.

Evidence of family violence, child abuse or neglect, or rendition of protective order against party. In an appropriate case, relevant portions of PJC 215.4 (history or pattern of family violence, history or pattern of child abuse or neglect, or protective order) should be included in the charge.

Modification within one year. The Committee believes the likelihood that a jury would be impaneled to decide a modification brought under Tex. Fam. Code § 156.102, after a court has determined the facts stated in the required affidavit to be sufficient to support an allegation and has rendered temporary orders, is extremely remote. For this reason, the Committee has proposed no instructions or questions based on that Code section.

PJC 217.5 Modification of Conservatorship—Multiple Parties Seeking Conservatorship (Comment)

PJC 217.1–217.4 are written for cases involving two parties, the minimum number of possible contestants. PJC 217.1 is used if one party seeks to replace the current sole managing conservator. PJC 217.2 is used if one party seeks to join the current sole managing conservator in a joint managing conservatorship. PJC 217.3 is used if one or both of the two current joint managing conservators seek to become the sole managing conservator. PJC 217.4 is used if one party seeks to be designated as the conservator who has the exclusive right to designate primary residence.

Situations involving additional parties seeking managing conservatorship present too large a variety of possibilities to be comprehensively covered in this book. The following example of modification of a sole managing conservatorship to another sole managing conservator in which two parties seek to replace the current sole managing conservator offers a pattern on which charges involving additional contestants may be based:

QUESTION 1

Should the order that designates *PARTY A* sole managing conservator of *CHILD* be modified to appoint a new sole managing conservator?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Who should be appointed sole managing conservator of *CHILD*?

Answer by writing the name of the person who should be appointed.

Answer: _____

Use these instructions. For this example, the instruction in PJC 217.1A (modification of sole managing conservatorship to another sole managing conservator) must be appropriately modified and given preceding Question 1. PJC 215.1 (best interest of child) should be used with Question 2 in the series above.

If more than one child. If more than one child is involved, the names of all the children may be included in the questions, or the questions may be repeated for each child.

PJC 217.6 Modification—Grandparental Possession or Access (Comment)

The Committee believes the submission of advisory jury questions, which may unduly lengthen the court's charge, is generally inappropriate. For this reason, the Committee has formulated neither instructions nor jury questions seeking advisory opinions about the granting of grandparental possession or access.

PJC 217.7 Modification of Terms and Conditions of Access, Support, and Conservatorship (Comment)

The court may not submit to the jury questions on the issues of support under Family Code chapter 154 (child support) or chapter 159 (UIFSA), a specific term or condition of possession of or access to the child, or any right or duty of a possessory or managing conservator other than the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child. Tex. Fam. Code § 105.002(c)(2).

PJC 218.1 Termination of Parent-Child Relationship

PJC 218.1A Termination of Parent-Child Relationship—Instruction

This is a case for termination of parental rights. "Termination" means that the parent-child relationship between the parent and the child is ended. All legal rights and duties with respect to each other are cut off, except that the child retains the right to inherit from and through the parent unless the court provides otherwise. The rights and duties a parent has are—

1. The right to have physical possession, to direct the moral and religious training, and to establish the residence of the child.

2. The duty of care, control, protection, and reasonable discipline of the child.

3. The duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education.

4. The duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

5. The right to the services and earnings of the child.

6. The right to consent to the child's marriage, to enlistment in the armed forces of the United States, to medical and dental care, and to psychiatric, psychological, and surgical treatment.

7. The right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child.

8. The right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child.

9. The right to inherit from and through the child.

10. The right to make decisions concerning the child's education.

11. Any other right or duty existing between a parent and child by virtue of law.

If no termination of the parent-child relationship is ordered, the court may modify these rights and duties by court order.

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

You will be required to determine whether termination of the parent-child relationship in this case would be in the best interest of the child. Some factors to consider in determining the best interest of the child are—

1. The desires of the child.

2. The emotional and physical needs of the child now and in the future.

3. Any emotional and physical danger to the child now and in the future.

4. The parenting ability of the individuals seeking custody.

5. The programs available to assist those individuals to promote the best interest of the child.

6. The plans for the child by those individuals or by the agency seeking custody.

7. The stability of the home or proposed placement.

8. The acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one.

9. Any excuse for the acts or omissions of the parent.

PJC 218.1B Termination of Parent-Child Relationship—Question

[Important: see "Form of submission" in the comment below concerning the propriety of this broad-form submission.]

For the parent-child relationship to be terminated in this case, it must be proved by clear and convincing evidence that *PARENT failed to support CHILD in accordance with PARENT's ability during the period between DATE 1 and DATE 2.*

For the parent-child relationship to be terminated in this case, it must also be proved by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child.

QUESTION 1

Should the parent-child relationship between *PARENT* and *CHILD* be terminated?

Answer "Yes" or "No."

Answer: _____

[See PJC 218.4 for discussion of additional questions.]

COMMENT

Source. The definition of "termination" in the first paragraph of the instruction in PJC 218.1A is based on Tex. Fam. Code § 161.206. The list of rights and duties of a parent in that paragraph is based on Tex. Fam. Code § 151.001. The definition of "clear and convincing evidence" is based on Tex. Fam. Code § 101.007. The list of factors to be considered in determining the best interest of the child is based on *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). The submission in PJC 218.1B is based on Tex. Fam. Code § 161.001(b).

When to use. The foregoing instructions and question are for use if termination of the parent-child relationship is sought under the provisions of Tex. Fam. Code § 161.001. The instruction in PJC 218.1A should be used in all such cases. The instruction and question in PJC 218.1B should be used (1) if there has been no prior order under Tex. Fam. Code § 161.205 denying a petition to terminate the parent-child relationship of the parent or (2) if the evidence of grounds for termination relates only to conduct alleged to have occurred *after* the date the prior order denying termination was entered. If there has been such a prior order and evidence has been admitted relating to conduct alleged to have occurred *before* the date the order was entered, see PJC 218.3.

Rewording if Code section 154.001(a–1) may apply. If the court determines that the circumstances of the case provide the possibility that Tex. Fam. Code § 154.001(a–1) may apply, the phrase "and except that the court may order the parent, if financially able, to pay child support after the termination" should be added to the third sentence of the first paragraph.

Rewording for appropriate grounds under Code section 161.001. In PJC 218.1B, the clause *PARENT failed to support CHILD in accordance with PARENT's ability during the period between DATE 1 and DATE 2*, based on Tex. Fam. Code § 161.001(b)(1)(F), is included only as an example. That clause should be replaced by the appropriate ground or grounds for termination in Tex. Fam. Code § 161.001(b). See the comment entitled "Selecting and wording relevant grounds for termination" below.

Form of submission. The broad-form question in PJC 218.1B was explicitly approved by the Texas Supreme Court in *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990). In January 2020, the supreme court issued a proposed amendment to Tex. R. Civ. P. 277 that would supersede *E.B.* and require specific jury findings in suits involving termination of the parent-child relationship. *See* Texas Supreme Court, *Order Amending Texas Rule of Civil Procedure 277*, Misc. Docket No. 20-9008 (Jan. 8, 2020), ___ Tex. B.J. ___ (2020). The proposed rule would require separate jury questions for each parent and each child on (1) each individual statutory ground for termination of the parent-child relationship and (2) whether termination of the parent-child relationship is in the best interest of the child. The proposal would further require the best-interest question to be predicated on an affirmative finding of at least one termination ground. As of the date this edition went to press, the proposed rule change was in a comment period and subject to revision. **The remainder of this comment should be read with the proposed rule change in mind, and the submission in PJC 218.1B should be reformulated in accordance with the final rule.**

In *E.B.*, the supreme court explicitly approved the broad-form question in PJC 218.1B, which asks the "controlling question" of whether parental rights should be terminated. The jury is questioned neither about the specific culpable act or acts that constitute the statutory grounds for termination of parental rights nor about whether termination is in the best interest of the child. More recent cases have indicated that broad-form submission may not be feasible in a variety of situations depending on the law, the theories, and the evidence in a given case. See the discussion of broad-form questions in PJC 251.2. In *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005), and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), judgments were reversed because of the erroneous inclusion in a broad-form issue of elements lacking support in the evidence. Because of the heightened burden of proof and the higher standard for legal sufficiency review on appeal (*see In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002)), these cases may be of particular relevance in the termination context.

Since the supreme court's decision in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), there has been speculation that the court would no longer sanction submission of multiple grounds in a broad-form question that does not require at least ten jurors to agree on a specific ground for termination. In *In re B.L.D.*, 56 S.W.3d 203 (Tex. App.—Waco 2001), *rev'd on other grounds*, 113 S.W.3d 340 (Tex. 2003), the court of appeals held that, in light of *Crown Life*, submission of the broad-form question was error. Because error had not been preserved in the trial court, the supreme court did not rule on that issue when reversing the judgment of the court of appeals. In the analysis leading to its holding that under the circumstances presented "a court of appeals must not retreat from our error-preservation standards to review unpreserved charge error in parental rights termination cases," however, the supreme court noted that "the charge in this case follows our precedent in *E.B.*, tracks the statutory language of the Family Code, and comports with Texas Rules of Civil Procedure

277 and 292." *In re B.L.D.*, 113 S.W.3d at 354–55. Although the "ten jurors" argument has been advanced in a number of termination cases, the Committee has discovered none other than the appellate court's decision in *B.L.D.* in which the broad-form submission was held to be error. *See In re L.C.*, 145 S.W.3d 790 (Tex. App.—Texarkana 2004, no pet.); *In re J.M.M.*, 80 S.W.3d 232 (Tex. App.—Fort Worth 2002, pet. denied); *In re K.S.*, 76 S.W.3d 36 (Tex. App.—Amarillo 2002, no pet.); *In re M.C.M.*, 57 S.W.3d 27 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

Selecting and wording relevant grounds for termination. Only those grounds for termination that are supported by the pleadings and evidence should be included in the instruction in PJC 218.1B. For example, if the allegations for termination are based on Tex. Fam. Code § 161.001(b)(1)(E)—that the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child"—an instruction to the jury may be phrased in the statutory language. *In re S.H.A.*, 728 S.W.2d 73 (Tex. App.—Dallas 1987, no writ). In such a case, however, if a valid objection is raised that there is no evidence that the parent *knowingly placed the child with persons who engaged in conduct*, for example, then that portion of the instruction should be omitted.

If more than one child. If more than one child is involved, PJC 218.1B should be repeated for each child.

If both parents. If termination of the parental rights of both parents is sought, PJC 218.1B should be repeated for each parent. Findings of grounds for termination for the individual parent whose rights are terminated is required in suits filed by the Department of Family and Protective Services and is advisable in all other such cases. *See* Tex. Fam. Code § 161.206(a–1).

PJC 218.2 Termination of Parent-Child Relationship—Inability to Care for Child

PJC 218.2A Termination of Parent-Child Relationship—Inability to Care for Child—Instruction

[Include instructions at PJC 218.1A.]

PJC 218.2B Termination of Parent-Child Relationship—Inability to Care for Child—Question

[Important: see "Form of submission" in the comment below concerning the propriety of this broad-form submission.]

For the parent-child relationship to be terminated in this case, it must be proved by clear and convincing evidence that—

1. the parent has a mental or emotional illness or a mental deficiency that renders the parent unable to provide for the physical, emotional, and mental needs of the child, and

2. the illness or deficiency, in all reasonable probability, will continue to render the parent unable to provide for the child's needs until the eighteenth birthday of the child, and

3. the Department of Family and Protective Services has made reasonable efforts to return the child to the parent, and

4. the termination of the parent-child relationship would be in the best interest of the child.

QUESTION 1

Should the parent-child relationship between *PARENT* and *CHILD* be terminated?

Answer "Yes" or "No."

Answer: _____

[See PJC 218.4 for discussion of additional questions.]

COMMENT

Source. The ground for termination submitted above is based on Tex. Fam. Code § 161.003(a)(1)–(2), (a)(4)–(5). The "clear and convincing evidence" standard is specified in Tex. Fam. Code § 161.206. Further, the standard is constitutionally required in all proceedings for involuntary termination of the parent-child relationship. *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980). Tex. Fam. Code § 161.003(a)(3) provides that, for this termination ground to arise, the Texas Department of Family and Protective Services (formerly Department of Protective and Regulatory Services) must have been the temporary or sole managing conservator of the child for at least six months preceding the date of the hearing, which may not be held earlier than 180 days after suit is filed; that factor is a question of law for the court.

When to use. The foregoing instructions and question are for use if termination of the parent-child relationship is sought under the provisions of Tex. Fam. Code § 161.003. A petition to terminate parental rights under this provision may be brought only by the Texas Department of Family and Protective Services.

Include instructions from PJC 218.1A. In every case in which the ground of termination in PJC 218.2 is submitted, the instructions at PJC 218.1A must be included.

Form of submission. The broad-form question in PJC 218.2B was explicitly approved by the Texas Supreme Court in *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990). In January 2020, the supreme court issued a proposed amendment to Tex. R. Civ. P. 277 that would supersede *E.B.* and require specific jury findings in suits involving termination of the parent-child relationship. *See* Texas Supreme Court, *Order Amending Texas Rule of Civil Procedure 277*, Misc. Docket No. 20-9008 (Jan. 8, 2020), ___ Tex. B.J. ___ (2020). The proposed rule would require separate jury questions for each parent and each child on (1) each individual statutory ground for termination of the parent-child relationship and (2) whether termination of the parent-child relationship is in the best interest of the child. The proposal would further require the best-interest question to be predicated on an affirmative finding of at least one termination ground. As of the date this edition went to press, the proposed rule change was in a comment period and subject to revision. **The remainder of this comment should be read with the proposed rule change in mind, and the submission in PJC 218.2B should be reformulated in accordance with the final rule.**

In *E.B.*, the supreme court explicitly approved the broad-form question in PJC 218.2B, which asks the "controlling question" of whether parental rights should be terminated. The jury is questioned neither about the specific culpable act or acts that constitute the statutory grounds for termination of parental rights nor about whether termination is in the best interest of the child. More recent cases have indicated that broad-form submission may not be feasible in a variety of situations depending on the

law, the theories, and the evidence in a given case. See the discussion of broad-form questions in PJC 251.2. In *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005), and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), judgments were reversed because of the erroneous inclusion in a broad-form issue of elements lacking support in the evidence. Because of the heightened burden of proof and the higher standard for legal sufficiency review on appeal (*see In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002)), these cases may be of particular relevance in the termination context.

Since the supreme court's decision in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), there has been speculation that the court would no longer sanction submission of multiple grounds in a broad-form question that does not require at least ten jurors to agree on a specific ground for termination. In *In re B.L.D.*, 56 S.W.3d 203 (Tex. App.—Waco 2001), *rev'd on other grounds*, 113 S.W.3d 340 (Tex. 2003), the court of appeals held that, in light of *Crown Life*, submission of the broad-form question was error. Because error had not been preserved in the trial court, the supreme court did not rule on that issue when reversing the judgment of the court of appeals. In the analysis leading to its holding that under the circumstances presented "a court of appeals must not retreat from our error-preservation standards to review unpreserved charge error in parental rights termination cases," however, the supreme court noted that "the charge in this case follows our precedent in *E.B.*, tracks the statutory language of the Family Code, and comports with Texas Rules of Civil Procedure 277 and 292." *In re B.L.D.*, 113 S.W.3d at 354–55. Although the "ten jurors" argument has been advanced in a number of termination cases, the Committee has discovered none other than the appellate court's decision in *B.L.D.* in which the broad-form submission was held to be error. *See In re L.C.*, 145 S.W.3d 790 (Tex. App.—Texarkana 2004, no pet.); *In re J.M.M.*, 80 S.W.3d 232 (Tex. App.—Fort Worth 2002, pet. denied); *In re K.S.*, 76 S.W.3d 36 (Tex. App.—Amarillo 2002, no pet.); *In re M.C.M.*, 57 S.W.3d 27 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

If more than one child. If more than one child is involved, PJC 218.2B should be repeated for each child.

If both parents. If termination of the parental rights of both parents is sought, PJC 218.2B should be repeated for each parent. Findings of grounds for termination for the individual parent whose rights are terminated is required in suits filed by the Department of Family and Protective Services and is advisable in all other such cases. *See* Tex. Fam. Code § 161.206(a–1).

PJC 218.3 Termination of Parent-Child Relationship—Prior Denial of Termination

PJC 218.3A Termination of Parent-Child Relationship—Prior Denial of Termination—Instruction

[Include instructions at PJC 218.1A.]

PJC 218.3B Termination of Parent-Child Relationship—Prior Denial of Termination—Both Pre-Denial and Post-Denial Conduct in Evidence

[Important: see "Form of submission" in the comment below concerning the propriety of this broad-form submission.]

For the parent-child relationship to be terminated in this case, it must be proved by clear and convincing evidence either—

1. that after *DATE, PARENT engaged in conduct or knowingly placed CHILD with persons who engaged in conduct that endangered the physical or emotional well-being of CHILD* or

2. that the circumstances of *CHILD* or of *PARENT* or of *POSSESSORY CONSERVATOR* or of *OTHER PARTY* have materially and substantially changed since *DATE*, and that, before *DATE, PARENT engaged in conduct or knowingly placed CHILD with persons who engaged in conduct that endangered the physical or emotional well-being of CHILD.*

For the parent-child relationship to be terminated in this case, it must also be proved by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child.

QUESTION 1

Should the parent-child relationship between *PARENT* and *CHILD* be terminated?

Answer "Yes" or "No."

Answer: _____

[See PJC 218.4 for discussion of additional questions.]

PJC 218.3C Termination of Parent-Child Relationship—Prior Denial of Termination—Only Pre-Denial Conduct in Evidence

[Important: see "Form of submission" in the comment below concerning the propriety of this broad-form submission.]

For the parent-child relationship to be terminated in this case, it must be proved by clear and convincing evidence that the circumstances of *CHILD* or of *PARENT* or of *POSSESSORY CONSERVATOR* or of *OTHER PARTY* have materially and substantially changed since *DATE*, and that, before *DATE, PARENT engaged in conduct or knowingly placed CHILD with persons who engaged in conduct that endangered the physical or emotional well-being of CHILD.*

For the parent-child relationship to be terminated in this case, it must also be proved by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child.

QUESTION 1

Should the parent-child relationship between *PARENT* and *CHILD* be terminated?

Answer "Yes" or "No."

Answer: _____

[See PJC 218.4 for discussion of additional questions.]

COMMENT

Source. The submissions in PJC 218.3B and 218.3C are based on Tex. Fam. Code §§ 161.001(b), 161.004. The "clear and convincing evidence" standard is specified in Tex. Fam. Code § 161.206. Further, the standard is constitutionally required in all proceedings for involuntary termination of the parent-child relationship. *Santosky v. Kramer*, 455 U.S. 745 (1982); *In re G.M.*, 596 S.W.2d 846 (Tex. 1980).

When to use. The foregoing instructions and question are for use if termination of the parent-child relationship is sought based on conduct listed in Tex. Fam. Code § 161.001(b)(1), there has been an earlier order under Tex. Fam. Code § 161.004 denying a petition to terminate the parent-child relationship of the parent, and evi-

dence of conduct alleged to have occurred before the prior order was entered has been admitted.

The instruction in PJC 218.1A should be used in all such cases. The instruction and question in PJC 218.3B should be used if evidence has been admitted of grounds for termination relating both to conduct occurring before *and* to conduct occurring after the prior order was entered. The instruction and question in PJC 218.3C should be used if the evidence admitted of grounds for termination relates only to conduct occurring *before* the prior order was entered. If there has been an earlier order denying termination but all evidence admitted relates to conduct occurring after that order was entered, see PJC 218.1.

Rewording instructions. In PJC 218.3B and 218.3C, the clause *PARENT engaged in conduct or knowingly placed CHILD with persons who engaged in conduct that endangered the physical or emotional well-being of CHILD*, based on Tex. Fam. Code § 161.001(b)(1)(E), is included only as an example. That clause should be replaced by the appropriate ground or grounds for termination in Tex. Fam. Code § 161.001(b)(1). See the comment entitled "Selecting and wording relevant grounds for termination" below. In PJC 218.3B and 218.3C, the term *DATE* should be replaced by the date of entry of the prior order denying termination.

Admission of evidence. Not all evidence of grounds for termination may be relevant. There are circumstances under which formerly relevant evidence for termination may, due to the passage of time, no longer be relevant. In the unusual context of a termination case that follows a prior denial of termination of the parent's rights, the trial court must use particular care in determining the admissibility of such evidence.

Form of submission. The broad-form question in PJC 218.3B and 218.3C were explicitly approved by the Texas Supreme Court in *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990). In January 2020, the supreme court issued a proposed amendment to Tex. R. Civ. P. 277 that would supersede *E.B.* and require specific jury findings in suits involving termination of the parent-child relationship. *See* Texas Supreme Court, *Order Amending Texas Rule of Civil Procedure 277*, Misc. Docket No. 20-9008 (Jan. 8, 2020), ___ Tex. B.J. ___ (2020). The proposed rule would require separate jury questions for each parent and each child on (1) each individual statutory ground for termination of the parent-child relationship and (2) whether termination of the parent-child relationship is in the best interest of the child. The proposal would further require the best-interest question to be predicated on an affirmative finding of at least one termination ground. As of the date this edition went to press, the proposed rule change was in a comment period and subject to revision. **The remainder of this comment should be read with the proposed rule change in mind, and the submission in PJC 218.3B and 218.3C should be reformulated in accordance with the final rule.**

In *E.B.*, the supreme court explicitly approved the broad-form question in PJC 218.3B and 218.3C, which asks the "controlling question" of whether parental rights should be terminated. The jury is questioned neither about the specific culpable act or acts that constitute the statutory grounds for termination of parental rights nor about whether termination is in the best interest of the child. More recent cases have indicated that broad-form submission may not be feasible in a variety of situations depending on the law, the theories, and the evidence in a given case. See the discussion of broad-form questions in PJC 251.2. In *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005), and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), judgments were reversed because of the erroneous inclusion in a broad-form issue of elements lacking support in the evidence. Because of the heightened burden of proof and the higher standard for legal sufficiency review on appeal (*see In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002)), these cases may be of particular relevance in the termination context.

Since the supreme court's decision in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), there has been speculation that the court would no longer sanction submission of multiple grounds in a broad-form question that does not require at least ten jurors to agree on a specific ground for termination. In *In re B.L.D.*, 56 S.W.3d 203 (Tex. App.—Waco 2001), *rev'd on other grounds*, 113 S.W.3d 340 (Tex. 2003), the court of appeals held that, in light of *Crown Life*, submission of the broad-form question was error. Because error had not been preserved in the trial court, the supreme court did not rule on that issue when reversing the judgment of the court of appeals. In the analysis leading to its holding that under the circumstances presented "a court of appeals must not retreat from our error-preservation standards to review unpreserved charge error in parental rights termination cases," however, the supreme court noted that "the charge in this case follows our precedent in *E.B.*, tracks the statutory language of the Family Code, and comports with Texas Rules of Civil Procedure 277 and 292." *In re B.L.D.*, 113 S.W.3d at 354–55. Although the "ten jurors" argument has been advanced in a number of termination cases, the Committee has discovered none other than the appellate court's decision in *B.L.D.* in which the broad-form submission was held to be error. *See In re L.C.*, 145 S.W.3d 790 (Tex. App.—Texarkana 2004, no pet.); *In re J.M.M.*, 80 S.W.3d 232 (Tex. App.—Fort Worth 2002, pet. denied); *In re K.S.*, 76 S.W.3d 36 (Tex. App.—Amarillo 2002, no pet.); *In re M.C.M.*, 57 S.W.3d 27 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

Selecting and wording relevant grounds for termination. Only those grounds for termination that are supported by the pleadings and evidence should be included in the instruction in PJC 218.3B and 218.3C. For example, if the allegations for termination are based on Tex. Fam. Code § 161.001(b)(1)(E)—that the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child"—an instruction to the jury may be phrased in the statutory language. *In re S.H.A.*, 728 S.W.2d 73 (Tex. App.—Dallas 1987, no writ). In such a case, however, if a valid objection is raised that

there is no evidence that the parent *knowingly placed the child with persons who engaged in conduct*, for example, then that portion of the instruction should be omitted.

If more than one child. If more than one child is involved, PJC 218.3B or 218.3C should be repeated for each child.

If both parents. If termination of the parental rights of both parents is sought, PJC 218.3B or 218.3C should be repeated for each parent. Findings of grounds for termination for the individual parent whose rights are terminated is required in suits filed by the Department of Family and Protective Services and is advisable in all other such cases. *See* Tex. Fam. Code § 161.206(a–1).

PJC 218.4 Conservatorship Issues in Conjunction with Termination (Comment)

Suits for termination of parental rights arise in a variety of contexts. One common situation involves state intervention in a family unit to terminate parental rights because of alleged neglect or abuse of a child. Another common fact pattern is an attempt by one parent to terminate parental rights of the other to facilitate a stepparent adoption. Either of these fact situations may be further complicated by the intervention of a third party seeking similar or different relief allowable under the Family Code. In all these situations, if termination of parental rights is sought, one or more of the parties will almost always seek other relief. For example, if the state seeks termination of parental rights, it invariably seeks managing conservatorship as well. If the jury answers "No" with respect to termination of the parental rights of one or both parents, conservatorship of the child remains in issue. Similarly, if a third party—for example, a grandparent—has intervened in a termination suit, conservatorship will remain in issue regardless of the answers to the termination questions. The instructions and other questions that would be required to accompany the conservatorship submission could become extremely complicated and lengthy. For this reason, the parties may prefer to seek a jury determination only on the termination issue and to leave the issues of conservatorship for the judge's determination. On the other hand, any party is entitled to a jury determination of conservatorship on request. Tex. Fam. Code § 105.002(c)(1).

Because managing conservatorship, possessory conservatorship, grandparental access, and child support may be in issue, virtually any instructions or questions contained in chapters 215 and 216 of this book may be required if conservatorship is to be submitted to the jury. If the parents involved were divorced before the termination proceeding, questions and instructions found in chapter 217 would properly be substituted for the questions in chapter 216. In cases involving several contesting parties, practical considerations may result in agreement that a judicial determination of all these issues is preferable.

Conditioning instruction for additional question. If one or more additional questions are submitted to the jury, the following instruction should follow the termination question for each parent:

> If you answered "No" to Question _____ [*termination question*], then answer Question _____ [*additional question regarding conservatorship*]. Otherwise, do not answer Question _____.

PJC 218.5 Termination by Nongenetic Father (Comment)

The Committee has considered the provisions of Tex. Fam. Code § 161.005(c)–(o), often referred to as "mistaken paternity," and believes that the procedure prescribed in these provisions, as written, does not encompass an opportunity for fact questions supporting termination of the parent-child relationship to be submitted to a jury.

In 2011, section 161.005 of the Texas Family Code was amended to provide that a man may seek termination of the parent-child relationship if, without obtaining genetic testing, the man signed an acknowledgment of paternity or if he was adjudicated to be the father of the child in a previous proceeding in which genetic testing did not occur. The verified petition seeking termination must allege facts showing that the petitioner is not the child's genetic father and that he signed the acknowledgment of paternity or failed to contest parentage in the previous proceeding because he was under the mistaken belief, when the acknowledgment was signed or on the date the court order in the previous proceeding was rendered, that he was the child's genetic father based on misrepresentations that led him to that conclusion. Tex. Fam. Code § 161.005(c). Such a petition must be filed not later than the second anniversary of the date on which the petitioner becomes aware of the facts alleged indicating that he is not the child's genetic father. Tex. Fam. Code § 161.005(e).

Tex. Fam. Code § 161.005(f) requires the court to hold a pretrial hearing to determine whether the petitioner has established a meritorious prima facie case for termination and, if so, to order genetic testing. If the results of the genetic testing exclude the petitioner as the child's genetic father, the court must render an order terminating the parent-child relationship. Tex. Fam. Code § 161.005(h). There is no requirement for a finding that the termination is also in the best interest of the child.

The Committee believes that, as written, these provisions do not support a question to be submitted to a jury. That is, once the petitioner has satisfied the court that he has a meritorious prima facie case and if the results of the genetic testing exclude him as the genetic father, the court is required to terminate the parent-child relationship.

[Chapters 219–229 are reserved for expansion.]

CHAPTER 230 WILL CONTESTS

PJC 230.1 Burden of Proof (Comment)

Placement of the burden of proof on certain issues related to will contests differs, depending on whether the will has been admitted to probate before the contest is filed. For those issues, the PJCs in this chapter provide alternative submissions for situations in which the will has not yet been admitted to probate and situations in which it has already been admitted.

Before a will is admitted to probate, the burden of proof is on the proponent to establish the elements required for a valid will. *See* Tex. Est. Code § 256.152(a); *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983) (testamentary capacity) (burden on proponent even though will has self-proving affidavit); *Douthit v. McLeroy*, 539 S.W.2d 351 (Tex. 1976) (execution); *In re Estate of Danford*, 550 S.W.3d 275, 281 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (execution and testamentary capacity); *In re Estate of Parrimore*, No. 14-14-00820-CV, 2016 WL 750293, at *6 (Tex. App.—Houston [14th Dist.] Feb. 25, 2016, no pet.) (mem. op.) (testamentary intent).

After the will has been admitted to probate, the burden of proof shifts to the contestant to disprove at least one element required for a valid will. *See In re Estate of Woods*, 542 S.W.2d 845, 846 (Tex. 1976) (burden is on contestant to prove lack of testamentary capacity after will has been admitted to probate); *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968); *Cravens v. Chick*, 524 S.W.2d 425 (Tex. App.—Fort Worth 1975, writ ref'd n.r.e.).

The burden of proving undue influence or fraud is on the party contesting the will, regardless of whether the contest arises before or after the admission of the will to probate. *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) (citing *Scott v. Townsend*, 166 S.W. 1138 (Tex. 1914)). *See In re Estate of Woods*, 542 S.W.2d at 846; *Pearce v. Cross*, 414 S.W.2d 457 (Tex. 1966).

PJC 230.2 Testamentary Capacity to Execute Will

PJC 230.2A Testamentary Capacity to Execute Will—Question before Will Admitted to Probate

QUESTION _____

Did *DECEDENT* have testamentary capacity to sign *the document dated DATE*?

A decedent has testamentary capacity if, at the time the decedent signs a will, the decedent—

1. has sufficient mental ability to understand that he is making a will, and

2. has sufficient mental ability to understand the effect of his act in making the will, and

3. has sufficient mental ability to understand the general nature and extent of his property, and

4. has sufficient mental ability to know his next of kin and natural objects of his bounty and their claims on him, and

5. has sufficient memory to collect in his mind the elements of the business to be transacted and to be able to hold the elements long enough to perceive their obvious relation to each other and to form a reasonable judgment as to these elements.

Answer "Yes" or "No."

Answer: _____

PJC 230.2B Testamentary Capacity to Execute Will—Question after Will Admitted to Probate

QUESTION _____

Did *DECEDENT* lack testamentary capacity to sign *the document dated DATE*?

A decedent lacks testamentary capacity if, at the time the decedent signs a will, the decedent—

1. lacks sufficient mental ability to understand that he is making a will, or

2. lacks sufficient mental ability to understand the effect of his act in making the will, or

3. lacks sufficient mental ability to understand the general nature and extent of his property, or

4. lacks sufficient mental ability to know his next of kin and natural objects of his bounty and their claims on him, or

5. lacks sufficient memory to collect in his mind the elements of the business to be transacted and to be able to hold the elements long enough to perceive their obvious relation to each other and to form a reasonable judgment as to these elements.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The testamentary capacity test was originally set out in *Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890). More recent formulations of the test can be found in *In re Estate of Danford*, 550 S.W.3d 275, 281 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (describing elements required to prove that testator had testamentary capacity), as well as *Lindley v. Lindley*, 384 S.W.2d 676 (Tex. 1964); *Pool v. Diana*, No. 03-08-00363-CV, 2010 WL 1170234 (Tex. App.—Austin Mar. 24, 2010, pet. denied) (mem. op.); *In re Estate of Robinson*, 140 S.W.3d 782, 793 (Tex. App.—Corpus Christi 2004, pet. denied); *Tieken v. Midwestern State University*, 912 S.W.2d 878 (Tex. App.—Fort Worth 1995, no writ). A person must be of sound mind to execute a valid will in Texas. Tex. Est. Code § 251.001. "Sound mind" means testamentary capacity under Texas law. *Bracewell v. Bracewell*, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Chambers v. Chambers*, 542 S.W.2d 901, 907 (Tex. App.—Dallas 1976, no writ).

The traditional formulation of item 1 in the instruction is "sufficient mental ability to understand the business in which he is engaged," but the Committee believes that the wording shown above is more understandable to a jury. In dicta, some courts have suggested that less mental capacity is required to enable a testator to make a will than for the same person to make a contract. *See, e.g., Hamill v. Brashear*, 513 S.W.2d 602, 607 (Tex. App.—Amarillo 1974, writ ref'd n.r.e.). Moreover, the case of *Prather v. McClelland* included this distinction in the charge to the jury, 13 S.W. 543, 546; *see*

also Vance v. Upson, 1 S.W. 179, 183 (Tex. 1886); *Cole v. Waite*, 242 S.W.2d 936, 938 (Tex. App.—Amarillo 1951), *aff'd*, 246 S.W.2d 849 (Tex. 1952).

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

Burden of proof. See PJC 230.1 (burden of proof (comment)) concerning the burden of proof before and after a will is admitted to probate. The fact that a will that has not been admitted to probate has a self-proving affidavit does not shift the burden to the contestant. *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983). After a will has been admitted to probate, the burden of proof shifts to the contestant to establish that the testator lacked testamentary capacity at the time the will was executed. *In re Estate of Woods*, 542 S.W.2d 845, 846 (Tex. 1976) (burden is on contestant to prove lack of testamentary capacity after will has been admitted to probate); *Lee v. Lee*, 424 S.W.2d 609, 610 n.1 (Tex. 1968) (citing *Chambers v. Winn*, 154 S.W.2d 454 (1941)); *see also In re Estate of Danford*, 550 S.W.3d at 281 (before will's admission to probate, proponent must establish that it was properly executed and that testator had testamentary capacity at time of execution).

Capacity at time will executed. The proper inquiry is whether the testator had capacity at the time the will was executed. *Lee*, 424 S.W.2d 609. The court may also look to the testator's state of mind at other times if these times tend to show the testator's state of mind on the day the will was executed. *Horton v. Horton*, 965 S.W.2d 78 (Tex. App.—Fort Worth 1998, no pet.). Evidence of incapacity at other times can be used to establish incapacity at the time the will was executed if it "demonstrates that the condition persists and 'has some probability of being the same condition which obtained at the time of the will's making.'" *Croucher*, 660 S.W.2d at 57 (quoting *Lee*, 424 S.W.2d at 611); *In re Watson*, 259 S.W.3d 390, 393 (Tex. App.—Eastland 2008, orig. proceeding) ("[C]ourts may look beyond the day a will was executed if the evidence tends to show the testator's state of mind at the time of its execution.").

If insane delusion raised. If the evidence raises the issue of insane delusion, an additional instruction is required. *Lindley*, 384 S.W.2d at 679. In such a case, the following instruction may be used:

> A person does not have testamentary capacity if he suffers from an "insane delusion" at the time he executes his will. An "insane delusion" is the belief of a state of supposed facts that do not exist and that no rational person would believe. The insane delusion, if any, must have caused the person to dispose of his property in a way that he would not have but for the insane delusion. A belief or decision, however illogical, if arrived at through a process of reasoning based on existing facts, is not an insane delusion.

Undue influence as alternative basis. At least one court of appeals has held that testamentary incapacity and undue influence are not necessarily mutually exclusive. *In re Estate of Lynch*, 350 S.W.3d 130 (Tex. App.—San Antonio 2011, pet. denied).

PJC 230.3 Requirements of Will

PJC 230.3A Requirements of Will—Before Will Admitted to Probate

QUESTION _____

Does *the document dated DATE* meet *all the following requirements*?

1. *The document* is in writing; and

2. *The document* was signed by the decedent in person; and

3. When *the document* was signed, the decedent was eighteen years of age or older, or was married, or had been married, or was a member of the United States Armed Forces, an auxiliary of the United States Armed Forces, or the United States Maritime Service; and

4. *The document* was attested by two or more credible persons who were at least fourteen years of age and who signed their names to *the document* in their own handwriting in the decedent's presence; and

5. The decedent signed *the document* with the intent to dispose of *his* property after *his* death.

Answer "Yes" or "No."

Answer: _____

[Include additional questions and instructions related to the validity of the will as needed, including testamentary capacity, revocation, and undue influence, together with appropriate conditioning instructions.]

PJC 230.3B Requirements of Will—After Will Admitted to Probate

QUESTION _____

Does *the document dated DATE* fail to meet *any one or more of the following requirements*?

1. *The document* is in writing; or

2. *The document* was signed by the decedent in person; or

3. When *the document* was signed, the decedent was eighteen years of age or older, or was married, or had been married, or was a member of the

United States Armed Forces, an auxiliary of the United States Armed Forces, or the United States Maritime Service; or

4. *The document* was attested by two or more credible persons who were at least fourteen years of age and who signed their names to *the document* in their own handwriting in the decedent's presence; or

5. The decedent signed *the document* with the intent to dispose of *his* property after *his* death.

Answer "Yes" or "No."

Answer: _____

[Include additional questions and instructions related to the validity of the will as needed, including testamentary capacity, revocation, and undue influence, together with appropriate conditioning instructions.]

COMMENT

Source. Items 1, 2, and 4 in the foregoing submissions are based on Tex. Est. Code § 251.051. Item 3 is based on Tex. Est. Code § 251.001. Item 5, which incorporates the definition of "testamentary intent," is based on *Hinson v. Hinson*, 280 S.W.2d 731 (Tex. 1955), and *Price v. Huntsman*, 430 S.W.2d 831 (Tex. App.—Waco 1968, writ ref'd n.r.e.).

When to use. The foregoing submissions are appropriate for use when a witnessed will is in issue. If a nonwitnessed holographic will is the subject, see PJC 230.4 (holographic will). If a holographic will that has been witnessed is the subject, either the foregoing submission or PJC 230.4 may be used.

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

Burden of proof. See PJC 230.1 (burden of proof (comment)) concerning the burden of proof before and after a will is admitted to probate. Before a will is admitted to probate, the proponent of the will has the burden to prove the requirements of a valid will. *Cravens v. Chick*, 524 S.W.2d 425, 427 (Tex. App.—Fort Worth 1975, writ ref'd n.r.e.). After a will has been admitted to probate, the burden of proof shifts to the contestant to disprove at least one requirement to make it a valid will. *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968).

If not all requirements in dispute. Only the requirements in dispute in the particular case should be submitted. If only one requirement is in dispute, substitute the phrase *the following requirement* for the phrase *all the following requirements* in the

question in PJC 230.3A and for the phrase *any one or more of the following requirements* in the question in PJC 230.3B.

Rewording if signed by another person. If appropriate, substitute the following for item 2:

> 2. *The document* was signed by another person on behalf of the decedent in *his* presence and under *his* direction; [*and*] [*or*]

Signature. A will may be signed with any mark made by the testator. If a testator cannot write, the requirement of a signature can be made by an *X*. *Orozco v. Orozco*, 917 S.W.2d 70 (Tex. App.—San Antonio 1996, writ denied); *Guest v. Guest*, 235 S.W.2d 710 (Tex. App.—Fort Worth 1950, writ ref'd n.r.e.); *Short v. Short*, 67 S.W.2d 425 (Tex. App.—Amarillo 1933, no writ). If appropriate, the following instruction may be included:

> A will may be signed with a mark made by the decedent intended to be *his* signature.

Rewording for certain wills. For testators dying on or after September 1, 2015, the requirements of Tex. Est. Code § 251.051 do not apply to a written will executed in compliance with the law of the state or foreign country (1) where the will was executed, as that law existed when the will was executed, or (2) where the testator was domiciled or had a place of residence, as that law existed when the will was executed or the testator died. Tex. Est. Code § 251.053. Rewording of the list of requirements above may be necessary to reflect that foreign law.

PJC 230.4 Holographic Will

PJC 230.4A Holographic Will—Before Will Admitted to Probate

QUESTION _____

Does *the document dated DATE* meet *all the following requirements*?

1. *The document* is wholly in the handwriting of the decedent; and

2. *The document* was signed by the decedent; and

3. When *the document* was signed, the decedent was eighteen years of age or older, or was married, or had been married, or was a member of the United States Armed Forces, an auxiliary of the United States Armed Forces, or the United States Maritime Service; and

4. The decedent signed *the document* with the intent to dispose of *his* property after *his* death.

Answer "Yes" or "No."

Answer: _____

[Include additional questions and instructions related to the validity of the will as needed, including testamentary capacity, revocation, and undue influence, together with appropriate conditioning instructions.]

PJC 230.4B Holographic Will—After Will Admitted to Probate

QUESTION _____

Does *the document dated DATE* fail to meet *any one or more of the following requirements*?

1. *The document* is wholly in the handwriting of the decedent; or

2. *The document* was signed by the decedent; or

3. When *the document* was signed, the decedent was eighteen years of age or older, or was married, or had been married, or was a member of the United States Armed Forces, an auxiliary of the United States Armed Forces, or the United States Maritime Service; or

4. The decedent signed *the document* with the intent to dispose of *his* property after *his* death.

Answer "Yes" or "No."

Answer: _____

[Include additional questions and instructions related to the validity of the will as needed, including testamentary capacity, revocation, and undue influence, together with appropriate conditioning instructions.]

COMMENT

Source. Items 1 and 2 in the foregoing submissions are based on Tex. Est. Code §§ 251.051, 251.052. Item 3 is based on Tex. Est. Code § 251.001. Item 4, which incorporates the definition of "testamentary intent," is based on *Hinson v. Hinson*, 280 S.W.2d 731 (Tex. 1955), and *Price v. Huntsman*, 430 S.W.2d 831 (Tex. App.—Waco 1968, writ ref'd n.r.e.).

Burden of proof. See PJC 230.1 (burden of proof (comment)) concerning the burden of proof before and after a will is admitted to probate. Before a holographic will is admitted to probate, the proponent has the burden to prove the requirements of a holographic will. *Cason v. Taylor*, 51 S.W.3d 397, 405 (Tex. App.—Waco 2001, no pet.). After the will has been admitted to probate, the burden of proof shifts to the contestant to disprove at least one element required for a valid holographic will. *See Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968).

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

If not all requirements in dispute. Only the requirements in dispute in the particular case should be submitted. If only one requirement is in dispute, substitute the phrase *the following requirement* for the phrase *all the following requirements* in the question in PJC 230.4A and for the phrase *any one or more of the following requirements* in the question in PJC 230.4B.

Signature. Although a holographic will must be signed by the testator, the signature may be in the body of the document and need not be at the end. *Lawson v. Dawson's Estate*, 53 S.W. 64 (Tex. Civ. App. 1899, writ ref'd). In an appropriate case, the following instruction may be included:

The decedent's signature need not be at the end of *the document*.

Surplusage. A holographic will may contain words not in the testator's handwriting if the words are not necessary to complete the will and do not affect its meaning. *Maul v. Williams*, 69 S.W.2d 1107 (Tex. Comm'n App. 1934). In an appropriate case, the following should be substituted for item 1 in the question:

1. The document is wholly in the handwriting of the decedent except for words that are not necessary to complete *the document* and that do not affect its meaning; [*and*] [*or*]

Rewording for certain wills. For testators dying on or after September 1, 2015, the requirements of Tex. Est. Code § 251.051 do not apply to a written will executed in compliance with the law of the state or foreign country (1) where the will was executed, as that law existed when the will was executed, or (2) where the testator was domiciled or had a place of residence, as that law existed when the will was executed or the testator died. Tex. Est. Code § 251.053. Rewording of the list of requirements above may be necessary to reflect that foreign law.

PJC 230.5 Undue Influence

QUESTION _____

Did *DECEDENT* sign *the document dated DATE* as a result of undue influence?

"Undue influence" means that—

1. an influence existed and was exerted, and

2. the influence undermined or overpowered the mind of the decedent at the time *he* signed *the document*, and

3. the decedent would not have signed *the document* but for the influence.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963), and *In re Estate of Woods*, 542 S.W.2d 845, 847 (Tex. 1976).

Burden of proof. The burden of proof is on the contestant whether the contest is filed before or after the will is admitted to probate. "The burden of proving undue influence is upon the party contesting its execution." *Rothermel*, 369 S.W.2d at 922.

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

Testamentary incapacity as alternative basis. At least one court of appeals has held that testamentary incapacity and undue influence are not necessarily mutually exclusive. *In re Estate of Lynch*, 350 S.W.3d 130 (Tex. App.—San Antonio 2011, pet. denied).

PJC 230.6 Fraud—Execution of Will

QUESTION _____

Did *DECEDENT* sign *the document dated DATE* as the result of fraud?

Fraud occurred if—

1. a person made a material misrepresentation, and

2. the misrepresentation was made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

3. the misrepresentation was made with the intention of inducing *DECEDENT* to sign *the document*, and

4. *DECEDENT* relied on the misrepresentation in signing *the document.*

"Misrepresentation" means:

A false statement of fact [*or*]

A promise of future performance made with an intent, at the time the promise was made, not to perform as promised [*or*]

A statement of opinion based on a false statement of fact [*or*]

A statement of opinion that the maker knows to be false [*or*]

An expression of opinion that is false, made by one claiming or implying to have special knowledge of the subject matter of the opinion.

"Special knowledge" means knowledge or information superior to that possessed by *DECEDENT* and to which *DECEDENT* did not have equal access.

Answer "Yes" or "No."

Answer: _____

COMMENT

Fraud. Fraud is sometimes subsumed under the rubric of undue influence. *See Curry v. Curry*, 270 S.W.2d 208 (Tex. 1954). However, fraud may be a separate basis for setting aside a will. *Collins v. Smith*, 53 S.W.3d 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Source. The elements of fraud in the foregoing submission are adapted from those in PJC 105.2 in the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* and the cases cited in the comment to that PJC. *See also, e.g., Collins*, 53 S.W.3d at 838–39. The definitions of "misrepresentation" are based on those in PJC 105.3A–.3E and the cases cited in the comments to those PJCs.

The foregoing question, unlike the question in PJC 105.1, does not identify a specific person alleged to have committed fraud, because in a will contest the identity of the actor is immaterial. Item 4 in the list differs from the analogous item in PJC 105.2 because the injury is the creation of the will itself. A finding of fraudulent inducement is sufficient to set aside the will. *Collins*, 53 S.W.3d at 838.

Use of "or." If more than one definition of "misrepresentation" is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

When to use. The foregoing instructions are appropriate if there is an allegation of intentional misrepresentation. If fraud through failure to disclose information when there is a duty to disclose is alleged, adapt PJC 105.4.

Burden of proof. Fraud in the inducement of a will is considered a species of undue influence. *Curry*, 270 S.W.2d at 214. The party claiming a will was procured through fraud has the burden of proof on this question. *In re Estate of Graham*, 69 S.W.3d 598, 612 (Tex. App.—Corpus Christi 2001, no pet.).

PJC 230.7 Proponent in Default

QUESTION _____

Did *PROPONENT* use reasonable diligence in filing *the document dated DATE*?

DECEDENT died *DATE* and *the document* was filed *DATE*. A will may not be admitted to probate after the fourth anniversary of the decedent's death unless the applicant proves that *he* used reasonable diligence from the date the decedent died until the will was filed.

The standard of diligence required is that diligence to locate and file a will for probate that an ordinarily prudent person would have used under the same or similar circumstances.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. A will may not be admitted to probate after the fourth anniversary of the decedent's death unless the applicant proves that he was not in default in failing to present the will for probate on or before the fourth anniversary of the decedent's death. Tex. Est. Code § 256.003(a). "Default" in this context means a failure due to the absence of reasonable diligence. *Brown v. Byrd*, 512 S.W.2d 753, 755 (Tex. App.—Tyler 1974, no writ).

When to use. The date of the offer of the will for probate is not a fact issue. The date of the decedent's death is generally not a disputed fact issue, either. Therefore, no PJC is provided on whether or not the application was filed within four years. The question above would be submitted only after a determination that the application was filed after the fourth anniversary of the decedent's death.

No imputation of default of predecessor or other beneficiary. Under prior law, a predecessor's default would be imputed to a proponent and the will denied probate. *See Faris v. Faris*, 138 S.W.2d 830, 832 (Tex. App.—Dallas 1940, writ ref'd). The supreme court overruled the *Faris* court's imputation rule in *Ferreira v. Butler*, 575 S.W.3d 331, 338 (Tex. 2019). Under current law, the default inquiry focuses solely on a proponent's conduct.

However, a proponent who is seeking probate of a will on behalf of another person cannot obtain probate of the will if that person was in default. In *Ferreira*, an executor of the husband's estate offered the will of the predeceased wife for probate, which left

all the wife's property to the husband. Because the husband was in default and the executor "stands in the shoes of the decedent," the will was denied probate. *Ferreira*, 575 S.W.3d at 334 (quoting *Smith v. O'Donnell*, 288 S.W.2d 417, 421 (Tex. 2009)). The husband's executor was otherwise interested in the husband's estate, and therefore the court remanded to allow the executor to replead and seek probate of the predeceased wife's will in the executor's individual capacity as a beneficiary of the husband's estate. *Ferreira*, 575 S.W.3d at 334–36.

Even though one beneficiary under a will may be barred from probating the will because he is in default, another beneficiary who is not in default may successfully submit it for probate. *In re Estate of McGrew*, 906 S.W.2d 53, 56 (Tex. App.—Tyler 1995, writ denied) (citing *Fortinberry v. Fortinberry*, 326 S.W.2d 717, 719–20 (Tex. App.—Waco 1959, writ ref'd n.r.e.)).

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

PJC 230.8 Alteration of Attested Will

PJC 230.8A Alteration of Attested Will—Before Will Admitted to Probate

Were the alterations to *the document dated DATE* made before *DECEDENT* signed it?

Answer "Yes" or "No."

Answer: _____

PJC 230.8B Alteration of Attested Will—After Will Admitted to Probate Including Alterations

Were the alterations to *the document dated DATE* made after *DECEDENT* signed it?

Answer "Yes" or "No."

Answer: _____

PJC 230.8C Alteration of Attested Will—After Will Admitted to Probate Excluding Alterations

Were the alterations to *the document dated DATE* made before *DECEDENT* signed it?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing submission should be used if it is disputed whether alterations to an attested will were made before or after its execution. Alterations or interlineations made on a will before it is signed and witnessed are valid. *See Schoenhals v. Schoenhals*, 366 S.W.2d 594 (Tex. App.—Amarillo 1963, writ ref'd n.r.e.); *Freeman v. Chick*, 252 S.W.2d 763 (Tex. App.—Austin 1952, writ dism'd). However, changes made after a will is executed are of no effect. *Leatherwood v. Stephens*, 24 S.W.2d 819 (Tex. Comm'n App. 1930); *In re Estate of Flores*, 76 S.W.3d 624 (Tex. App.—Corpus Christi 2002, no pet.); *Pullen v. Russ*, 209 S.W.2d 630, 636 (Tex. App.—Amarillo 1948, writ ref'd n.r.e.).

Holographic will. Subsequent alterations and interlineations in a holographic will are not invalid. *See Stanley v. Henderson*, 162 S.W.2d 95 (Tex. 1942) (changes made by testator in holographic will were controlling over conflicting provisions of original will because they were made later).

Burden of proof. See PJC 230.1 (burden of proof (comment)) concerning the burden of proof before and after a will is admitted to probate. If the will has not been admitted to probate, the proponent who seeks to have the alterations given effect has the burden of proving that the alterations were made before the will was signed. If the will has already been admitted to probate and the order specifically admits the alterations to probate, the contestant who seeks to have the alterations ignored has the burden of proving that the alterations were made after execution of the will. However, if the will was admitted to probate and the order specifically excludes the alterations from probate, the proponent seeking to have the alterations given effect must prove that the alterations were made before the will was signed.

If order silent regarding alterations. The Committee has found no Texas authority on the effect of an order admitting a will to probate that is silent about the admission or exclusion of alterations and expresses no opinion on which of PJC 230.8B or PJC 230.8C should be used in such a situation.

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

PJC 230.9 Revocation of Will

PJC 230.9A Revocation of Will—Before Will Admitted to Probate

QUESTION _____

Was *the document dated DATE* not revoked by *DECEDENT*?

A person may revoke a will by *destroying or canceling the will, or by causing it to be destroyed or canceled in his presence.*

Answer "It was not revoked" or "It was revoked."

The answer "It was not revoked" must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports that answer, then answer "It was revoked."

Answer: _____

[Include additional questions and instructions related to the validity of the will as needed, including testamentary capacity, testamentary intent, and undue influence, together with appropriate conditioning instructions.]

PJC 230.9B Revocation of Will—After Will Admitted to Probate

QUESTION _____

Did *DECEDENT* revoke *the document dated DATE*?

A person may revoke a will by *destroying or canceling the will, or by causing it to be destroyed or canceled in his presence.*

Answer "Yes" or "No."

Answer: _____

[Include additional questions and instructions related to the validity of the will as needed, including testamentary capacity, testamentary intent, and undue influence, together with appropriate conditioning instructions.]

COMMENT

Source. To obtain probate of a will, the applicant must prove that the decedent did not revoke the will. Tex. Est. Code § 256.152(a)(1). Means of revocation are listed in Tex. Est. Code § 253.002.

When to use. When the original will is produced in court, a rebuttable presumption exists that the will has not been revoked, and it is not necessary for the proponent to produce evidence that the will was not revoked. However, if the contestants of the will produce substantial evidence of revocation, the presumption of continuity is rebutted and the proponent must prove that the will has not been revoked. *In re Estate of McGrew*, 906 S.W.2d 53 (Tex. App.—Tyler 1995, writ denied).

Burden of proof. See PJC 230.1 (burden of proof (comment)) concerning the burden of proof before and after a will is admitted to probate.

In a will contest instituted before a will has been admitted to probate, the proponent has the burden of proving that the decedent did not revoke the will. *See* Tex. Est. Code § 256.152(a)(1). However, when the proponent of the will establishes that the document has been executed with the requisite formalities of a valid will, a rebuttable presumption of continuity is recognized and it is not necessary for the proponent to produce direct evidence of nonrevocation. *In re Page's Estate*, 544 S.W.2d 757, 760 (Tex. App.—Corpus Christi–Edinburg 1976, writ ref'd n.r.e.); *Usher v. Gwynn*, 375 S.W.2d 564 (Tex. App.—San Antonio 1964), *aff'd*, *Ashley v. Usher*, 384 S.W.2d 696 (Tex. 1964). If the contestants produce evidence of revocation to cast doubt on the continuity of the will, the presumption is rebutted and the proponents of the will must prove, by a preponderance of the evidence, that the will has not been revoked. *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex. App.—Houston [1st Dist.] 1991, writ denied). The evidence of revocation must be substantial before the presumption of continuity is rebutted. *In re Page's Estate*, 544 S.W.2d at 761.

After a will is admitted to probate, the burden of proof regarding revocation is on the contestant. *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968).

Rewording. In an appropriate case, the instruction should be reworded to reflect the relevant provisions of Tex. Est. Code § 253.002 by replacing the phrase *destroying or canceling the will, or by causing it to be destroyed or canceled in his presence* with the phrase *executing a subsequent document revoking the prior will.*

If more than one document offered. If more than one document is offered for probate, questions regarding the most recent instrument should be asked before the questions regarding any earlier document. Questions regarding an earlier document should be conditioned on a negative answer to the questions regarding the later document.

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

Revocation by implication. The instructions above reflect only the means of revoking a will that are specified in Tex. Est. Code § 253.002. A will may also be revoked by implication, even though there is not a specific revocation clause in a subsequent will or codicil, but only to the extent that the two wills are inconsistent. *See, e.g., Cason v. Taylor*, 51 S.W.3d 397 (Tex. App.—Waco 2001, no pet.); *Lane v. Sherrill*, 614 S.W.2d 619 (Tex. App.—Austin 1981, no writ); *Van Hoose v. Moore*, 441 S.W.2d 597 (Tex. App.—Amarillo 1969, writ ref'd n.r.e.); *Baptist Foundation v. Buchanan*, 291 S.W.2d 464 (Tex. App.—Dallas 1956, writ ref'd n.r.e.); *Laborde v. First State Bank & Trust Co.*, 101 S.W.2d 389 (Tex. App.—San Antonio 1936, writ ref'd). Because the questions and instructions in such cases would depend on the specific facts of each case, the Committee has not suggested pattern instructions.

Revocation by will not admitted to probate. Even though a will not produced in court is not admitted to probate, it can still be used to show revocation of a prior will. *May v. Brown*, 190 S.W.2d 715 (Tex. 1945); *Brackenridge v. Roberts*, 267 S.W. 244 (Tex. 1924); *Lisby v. Estate of Richardson*, 623 S.W.2d 448 (Tex. App.—Texarkana 1981, no writ).

PJC 230.10 Forfeiture Clause

PJC 230.10A Forfeiture Clause—Decedent Dying before June 19, 2009 (Comment)

The Committee expresses no opinion on the appropriate instruction to be given for cases involving decedents dying before June 19, 2009. For cases involving decedents dying after June 18, 2009, and before September 1, 2011, Probate Code section 64 provided that a forfeiture provision in a will is unenforceable if probable cause existed for bringing the lawsuit and the suit was brought and maintained in good faith. The bill enacting section 64 recited that it was to clarify existing law. Acts 2009, 81st Leg., R.S., ch. 414, §§ 1, 4(c) (H.B. 1969), eff. June 19, 2009.

PJC 230.10B Forfeiture Clause—Decedent Dying on or after June 19, 2009, and before September 1, 2011

QUESTION 1

Did *CONTESTANT* have probable cause to bring this lawsuit?

Probable cause exists when, at the time of instituting the lawsuit, there was evidence that would lead a reasonable person to conclude that there was a reasonable likelihood that the challenge would be successful.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did *CONTESTANT* bring and maintain the lawsuit in good faith?

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

Answer "Yes" or "No."

Answer: _____

PJC 230.10C Forfeiture Clause—Decedent Dying on or after September 1, 2011

QUESTION 1

Did *CONTESTANT* have just cause to bring this lawsuit?

"Just cause" means that the actions were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did *CONTESTANT* bring and maintain the lawsuit in good faith?

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

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Use this submission when there is a provision in a will that would cause a forfeiture of a devise or void a devise or provision in favor of a person for bringing any lawsuit, including contesting a will.

Source. Tex. Est. Code § 254.005(a) provides that such a forfeiture provision in a will is enforceable unless just cause existed for bringing the lawsuit and the lawsuit was brought and maintained in good faith. For cases involving decedents dying on or after June 19, 2009, and before September 1, 2011, Probate Code section 64 provided that the provision is unenforceable if probable cause exists for bringing the lawsuit and it was brought and maintained in good faith. Acts 2009, 81st Leg., R.S., ch. 414, § 1 (H.B. 1969), eff. June 19, 2009.

Definitions. The definitions of "good faith" and "just cause" are derived from cases under Texas Probate Code section 243 (codified as Tex. Est. Code § 352.052). *See Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

The Committee expresses no opinion on whether these definitions are appropriate for use in other contexts. The definition of "probable cause" is adapted from *Restatement (Third) of Property* § 8.5 cmt. c. (2003).

[Chapter 231 is reserved for expansion.]

PJC 232.1 Breach of Duty by Personal Representative—Other Than Self-Dealing

QUESTION _____

Did *PERSONAL REPRESENTATIVE* fail to comply with one or more of the following duties?

Answer "Yes" or "No" for each.

[List duties alleged to have been breached and the standard of care applicable to each, using language from the Texas Estates Code or common law, as appropriate. See comment below.]

1. Answer: _____

2. Answer: _____

3. Answer: _____

COMMENT

When to use. The foregoing question should be used in cases in which an executor or administrator is accused of failing to comply with one or more of his duties but is not alleged to have engaged in any self-dealing transaction. If self-dealing is alleged, see PJC 232.2.

Duties. The personal representative of an estate is held to the same high fiduciary standards in administering an estate as a trustee. *Humane Society v. Austin National Bank*, 531 S.W.2d 574, 577 (Tex. 1975). The source of the duties for which a personal representative may be held liable varies on a case-by-case basis:

1. The duties of a personal representative must first be drawn from the applicable statutes. For example, Tex. Est. Code § 351.101 requires that an "executor or administrator . . . shall take care of estate property as a prudent person would take care of that person's own property." Chapter 351 of the Estates Code lists many other duties. Other statutes may also affect particular duties. See, for example, Tex. Prop. Code ch. 116, Uniform Principal and Income Act.

2. The duties of a personal representative are governed by common-law principles to the extent those principles do not conflict with Texas statutes. Tex. Est. Code § 351.001. For example, a personal representative owes the common-law duty of full disclosure in addition to statutory requirements of accounting. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); *Geeslin v. McElhanney*, 788 S.W.2d 683, 685 (Tex. App.—Austin 1990, no writ); *Cartwright v. Minton*, 318 S.W.2d 449

(Tex. App.—Eastland 1958, writ ref'd n.r.e.). A personal representative also owes the common-law duty of loyalty. *Humane Society*, 531 S.W.2d 574, 579–80; *Evans v. First National Bank of Bellville*, 946 S.W.2d 367, 379 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

Testator's modification or elimination of duties or exculpation for breach. Some wills contain language purporting to modify or eliminate the duties of the personal representative or exculpate the representative for breach of certain duties. However, the Committee has found no general statutory authority or case law permitting or prohibiting such modification, elimination, or exculpation. But see Tex. Est. Code § 356.652, which provides that a personal representative of an estate may purchase estate property if the representative was appointed in a will that has been admitted to probate and that expressly authorizes the sale. The terms of the will also control as to matters covered by Tex. Est. Code §§ 124.051–.052 (satisfaction of certain pecuniary gifts), Tex. Estates Code ch. 310 (allocation of estate income and expenses), and Tex. Prop. Code § 116.004 (regarding provisions of the Uniform Principal and Income Act applicable to personal representatives).

Describing duties. If a statute supplies the scope of the duty, the statutory language should be used. For example, if the personal representative is accused of violating Tex. Est. Code § 351.101, the instruction should be worded as follows:

> A personal representative has the duty to take care of estate property as a prudent person would take care of that person's own property.

Broad-form submission. Tex. R. Civ. P. 277 mandates broad-form submission whenever feasible. If there is no dispute about the duties imposed on the personal representative, no issue about the sufficiency of the evidence for any of the duties, and no difference in the damages arising from the breach of each duty, this question may be submitted in broad form with the duties listed in an instruction. Otherwise, the question should be submitted as shown above.

Burden of proof. The plaintiff bears the burden of proof in cases involving breach of duty by a personal representative other than those involving self-dealing transactions. For self-dealing transactions, see PJC 232.2.

PJC 232.2 Breach of Duty by Personal Representative—Self-Dealing

QUESTION _____

Did *PERSONAL REPRESENTATIVE* comply with *his* fiduciary duty in connection with [*describe self-dealing transaction*]?

In administering the estate, *PERSONAL REPRESENTATIVE* owed the *beneficiaries* of the estate a fiduciary duty. To prove *he* complied with this duty in connection with [*describe self-dealing transaction*], *PERSONAL REPRESENTATIVE* must show that, at the time of the *transaction* in question—

[Use only the items that are relevant in the particular case.]

1. the *transaction in question was* fair and equitable to the *beneficiaries*, considering *PERSONAL REPRESENTATIVE*'s obligations in administering the estate; [*and*]

2. *PERSONAL REPRESENTATIVE* made reasonable use of the confidence placed in *him* as the result of *his* appointment; [*and*]

3. *PERSONAL REPRESENTATIVE* acted in the utmost good faith and exercised the most scrupulous honesty toward the *beneficiaries* in connection with the *transaction* in question; [*and*]

4. *PERSONAL REPRESENTATIVE* placed the interests of the *beneficiaries* before *his* own and did not use the advantage of *his* position to gain any benefit for *himself* at the expense of the *beneficiaries*; [*and*]

5. *PERSONAL REPRESENTATIVE* fully and fairly disclosed to the *beneficiaries* all material facts known to *PERSONAL REPRESENTATIVE* concerning the *transaction* in question that might affect the rights of the *beneficiaries*.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing question should be used when an executor or administrator is accused of self-dealing in a transaction that is not specifically addressed by

statute or when a remedy is sought that is not provided by statute. See Tex. Est. Code § 351.001, which states that the rights, powers, and duties of executors and administrators are governed by common-law principles to the extent that those principles do not conflict with Texas statutes. For example, see Tex. Est. Code § 356.651, which prohibits personal representatives from purchasing estate property except in certain circumstances stated in Tex. Est. Code §§ 356.652–.654. If there is no evidence rebutting the presumption of unfairness that arises when a fiduciary profits or benefits in any way from the transaction with the beneficiary, the question should not be submitted for that transaction. See comment below entitled "Presumption of unfairness shifts burden of proof."

Rewording. If more than one self-dealing transaction is alleged, the phrase *transaction in question was* in item 1 should be replaced with the phrase *transactions in question were*, and the word *transaction* in the initial instruction and in items 3 and 5 should be replaced with the word *transactions*. In an appropriate case, the word *beneficiaries* in the initial instruction and in items 1, 3, 4, and 5 should be replaced with the word *beneficiary*.

If not all elements in dispute. Only the elements in items 1 through 5 that are in dispute in the particular case should be submitted.

Source of question and instruction. A personal representative owes the common-law duty of loyalty, which prohibits self-dealing in transactions not specifically addressed in the statutes. *Humane Society v. Austin National Bank*, 531 S.W.2d 574, 579–80 (Tex. 1975) (personal representative holds estate funds in trust for beneficiaries and "must act in scrupulous good faith, casting aside completely its personal interest and opportunities for gain resulting from the fiduciary relationship"); *Evans v. First National Bank of Bellville*, 946 S.W.2d 367, 379 (Tex. App.—Houston [14th Dist.] 1997, writ denied). The foregoing question and instruction are derived from common-law principles set forth in *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1975) (material issues are whether fiduciary made reasonable use of trust and confidence placed in him and whether transactions were ultimately fair and equitable to beneficiary); *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992), *superseded by statute as stated in Lesley v. Veterans Land Board of Texas*, 352 S.W.3d 479, 490 n.72 (Tex. 2011) (fiduciary duty requires party to place interest of other party before his own); *Slay v. Burnett Trust*, 187 S.W.2d 377, 387–88 (Tex. 1945) (duty of loyalty prohibits trustee from using advantage of his position to gain any benefit for himself at expense of his cestui que trust and from placing himself in any position where his self-interest will or may conflict with his obligations as trustee); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512–14 (Tex. 1942) (it is duty of fiduciary to deal openly and to make full disclosure to party with whom he stands in such relationship); *Johnson v. Peckham*, 120 S.W.2d 786, 787 (Tex. 1938) (partners required to make full disclosure of all material facts within their knowledge relating to partnership affairs; it is

necessary to make disclosure of all important information); *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984) (executor owes beneficiary fiduciary duty of full disclosure of all material facts known to him that might affect beneficiary's rights); *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (trustee's duty of full disclosure extends to all material facts that might affect beneficiary's rights).

The question and the initial instruction in the foregoing submission differ from that in PJC 104.2 (see the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment*). The Committee believes it is appropriate to clearly describe the transaction in question and to limit the jury's consideration to the circumstances existing at the time of the transaction. *See Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964); *Estate of Townes v. Townes*, 867 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Miller v. Miller*, 700 S.W.2d 941, 947 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

Item 1 in the foregoing submission differs from that in PJC 104.2. Unlike an agent, who owes a duty of loyalty only to his principal, a personal representative of an estate has other obligations—such as paying valid claims to third parties, making certain elections, and setting aside exempt property—that should be considered in connection with the question of whether a particular transaction was fair to the beneficiaries.

Item 3 differs from that in PJC 104.2 in order to focus the issue on the particular self-dealing transaction.

Item 5 differs from that in PJC 104.2 in three respects. The Committee believes that the term "material facts" is more frequently used in case law. The personal representative's duty to disclose in conjunction with a self-dealing transaction is limited to the facts known to the personal representative. *Huie*, 922 S.W.2d at 923; *Montgomery*, 669 S.W.2d at 313. See PJC 105.4 for instruction on common-law fraud for failure to disclose when there is a duty to disclose. If it is alleged that the personal representative *should* have known certain facts that were not disclosed, a negligence question may be appropriate under PJC 232.1. The last clause in item 5 is included to recognize that the information required to be disclosed must be related to the rights of the beneficiaries.

The definition of "good faith" is based on cases under Texas Probate Code section 243 (codified as Tex. Est. Code § 352.052) (will contests). *See Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Although the foregoing cases use the disjunctive standard (intention *or* reasonable belief), the Committee has chosen the conjunctive standard ("and") because the Committee believes that both the subjective standard of intention and the objective standard of reasonableness are appropriate to measure the conduct of a fiduciary. *See Lee v. Lee*, 47 S.W.3d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (executor could recover attorney's fees in removal action despite breaches of fiduciary duty as long as he subjectively believed his defense was viable and his belief was reasonable under existing law). But note that

in other contexts—for example, forfeiture and attorney's fees—the disjunctive standard ("or") is used. The Committee expresses no opinion on whether the definitions are appropriate for use in other contexts.

Presumption of unfairness shifts burden of proof. When a fiduciary profits or benefits in any way from a transaction with the beneficiary, a presumption of unfairness arises that shifts the burden of persuasion to the fiduciary or the party claiming the validity or benefits of the transaction to show that the transaction was fair and equitable to the beneficiary. *Keck, Mahin & Cate v. National Union Fire Insurance Co.*, 20 S.W.3d 692, 699 (Tex. 2000); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508–09 (Tex. 1980); *Archer*, 390 S.W.2d at 739; *Lesikar v. Rappeport*, 33 S.W.3d 282, 298 (Tex. App.—Texarkana 2000, pet. denied).

A presumption of unfairness also arises and the burden of proof shifts to the fiduciary if the fiduciary places himself in a position in which his self-interest might conflict with his obligations as a fiduciary. *Stephens County Museum, Inc.*, 517 S.W.2d at 260–61 (fiduciary's positions as attorney for donors and as director and officer of donee created presumption of unfairness in transactions). By definition, in any self-dealing transaction the personal representative is in such a position.

The presumption may be rebutted by the fiduciary. *Stephens County Museum, Inc.*, 517 S.W.2d at 261; see also *Texas Bank & Trust Co.*, 595 S.W.2d at 509. Normally, a rebuttable presumption shifts the burden of producing evidence to the party against whom it operates but does not shift the burden of persuasion to that party. *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993). In fiduciary duty cases, however, the presumption of unfairness operates to shift both the burden of producing evidence and the burden of persuasion to the fiduciary. *Sorrell v. Elsey*, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied); *Miller*, 700 S.W.2d at 945–46; *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. App.—Eastland 1977, writ ref'd n.r.e.); see also *Peckham*, 120 S.W.2d at 788 (issue of whether beneficiary of fiduciary relationship relied on fiduciary to perform his duties was immaterial).

If there is no evidence rebutting the presumption, no breach of fiduciary duty question is necessary. *Texas Bank & Trust Co.*, 595 S.W.2d at 509.

Liability questions normally place the burden of proof on the plaintiff, who is required to obtain an affirmative finding. When the burden is shifted to the fiduciary, however, a "No" answer supports liability.

If there is a dispute over whether the personal representative profited or benefited from the transaction or whether the fiduciary placed himself in a position in which his self-interest might conflict with his obligations as a fiduciary, a predicate jury question may be submitted to decide that issue, with the breach question conditioned on an affirmative answer. The burden of proof on the predicate issue is on the beneficiaries.

PJC 232.3 Remedies for Breach of Fiduciary Duty (Comment)

Actual damages. In a proper case, actual damages may be recovered for breach of fiduciary duty. Actual damages can include both general or direct damages and special or consequential damages. *Lesikar v. Rappeport*, 33 S.W.3d 282, 305 (Tex. App.—Texarkana 2000, pet. denied). See comments at PJC 232.4. The Texas Estates Code also authorizes the recovery of damages for certain breaches of duty. *See, e.g.*, Tex. Est. Code §§ 359.101, 360.301.

Exemplary damages. In a proper case, the plaintiff may also recover exemplary damages. *Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984) (cancellation of lease obtained by willful and unconscionable breach of fiduciary duty and award of $382,608.79 in actual damages supported exemplary damages award of $500,000); *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963) (corporation could also recover exemplary damages in case where corporate officers required to return profits for self-dealing stock sale, even though remedy elected was purely equitable in nature); *Lesikar*, 33 S.W.3d at 310–11 (intentional breach of fiduciary duty by executor may give rise to exemplary damages; imposition of constructive trust, even without award of "typical" actual damages, was sufficient to support exemplary damages award); *Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377, 385 (Tex. App.—Tyler 2000, pet. denied) (equitable return of property obtained by breach of fiduciary duty sufficient to support exemplary damages award). *But see RDG Partnership v. Long*, 350 S.W.3d 262, 280–81 (Tex. App.—San Antonio 2011, no pet.) (although exemplary damages may be recovered in connection with equitable relief, jury question and finding regarding value of equitable relief is required) (citing *Martin v. Texas Dental Plans, Inc.*, 948 S.W.2d 799, 804–05 (Tex. App.—San Antonio 1997, pet. denied) (concrete value must be assigned to equitable relief before exemplary damages may be awarded)). If exemplary damages are in issue, see PJC 115.37–.46 in the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment*.

Additional remedies for breach of duty by personal representative. The Texas Estates Code provides a number of remedies, for example—

1. an order assessing statutory penalties or damages for failing to perform duties (e.g., Tex. Est. Code §§ 356.559, 359.102, 360.301);

2. an order compelling a personal representative to perform the personal representative's duties (e.g., Tex. Est. Code §§ 357.005, 359.101);

3. an order requiring an independent executor to post bond (Tex. Est. Code § 404.002);

4. an order requiring a personal representative to file an annual account (Tex. Est. Code § 359.101);

5. an order removing a personal representative (Tex. Est. Code §§ 361.051–.054, 404.0036);

6. an order reducing or denying compensation to the personal representative (Tex. Est. Code § 352.004); or

7. an order voiding an act of the personal representative (e.g., Tex. Est. Code § 356.655).

Concerning receiverships and injunctions, see Tex. Civ. Prac. & Rem. Code chs. 64, 65.

Jury questions. Whether equitable relief is granted is for the court to decide based on "the equity of the circumstances"; however, the jury must resolve any contested fact issues. *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999).

Equitable relief generally. Where a personal representative has profited through a breach of trust, as described in PJC 232.1 and 232.2 (breach of duty), the plaintiff is entitled to equitable relief (such as rescission, constructive trust, or fee forfeiture) without having to show that the breach caused damages. *Burrow*, 997 S.W.2d at 238; *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942); *Geeslin v. McElhanney*, 788 S.W.2d 683, 687 (Tex. App.—Austin 1990, no writ); *see also Restatement (Third) of Agency* § 8.01 cmt. d (2006) (listing remedies).

Rescission. The court may grant rescission of a transaction accomplished by a breach of the defendant's fiduciary duty. *See Allison v. Harrison*, 156 S.W.2d 137, 140 (Tex. 1941) (purchase of land by fiduciary without full disclosure by fiduciary was voidable and could be set aside at plaintiff's option, even without proof that price obtained was unreasonable); *see also Schiller v. Elick*, 240 S.W.2d 997, 1000 (Tex. 1951) (setting aside deed obtained through fiduciary's breach); Tex. Est. Code § 356.655 (voiding and setting aside purchase of estate property by personal representative in violation of subchapter N, chapter 356).

Constructive trust. The court may impose a constructive trust to restore property or profits lost through the fiduciary's breach. *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966); *Holloway*, 368 S.W.2d at 577; *Slay v. Burnett Trust*, 187 S.W.2d 377, 388 (Tex. 1945); *Lesikar*, 33 S.W.3d at 303–04.

Fee forfeiture. The right to fee forfeiture does not present a jury question. If the amount earned is disputed, however, see PJC 115.17 in the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment.*

PJC 232.4 Actual Damages for Breach of Duty by Personal Representative

PJC 232.4A Actual Damages for Breach of Duty by Personal Representative—Consequential

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the *estate* for damages, if any, that were proximately caused by the *conduct inquired about in Question* _____ [*PJC 232.1 or 232.2 (breach of duty)*]?

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

Consider the following elements of damages, if any, and none other.

1. *Any profit that would have accrued to the estate.*
2. [*Other applicable elements of consequential damages.*]

Consider each element separately. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element 1*] sustained in the past.

Answer: _____

2. [*Element 1*] that, in reasonable probability, will be sustained in the future.

Answer: _____

3. [*Element 2*] sustained in the past.

Answer: _____

4. [*Element 2*] that, in reasonable probability, will be sustained in the future.

Answer: _____

PJC 232.4B Actual Damages for Breach of Duty by Personal Representative—Direct

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the *estate* for damages, if any, resulting from the *conduct inquired about in Question* _____ [*PJC 232.1 or 232.2 (breach of duty)*]?

Consider the following elements of damages, if any, and none other.

1. *Any loss or depreciation in value of the estate.*
2. *Any profit made by PERSONAL REPRESENTATIVE.*
3. [*Other applicable elements of direct damages.*]

Consider each element separately. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element 1*]

Answer: _____

2. [*Element 2*]

Answer: _____

COMMENT

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a "Yes" answer to PJC 232.1 (breach of duty by personal representative—other than self-dealing) or a "No" answer to PJC 232.2 (breach of duty by personal representative—self-dealing).

If damages are sought based on PJC 232.1 and that question is submitted as shown in PJC 232.1 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be worded as follows:

> If you answered "Yes" to any item in Question ____, then answer the following question. Otherwise, do not answer the following question.

Rewording question. In an appropriate case, the word *estate* in the question in PJC 232.4A and 232.4B should be changed to *beneficiary* or *beneficiaries*.

Rewording question if PJC 232.1 liability question submitted. If damages are sought based on PJC 232.1 (breach of duty by personal representative—other than self-dealing) and that question is submitted as shown in PJC 232.1 (that is, with separate answers for each duty) rather than in broad form, the words *conduct inquired about in Question* ____ in the question should be replaced with *conduct about which you answered "Yes" in Question* ____.

Causation standard: direct vs. consequential damages. Actual damages available for breach of fiduciary duty and fraud include both direct damages and consequential damages. Direct damages compensate the plaintiff for loss that is conclusively presumed to have been foreseen by the defendant from his wrongful act, while consequential damages are not presumed to have been foreseen or to be the necessary and usual result of the wrongful act. A plaintiff must plead and prove consequential damages separately, premised on a finding that they proximately resulted from the defendant's wrongful conduct. A proximate cause or foreseeability showing is appropriate only in the context of special or consequential actual damages, not in the context of direct actual damages. *Lesikar v. Rappeport*, 33 S.W.3d 282, 305 (Tex. App.—Texarkana 2000, pet. denied). See the Comments at PJC 115.4 and 115.5 in the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment*.

Separate submission of damages for different breaches. It may be necessary to submit separate damages questions for distinct breaches that give rise to different damages.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits

on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases); *see also Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514, 530 (Tex. 1998) (reconciling equitable prejudgment interest with statutory prejudgment interest); *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 931 (Tex. 1988) (unliquidated damages in contract cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Parallel theories. If the breach of fiduciary duty cause of action is only one of several theories of recovery submitted in the charge and any theory has a different legal measure of damages to be applied to a factually similar claim for damages, a separate damages question for each theory may be submitted and the following additional instruction may be included earlier in the charge:

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

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation or interest that should have been earned on an estate asset is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 233.1 Removal of Personal Representative—Dependent Administration

QUESTION 1

Did *PERSONAL REPRESENTATIVE engage in gross misconduct, or mismanagement in the performance of his duties*?

"Gross misconduct" means glaringly obvious or flagrant misconduct.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing question should be used when removal of a dependent executor or dependent administrator is sought under Tex. Est. Code § 361.052. For independent personal representatives, see PJC 233.2.

The decision to remove the personal representative is within the discretion of the court. Tex. Est. Code § 361.052. However, if there are factual disputes about the basis for removal, the foregoing submission may be appropriate. *McLendon v. McLendon*, 862 S.W.2d 662, 677 (Tex. App.—Dallas 1992, writ denied), *disapproved on other grounds, Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240, 250 n.42 (Tex. 2003).

Source. Tex. Est. Code § 361.052 describes the grounds for removing a personal representative, other than an independent executor or independent administrator, with notice. *But see Baker v. Hammett*, 789 S.W.2d 682, 683–85 (Tex. App.—Texarkana 1990, no writ) (noting that "[p]ersonal representative is defined as including an independent executor, however, the inclusion of an independent executor does not subject the representative to control of the courts and probate matters with respect to settlement of estates except as expressly provided by law."). The definition of "gross misconduct" is based on *Kappus v. Kappus*, 284 S.W.3d 831, 836 (Tex. 2009).

Rewording. In an appropriate case, the words *engage in gross misconduct, or mismanagement in the performance of his duties* should be replaced with language reflecting any other ground in Tex. Est. Code § 361.052 that presents a relevant disputed fact question. The Committee notes that the language regarding removal of an independent personal representative under Tex. Est. Code § 404.0035(b)(3) differs from that for removal of a dependent personal representative under Tex. Est. Code § 361.052(4).

PJC 233.2 Removal of Personal Representative—Independent Administration

QUESTION 1

Did *PERSONAL REPRESENTATIVE engage in gross misconduct or gross mismanagement in the performance of his duties*?

"Gross misconduct" means glaringly obvious or flagrant misconduct.

"Gross mismanagement" means glaringly obvious or flagrant mismanagement.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing question should be used when removal of an independent executor or independent administrator is sought under Tex. Est. Code § 404.0035. For executors or administrators in dependent administrations, see PJC 233.1.

The decision to remove the personal representative is within the discretion of the court. Tex. Est. Code § 404.0035. If there are factual disputes about the basis for removal, the foregoing submission may be appropriate. *McLendon v. McLendon*, 862 S.W.2d 662, 677 (Tex. App.—Dallas 1992, writ denied), *disapproved on other grounds*, *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240, 250 n.42 (Tex. 2003).

Source. Tex. Est. Code § 404.0035 describes the grounds for removing an independent personal representative with notice. The definitions of "gross misconduct" and "gross mismanagement" are based on *Kappus v. Kappus*, 284 S.W.3d 831, 836 (Tex. 2009). *See also Geeslin v. McElhenney*, 788 S.W.2d 683, 685 (Tex. App.—Austin 1990, no writ) (noting "the statutory criteria ('gross mismanagement' and 'gross misconduct') are necessarily elastic. They must be sufficiently narrow to exclude ordinary negligence . . . [but] they include *at minimum:* (1) any *willful* omission to perform a legal duty; (2) any *intentional* commission of a wrongful act; and (3) any breach of a *fiduciary* duty that results in actual harm to a beneficiary's interest.").

Rewording. In an appropriate case, the words *engage in gross misconduct or gross mismanagement in the performance of his duties* should be replaced with language reflecting any other ground in Tex. Est. Code § 404.0035 that presents a relevant disputed fact question. The Committee notes that the language regarding removal of an independent personal representative under Tex. Est. Code

§ 404.0035(b)(3) differs from that for removal of a dependent personal representative under Tex. Est. Code § 361.052(4).

[Chapter 234 is reserved for expansion.]

PJC 235.1 Mental Capacity to Create Inter Vivos Trust

QUESTION _____

Did *SETTLOR* lack sufficient mental capacity to create a trust when *he* signed *the document dated DATE*?

A person lacks sufficient mental capacity to create a trust if he lacks sufficient mind and memory to understand the nature and consequences of his acts and the business he is transacting.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The mental capacity required to create a trust is the same as that required to make a contract. *In re Estate of Robinson*, 140 S.W.3d 782 (Tex. App.—Corpus Christi 2004, pet. denied) (discussing difference between testamentary capacity and capacity to make a trust). To establish mental capacity to execute a deed or contract, the grantor must have had sufficient mind and memory to understand the nature and effect of his act at the time of execution. *See Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969) (discussing mental capacity to execute contract); *see also Decker v. Decker*, 192 S.W.3d 648, 652 (Tex. App.—Fort Worth 2006, no pet.) (discussing mental capacity to execute deed); *Bradshaw v. Naumann*, 528 S.W.2d 869, 873 (Tex. App.—Austin 1975, writ dism'd) (discussing mental capacity to execute deed). *See also* Tex. Prop. Code § 112.007. In dicta, some courts have suggested that less mental capacity is required to enable a testator to make a will than for the same person to make a contract. *See, e.g., Hamill v. Brashear*, 513 S.W.2d 602, 607 (Tex. App.—Amarillo 1974, writ ref'd n.r.e.). However, the Committee has found no case holding that this distinction should be included as part of the definition.

When to use. The foregoing question and instruction are used only for an inter vivos trust, not for a testamentary trust in a will. For the question on mental capacity required to execute a will containing a testamentary trust, see PJC 230.2 (testamentary capacity to execute will).

Burden of proof. A person is generally presumed to have sufficient mental capacity to execute a contract or an inter vivos trust; therefore the burden of proof is on the contestant. *Walker v. Eason*, 643 S.W.2d 390, 391 (Tex. 1982); *Bradshaw*, 528 S.W.2d at 873. If a trust is created by a person who has been declared incapacitated, the burden may shift to the proponent of the document. *See Bogel v. White*, 168 S.W.2d 309 (Tex. App.—Galveston 1942, writ ref'd w.o.m.).

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

If insane delusion raised. If the evidence raises the issue of insane delusion, an additional instruction is required. *See Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964) (testamentary capacity). In such a case, the following instruction may be used:

> A person lacks sufficient mental capacity to create a trust if he suffers from an "insane delusion" at the time he executes the trust. An "insane delusion" is the belief of a state of supposed facts that do not exist and that no rational person would believe. The insane delusion, if any, must have caused the person to create the trust in a way that he would not have but for the insane delusion. A belief or decision, however illogical, if arrived at through a process of reasoning based on existing facts, is not an insane delusion.

PJC 235.2 Intention to Create Trust

QUESTION _____

Did *SETTLOR* show an intent to create a trust when *he signed the document dated DATE*?

A trust is a special relationship that arises when the settlor shows an intent to create a relationship that requires one person to hold property for the benefit of another.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Prop. Code §§ 111.004(4), 112.002, 112.004(2).

When to use. The foregoing submission should be used when there is a question whether the settlor intended to create a trust or a different relationship such as a life estate with remainder, fee simple grant, or partnership.

Rewording. In certain circumstances, it may be appropriate to define the term *trustee* or *beneficiary*. *See* Tex. Prop. Code § 111.004(2), (18).

Rewording for oral trust. A settlor may create a trust in personal property without a written document. An oral trust in personal property may be created by transferring trust property to a trustee who is neither settlor nor beneficiary if the transferor expresses simultaneously with or before the transfer the intention to create a trust. Tex. Prop. Code § 112.004(1). In an appropriate case, the phrase *signed the document dated DATE* should be replaced by *transferred the property to TRUSTEE*.

Trustee as beneficiary. If the trustee is also a beneficiary, add the following sentence at the end of the instruction:

> A trust may be created even though the trustee is one of the beneficiaries.

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number. It would be inappropriate to use the term "trust" in describing the document.

PJC 235.3 Undue Influence

QUESTION _____

Did *SETTLOR* sign *the document dated DATE* as a result of undue influence?

"Undue influence" means that—

1. an influence existed and was exerted, and

2. the influence undermined or overpowered the mind of the person executing *the document* at the time of its execution, and

3. the person would not have executed *the document* but for such influence.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).

Burden of proof. "The burden of proving undue influence is upon the party contesting its execution." *Rothermel*, 369 S.W.2d at 922 (citing *Scott v. Townsend*, 166 S.W. 1138 (Tex. 1914)).

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

PJC 235.4 Forgery

QUESTION _____

Was *the document dated DATE* forged?

A document is forged if a person *signs* the document so that it purports to be the act of another who did not authorize the act.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. *See In re Estate of Flores*, 76 S.W.3d 624, 630 (Tex. App.—Corpus Christi 2002, no pet.) (in context of will contest, stating that "[t]he act of forgery is defined as altering, making, completing, executing, or authenticating a writing so that it purports to be the act of another who did not authorize that act"). *See also* Tex. Penal Code § 32.21(a); *Parker v. State*, 985 S.W.2d 460, 463 (Tex. Crim. App. 1999).

Rewording. In an appropriate case, substitute the word *alters*, *makes*, *completes*, or *authenticates* for the word *signs* in the instruction.

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

PJC 235.5 Revocation of Trust

QUESTION _____

Did *SETTLOR* revoke *the document dated DATE*?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Prop. Code § 112.051.

When to use. Revocation of a trust created by a written instrument must be in writing unless the trust instrument provides otherwise. Tex. Prop. Code §§ 111.0035(b), 112.051. Therefore, unlike a will, a trust instrument may not generally be revoked by destroying it. See PJC 230.9 (revocation of will). However, if the settlor reserves a power to revoke the trust but does not specify any mode of revocation, the power can be exercised in any manner that sufficiently evidences the intention of the settlor to revoke the trust. *Sanderson v. Aubrey*, 472 S.W.2d 286 (Tex. App.—Fort Worth 1971, writ ref'd n.r.e.) (language in settlor's will revoking inter vivos trust was effective revocation as of date will was signed).

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

Instruction if trust sets out specific method of revocation. In an appropriate case, an instruction describing the specific method required for revocation should be set out in an instruction. The following is an example only.

> To revoke the *document dated DATE, SETTLOR* must have given a copy of the revocation to *TRUSTEE*.

PJC 235.6 Modification or Amendment of Trust

QUESTION _____

Did *SETTLOR* modify or amend *the document dated DATE*?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Prop. Code § 112.051. Modification or amendment of a trust created by a written instrument must be in writing unless the trust instrument provides otherwise. Tex. Prop. Code §§ 111.0035(b), 112.051.

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the question. For example, the document might be identified by its exhibit number.

PJC 235.7 Acceptance of Trust by Trustee

PJC 235.7A Acceptance of Trust by Trustee—Instruction—Duties under Trust

A trustee accepts a trust by exercising powers or performing duties under the trust.

PJC 235.7B Acceptance of Trust by Trustee—Instruction—Specific Trust Provision

A trustee accepts a trust by following this trust provision: [*specify requirements from trust instrument*].

PJC 235.7C Acceptance of Trust by Trustee—Question

QUESTION _____

Did *TRUSTEE* accept the trust?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. If the trustee has not signed the trust agreement, there may be a fact question whether he ever accepted the position. *See Blieden v. Greenspan*, 751 S.W.2d 858 (Tex. 1988) (per curiam).

If the named trustee has signed the trust agreement, his acceptance is conclusively established and no jury question should be submitted. Tex. Prop. Code § 112.009(a). If the person named as trustee exercises powers or performs duties under the trust, with the exceptions noted in Tex. Prop. Code § 112.009(a)(1), (a)(2), he is presumed to have accepted the trust. If the trust instrument specifies a particular procedure to be followed for the trustee to accept the trust, his failure to strictly comply with the terms of the trust will render his "acceptance" ineffective. *See Alpert v. Riley*, 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (purported trustee did not accept trusteeship in accordance with trust's terms, thus precluding his status as successor trustee).

Exceptions under Property Code section 112.009(a)(1), (a)(2). If the exceptions under Tex. Prop. Code § 112.009(a)(1) or (a)(2) apply, the instruction in PJC 235.7A, if used, should be modified accordingly.

PJC 235.8 Forfeiture Clause

PJC 235.8A Forfeiture Clause—Action Brought before September 1, 2011

QUESTION 1

Did *CONTESTANT* have probable cause to bring this lawsuit?

Probable cause exists when, at the time of instituting the lawsuit, there was evidence that would lead a reasonable person to conclude that there was a reasonable likelihood that the challenge would be successful.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did *CONTESTANT* bring and maintain the lawsuit in good faith?

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

Answer "Yes" or "No."

Answer: _____

PJC 235.8B Forfeiture Clause—Action Brought on or after September 1, 2011

QUESTION 1

Did *CONTESTANT* have just cause to bring this lawsuit?

"Just cause" means that the actions were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did *CONTESTANT* bring and maintain the lawsuit in good faith?

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

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Use this submission when there is a provision in a trust that would cause a forfeiture of or void an interest for bringing any lawsuit, including contesting a trust. See Tex. Prop. Code § 112.038(a), which provides that such a trust provision is enforceable unless just cause existed for bringing the lawsuit and the lawsuit was brought and maintained in good faith. For cases brought before September 1, 2011, Property Code section 112.038 provided that the provision is unenforceable if probable cause exists for bringing the action and it was brought and maintained in good faith. Acts 2009, 81st Leg., R.S., ch. 414, § 3 (H.B. 1969), eff. June 19, 2009.

Source. The definitions of "good faith" and "just cause" are derived from cases under Texas Probate Code section 243 (codified as Tex. Est. Code § 352.052) (will contests). *See Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The Committee expresses no opinion on whether these definitions are appropriate for use in other contexts. The definition of "probable cause" is adapted from *Restatement (Third) of Property* § 8.5 cmt. c. (2003).

PJC 235.9 Breach of Duty by Trustee—Other Than Self-Dealing

QUESTION _____

Did *TRUSTEE* fail to comply with one or more of the following duties?

Answer "Yes" or "No" for each.

[List duties alleged to have been breached and the standard of care applicable to each, using language from the trust document, Texas Trust Code, or common law, as appropriate. See comment below.]

1. Answer: _____

2. Answer: _____

3. Answer: _____

COMMENT

When to use. The foregoing question should be used in cases in which the trustee is accused of failing to comply with one or more of his duties (such as investment, accountings, or other disclosure) set forth in the trust, by statute, or by common law but is not alleged to have engaged in any self-dealing transaction. If self-dealing is alleged, see PJC 235.10–235.12.

Duties. The source of the duties for which a trustee may be held liable varies on a case-by-case basis:

1. The duties of a trustee must first be drawn from the trust (subject to the limitations expressed in sections 111.0035 and 114.007). Tex. Prop. Code §§ 111.0035, 114.007.

2. To the extent not eliminated or modified by the trust, the duties are drawn from the Texas Trust Code. Tex. Prop. Code §§ 111.0035, 116.004.

3. Only if the duty is not covered by either the trust or the Trust Code should resort be had to the common law. Tex. Prop. Code § 111.005. *See also National Plan Administrators, Inc. v. National Health Insurance Co.*, 235 S.W.3d 695, 703–04 (Tex. 2007); *Sterling Trust Co. v. Adderly*, 168 S.W.3d 835, 846–47 (Tex. 2005).

Therefore, if the duties the trustee is alleged to have breached are not specified or modified in the trust agreement, the duties should be described using the applicable language found in the Trust Code. If the duty is one that is not covered expressly by the trust agreement or the Trust Code, it may be described using generic, common-law fiduciary duties in the question or instruction. See, for example, PJC 104.3 in the cur-

rent edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment.*

Describing duties. If the trust agreement specifies the conduct to be followed in connection with a particular duty, that language should be included in the instruction verbatim. *See Jochec v. Clayburne*, 863 S.W.2d 516, 520–22 (Tex. App.—Austin 1993, writ denied) (court's failure to instruct jury that trust instrument modified trustee's duty of loyalty was reversible error). If the Trust Code is supplying the scope of the duty, the statutory language should be used. For example, if the trustee is accused of violating the "prudent investor" standard of care set forth in Tex. Prop. Code § 117.004, all relevant subsections of that provision should be set forth in the instruction:

> 1. A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
>
> 2. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
>
> 3. Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
>
> a. general economic conditions;
>
> b. the possible effect of inflation or deflation;
>
> c. the expected tax consequences of investment decisions or strategies;
>
> d. the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
>
> e. the expected total return from income and the appreciation of capital;
>
> f. other resources of the beneficiaries;

g. needs for liquidity, regularity of income, and preservation or appreciation of capital; and

h. an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

4. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

The instruction above does not include subsections (e) and (f) of Tex. Prop. Code § 117.004. If the trustee is a professional, subsection (f) should be included in the instruction:

5. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

Breach of duty of good faith. Every trustee is required to act in good faith and in accordance with the purposes of the trust. Tex. Prop. Code § 111.0035(b)(4)(B). If it is alleged that this duty has been breached, submit the following:

Did TRUSTEE fail to comply with *his* duty as trustee when *he purchased the trust property*?

A trustee fails to comply with his duty as trustee if he fails to act in good faith or fails to act in accordance with the purposes of the trust.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

The definition of "good faith" is based on cases under Texas Probate Code section 243 (codified as Tex. Est. Code § 352.052) (will contests). *See Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Although the foregoing cases use the disjunctive standard (intention *or* reasonable belief), the Committee has chosen the conjunctive standard ("and") because the Committee believes that both the subjective standard of intention and the objective standard of reasonableness are appropriate to measure the conduct of a fiduciary. *See Lee v. Lee*, 47 S.W.3d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (executor could recover attorney's fees in removal action despite breaches of fiduciary duty as long as he subjectively believed his defense was viable and his belief was reasonable under existing law). But note that

in other contexts—for example, forfeiture and attorney's fees—the disjunctive standard ("or") is used. The Committee expresses no opinion on whether the definitions are appropriate for use in other contexts.

Broad-form submission. Tex. R. Civ. P. 277 mandates broad-form submission whenever feasible. If there is no dispute about what duties are imposed on the trustee, no issue about the sufficiency of the evidence for any of the duties, and no difference in the damages arising from the breach of each duty, this question may be submitted in broad form with the duties listed in an instruction. Otherwise, the question should be submitted as shown above.

PJC 235.10 Breach of Duty by Trustee—Self-Dealing—Duties Not Modified or Eliminated by Trust

QUESTION _____

Did *TRUSTEE* comply with *his* fiduciary duty to *BENEFICIARY* in connection with [*describe self-dealing transaction*]?

TRUSTEE owed *BENEFICIARY* a fiduciary duty. To prove *he* complied with this duty in connection with [*describe self-dealing transaction*], *TRUSTEE* must show that, at the time of the *transaction* in question—

[Use only the items that are relevant in the particular case.]

1. the *transaction in question was* fair and equitable to *BENEFICIARY*; [*and*]

2. *TRUSTEE* made reasonable use of the confidence placed in *him by SETTLOR*; [*and*]

3. *TRUSTEE* acted in good faith and in accordance with the purposes of the trust in connection with the *transaction* in question; [*and*]

4. *TRUSTEE* placed the interests of *BENEFICIARY* before *his* own and did not use the advantage of *his* position to gain any benefit for *himself* at the expense of *BENEFICIARY*; [*and*]

5. *TRUSTEE* fully and fairly disclosed to *BENEFICIARY* all material facts known to *TRUSTEE* concerning the *transaction* in question that might affect *BENEFICIARY*'s rights.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing question should be submitted when the trustee is accused of self-dealing and the duties of loyalty and full disclosure have been neither modified nor eliminated by the trust instrument or by statute (*see, e.g.*, Tex. Prop. Code §§ 113.056–.057). If there is no evidence rebutting the presumption of unfairness that arises when a fiduciary profits or benefits in any way from a transaction with

the beneficiary, or if the transaction is expressly prohibited by Tex. Prop. Code §§ 113.052–.055, the question should not be submitted for that transaction. See comment below entitled "Presumption of unfairness shifts burden of proof." Even if the question is not submitted, the question in PJC 235.15 (exculpatory clause) should be submitted if the trust contains an exculpatory provision.

Rewording. If more than one self-dealing transaction is alleged, the phrase *transaction in question was* in item 1 should be replaced with the phrase *the transactions in question were*, and the word *transaction* in the initial instruction and in items 3 and 5 should be replaced with the word *transactions*.

If not all elements in dispute. Only the elements in items 1 through 5 that are in dispute in the particular case should be submitted.

Source of question and instruction. Unless limited or modified by the terms of the trust agreement or the Trust Code, trustees are subject to the same "common law" fiduciary duties as other fiduciaries. Tex. Prop. Code § 113.051. The foregoing question and instruction are derived from *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1975) (material issues are whether fiduciary made reasonable use of trust and confidence placed in him and whether transactions were ultimately fair and equitable to beneficiary); Tex. Prop. Code § 113.051 (trustee required to administer trust in good faith according to its terms); *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 594 (Tex. 1992), *superseded by statute as stated in Lesley v. Veterans Land Board of Texas*, 352 S.W.3d 479, 490 n.72 (Tex. 2011) (fiduciary duty requires party to place interest of other party before his own); *Slay v. Burnett Trust*, 187 S.W.2d 377, 387–88 (Tex. 1945) (duty of loyalty prohibits trustee from using advantage of his position to gain any benefit for himself at expense of his cestui que trust and from placing himself in any position where his self-interest will or may conflict with his obligations as trustee); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512–14 (Tex. 1942) (it is duty of fiduciary to deal openly and to make full disclosure to party with whom he stands in such relationship); *Johnson v. Peckham*, 120 S.W.2d 786, 787 (Tex. 1938) (partners required to make full disclosure of all material facts within their knowledge relating to partnership affairs; it is necessary to make disclosure of all important information); *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984) (trustee owes beneficiary fiduciary duty of full disclosure of all material facts known to him that might affect beneficiary's rights); *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (trustee's duty of full disclosure extends to all material facts that might affect beneficiary's rights).

The question and the initial instruction in the foregoing submission differ from that in PJC 104.2 (see the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment*). The Committee believes it is appropriate to clearly describe the transaction in question and to limit the jury's consideration to the circumstances existing at the time of the transaction. *See Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964); *Estate of Townes v. Townes*, 867 S.W.2d 414, 417 (Tex. App.—Hous-

ton [14th Dist.] 1994, writ denied); *Miller v. Miller*, 700 S.W.2d 941, 947 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

Item 3 in the foregoing submission differs from that in PJC 104.2 because it is based on the requirement in Tex. Prop. Code § 113.051, which applies specifically to trustees. Additionally, it focuses the issue on the particular self-dealing transaction.

Item 5 differs from that in PJC 104.2 in three respects. The Committee believes that the term "material facts" is more frequently used in case law. The fiduciary's duty to disclose in conjunction with a self-dealing transaction is limited to the facts known to the fiduciary. *Huie*, 922 S.W.2d at 923; *Montgomery*, 669 S.W.2d at 313. See PJC 105.4 for an instruction on common-law fraud for failure to disclose when there is a duty to disclose. If it is alleged that the fiduciary *should* have known certain facts that were not disclosed, a negligence question may be appropriate under PJC 235.9. The last clause in item 5 is included to recognize that the information required to be disclosed must be related to the rights of the particular beneficiary.

The definition of "good faith" is based on cases under Texas Probate Code section 243 (codified as Tex. Est. Code § 352.052) (will contests). *See Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Although the foregoing cases use the disjunctive standard (intention *or* reasonable belief), the Committee has chosen the conjunctive standard ("and") because the Committee believes that both the subjective standard of intention and the objective standard of reasonableness are appropriate to measure the conduct of a fiduciary. *See Lee v. Lee*, 47 S.W.3d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (executor could recover attorney's fees in removal action despite breaches of fiduciary duty as long as he subjectively believed his defense was viable and his belief was reasonable under existing law). But note that in other contexts—for example, forfeiture and attorney's fees—the disjunctive standard ("or") is used. The Committee expresses no opinion on whether the definitions are appropriate for use in other contexts.

Presumption of unfairness shifts burden of proof. When a fiduciary profits or benefits in any way from a transaction with the beneficiary, a presumption of unfairness arises that shifts the burden of persuasion to the fiduciary or the party claiming the validity or benefits of the transaction to show that the transaction was fair and equitable to the beneficiary. *Keck, Mahin & Cate v. National Union Fire Insurance Co.*, 20 S.W.3d 692, 699 (Tex. 2000); *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508–09 (Tex. 1980); *Archer*, 390 S.W.2d at 739.

A presumption of unfairness also arises and the burden of proof shifts to the fiduciary if the fiduciary places himself in a position in which his self-interest might conflict with his obligations as a fiduciary. *Stephens County Museum, Inc.*, 517 S.W.2d at 260–61 (fiduciary's positions as attorney for donors and as director and officer of

donee created presumption of unfairness in transactions). By definition, in any self-dealing transaction the fiduciary is in such a position.

The presumption may be rebutted by the fiduciary. *Stephens County Museum, Inc.*, 517 S.W.2d at 261; *see also Texas Bank & Trust Co.*, 595 S.W.2d at 509. Normally, a rebuttable presumption shifts the burden of producing evidence to the party against whom it operates but does not shift the burden of persuasion to that party. *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993). In fiduciary duty cases, however, the presumption of unfairness operates to shift both the burden of producing evidence and the burden of persuasion to the fiduciary. *Sorrell v. Elsey*, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied); *Miller*, 700 S.W.2d at 945–46; *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. App.—Eastland 1977, writ ref'd n.r.e.); *see also Peckham*, 120 S.W.2d at 788 (issue of whether beneficiary of fiduciary relationship relied on fiduciary to perform his duties was immaterial).

If there is a dispute over whether the fiduciary profited or benefited from the transaction or whether the fiduciary placed himself in a position in which his self-interest might conflict with his obligations as a fiduciary, a predicate jury question may be submitted to decide that issue, with the breach question conditioned on an affirmative answer. The burden of proof on the predicate issue is on the beneficiaries.

If there is no evidence rebutting the presumption, no breach of fiduciary duty question is necessary. *Texas Bank & Trust Co.*, 595 S.W.2d at 509.

Liability questions normally place the burden of proof on the plaintiff, who is required to obtain an affirmative finding. When the burden is shifted to the fiduciary, however, a "No" answer supports liability.

PJC 235.11 Breach of Duty by Trustee—Self-Dealing—Duties Modified but Not Eliminated by Trust

QUESTION _____

Did *TRUSTEE* comply with *his* duties as trustee in connection with the *purchase of trust property*?

TRUSTEE complied with *his* duties if *his purchase of the trust property was for fair and adequate consideration* and *he* acted in good faith and in accordance with the purposes of the trust.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing question and instruction should be submitted in cases in which the trustee is accused of self-dealing and the trust agreement permits self-dealing under stated circumstances or otherwise modifies the duty of loyalty but does not completely eliminate it. Care should be taken to track the language of the document verbatim. *See Jochec v. Clayburne*, 863 S.W.2d 516, 520–22 (Tex. App.—Austin 1993, writ denied) (court's failure to instruct jury that trust instrument modified trustee's duty of loyalty was reversible error).

Source. Under current law, a settlor may modify or eliminate the duty of loyalty, which would otherwise prohibit the trustee from engaging in transactions with the trust from which the trustee or an affiliate of the trustee would personally profit or benefit. See Tex. Prop. Code § 111.004(1) for the definition of "affiliate." Although many duties may be modified or eliminated by the settlor, Tex. Prop. Code § 111.0035(b)(4)(B) provides that a trustee's duty to act in good faith and in accordance with the purposes of the trust may not be limited by the terms of the trust.

The definition of "good faith" is based on cases under Texas Probate Code section 243 (codified as Tex. Est. Code § 352.052) (will contests). *See Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Although the foregoing cases use the disjunctive standard (intention *or* reasonable belief), the Committee has chosen the conjunctive standard ("and") because the Committee believes that both the subjective standard of intention and the objective standard of reasonableness are appropriate to measure the conduct of a fiduciary. *See Lee v. Lee*, 47 S.W.3d 767, 795 (Tex. App.—

Houston [14th Dist.] 2001, pet. denied) (executor could recover attorney's fees in removal action despite breaches of fiduciary duty as long as he subjectively believed his defense was viable and his belief was reasonable under existing law). But note that in other contexts—for example, forfeiture and attorney's fees—the disjunctive standard ("or") is used. The Committee expresses no opinion on whether the definitions are appropriate for use in other contexts.

Rewording for other types of transactions and duties. The phrases *purchase of trust property* and *purchase of the trust property was for fair and adequate consideration* should be replaced with language reflecting the specific type of transaction in issue. See Tex. Prop. Code §§ 113.052–.057, which prohibit certain self-dealing transactions, with some exceptions. However, even these prohibitions may be modified or eliminated by the trust document. Tex. Prop. Code § 111.0035.

Burden of proof. Unless the duty of loyalty has been completely eliminated, the Committee believes the burden of proof remains on the trustee. See comments regarding burden of proof in PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust).

PJC 235.12 Breach of Duty by Trustee—Self-Dealing—Duty of Loyalty Eliminated

QUESTION _____

Did *TRUSTEE* fail to comply with *his* duty as trustee when *he purchased the trust property*?

A trustee fails to comply with his duty as trustee if he fails to act in good faith or fails to act in accordance with the purposes of the trust.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing question and instructions should be submitted in cases in which the trustee is accused of self-dealing and the trust agreement permits self-dealing by completely eliminating the duty of loyalty.

Source. Under current law, a settlor may modify or eliminate the duty of loyalty, which would otherwise prohibit the trustee from engaging in transactions with the trust from which the trustee or an affiliate of the trustee would personally profit or benefit. See Tex. Prop. Code § 111.004(1) for the definition of "affiliate." However, the terms of the trust may not limit a trustee's duty to act in good faith and in accordance with the purposes of the trust. Tex. Prop. Code § 111.0035(b)(4)(B).

The definition of "good faith" is based on cases under Texas Probate Code section 243 (codified as Tex. Est. Code § 352.052) (will contests). *See Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.); *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Although the foregoing cases use the disjunctive standard (intention *or* reasonable belief), the Committee has chosen the conjunctive standard ("and") because the Committee believes that both the subjective standard of intention and the objective standard of reasonableness are appropriate to measure the conduct of a fiduciary. *See Lee v. Lee*, 47 S.W.3d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (executor could recover attorney's fees in removal action despite breaches of fiduciary duty as long as he subjectively believed his defense was viable and his belief was reasonable under existing law). But note that in other contexts—for example, forfeiture and attorney's fees—the disjunctive standard ("or") is used. The Committee expresses no opinion on whether the definitions are appropriate for use in other contexts.

Rewording for other types of transactions. The phrase *purchased the trust property* should be replaced with language reflecting the specific type of transaction in issue. See Tex. Prop. Code §§ 113.052–.055, which prohibit certain self-dealing transactions. However, these prohibitions may be modified or eliminated by the trust document. Tex. Prop. Code § 111.0035.

PJC 235.13 Remedies for Breach of Fiduciary Duty (Comment)

Actual damages. In a proper case, actual damages may be recovered pursuant to Tex. Prop. Code § 114.008. See PJC 235.14 (actual damages for breach of trust).

Profits derived by trustee. Any profit derived by the trustee from a breach of trust is recoverable even though the trustee is otherwise exculpated from liability. Tex. Prop. Code § 114.007(a)(2).

Exemplary damages. In a proper case, the plaintiff may also recover exemplary damages. *Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984) (cancellation of lease obtained by willful and unconscionable breach of fiduciary duty and award of $382,608.79 in actual damages supported exemplary damages award of $500,000); *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963) (corporation could also recover exemplary damages in case where corporate officers required to return profits for self-dealing stock sale, even though remedy elected was purely equitable in nature); *Lesikar v. Rappeport*, 33 S.W.3d 282, 310–11 (Tex. App.—Texarkana 2000, pet. denied) (intentional breach of fiduciary duty may give rise to exemplary damages; imposition of constructive trust, even without award of "typical" actual damages, was sufficient to support exemplary damages award); *Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377, 385 (Tex. App.—Tyler 2000, pet. denied) (equitable return of property obtained by breach of fiduciary duty sufficient to support exemplary damages award). *But see RDG Partnership v. Long*, 350 S.W.3d 262, 280–81 (Tex. App.—San Antonio 2011, no pet.) (although exemplary damages may be recovered in connection with equitable relief, jury question and finding regarding value of equitable relief is required) (citing *Martin v. Texas Dental Plans, Inc.*, 948 S.W.2d 799, 804–05 (Tex. App.—San Antonio 1997, pet. denied) (concrete value must be assigned to equitable relief before exemplary damages may be awarded)). If exemplary damages are in issue, see PJC 115.37–115.46 in the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment.*

Additional remedies for breach of trust. Tex. Prop. Code § 114.008(a) provides that a court may—

1. compel a trustee to perform the trustee's duties;

2. enjoin the trustee from committing a breach of trust;

3. compel the trustee to redress a breach of trust;

4. order a trustee to account;

5. appoint a receiver to take possession of the trust property and administer the trust;

6. suspend the trustee;

7. remove the trustee when the trustee materially violates or attempts to violate a trust, the trustee becomes incapacitated or insolvent, the trustee fails to make a necessary accounting, or the court finds other cause for the trustee's removal;

8. reduce or deny compensation to the trustee;

9. void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or

10. order any other appropriate relief.

Concerning receiverships and injunctions, see Tex. Civ. Prac. & Rem. Code chs. 64, 65.

Jury questions. Whether equitable relief is granted is for the court to decide based on "the equity of the circumstances"; however, the jury must resolve any contested fact issues. *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999).

Equitable relief generally. Where a trustee has profited through a breach of trust, as described in PJC 235.9–235.12 (breach of duty), the plaintiff is entitled to equitable relief (such as rescission, constructive trust, or fee forfeiture) without having to show that the breach caused damages. *Burrow*, 997 S.W.2d at 238; *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942); *see also Restatement (Third) of Agency* § 8.01 cmt. d (2006) (listing remedies).

Rescission. The court may grant rescission of a transaction accomplished by a breach of the defendant's fiduciary duty. *See Allison v. Harrison*, 156 S.W.2d 137, 140 (Tex. 1941) (purchase of land by fiduciary without full disclosure by fiduciary was voidable and could be set aside at plaintiff's option, even without proof that price obtained was unreasonable); *see also Schiller v. Elick*, 240 S.W.2d 997, 1000 (Tex. 1951) (setting aside deed obtained through fiduciary's breach).

Constructive trust. The court may impose a constructive trust to restore property or profits lost through the fiduciary's breach. *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966); *Holloway*, 368 S.W.2d at 577; *Slay v. Burnett Trust*, 187 S.W.2d 377, 388 (Tex. 1945).

Fee forfeiture. The right to fee forfeiture does not present a jury question. If the amount earned is disputed, however, see PJC 115.17 in the current edition of *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment.*

PJC 235.14 Actual Damages for Breach of Trust

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the trust estate for the damages, if any, resulting from the *conduct inquired about in Question* _____ [*PJC 235.9–235.12 (breach of duty)*]?

Consider the following elements of damages, if any, and none other.

1. *Any loss or depreciation in value of the trust.*
2. *Any profit made by the trustee.*
3. *Any profit that would have accrued to the trust estate.*
4. [*Other applicable elements.*]

Consider each element separately. Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

1. [*Element 1*]

Answer: _____

2. [*Element 2*]

Answer: _____

COMMENT

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a "Yes" answer to PJC 235.9 (breach of duty by trustee—other than self-dealing) or PJC 235.12 (breach of duty by trustee—self-dealing—duty of loyalty eliminated), or a "No" answer to PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust) or PJC 235.11 (breach of duty by trustee—self-dealing—duties modified but not eliminated by trust).

If damages are sought based on PJC 235.9 and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be worded as follows:

If you answered "Yes" to any item in Question _____, then answer the following question. Otherwise, do not answer the following question.

Rewording question if PJC 235.9 liability question submitted. If damages are sought based on PJC 235.9 (breach of duty by trustee—other than self-dealing) and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the words *conduct inquired about in Question* _____ in the question should be replaced with *conduct about which you answered "Yes" in Question* _____.

Source for elements of damage. The elements listed as items 1–3 above are based on Tex. Prop. Code § 114.001. Tex. Prop. Code § 114.007(a)(2) provides that the trustee cannot be relieved of liability for any profit derived by the trustee from a breach of trust.

Causation standard. The causation standard is taken from Tex. Prop. Code § 114.001(c).

Separate submission of damages for different breaches. It may be necessary to submit separate damages questions for distinct breaches that give rise to different damages.

Elements of damages submitted separately. The Committee generally recommends that multiple elements of damages be separately submitted to the jury. *Harris County v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002) (broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted); *see also* Tex. Civ. Prac. & Rem. Code § 41.008(a) ("In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages."). Separating economic from noneconomic damages is required to allow the court to apply the limits on recovery of exemplary damages based on economic and noneconomic damages as required by Tex. Civ. Prac. & Rem. Code § 41.008(b).

Further, "[p]rejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases); *see also Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514, 530 (Tex. 1998) (reconciling equitable prejudgment interest with statutory prejudgment interest); *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 931 (Tex. 1988) (unliquidated damages in contract cases). Therefore, separation of past and future damages is required.

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2002), provides an instruction for cases involving undefined or

potentially overlapping categories of damages. In those cases, the following language should be substituted for the instruction to consider each element separately:

> Consider the following elements of damages, if any, and none other. You shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any.

Parallel theories. If the breach of fiduciary duty cause of action is only one of several theories of recovery submitted in the charge and any theory has a different legal measure of damages to be applied to a factually similar claim for damages, a separate damages question for each theory may be submitted and the following additional instruction may be included earlier in the charge:

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

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation or interest that should have been earned on a trust asset is claimed as an element of damages, it may be necessary to modify the instruction on interest.

PJC 235.15 Exculpatory Clause

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *TRUSTEE* engage in the *conduct inquired about in Question* _____ *[PJC 235.9–235.12 (breach of duty)] in bad faith, or intentionally, or with reckless indifference to the interests of BENEFICIARY*?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. This submission is to be used only if the trust agreement has an exculpatory clause and should be conditioned on a finding that the trustee breached his duty as trustee.

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a "Yes" answer to PJC 235.9 (breach of duty by trustee—other than self-dealing) or PJC 235.12 (breach of duty by trustee—self-dealing—duty of loyalty eliminated), or a "No" answer to PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust) or PJC 235.11 (breach of duty by trustee—self-dealing—duties modified but not eliminated by trust).

If damages are sought based on PJC 235.9 and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be worded as follows:

> If you answered "Yes" to any item in Question _____, then answer the following question. Otherwise, do not answer the following question.

If no breach question submitted. If the trust instrument contains an exculpatory provision but no question on breach of duty with regard to a particular transaction is submitted because there is no evidence rebutting the presumption of unfairness or the transaction is expressly prohibited by Tex. Prop. Code §§ 113.052–.055, omit the conditioning instruction and submit the question as follows:

Did *TRUSTEE* engage in [*describe self-dealing transaction*] *in bad faith, or intentionally, or with reckless indifference to the interests of BENEFICIARY*?

Rewording of question. The wording *in bad faith, or intentionally, or with reckless indifference to the interests of BENEFICIARY* in the foregoing question reflects the language of Tex. Prop. Code § 114.007, which was taken from *Restatement (Second) of Trusts* § 222 (1959). If the trust document provides greater exculpation than section 114.007—for example, that the trustee is not liable for any breach of duty or not liable for conduct in bad faith—use the statutory language as shown in the question above. If the trust document provides less exculpation than section 114.007—for example, that the trustee is not liable for honest mistakes in judgment—the question should be adapted in accordance with the terms of the instrument.

Rewording question if PJC 235.9 liability question submitted. If damages are sought based on PJC 235.9 (breach of duty by trustee—other than self-dealing) and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the words *conduct inquired about in Question* _____ in the question should be replaced with *conduct about which you answered "Yes" in Question* _____.

Source. Even if the trustee has been found to have committed a breach of duty, he may nonetheless be protected from liability for his acts if the trust agreement contains language exculpating him from liability. *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240 (Tex. 2002). The foregoing submission is based on Tex. Prop. Code § 114.007, which sets the public policy limits on the scope of an exculpatory clause such that conduct that is in "bad faith," "intentional," or "with reckless indifference to the interest of the beneficiary" may not be excused by the terms of the trust.

Intentional conduct. If intentional conduct is alleged, the following instruction, which is adapted from *Restatement (Second) of Trusts* § 222 cmt. a. (1959), may be used:

A person acts intentionally if he does or omits to do an act when he knows the act or omission is a breach of his duty as trustee.

Bad faith. The Committee has found no case providing a specific definition of "bad faith" in the context of exculpation of a trustee. The following definition, which may be used if bad faith is alleged, is based on *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 897 (Tex. App.—Texarkana 1987, no writ) (citing *King v. Swanson*, 291 S.W.2d 773, 775 (Tex. App.—Eastland 1956, no writ), and *Ford v. Aetna Insurance Co.*, 394 S.W.2d 693, 698 (Tex. App.—Corpus Christi–Edinburg 1965, writ ref'd n.r.e.)) (improper motive); and *Black's Law Dictionary* (2d ed. 1910) ("the opposite of 'good faith' ").

"Bad faith" means an action or omission that is prompted by some improper motive rather than by an honest mistake or a reasonable belief that the action was probably correct.

PJC 235.16 Removal of Trustee

QUESTION 1

Did *TRUSTEE* materially violate or attempt to materially violate the terms of the trust dated *DATE*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did the violation or attempted violation of the trust dated *DATE* result in a material financial loss to the trust?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Prop. Code § 113.082(a)(1). Section 113.083(a) provides other grounds for removal: incapacity or insolvency of the trustee, failure to make a required accounting, or other cause found by the court. No submissions are provided for those grounds because they are unlikely to generate fact questions.

When to use. The decision to remove the trustee is within the discretion of the court. Tex. Prop. Code § 113.082. If there are factual disputes on the bases for removal, the foregoing submission may be appropriate. However, findings on other submitted questions, such as questions on breach of duty and damages, might support removal. *See Lee v. Lee*, 47 S.W.3d 767 (Houston [14th Dist.] 2001, pet. denied).

Limitations. Although the four-year limitations period determines whether an interested person can obtain monetary recovery from a trustee's fiduciary breach, it does not affect whether the interested person can seek that trustee's removal. *Ditta v. Conte*, 298 S.W.3d 187, 192 (Tex. 2009).

PJC 235.17 Liability of Cotrustees—Not Modified by Document

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION 1

Was *TRUSTEE*'s *failure to insure the trust property* a serious failure to comply with *his* duties as trustee?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did *OTHER TRUSTEE* exercise reasonable care to prevent *TRUSTEE* from *failing to insure the trust property* and to compel *TRUSTEE* to redress *the failure to insure the trust property*?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing submission should be used if the trustee did not join in the action of a cotrustee. Such a trustee is not liable for the cotrustee's action unless the trustee does not exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress a serious breach of trust. Tex. Prop. Code § 114.006.

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a "Yes" answer to PJC 235.9 (breach of duty by trustee—other than self-dealing) or PJC 235.12 (breach of duty by trustee—self-dealing—duty of loyalty eliminated), or a "No" answer to PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust) or PJC 235.11 (breach of duty by trustee—self-dealing—duties modified but not eliminated by trust).

If damages are sought based on PJC 235.9 and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be reworded accordingly.

Source. The foregoing submission is based on Tex. Prop. Code § 114.006 (liability of cotrustees). *See also Trinity-Universal Insurance Co. v. Maxwell*, 101 S.W.2d 606 (Tex. App.—Austin 1937, writ dism'd) (discussing standard for liability of two trustees, one of whom less actively participated in fraud); *Commercial National Bank v. Hayter*, 473 S.W.2d 561 (Tex. App.—Tyler, 1971, writ ref'd n.r.e.) (although two trustees voted not to appeal or seek new trial, third trustee could appeal).

Rewording instruction. A description of the act complained of in the particular case should be substituted for the words *failure to insure the trust property* in Question 1 and for *failing to insure the trust property* and *the failure to insure the trust property* in Question 2.

PJC 235.18 Liability of Successor Trustee—Not Modified by Document

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *SUCCESSOR TRUSTEE*, the successor trustee, fail to comply with *his* duties with respect to the conduct of *PREDECESSOR TRUSTEE*, the predecessor trustee?

A successor trustee fails to comply with his duties with respect to the conduct of a predecessor trustee if the successor trustee knows or should have known that the predecessor trustee failed to comply with his duties and the successor trustee *(1) improperly permits the situation to continue or (2) fails to make a reasonable effort to compel the predecessor trustee to deliver the trust property or (3) fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee.*

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. The foregoing submission should be used if the instrument does not modify the statutory duties of a successor trustee to investigate and redress the acts or omissions of a predecessor trustee.

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a "Yes" answer to PJC 235.9 (breach of duty by trustee—other than self-dealing) or PJC 235.12 (breach of duty by trustee—self-dealing—duty of loyalty eliminated), or a "No" answer to PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust) or PJC 235.11 (breach of duty by trustee—self-dealing—duties modified but not eliminated by trust).

If damages are sought based on PJC 235.9 and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be reworded accordingly.

Source. The foregoing submission is based on Tex. Prop. Code § 114.002. All three enumerated conditions in the instruction above may not be necessary in a given case.

Rewording instruction. In an appropriate case, omit the inapplicable conditions and renumber accordingly.

PJC 235.19 Third-Party Liability

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *THIRD PARTY* participate in or benefit from *TRUSTEE*'s [*describe conduct or transaction*], knowing that *TRUSTEE* was a trustee and that *his* conduct was a failure to comply with *his* duties as a trustee?

Answer "Yes" or "No."

Answer: _____

COMMENT

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a "Yes" answer to PJC 235.9 (breach of duty by trustee—other than self-dealing) or PJC 235.12 (breach of duty by trustee—self-dealing—duty of loyalty eliminated), or a "No" answer to PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust) or PJC 235.11 (breach of duty by trustee—self-dealing—duties modified but not eliminated by trust).

If damages are sought based on PJC 235.9 and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be reworded accordingly.

Source. "It is settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tort-feasor with the fiduciary and is liable as such." *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942). *See Horton v. Robinson*, 776 S.W.2d 260, 266 (Tex. App.—El Paso 1989, no writ); *Kirby v. Cruce*, 688 S.W.2d 161, 166 (Tex. App.—Dallas 1985, writ ref'd n.r.e.); *see also Tinney v. Team Bank*, 819 S.W.2d 560, 563 (Tex. App.—Fort Worth 1991, writ denied) (noting that *Kinzbach* holds that "one who knowingly benefits from the action of a fiduciary in derogation of the fiduciary's responsibility shares liability with the fiduciary to those to whom the fiduciary owed his duty").

With respect to financial institutions, "if a bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, . . . it will be undoubtedly liable." *United States Fidelity & Guaranty Co. v. Adoue & Lobit*, 137 S.W. 648, 653 (Tex. 1911). Liability occurs if the financial institution has notice or

knowledge that a breach of trust is being committed by an improper withdrawal of funds. *See Wichita Royalty Co. v. City National Bank of Wichita Falls*, 89 S.W.2d 394, 402–03 (Tex. 1935).

PJC 235.20 Release of Liability by Beneficiary

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *BENEFICIARY* have full knowledge of all the material facts related to *TRUSTEE*'s *failure to insure the trust property* when *he* signed the document dated *DATE*?

Answer "Yes" or "No."

Answer: _____

COMMENT

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a "Yes" answer to PJC 235.9 (breach of duty by trustee—other than self-dealing) or PJC 235.12 (breach of duty by trustee—self-dealing—duty of loyalty eliminated), or a "No" answer to PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust) or PJC 235.11 (breach of duty by trustee—self-dealing—duties modified but not eliminated by trust).

If damages are sought based on PJC 235.9 and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be reworded accordingly.

Source. The foregoing submission is based on Tex. Prop. Code §§ 114.005(a), 114.032(a). *See also Slay v. Burnett Trust*, 187 S.W.2d 377, 390 (Tex. 1945) ("[T]he established rule is that while a beneficiary's consent to an act of his trustee which would constitute a violation of the duty of loyalty precludes him from holding the trustee liable for the consequences of the act, the beneficiary is not precluded from holding the trustee liable unless it is made to appear that when he gave his consent the beneficiary had full knowledge of all the material facts which the trustee knew.")

Rewording. The phrase *failure to insure the trust property* should be replaced with language reflecting the particular act or omission in issue.

Formal requirements assumed. A release of liability by a beneficiary must be in writing and delivered to the trustee. Tex. Prop. Code § 114.005(b). The beneficiary must also have full legal capacity. Tex. Prop. Code § 114.005(a). The foregoing submission assumes that those requirements have been met and that the only question relates to the beneficiary's knowledge of the circumstances surrounding the release.

PJC 235.21 Limitations

If you answered ["Yes"] ["No"] [*see comment*] to Question _____, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

By what date should *BENEFICIARY*, in the exercise of reasonable diligence, have discovered the [*describe breach of fiduciary duty*] of *TRUSTEE*?

Answer by stating the date.

Answer: _____

COMMENT

Wording conditioning instruction. This PJC is predicated on a finding of breach of fiduciary duty: a "Yes" answer to PJC 235.9 (breach of duty by trustee—other than self-dealing) or PJC 235.12 (breach of duty by trustee—self-dealing—duty of loyalty eliminated), or a "No" answer to PJC 235.10 (breach of duty by trustee—self-dealing—duties not modified or eliminated by trust) or PJC 235.11 (breach of duty by trustee—self-dealing—duties modified but not eliminated by trust).

If damages are sought based on PJC 235.9 and that question is submitted as shown in PJC 235.9 (that is, with separate answers for each duty) rather than in broad form, the conditioning instruction should be reworded accordingly.

When to use. PJC 235.21 is to be used to determine if a cause of action for breach of fiduciary duty by a trustee is barred by the statute of limitations in those cases where the discovery rule applies. The statute of limitations for a breach of fiduciary duty by a trustee is four years. Tex. Civ. Prac & Rem. Code § 16.004(a)(5).

The supreme court has identified two categories of litigation in which the accrual of a cause of action may be deferred for limitations purposes: (1) cases involving allegations of fraud or fraudulent concealment and (2) all other cases.

Fiduciary duty claims not involving fraud or fraudulent concealment fall in the second category. Thus the discovery rule may apply to claims not involving fraud or fraudulent concealment, but only when the nature of the injury incurred is inherently undiscoverable and the evidence of the injury is objectively verifiable. *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996) (quoting *Computer Associates International, Inc. v. Altai*, 918 S.W.2d 453, 456 (Tex. 1996)). In applying this two-part test to breach of fiduciary duty claims, the nature of the injury may be presumed to be "inherently undiscoverable" if the person to whom a fiduciary duty is owed is either unable to inquire into the

fiduciary's actions or unaware of the need to do so. *S.V.*, 933 S.W.2d at 8; *Computer Associates*, 918 S.W.2d at 456. But in all cases the injury and the wrongful conduct causing the injury must still be supported by "objectively verifiable" evidence. *S.V.*, 933 S.W.2d at 23.

The doctrines of fraud and fraudulent concealment to avoid limitations may also apply to fiduciary duty claims when a defendant has a duty to disclose but fraudulently conceals the existence of a cause of action from the party to whom it belongs. The defendant is then estopped from relying on a limitations defense until the party learns of the right of action or should have learned of it through the exercise of reasonable diligence. *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983) (because physician-patient relationship is one of trust and confidence, Texas recognizes duty on physician's part to disclose negligent act or fact that injury has occurred); *see also Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001) (fraudulent concealment in medical malpractice case tolls limitations until plaintiff discovers fraud or could have discovered fraud with reasonable diligence; plaintiff must show defendant "actually knew a wrong occurred, had a fixed purpose to conceal the wrong, and did conceal the wrong" from plaintiff).

Because Texas courts have not consistently defined the elements of fraudulent concealment for limitations purposes, the Committee expresses no opinion on the appropriate submission.

Removal. Although the four-year limitations period determines whether an interested person can obtain monetary recovery from a trustee's fiduciary breach, it does not affect whether the interested person can seek that trustee's removal. *Ditta v. Conte*, 298 S.W.3d 187, 192 (Tex. 2009).

[Chapters 236–239 are reserved for expansion.]

CHAPTER 240 GUARDIANSHIP OF ADULT

PJC 240.1 Purpose of Guardianship (Comment)

When crafting a jury charge, litigants and judges should always be mindful of the stated policy of the state of Texas to allow incapacitated individuals to retain as much of their right to self-determine as is consistent with their level of remaining capacity. Consequently, jury questions should be narrowly framed to address the core issues of capacity or lack thereof and the degree of incapacity. This policy is set out in section 1001.001 of the Texas Estates Code:

> (a) A court may appoint a guardian with either full or limited authority over an incapacitated person as indicated by the incapacitated person's actual mental or physical limitations and only as necessary to promote and protect the well-being of the incapacitated person.
>
> (b) In creating a guardianship that gives a guardian limited authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence.

Tex. Est. Code § 1001.001.

The Code also provides as follows:

> In determining whether to appoint a guardian for an incapacitated person who is not a minor, the court may not use age as the sole factor.

Tex. Est. Code § 1101.105.

Further, in preparing the charge, careful consideration should be given to the possibility that there may be a guardianship of the person of the ward and a separate guardianship of the estate of the ward or that the facts may require only one of these guardianships. In addition, different persons may have applied to be guardian of the person and of the estate, and a particular person may be the best choice for one of these and not the other.

PJC 240.2 Incapacity

QUESTION _____

Do you find by clear and convincing evidence that *PROPOSED WARD* is an incapacitated person?

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

Determination of incapacity must be evidenced by recurring acts or occurrences within the immediately preceding six-month period and not by isolated instances of negligence or bad judgment.

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing question is based on Tex. Est. Code § 1101.101(a)(1)(A). The definition of "incapacitated person" is based on Tex. Est. Code § 1002.017(2). The instruction on determination of incapacity is based on Tex. Est. Code § 1101.102. For the definition of "clear and convincing evidence," see *In re Guardianship of Hinrichsen*, 99 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Rewording instruction if only one type of guardianship sought. If only guardianship of the person is sought, the following definition of "incapacitated person" should be used:

> An "incapacitated person" is an adult who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself or to care for the person's own physical health.

If only guardianship of the estate is sought, the following definition of "incapacitated person" should be used:

An "incapacitated person" is an adult who, because of a physical or mental condition, is substantially unable to manage the person's own financial affairs.

Guardianship of minor. The foregoing submission should not be used if guardianship of a minor is sought. A minor is by definition an incapacitated person. Tex. Est. Code § 1002.017(1). A minor is a person younger than eighteen years of age who has never been married or had the disabilities of minority removed for general purposes. Tex. Est. Code § 1002.019.

PJC 240.3 Lack of Capacity to Care for Self (Guardianship of the Person)

PJC 240.3A Lack of Capacity to Care for Self (Guardianship of the Person)—Total

If you answered "Yes" to Question _____ [*240.2*], then answer Question _____ [*240.3A*]. Otherwise, do not answer Question _____ [*240.3A*].

QUESTION _____

Is *PROPOSED WARD* totally without capacity to care for *himself*, safely operate a motor vehicle, make personal decisions regarding residence, and vote in a public election?

Answer "Yes" or "No."

Answer: _____

If you answered "No" to Question _____ [*240.3A*], then answer Question _____ [*240.3B*]. Otherwise, do not answer Question _____ [*240.3B*].

PJC 240.3B Lack of Capacity to Care for Self (Guardianship of the Person)—Partial—Without Supports and Services

QUESTION _____

Does *PROPOSED WARD* lack the capacity to perform the following tasks without supports and services?

"Supports and services" means available formal and informal resources and assistance that enable an individual to—

1. meet the individual's needs for food, clothing, or shelter;

2. care for the individual's physical or mental health; or

3. make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

Answer "Yes" or "No" for each of the following:

[Include items 1, 2, 3, and 4 in every case; otherwise, include only items relevant to the case.]

1. To safely operate a motor vehicle?

Answer: _____

2. To vote in a public election?

Answer: _____

3. To make personal decisions regarding residence?

Answer: _____

4. To make personal decisions regarding marriage?

Answer: _____

5. To provide food, clothing, and shelter for *himself*?

Answer: _____

6. To consent to medical, dental, psychological, or psychiatric treatment?

Answer: _____

If you answered "Yes" to any part of Question _____ [*240.3B*], then answer the corresponding part of Question _____ [*240.3C*]. Otherwise, do not answer Question _____ [*240.3C*].

PJC 240.3C Lack of Capacity to Care for Self (Guardianship of the Person)—Partial—With Supports and Services

QUESTION _____

Does *PROPOSED WARD* lack the capacity to perform the following tasks even with the supports and services available to *him*?

Answer "Yes" or "No" for each of the following:

[Repeat items as submitted in the prior question.]

1. To safely operate a motor vehicle?

Answer: _____

2. To vote in a public election?

Answer: _____

3. To make personal decisions regarding residence?

Answer: _____

4. To make personal decisions regarding marriage?

Answer: _____

5. To provide food, clothing, and shelter for *himself*?

Answer: _____

6. To consent to medical, dental, psychological, or psychiatric treatment?

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code §§ 1101.101(a)(2)(D), 1101.151, and 1101.152.

The definition of "supports and services" is based on Tex. Est. Code § 1002.031(1), (2), (4). The category listed in section 1002.031(3), which pertains only to guardianship of the estate, has been omitted from the definition.

The tasks listed in PJC 240.3B and PJC 240.3C are suggestions only, several of which are drawn from Tex. Est. Code § 1101.103(b)(1)(C)–(E). They should be adapted to the requirements of the particular case to ensure that the least restrictive alternative is always considered. See Tex. Est. Code § 1001.001, as set out in PJC 240.1. However, items 1, 2, 3, and 4 must always be submitted. *See* Tex. Est. Code §§ 1101.101(c), 1101.151(b)(5).

When to use. The foregoing submission is appropriate when the proposed ward's capacity to care for himself is in issue. For cases in which the proposed ward's capacity to manage his property is in issue, see PJC 240.4 (lack of capacity to manage property (guardianship of the estate)). In an appropriate case, both PJC 240.3 and PJC 240.4 should be submitted.

In some cases when guardianship of the person is sought but no guardianship of the estate is necessary, a separate finding on the proposed ward's ability to manage his property may be appropriate as an additional item under PJC 240.3A, PJC 240.3B, and PJC 240.3C.

If total lack of capacity not in issue. If total lack of capacity of the proposed ward to care for himself is not in issue, omit PJC 240.3A and include the following conditioning instruction before PJC 240.3B:

> If you answered "Yes" to Question _____ [*240.2*], then answer Question _____ [*240.3B*]. Otherwise, do not answer Question _____ [*240.3B*].

PJC 240.4 Lack of Capacity to Manage Property (Guardianship of the Estate)

PJC 240.4A Lack of Capacity to Manage Property (Guardianship of the Estate)—Total

If you answered "Yes" to Question _____ [*240.2*], then answer Question _____ [*240.4A*]. Otherwise, do not answer Question _____ [*240.4A*].

QUESTION _____

Is *PROPOSED WARD* totally without capacity to manage *his* property, safely operate a motor vehicle, make personal decisions regarding residence, and vote in a public election?

Answer "Yes" or "No."

Answer: _____

If you answered "No" to Question _____ [*240.4A*], then answer Question _____ [*240.4B*]. Otherwise, do not answer Question _____ [*240.4B*].

PJC 240.4B Lack of Capacity to Manage Property (Guardianship of the Estate)—Partial—Without Supports and Services

QUESTION _____

Does *PROPOSED WARD* lack the capacity to perform the following tasks without supports and services?

"Supports and services" means available formal and informal resources and assistance that enable an individual to—

1. manage the individual's financial affairs; or

2. make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

Answer "Yes" or "No" for each of the following:

[Include items 1, 2, 3, and 4 in every case; otherwise, include only items relevant to the case.]

1. To safely operate a motor vehicle?

Answer: _____

2. To vote in a public election?

Answer: _____

3. To make personal decisions regarding residence?

Answer: _____

4. To make personal decisions regarding marriage?

Answer: _____

5. To handle business and managerial matters?

Answer: _____

6. To manage financial matters?

Answer: _____

If you answered "Yes" to any part of Question _____ [*240.4B*], then answer the corresponding part of Question _____ [*240.4C*]. Otherwise, do not answer Question _____ [*240.4C*].

PJC 240.4C Lack of Capacity to Manage Property (Guardianship of the Estate)—Partial—With Supports and Services

QUESTION _____

Does *PROPOSED WARD* lack the capacity to perform the following tasks even with the supports and services available to *him*?

Answer "Yes" or "No" for each of the following:

[Repeat items as submitted in the prior question.]

1. To safely operate a motor vehicle?

Answer: _____

2. To vote in a public election?

Answer: _____

3. To make personal decisions regarding residence?

Answer: _____

4. To make personal decisions regarding marriage?

Answer: _____

5. To handle business and managerial matters?

Answer: _____

6. To manage financial matters?

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code §§ 1101.101(a)(2)(D), 1101.151, and 1101.152.

The definition of "supports and services" is based on Tex. Est. Code § 1002.031(3), (4). The categories listed in section 1002.031(1) and (2), which pertain only to guardianship of the person, have been omitted from the definition.

The tasks listed in PJC 240.4B and PJC 240.4C are suggestions only, which are drawn from Tex. Est. Code § 1101.103(b)(1)(A), (b)(1)(B). They should be adapted to the requirements of the particular case to ensure that the least restrictive alternative is always considered. See Tex. Est. Code § 1001.001, as set out in PJC 240.1. For example, the question about handling business and managerial matters might be broken into several questions, such as capacity to make purchases, capacity to enter into contracts, and capacity to make gifts. However, items 1, 2, 3, and 4 must always be submitted. *See* Tex. Est. Code §§ 1101.101(c), 1101.151(b)(5).

When to use. The foregoing submission is appropriate when the proposed ward's capacity to manage his property is in issue. For cases in which the proposed ward's capacity to care for himself is in issue, see PJC 240.3 (lack of capacity to care for self (guardianship of the person)). In an appropriate case, both PJC 240.3 and PJC 240.4 should be submitted.

If total lack of capacity not in issue. If total lack of capacity of the proposed ward to manage his property is not in issue, omit PJC 240.4A and include the following conditioning instruction before PJC 240.4B:

> If you answered "Yes" to Question _____ [*240.2*], then answer Question _____ [*240.4B*]. Otherwise, do not answer Question _____ [*240.4B*].

PJC 240.5 Supports and Services (Guardianship of the Person)

If you answered "Yes" to Question _____ [*240.3A*] or any part of Question _____ [*240.3B*], then answer Question _____ [*240.5*]. Otherwise, do not answer Question _____ [*240.5*].

QUESTION _____

Do you find by clear and convincing evidence that supports and services available to *PROPOSED WARD* that would avoid the need for the appointment of a guardian of the person are not feasible?

"Supports and services" means available formal and informal resources and assistance that enable an individual to—

1. meet the individual's needs for food, clothing, or shelter;
2. care for the individual's physical or mental health; or
3. make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

Answer "Yes" if they are not feasible; otherwise, answer "No."

Answer: _____

COMMENT

Source. The foregoing question is based on Tex. Est. Code § 1101.101(a)(1)(E). The phrase "are not feasible" is used in place of the phrase "have been . . . determined not to be feasible" that appears in Tex. Est. Code § 1101.101(a)(1)(E). This revised wording ensures that the jury determines the disputed fact issue of feasibility. No question regarding whether supports and services have been considered is submitted, because such consideration is implicit in the jury's determination of feasibility.

The definition of "supports and services" is based on Tex. Est. Code § 1002.031(1), (2), (4). The category listed in section 1002.031(3), which pertains only to guardianship of the estate, has been omitted from the definition. For the definition of "clear and convincing evidence," see *In re Guardianship of Hinrichsen*, 99 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

When to use. The foregoing submission is appropriate when the proposed ward's capacity to care for himself is in issue. For cases in which the proposed ward's capacity to manage his property is in issue, see PJC 240.6 (supports and services (guardianship of the estate)). In an appropriate case, both PJC 240.5 and PJC 240.6 should be submitted.

PJC 240.6 Supports and Services (Guardianship of the Estate)

If you answered "Yes" to Question _____ [*240.4A*] or any part of Question _____ [*240.4B*], then answer Question _____ [*240.6*]. Otherwise, do not answer Question _____ [*240.6*].

QUESTION _____

Do you find by clear and convincing evidence that supports and services available to *PROPOSED WARD* that would avoid the need for the appointment of a guardian of the estate are not feasible?

"Supports and services" means available formal and informal resources and assistance that enable an individual to—

1. manage the individual's financial affairs; or

2. make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

Answer "Yes" if they are not feasible; otherwise, answer "No."

Answer: _____

COMMENT

Source. The foregoing question is based on Tex. Est. Code § 1101.101(a)(1)(E). The phrase "are not feasible" is used in place of the phrase "have been . . . determined not to be feasible" that appears in Tex. Est. Code § 1101.101(a)(1)(E). This revised wording ensures that the jury determines the disputed fact issue of feasibility. No question regarding whether supports and services have been considered is submitted, because such consideration is implicit in the jury's determination of feasibility.

The definition of "supports and services" is based on Tex. Est. Code § 1002.031(3), (4). The categories listed in section 1002.031(1) and (2), which pertain only to guardianship of the person, have been omitted from the definition. For the definition of "clear and convincing evidence," see *In re Guardianship of Hinrichsen*, 99 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

When to use. The foregoing submission is appropriate when the proposed ward's capacity to manage his property is in issue. For cases in which the proposed ward's

capacity to care for himself is in issue, see PJC 240.5 (supports and services (guardianship of the person)). In an appropriate case, both PJC 240.5 and PJC 240.6 should be submitted.

PJC 240.7 Alternatives to Guardianship (Guardianship of the Person)

If you answered "Yes" to Question _____ [*240.5*], then answer Question _____ [*240.7*]. Otherwise, do not answer Question _____ [*240.7*].

QUESTION _____

Do you find by clear and convincing evidence that alternatives to guardianship available to *PROPOSED WARD* that would avoid the need for the appointment of a guardian of the person are not feasible?

The alternatives to guardianship available to *PROPOSED WARD* are—

[Include only the items that are relevant to the particular case. The following is an example only.]

1. The medical power of attorney dated *DATE*.

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

Answer "Yes" if they are not feasible; otherwise, answer "No."

Answer: _____

COMMENT

Source. The foregoing question is based on Tex. Est. Code § 1101.101(a)(1)(D). The phrase "are not feasible" is used in place of the phrase "have been . . . determined not to be feasible" that appears in Tex. Est. Code § 1101.101(a)(1)(D). This revised wording ensures that the jury determines the disputed fact issue of feasibility. No question regarding whether alternatives have been considered is submitted, because such consideration is implicit in the jury's determination of feasibility.

Other examples of alternatives to guardianship are listed in Tex. Est. Code § 1002.0015. For the definition of "clear and convincing evidence," see *In re Guardianship of Hinrichsen*, 99 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

The form of submission above assumes that there is no question as to the validity of the alternatives to guardianship listed. If the validity of an alternative is challenged, a question should be submitted on that issue, with the foregoing submission conditioned on that question.

When to use. The foregoing submission is appropriate when the proposed ward's capacity to care for himself is in issue. For cases in which the proposed ward's capacity to manage his property is in issue, see PJC 240.8 (alternatives to guardianship (guardianship of the estate)). In an appropriate case, both PJC 240.7 and PJC 240.8 should be submitted.

PJC 240.8 Alternatives to Guardianship (Guardianship of the Estate)

If you answered "Yes" to Question _____ [*240.6*], then answer Question _____ [*240.8*]. Otherwise, do not answer Question _____ [*240.8*].

QUESTION _____

Do you find by clear and convincing evidence that alternatives to guardianship available to *PROPOSED WARD* that would avoid the need for the appointment of a guardian of the estate are not feasible?

The alternatives to guardianship available to *PROPOSED WARD* are—

[Include only the items that are relevant to the particular case. The following is an example only.]

1. The durable power of attorney dated *DATE*.

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

Answer "Yes" if they are not feasible; otherwise, answer "No."

Answer: _____

COMMENT

Source. The foregoing question is based on Tex. Est. Code § 1101.101(a)(1)(D). The phrase "are not feasible" is used in place of the phrase "have been . . . determined not to be feasible" that appears in Tex. Est. Code § 1101.101(a)(1)(D). This revised wording ensures that the jury determines the disputed fact issue of feasibility. No question regarding whether alternatives have been considered is submitted, because such consideration is implicit in the jury's determination of feasibility.

Other examples of alternatives to guardianship are listed in Tex. Est. Code § 1002.0015. For the definition of "clear and convincing evidence," see *In re Guardianship of Hinrichsen*, 99 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

The form of submission above assumes that there is no question as to the validity of the alternatives to guardianship listed. If the validity of an alternative is challenged, a question should be submitted on that issue, with the foregoing submission conditioned on that question.

When to use. The foregoing submission is appropriate when the proposed ward's capacity to manage his property is in issue. For cases in which the proposed ward's capacity to care for himself is in issue, see PJC 240.7 (alternatives to guardianship (guardianship of the person)). In an appropriate case, both PJC 240.7 and PJC 240.8 should be submitted.

PJC 240.9 Best Interest of Proposed Ward

If you answered "Yes" to Question _____ [*240.7*] or Question _____ [*240.8*], then answer Question _____ [*240.9*]. Otherwise, do not answer Question _____ [*240.9*].

QUESTION _____

Do you find by clear and convincing evidence that it is in the best interest of *PROPOSED WARD* for the court to appoint a guardian?

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing question is based on Tex. Est. Code § 1101.101(a)(1)(B). For the definition of "clear and convincing evidence," see *In re Guardianship of Hinrichsen*, 99 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Although the term "best interest" is not defined in the Estates Code, Tex. Est. Code § 1001.001 is instructive of its meaning.

Required issue. The Committee is of the opinion that there can be overlap and potential conflict between this PJC 240.9 and PJC 240.10 (protection of the person) and between this PJC 240.9 and PJC 240.11 (protection of the estate), but Tex. Est. Code § 1101.101(a)(1) requires clear and convincing findings on each.

PJC 240.10 Protection of the Person

If you answered "Yes" to Question _____ [*240.7*] and you also answered "Yes" to Question _____ [*240.9*], then answer Question _____ [*240.10*]. Otherwise, do not answer Question _____ [*240.10*].

QUESTION _____

Do you find by clear and convincing evidence that the rights of *PROPOSED WARD* will be protected by the appointment of a guardian?

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing question is based on Tex. Est. Code § 1101.101(a)(1)(C). For the definition of "clear and convincing evidence," see *In re Guardianship of Hinrichsen*, 99 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

When to use. The foregoing submission is appropriate when the proposed ward's capacity to care for himself is in issue. For cases in which the proposed ward's capacity to manage his property is in issue, see PJC 240.11 (protection of the estate). In an appropriate case, both PJC 240.10 and PJC 240.11 should be submitted.

The Committee is of the opinion that there can be overlap and potential conflict between PJC 240.9 (best interest of proposed ward) and this PJC 240.10, but Tex. Est. Code § 1101.101(a)(1) requires clear and convincing findings on each.

PJC 240.11 Protection of the Estate

If you answered "Yes" to Question _____ [*240.8*] and you also answered "Yes" to Question _____ [*240.9*], then answer Question _____ [*240.11*]. Otherwise, do not answer Question _____ [*240.11*].

QUESTION _____

Do you find by clear and convincing evidence that *PROPOSED WARD*'s property will be protected by the appointment of a guardian?

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing question is based on Tex. Est. Code § 1101.101(a)(1)(C). For the definition of "clear and convincing evidence," see *In re Guardianship of Hinrichsen*, 99 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

When to use. The foregoing submission is appropriate when the proposed ward's capacity to manage his property is in issue. For cases in which the proposed ward's capacity to care for himself is in issue, see PJC 240.10 (protection of the person). In an appropriate case, both PJC 240.10 and PJC 240.11 should be submitted.

The Committee is of the opinion that there can be overlap and potential conflict between PJC 240.9 (best interest of proposed ward) and this PJC 240.11, but Tex. Est. Code § 1101.101(a)(1) requires clear and convincing findings on each.

PJC 240.12 Qualification of Proposed Guardian of the Person

If you answered "Yes" to Question _____ [*240.10*], then answer Question _____ [*240.12*]. Otherwise, do not answer Question _____ [*240.12*].

QUESTION _____

Is *PROPOSED GUARDIAN OF PERSON* qualified to act as guardian of the person of *PROPOSED WARD*?

A person is not qualified if the person is *a person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the ward.*

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code §§ 1104.351–.357.

Rewording. In an appropriate case, the ground for disqualification included in the sample instruction above, which reflects Tex. Est. Code § 1104.351(2), should be replaced with language reflecting any other ground in Tex. Est. Code ch. 1104, subch. H, that presents a relevant disputed fact question.

PJC 240.13 Qualification of Proposed Guardian of the Estate

If you answered "Yes" to Question _____ [*240.11*], then answer Question _____ [*240.13*]. Otherwise, do not answer Question _____ [*240.13*].

QUESTION _____

Is *PROPOSED GUARDIAN OF ESTATE* qualified to act as guardian of the estate of *PROPOSED WARD*?

A person is not qualified if the person is *a person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the ward's property.*

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code §§ 1104.351–.357.

Rewording. In an appropriate case, the ground for disqualification included in the sample instruction above, which reflects Tex. Est. Code § 1104.351(2), should be replaced with language reflecting any other ground in Tex. Est. Code ch. 1104, subch. H, that presents a relevant disputed fact question.

PJC 240.14 Best Qualified Proposed Guardian of the Person

If you answered "Yes" to more than one of Questions _____ [*240.12 for each proposed guardian*], then answer Question _____ [*240.14*]. Otherwise, do not answer Question _____ [*240.14*].

QUESTION _____

Who will *best* serve the interests of *PROPOSED WARD* as *his* guardian of the person?

In this situation, only one person may be appointed guardian of the person.

Place the word "*best*" by one of the persons listed below for whom you answered "Yes" in Questions _____ [*240.12 for each proposed guardian*].

1. *PROPOSED GUARDIAN 1* _____
2. *PROPOSED GUARDIAN 2* _____
3. *PROPOSED GUARDIAN 3* _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code § 1104.102(3).

When to use. This question should be submitted when two or more persons are equally entitled under Tex. Est. Code § 1104.102 to be appointed as guardian of the person.

Rewording. If there are only two applicants, substitute the word *better* for the word *best* in the question and the answer instruction.

PJC 240.15 Best Qualified Proposed Guardian of the Estate

If you answered "Yes" to more than one of Questions _____ [*240.13 for each proposed guardian*], then answer Question _____ [*240.15*]. Otherwise, do not answer Question _____ [*240.15*].

QUESTION _____

Who will *best* serve the interests of *PROPOSED WARD* as guardian of *his* estate?

In this situation, only one person may be appointed guardian of the estate.

Place the word "*best*" by one of the persons listed below for whom you answered "Yes" in Questions _____ [*240.13 for each proposed guardian*].

1. *PROPOSED GUARDIAN 1* _____
2. *PROPOSED GUARDIAN 2* _____
3. *PROPOSED GUARDIAN 3* _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code § 1104.102(3).

When to use. This question should be submitted when two or more persons are equally entitled under Tex. Est. Code § 1104.102 to be appointed as guardian of the estate.

Rewording. If there are only two applicants, substitute the word *better* for the word *best* in the question and the answer instruction.

PJC 240.16 Restoration of Capacity—The Person

PJC 240.16A Restoration of Capacity—The Person—Complete

QUESTION _____

Is *WARD* substantially able to provide food, clothing, and shelter for *himself*, to make personal decisions regarding residence, and to care for *his* own physical health?

Answer "Yes" or "No."

Answer: _____

If you answered "No" to Question _____ [*240.16A*], then answer Question _____ [*240.16B*]. Otherwise, do not answer Question _____ [*240.16B*].

PJC 240.16B Restoration of Capacity—The Person—Partial—Without Supports and Services

QUESTION _____

Does *WARD* have the capacity to perform the following tasks without supports and services?

"Supports and services" means available formal and informal resources and assistance that enable an individual to—

1. meet the individual's needs for food, clothing, or shelter;

2. care for the individual's physical or mental health; or

3. make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

Answer "Yes" or "No" for each of the following:

[Include only items relevant to the particular case.]

1. To safely operate a motor vehicle?

Answer: _____

2. To vote in a public election?

Answer: _____

3. To make personal decisions regarding residence?

Answer: _____

4. To make personal decisions regarding marriage?

Answer: _____

5. To provide food, clothing, and shelter for *himself*?

Answer: _____

6. To consent to medical, dental, psychological, or psychiatric treatment?

Answer: _____

If you answered "No" to any part of Question _____ [*240.16B*], then answer the corresponding part of Question _____ [*240.16C*]. Otherwise, do not answer Question _____ [*240.16C*].

PJC 240.16C Restoration of Capacity—The Person—Partial—With Supports and Services

QUESTION _____

Does *WARD* have the capacity to perform the following tasks with supports and services available to *him*?

Answer "Yes" or "No" for each of the following:

[Repeat items as submitted in the prior question.]

1. To safely operate a motor vehicle?

Answer: _____

2. To vote in a public election?

Answer: _____

3. To make personal decisions regarding residence?

Answer: _____

4. To make personal decisions regarding marriage?

Answer: _____

5. To provide food, clothing, and shelter for *himself*?

Answer: _____

6. To consent to medical, dental, psychological, or psychiatric treatment?

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code § 1202.051(1), (3). An order under section 1202.051(3) limiting the powers or duties of the guardian and permitting the ward to care for himself commensurate with the ward's ability requires a finding that the ward has the capacity, or sufficient capacity with supports and services, to do specific tasks.

The definition of "supports and services" is based on Tex. Est. Code § 1002.031(1), (2), (4). The category listed in section 1002.031(3), which pertains only to guardianship of the estate, has been omitted from the definition.

The tasks listed in PJC 240.16B and PJC 240.16C are suggestions only, several of which are drawn from Tex. Est. Code § 1101.103(b)(1)(C)–(E), and should be adapted to the requirements of the particular case. The list of items should track the order creating the guardianship and should be tailored for each restoration unless the original finding was one of total incapacity.

When to use. The foregoing submission is appropriate when restoration regarding the ward's ability to care for himself is sought. If restoration regarding management of the ward's financial affairs is sought, see PJC 240.17 (restoration of capacity—the estate).

If modification of a guardianship is sought to grant additional powers or duties to the guardian rather than to limit such powers or duties, see PJC 240.18 (modification of guardianship (comment)).

Restoration of right to drive, right to make personal decisions regarding residence, and right to vote. If the ward is seeking complete restoration, questions regarding whether the ward can safely operate a motor vehicle, make personal decisions regarding residence, or vote in a public election should also be submitted if those rights are in issue.

If complete restoration not in issue. If complete restoration of capacity regarding the ward's ability to care for himself is not in issue, omit PJC 240.16A.

PJC 240.17 Restoration of Capacity—The Estate

PJC 240.17A Restoration of Capacity—The Estate—Complete

QUESTION _____

Is *WARD* substantially able to manage *his* own financial affairs?

Answer "Yes" or "No."

Answer: _____

If you answered "No" to Question _____ [*240.17A*], then answer Question _____ [*240.17B*]. Otherwise, do not answer Question _____ [*240.17B*].

PJC 240.17B Restoration of Capacity—The Estate—Partial—Without Supports and Services

QUESTION _____

Does *WARD* have the capacity to perform the following tasks without supports and services?

"Supports and services" means available formal and informal resources and assistance that enable an individual to—

1. manage the individual's financial affairs; or

2. make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

Answer "Yes" or "No" for each of the following:

[Include only items relevant to the particular case.]

1. To safely operate a motor vehicle?

Answer: _____

2. To vote in a public election?

Answer: _____

3. To make personal decisions regarding residence?

Answer: _____

4. To make personal decisions regarding marriage?

Answer: _____

5. To handle business and managerial matters?

Answer: _____

6. To manage financial matters?

Answer: _____

If you answered "No" to any part of Question _____ [*240.17B*], then answer the corresponding part of Question _____ [*240.17C*]. Otherwise, do not answer Question _____ [*240.17C*].

PJC 240.17C Restoration of Capacity—The Estate—Partial—With Supports and Services

QUESTION _____

Does *WARD* have the capacity to perform the following tasks with supports and services available to *him*?

Answer "Yes" or "No" for each of the following:

[Repeat items as submitted in the prior question.]

1. To safely operate a motor vehicle?

Answer: _____

2. To vote in a public election?

Answer: _____

3. To make personal decisions regarding residence?

Answer: _____

4. To make personal decisions regarding marriage?

Answer: _____

5. To handle business and managerial matters?

Answer: _____

6. To manage financial matters?

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code § 1202.051(1), (3). An order under section 1202.051(3) limiting the powers or duties of the guardian and permitting the ward to manage his own financial affairs commensurate with the ward's ability requires a finding that the ward has the capacity, or sufficient capacity with supports and services, to do specific tasks.

The definition of "supports and services" is based on Tex. Est. Code § 1002.031(3), (4). The categories listed in section 1002.031(1) and (2), which pertain only to guardianship of the person, have been omitted from the definition.

The tasks listed in PJC 240.17B and PJC 240.17C are suggestions only, which are drawn from Tex. Est. Code § 1101.103(b)(1)(A), (b)(1)(B), and should be adapted to the requirements of the particular case. For example, the question about handling business and managerial matters might be broken into several questions, such as capacity to make purchases, capacity to enter into contracts, and capacity to make gifts. The list of items should track the order creating the guardianship and should be tailored for each restoration unless the original finding was one of total incapacity.

When to use. The foregoing submission is appropriate when restoration regarding management of the ward's financial affairs is sought. If restoration regarding the ward's ability to care for himself is sought, see PJC 240.16 (restoration of capacity—the person).

If modification of a guardianship is sought to grant additional powers or duties to the guardian rather than to limit such powers or duties, see PJC 240.18 (modification of guardianship (comment)).

Restoration of right to drive, right to make personal decisions regarding residence, and right to vote. If the ward is seeking complete restoration, questions regarding whether the ward can safely operate a motor vehicle, make personal decisions regarding residence, or vote in a public election should also be submitted if those rights are in issue.

If complete restoration not in issue. If complete restoration of capacity regarding management of the ward's financial affairs is not in issue, omit PJC 240.17A.

PJC 240.18 Modification of Guardianship (Comment)

A guardianship may be modified to grant additional powers or duties to the guardian. Tex. Est. Code § 1202.051(2). Unlike an order under section 1202.051(3) limiting the powers or duties of the guardian, an order under section 1202.051(2) requires a finding that the ward *lacks* the capacity to do some or all of the tasks in issue. Thus, the questions in PJC 240.16 (restoration of capacity—the person) and PJC 240.17 (restoration of capacity—the estate) are inappropriate for submitting such a modification of the guardianship.

For modification of a guardianship of the person to grant additional powers or duties to the guardian, the questions in PJC 240.3 (lack of capacity to care for self (guardianship of the person)) may be submitted. If total incapacity of the ward to care for himself is not in issue, only the questions in PJC 240.3B and PJC 240.3C (lack of capacity to care for self (guardianship of the person)—partial) should be submitted.

For modification of a guardianship of the estate to grant additional powers or duties to the guardian, the questions in PJC 240.4 (lack of capacity to manage property (guardianship of the estate)) may be submitted. If total incapacity of the ward to manage his property is not in issue, only the questions in PJC 240.4B and PJC 240.4C (lack of capacity to manage property (guardianship of the estate)—partial) should be submitted.

[PJC 240.19 is reserved for expansion.]

PJC 240.20 Removal of Guardian

QUESTION _____

Did *GUARDIAN neglect to educate or maintain WARD as liberally as the means of WARD's estate and WARD's ability or condition permit*?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing submission is based on Tex. Est. Code § 1203.052(a).

Rewording. In an appropriate case, the words *neglect to educate or maintain WARD as liberally as the means of WARD's estate and WARD's ability or condition permit* should be replaced with language reflecting any other ground in Tex. Est. Code § 1203.052(a) that presents a relevant disputed fact question.

[Chapters 241–244 are reserved for expansion.]

PJC 245.1 Temporary Inpatient Mental Health Services

As used in Questions 1 through 6, "clear and convincing evidence" means that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true. To be clear and convincing, there must be evidence of a recent overt act or a continuing pattern of behavior that tends to confirm (1) the likelihood of serious harm to the proposed patient or others or (2) the proposed patient's distress and the deterioration of the proposed patient's ability to function.

QUESTION 1

Do you find by clear and convincing evidence that *INITIALS OF PROPOSED PATIENT* is a person with mental illness?

"Mental illness" means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that substantially impairs a person's thought, perception of reality, emotional process, or judgment or grossly impairs behavior as demonstrated by recent disturbed behavior.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* is likely to cause serious harm to *himself*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* is likely to cause serious harm to others?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 4. Otherwise, do not answer Question 4.

QUESTION 4

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* suffers severe and abnormal mental, emotional, or physical distress?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 4, then answer Question 5. Otherwise, do not answer Question 5.

QUESTION 5

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* is experiencing substantial mental or physical deterioration of *his* ability to function independently, which is exhibited by *his* inability, except for reasons of indigence, to provide for *his* basic needs, including food, clothing, health, or safety?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 5, then answer Question 6. Otherwise, do not answer Question 6.

QUESTION 6

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* is unable to make a rational and informed decision as to whether or not to submit to treatment?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing questions are based on Tex. Health & Safety Code § 574.034(a), which provides criteria for an order for temporary inpatient mental health services. The first sentence of the definition of "clear and convincing evidence" is prescribed in *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). The second sentence of that definition is based on Tex. Health & Safety Code § 574.034(d). The definition of "mental illness" is based on Tex. Health & Safety Code § 571.003(14).

Dangerousness. A person may not be involuntarily committed unless the person is dangerous to himself or others. Such dangerousness can be shown by the likelihood of causing serious harm to one's self or to others or being gravely disabled to the point of being dangerous. *See Addington v. Texas*, 441 U.S. 418 (1979); *see also In re F.M.*, 183 S.W.3d 489 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *In re Breeden*, 4 S.W.3d 782 (Tex. App.—San Antonio 1999, no pet.).

Burden of proof. The required standard of proof is clear and convincing evidence. *See State v. Addington*, 588 S.W.2d at 570, *on remand from Addington v. Texas*, 441 U.S. 418 (indefinite commitment).

PJC 245.2 Extended Inpatient Mental Health Services

As used in Questions 1 through 6, "clear and convincing evidence" means that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true. To be clear and convincing, there must be evidence of a recent overt act or a continuing pattern of behavior that tends to confirm (1) the likelihood of serious harm to the proposed patient or others or (2) the proposed patient's distress and the deterioration of the proposed patient's ability to function.

QUESTION 1

Do you find by clear and convincing evidence that *INITIALS OF PROPOSED PATIENT* is a person with mental illness?

"Mental illness" means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that substantially impairs a person's thought, perception of reality, emotional process, or judgment or grossly impairs behavior as demonstrated by recent disturbed behavior.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* is likely to cause serious harm to *himself*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* is likely to cause serious harm to others?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 4. Otherwise, do not answer Question 4.

QUESTION 4

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* suffers severe and abnormal mental, emotional, or physical distress?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 4, then answer Question 5. Otherwise, do not answer Question 5.

QUESTION 5

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* is experiencing substantial mental or physical deterioration of *his* ability to function independently, which is exhibited by *his* inability, except for reasons of indigence, to provide for *his* basic needs, including food, clothing, health, or safety?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 5, then answer Question 6. Otherwise, do not answer Question 6.

QUESTION 6

Do you find by clear and convincing evidence that, as a result of that mental illness, *INITIALS OF PROPOSED PATIENT* is unable to make a rational and informed decision as to whether or not to submit to treatment?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 2 or Question 3 or Question 6, then answer Question 7. Otherwise, do not answer Question 7.

As used in Questions 7 and 8, "clear and convincing evidence" means that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

QUESTION 7

Do you find by clear and convincing evidence that *INITIALS OF PROPOSED PATIENT*'s condition is expected to continue for more than ninety days?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 7, then answer Question 8. Otherwise, do not answer Question 8.

QUESTION 8

Do you find by clear and convincing evidence that *INITIALS OF PROPOSED PATIENT* has received court-ordered inpatient mental health services under subtitle C of title 7 of the Texas Health and Safety Code or chapter 46B of the Texas Code of Criminal Procedure for at least sixty consecutive days during the preceding twelve months?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing questions are based on Tex. Health & Safety Code § 574.035(a), which provides criteria for an order for extended inpatient mental health services. The first sentence of the definition of "clear and convincing evidence" is prescribed in *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). The second sentence of that definition as given for questions 1 through 6 is based on Tex. Health & Safety Code § 574.035(e). The definition of "mental illness" is based on Tex. Health & Safety Code § 571.003(14).

When question 8 not needed. Question 8 should not be submitted if the proposed patient has already been subject to an order for extended mental health services. *See* Tex. Health & Safety Code § 574.035(d).

Dangerousness. A person may not be involuntarily committed unless the person is dangerous to himself or others. Such dangerousness can be shown by the likelihood of causing serious harm to one's self or to others or being gravely disabled to the point of being dangerous. *See Addington v. Texas*, 441 U.S. 418 (1979); *see also In re F.M.*, 183 S.W.3d 489 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *In re Breeden*, 4 S.W.3d 782 (Tex. App.—San Antonio 1999, no pet.).

Burden of proof. The required standard of proof for civil proceedings for indefinite commitment to a state mental hospital is clear and convincing evidence. *State v. Addington*, 588 S.W.2d at 570, *on remand from Addington v. Texas*, 441 U.S. 418.

PJC 245.3 Chemical Dependency Treatment

As used in Questions 1 through 6, "clear and convincing evidence" means that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

QUESTION 1

Do you find by clear and convincing evidence that *INITIALS OF PROPOSED PATIENT* is a person with a chemical dependency?

"Chemical dependency" means the abuse of alcohol or a controlled substance, psychological or physical dependence on alcohol or a controlled substance, or addiction to alcohol or a controlled substance.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Do you find by clear and convincing evidence that, as a result of that chemical dependency, *INITIALS OF PROPOSED PATIENT* is likely to cause serious harm to *himself*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

Do you find by clear and convincing evidence that, as a result of that chemical dependency, *INITIALS OF PROPOSED PATIENT* is likely to cause serious harm to others?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 4. Otherwise, do not answer Question 4.

QUESTION 4

Do you find by clear and convincing evidence that, as a result of that chemical dependency, *INITIALS OF PROPOSED PATIENT* will continue to suffer abnormal mental, emotional, or physical distress?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 4, then answer Question 5. Otherwise, do not answer Question 5.

QUESTION 5

Do you find by clear and convincing evidence that, as a result of that chemical dependency, *INITIALS OF PROPOSED PATIENT* will continue to deteriorate in ability to function independently if not treated?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 5, then answer Question 6. Otherwise, do not answer Question 6.

QUESTION 6

Do you find by clear and convincing evidence that, as a result of that chemical dependency, *INITIALS OF PROPOSED PATIENT* is unable to make a rational and informed decision as to whether to submit to treatment?

Answer "Yes" or "No."

Answer: _____

COMMENT

Source. The foregoing questions are based on Tex. Health & Safety Code §§ 462.062(e)(2), 462.068, 462.069, which provide criteria for a court order for treatment for chemical dependency. The definition of "clear and convincing evidence" is based on *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979), and Tex. Civ. Prac. &

Rem. Code § 41.001(2). The definition of "chemical dependency" is based on Tex. Health & Safety Code § 462.001(3).

When to use. The foregoing submission may be used when seeking court-ordered treatment for chemical dependency under Tex. Health & Safety Code § 462.062 or the renewal of an order for such treatment under Tex. Health & Safety Code § 462.075.

Dangerousness. Although the Committee has found no cases specifically addressing chemical dependency commitments, the Committee believes that a person may not be involuntarily committed under these provisions of the Health and Safety Code unless the person is dangerous to himself or others as a result of his chemical dependency. Cases involving mental health commitments indicate that such dangerousness can be shown by the likelihood of causing serious harm to one's self or to others or being gravely disabled to the point of being dangerous. *See Addington v. Texas*, 441 U.S. 418 (1979); *see also In re F.M.*, 183 S.W.3d 489 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *In re Breeden*, 4 S.W.3d 782 (Tex. App.—San Antonio 1999, no pet.).

Burden of proof. The required standard of proof is clear and convincing evidence. Tex. Health & Safety Code §§ 462.068, 462.069.

[Chapters 246–249 are reserved for expansion.]

CHAPTER 250 ATTORNEY'S FEES

PJC 250.1 Attorney's Fees—Family

QUESTION _____

What is a reasonable fee for the necessary services of *PARTY A*'s attorney *in this lawsuit*?

A reasonable fee is reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work.

Do not include fees that relate solely to any other claim.

Answer with an amount in dollars and cents for each of the following:

1. For representation in the trial court.

Answer: _____

2. For representation in the court of appeals.

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

When to use. Attorney's fees are a factor to be considered by the court in making an equitable division of the community estate. *Carle v. Carle*, 234 S.W.2d 1002 (Tex. 1950). In addition, statutory authority for an award of reasonable attorney's fees is found in numerous provisions of the Family Code relating to dissolution of marriage and suits affecting the parent-child relationship, including Tex. Fam. Code §§ 6.708, 9.014, 9.106, 9.205, 106.002, 107.015, 107.023, 156.005, 157.164, and

157.167. Payment of attorney's fees may also be ordered as a sanction for abuse of discovery. Tex. R. Civ. P. 215.2(b)(8).

Stages of representation. Depending on the evidence in a particular case, the court may submit a different number of elements and change the descriptions of the stages of representation.

Guiding considerations. "When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019). Both of these elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a party can shift to the other party. *See Rohrmoos Venture*, 578 S.W.3d at 489.

The lodestar analysis applies to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. The "fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts." *Rohrmoos Venture*, 578 S.W.3d at 498. The process applies to both jury trials and bench trials. *Rohrmoos Venture*, 578 S.W.3d at 494. This applies even in cases where the fee agreement is one for an arrangement other than hourly billing as well as in the sanctions context. *Rohrmoos Venture*, 578 S.W.3d at 499 n.10; *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

Factors to consider. In an appropriate case, additional considerations may be taken into account in determining a reasonable and necessary attorney's fee. *See Rohrmoos Venture*, 578 S.W.3d at 500–01.

In such a case, the following instruction should be used instead. However, the additional consideration cannot be a consideration already subsumed in the reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 500–02.

> A reasonable fee is presumed to be the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work. But other considerations may justify an enhancement or reduction to that amount. You must determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to a reasonable fee.

Rewording question. In appropriate cases, it may be necessary to use a more specific phrase, such as *for prosecution of the divorce cause of action in this lawsuit* in place of the phrase *in this lawsuit* in the first paragraph of the foregoing question. For example, such an approach might be appropriate in a proceeding in which a tort action is joined with the divorce. In such a case, a statement should be added instructing the jury not to include any amounts required for prosecution of the tort action. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).

Item 1 in the list in the question above may be expanded if applicable to include ancillary actions taken in other courts in connection with the trial of the case, such as prohibition, mandamus, motion to transfer, and lifting stay in bankruptcy court.

Good faith not required. Several older cases required a finding that a divorce was brought in good faith and with probable cause before attorney's fees could be awarded. *See, e.g., Long v. Lewis*, 210 S.W.2d 207 (Tex. App.—Amarillo 1948, writ ref'd n.r.e.). Those cases were decided before the enactment of the Family Code, which now provides for divorce without a finding of fault. Tex. Fam. Code § 6.001. The Committee believes that findings of good faith and probable cause are no longer required to support an award of attorney's fees.

Paralegal expenses. Concerning the inclusion of compensation for a legal assistant's work in an award of attorney's fees, see *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).

PJC 250.2 Attorney's Fees—Family—Advisory Questions (Comment)

The Committee believes the submission of advisory jury questions, which may unduly lengthen the court's charge, is generally inappropriate. For this reason, the Committee has formulated neither instructions nor jury questions regarding advisory opinions on whether the court should award the attorney's fees of one party to the other party.

PJC 250.3 Attorney's Fees and Costs—Will Prosecution or Defense

QUESTION 1

Did *PARTY* act in good faith and with just cause, whether or not successful, in [prosecuting this suit for the purpose of having *the document dated DATE* admitted to probate] [defending *the document dated DATE* previously admitted to probate]?

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

"With just cause" means that the actions were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

What sum of money do you find to be necessary expenses and disbursements, including reasonable attorney's fees, to [prosecute this suit for the purpose of having *the document dated DATE* admitted to probate] [defend *the document dated DATE* previously admitted to probate]?

A reasonable attorney's fee is the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work.

Do not include fees that relate solely to any other claim.

Answer with an amount in dollars and cents for each of the following:

1. For representation in the trial court.

Answer: _____

2. For representation in the court of appeals.

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

Source. Question 1 in the foregoing submission is based on Tex. Est. Code § 352.052(a), (b). The definitions of "good faith" and "just cause" are derived from *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.), and *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see also In re Estate of Lynch*, 350 S.W.3d 130, 140 (Tex. App.—San Antonio 2011, pet. denied). While Tex. Est. Code § 352.052(a), (b) contains the phrase "whether or not successful," the Committee has found no definitive case law on whether its inclusion in the question is appropriate.

To recover attorney's fees in a will contest, a party must obtain a finding of good faith and just cause. *In re Estate of Lynch*, 350 S.W.3d 130, 140–41 (attorney's fees denied on jury finding that will proponent in losing will contest did not act in good faith and with just cause). However, the Committee notes that in certain circumstances a finding of good faith and just cause may be presumed. *See Miller v. Anderson*, 651 S.W.2d 726, 728 (Tex. 1983); *In re Kam*, 484 S.W.3d 642, 654–55 (Tex. App.—El Paso 2016, pet. denied).

Successful prosecution of will contest by interested person. In a case to which Tex. Est. Code § 352.052(c) applies, the following should be substituted for Question 1:

QUESTION 1

Did *PARTY* act in good faith and with just cause in prosecuting this suit to contest the validity of *the document dated DATE*?

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

"With just cause" means that the actions were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

Answer "Yes" or "No."

Answer: _____

Identifying document. Any appropriate wording to identify the document may be used in place of *the document dated DATE* in the questions. For example, the document might be identified by its exhibit number.

Guiding considerations. The Committee believes that principles applicable to fee-shifting cases generally also apply when attorney's fees are sought from an estate. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). When a claimant wishes to obtain attorney's fees, the claimant must prove that the requested fees are both reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 489. Both of these elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a party can obtain. *See Rohrmoos Venture*, 578 S.W.3d at 489.

The lodestar analysis applies to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. The "fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts." *Rohrmoos Venture*, 578 S.W.3d at 498. The process applies to both jury trials and bench trials. *Rohrmoos Venture*, 578 S.W.3d at 494. This applies even in cases where the fee agreement is one for an arrangement other than hourly billing as well as in the sanctions context. *Rohrmoos Venture*, 578 S.W.3d at 499 n.10; *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

Factors to consider. In an appropriate case, additional considerations may be taken into account in determining a reasonable and necessary attorney's fee. *See Rohrmoos Venture*, 578 S.W.3d at 500–01.

In such a case, the following instruction should be used instead. However, the additional consideration cannot be a consideration already subsumed in the reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 500–02.

> A reasonable attorney's fee is presumed to be the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work. But other considerations may justify an enhancement or reduction to that amount. You must determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to a reasonable fee.

Zero fees. Unless evidence was admitted that no fee was needed to assert or defend a claim, a zero-dollar award may be reversible error. *See Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009). The trial court can correct the error by directing jurors before they are discharged to return to the jury room and reform their

answer. *See* Tex. R. Civ. P. 295; *Smith*, 296 S.W.3d at 548. In such a case, the following instruction may be used:

> The evidence in this case indicates that some amount of attorney's fees is reasonable, making the finding of zero inappropriate. It is up to the court to fashion a judgment from the answers to the jury questions. Therefore, I am instructing you to return to your deliberations to make a decision on the question[*s*] for attorney's fees that is consistent with the evidence and other instructions given by the court to the jury.

Segregation of fees. If any attorney's fees relate solely to a claim other than the validity of a will as described by Tex. Est. Code § 352.052, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make unrecoverable fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006); *see also Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *In re Estate of Vrana*, 335 S.W.3d 322, 328 (Tex. App.—San Antonio 2010, pet. denied). Segregation of fees may be required on a claim-by-claim basis. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 884 (Tex. 2017) (no evidence to support breach of contract claim, but evidence supported Texas Theft Liability Act claim, so remanded for testimony segregating on a claim-by-claim basis); *Chapa*, 212 S.W.3d at 313–14.

Any error in failing to segregate attorney's fees is waived by a failure to object to the lack of segregation. *Green International, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997).

Liability for fees. The Texas Supreme Court has ruled that Texas Probate Code section 243, codified as Tex. Est. Code § 352.052, is a reimbursement statute. Thus, if the proponent is not obligated to pay the fee, it is not reimbursable from the estate. *Russell v. Moeling*, 526 S.W.2d 533, 535 (Tex. 1975) (recognizing that purpose of Probate Code section 243 is "to pay the costs of attorney's fees that are owed by the executor or administrator, and the allowance is not to the attorney, but to the administrator"); *Salmon v. Salmon*, 395 S.W.2d 29, 31 (Tex. 1965) (concluding that Probate Code section 243 authorized reimbursement of fees and expenses "incurred" by executors); *In re Estate of Arndt*, 187 S.W.3d 84, 90 (Tex. App.—Beaumont 2005, no pet.) (refusing to award appellate fees where there was no evidence party actually incurred liability for attorney's fees). *But see In re Estate of Johnson*, 340 S.W.3d at 787 (in case not involving contingent fee, court stated " 'proof of fees actually incurred or paid [is] not [a] prerequisite[] to the recovery of attorney's fees in Texas.' *AMX Enters., L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506, 520 (Tex. App.—Fort Worth 2009, no pet.).").

Paralegal expenses. Concerning the inclusion of compensation for a legal assistant's work in an award of attorney's fees, see *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).

PJC 250.4 Attorney's Fees—Trust

QUESTION _____

What is a reasonable fee for the necessary services of [*TRUSTEE*'s] [*BENEFICIARY*'s] attorney in this action?

A reasonable fee is the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work.

Do not include fees that relate solely to any other claim.

Answer with an amount in dollars and cents for each of the following:

1. For representation in the trial court.

Answer: _____

2. For representation in the court of appeals.

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

When to use. Attorney's fees may be recoverable under Tex. Prop. Code § 114.064 based on the court's determination of what is equitable and just.

Guiding considerations. The Committee believes that principles applicable to fee-shifting cases generally also apply when attorney's fees are sought under the Trust Code. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). When a claimant wishes to obtain attorney's fees, the claimant must prove that the requested fees are both reasonable and necessary. *Rohrmoos Venture*,

578 S.W.3d at 489. Both of these elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a party can obtain. *See Rohrmoos Venture*, 578 S.W.3d at 489.

The lodestar analysis applies to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. The "fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts." *Rohrmoos Venture*, 578 S.W.3d at 498. The process applies to both jury trials and bench trials. *Rohrmoos Venture*, 578 S.W.3d at 494. This applies even in cases where the fee agreement is one for an arrangement other than hourly billing as well as in the sanctions context. *Rohrmoos Venture*, 578 S.W.3d at 499 n.10; *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

Factors to consider. In an appropriate case, additional considerations may be taken into account in determining a reasonable and necessary attorney's fee. *See Rohrmoos Venture*, 578 S.W.3d at 500–01.

In such a case, the following instruction should be used instead. However, the additional consideration cannot be a consideration already subsumed in the reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 500–02.

> A reasonable fee is presumed to be the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work. But other considerations may justify an enhancement or reduction to that amount. You must determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to a reasonable fee.

Zero fees. Unless evidence was admitted that no fee was needed to assert or defend a claim, a zero-dollar award may be reversible error. *See Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009). The trial court can correct the error by directing jurors before they are discharged to return to the jury room and reform their answer. *See* Tex. R. Civ. P. 295; *Smith*, 296 S.W.3d at 548. In such a case, the following instruction may be used:

> The evidence in this case indicates that some amount of attorney's fees is reasonable, making the finding of zero inappropriate. It is up to the court to fashion a judgment from the answers to the jury questions. Therefore, I am instructing you to return to your deliberations to make a decision on the question[*s*] for attorney's fees that is consistent with the evidence and other instructions given by the court to the jury.

Segregation of fees. If necessary, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make unrecoverable fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006); *see also Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *In re Estate of Vrana*, 335 S.W.3d 322, 328 (Tex. App.—San Antonio 2010, pet. denied). Segregation of fees may be required on a claim-by-claim basis. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 884 (Tex. 2017) (no evidence to support breach of contract claim, but evidence supported Texas Theft Liability Act claim, so remanded for testimony segregating on a claim-by-claim basis); *Chapa*, 212 S.W.3d at 313–14.

Any error in failing to segregate attorney's fees is waived by a failure to object to the lack of segregation. *Green International, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997).

Paralegal expenses. Concerning the inclusion of compensation for a legal assistant's work in an award of attorney's fees, see *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).

PJC 250.5 Attorney's Fees—Guardianship—Application

QUESTION 1

Did *APPLICANT* act in good faith and for just cause in the filing and prosecution of the application for appointment of a guardian *of the person* of *PROPOSED WARD*?

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

"For just cause" means that the actions were based on reasonable grounds and there was a fair and honest cause or reason for the actions.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

What is a reasonable fee for the necessary services of *APPLICANT*'s attorney in this action?

A reasonable fee is the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work.

Do not include fees that relate solely to any other claim.

Answer with an amount in dollars and cents for each of the following:

1. For representation in the trial court.

   Answer: _____

2. For representation in the court of appeals.

   Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

   Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

When to use. If a guardianship or management trust is created, attorney's fees may be recoverable from a proposed ward's estate under Tex. Est. Code § 1155.054 for an attorney representing the applicant in a guardianship proceeding based on the court's determination of what is equitable and just.

Source. Question 1 in the foregoing submission is based on Tex. Est. Code § 1155.054(c). The definitions of "good faith" and "just cause" are derived from *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.), and *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Rewording. In an appropriate case, the phrase *of the estate* or *of the person and the estate* should be substituted for the phrase *of the person* in Question 1.

Guiding considerations. The Committee believes that principles applicable to fee-shifting cases generally also apply when attorney's fees are sought from a proposed ward's estate. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). When a claimant wishes to obtain attorney's fees, the claimant must prove that the requested fees are both reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 489. Both of these elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a party can obtain. *See Rohrmoos Venture*, 578 S.W.3d at 489.

The lodestar analysis applies to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. The "fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts." *Rohrmoos Venture*, 578 S.W.3d at 498. The process applies to both jury trials and bench trials. *Rohrmoos Venture*, 578 S.W.3d at 494. This applies even in cases where the fee agreement is one for an arrangement other than hourly billing as well as in the sanctions context. *Rohrmoos Venture*, 578 S.W.3d at 499 n.10; *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

Factors to consider. In an appropriate case, additional considerations may be taken into account in determining a reasonable and necessary attorney's fee. *See Rohrmoos Venture*, 578 S.W.3d at 500–01.

In such a case, the following instruction should be used instead. However, the additional consideration cannot be a consideration already subsumed in the reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 500–02.

> A reasonable fee is presumed to be the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work. But other considerations may justify an enhancement or reduction to that amount. You must determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to a reasonable fee.

Zero fees. Unless evidence was admitted that no fee was needed to assert or defend a claim, a zero-dollar award may be reversible error. *See Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009). The trial court can correct the error by directing jurors before they are discharged to return to the jury room and reform their answer. *See* Tex. R. Civ. P. 295; *Smith*, 296 S.W.3d at 548. In such a case, the following instruction may be used:

> The evidence in this case indicates that some amount of attorney's fees is reasonable, making the finding of zero inappropriate. It is up to the court to fashion a judgment from the answers to the jury questions. Therefore, I am instructing you to return to your deliberations to make a decision on the question[*s*] for attorney's fees that is consistent with the evidence and other instructions given by the court to the jury.

Segregation of fees. If any attorney's fees relate solely to a claim other than the creation of a guardianship or management trust, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make unrecoverable fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006); *see also Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *In re Estate of Vrana*, 335 S.W.3d 322, 328 (Tex. App.—San Antonio 2010, pet. denied). Segregation of fees may be required on a claim-by-claim basis. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 884 (Tex. 2017) (no evidence to support breach of contract claim, but evidence supported Texas Theft Liability Act claim, so remanded for testimony segregating on a claim-by-claim basis); *Chapa*, 212 S.W.3d at 313–14.

Any error in failing to segregate attorney's fees is waived by a failure to object to the lack of segregation. *Green International, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997).

Paralegal expenses. Concerning the inclusion of compensation for a legal assistant's work in an award of attorney's fees, see *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).

PJC 250.6 Attorney's Fees—Guardianship—Representation of Ward in Restoration or Modification

QUESTION 1

Did *ATTORNEY RETAINED BY WARD* have a good-faith belief that *WARD* had the capacity necessary to retain the attorney's services?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

What is a reasonable fee for the necessary services of *WARD*'s attorney in this action?

A reasonable fee is the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work.

Do not include fees that relate solely to any other claim.

Answer with an amount in dollars and cents for each of the following:

1. For representation in the trial court.

Answer: _____

2. For representation in the court of appeals.

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

When to use. Attorney's fees may be recoverable from a ward's estate under Tex. Est. Code § 1202.103 for an attorney representing a ward in a proceeding involving restoration of the ward's capacity or modification of the ward's guardianship. The court may award fees only if there is a finding that the attorney had a good-faith belief that the ward had the capacity to retain the attorney's services.

Guiding considerations. The Committee believes that principles applicable to fee-shifting cases generally also apply when attorney's fees are sought from a ward's estate. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). When a claimant wishes to obtain attorney's fees, the claimant must prove that the requested fees are both reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 489. Both of these elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a party can obtain. *See Rohrmoos Venture*, 578 S.W.3d at 489.

The lodestar analysis applies to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. The "fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts." *Rohrmoos Venture*, 578 S.W.3d at 498. The process applies to both jury trials and bench trials. *Rohrmoos Venture*, 578 S.W.3d at 494. This applies even in cases where the fee agreement is one for an arrangement other than hourly billing as well as in the sanctions context. *Rohrmoos Venture*, 578 S.W.3d at 499 n.10; *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

Factors to consider. In an appropriate case, additional considerations may be taken into account in determining a reasonable and necessary attorney's fee. *See Rohrmoos Venture*, 578 S.W.3d at 500–01.

In such a case, the following instruction should be used instead. However, the additional consideration cannot be a consideration already subsumed in the reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 500–02.

> A reasonable fee is presumed to be the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work. But other considerations may justify an enhancement or reduction to that amount. You must determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to a reasonable fee.

Zero fees. Unless evidence was admitted that no fee was needed to assert or defend a claim, a zero-dollar award may be reversible error. *See Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009). The trial court can correct the error by directing jurors before they are discharged to return to the jury room and reform their answer. *See* Tex. R. Civ. P. 295; *Smith*, 296 S.W.3d at 548. In such a case, the following instruction may be used:

> The evidence in this case indicates that some amount of attorney's fees is reasonable, making the finding of zero inappropriate. It is up to the court to fashion a judgment from the answers to the jury questions. Therefore, I am instructing you to return to your deliberations to make a decision on the question[*s*] for attorney's fees that is consistent with the evidence and other instructions given by the court to the jury.

Segregation of fees. If any attorney's fees relate solely to a claim other than the restoration of a ward's capacity or modification of a guardianship under Tex. Est. Code §§ 1202.051–.157, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make unrecoverable fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006); *see also Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *In re Estate of Vrana*, 335 S.W.3d 322, 328 (Tex. App.—San Antonio 2010, pet. denied). Segregation of fees may be required on a claim-by-claim basis. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 884 (Tex. 2017) (no evidence to support breach of contract claim, but evidence supported Texas Theft Liability Act claim, so remanded for testimony segregating on a claim-by-claim basis); *Chapa*, 212 S.W.3d at 313–14.

Any error in failing to segregate attorney's fees is waived by a failure to object to the lack of segregation. *Green International, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997).

Paralegal expenses. Concerning the inclusion of compensation for a legal assistant's work in an award of attorney's fees, see *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).

PJC 250.7 Attorney's Fees and Costs—Defense for Removal of Independent Personal Representative

QUESTION 1

Did *PARTY* act in good faith, whether successful or not, in defending the action for *his* removal?

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

What sum of money do you find to be the necessary expenses and disbursements, including reasonable attorney's fees, for defending this action for removal?

A reasonable fee is the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work.

Do not include fees that relate solely to any other claim.

Answer with an amount in dollars and cents as to attorney's fees and other expenses for each of the following:

1. For representation in the trial court.

Answer: _____

2. For representation in the court of appeals.

Answer: _____

3. For representation at the petition for review stage in the Supreme Court of Texas.

Answer: _____

4. For representation at the merits briefing stage in the Supreme Court of Texas.

Answer: _____

5. For representation through oral argument and the completion of proceedings in the Supreme Court of Texas.

Answer: _____

COMMENT

Standard for award of attorney's fees. An independent executor or independent administrator who defends an action for his removal in good faith, whether successful or not, shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings. Tex. Est. Code §§ 404.0037(a), 22.017.

Whether to award attorney's fees under section 404.0037(b) to the party seeking removal of the independent executor or independent administrator is solely within the trial court's discretion and will not be reversed absent a clear abuse of that discretion. *Sammons v. Elder*, 940 S.W.2d 276 (Tex. App.—Waco 1997, writ denied).

Source. Question 1 in the foregoing submission is based on Tex. Est. Code § 404.0037(a). The definition of "good faith" is derived from *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.), and *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Although these cases use the disjunctive standard (intention *or* reasonable belief), the Committee has chosen the conjunctive standard ("and") because the Committee believes that both the subjective standard of intention and the objective standard of reasonableness are appropriate to measure the conduct of a fiduciary. *See Lee v. Lee*, 47 S.W.3d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (executor could recover attorney's fees in removal action despite breaches of fiduciary duty as long as he subjectively believed his defense was viable and his belief was reasonable under existing law). But note that in other contexts—for example, forfeiture and attorney's fees—the disjunctive standard ("or") is used. The Committee expresses no opinion on whether the definitions are appropriate for use in other contexts. While Texas Estates Code section 404.0037(a) contains the phrase "whether successful or not," the Committee has found no definitive case law on whether its inclusion in the question is appropriate.

Guiding considerations. The Committee believes that principles applicable to fee-shifting cases generally also apply when attorney's fees are sought from an estate. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). When a claimant wishes to obtain attorney's fees, the claimant must prove that the requested fees are both reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 489. Both of these elements are questions of fact to be determined by the fact finder

and act as limits on the amount of fees that a party can obtain. *See Rohrmoos Venture*, 578 S.W.3d at 489.

The lodestar analysis applies to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. The "fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts." *Rohrmoos Venture*, 578 S.W.3d at 498. The process applies to both jury trials and bench trials. *Rohrmoos Venture*, 578 S.W.3d at 494. This applies even in cases where the fee agreement is one for an arrangement other than hourly billing as well as in the sanctions context. *Rohrmoos Venture*, 578 S.W.3d at 499 n.10; *Nath v. Texas Children's Hospital*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

Factors to consider. In an appropriate case, additional considerations may be taken into account in determining a reasonable and necessary attorney's fee. *See Rohrmoos Venture*, 578 S.W.3d at 500–01.

In such a case, the following instruction should be used instead. However, the additional consideration cannot be a consideration already subsumed in the reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 500–02.

> A reasonable fee is presumed to be the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work. But other considerations may justify an enhancement or reduction to that amount. You must determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to a reasonable fee.

Zero fees. Unless evidence was admitted that no fee was needed to assert or defend a claim, a zero-dollar award may be reversible error. *See Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009). The trial court can correct the error by directing jurors before they are discharged to return to the jury room and reform their answer. *See* Tex. R. Civ. P. 295; *Smith*, 296 S.W.3d at 548. In such a case, the following instruction may be used:

> The evidence in this case indicates that some amount of attorney's fees is reasonable, making the finding of zero inappropriate. It is up to the court to fashion a judgment from the answers to the jury questions. Therefore, I am instructing you to return to your deliberations to make a decision on the question[*s*] for attorney's fees that is consistent with the evidence and other instructions given by the court to the jury.

Segregation of fees. If any attorney's fees relate solely to a claim other than the removal of an independent executor, a claimant must segregate recoverable from unre-

coverable fees. Intertwined facts do not make unrecoverable fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006); *see also Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *In re Estate of Vrana*, 335 S.W.3d 322, 328 (Tex. App.—San Antonio 2010, pet. denied). Segregation of fees may be required on a claim-by-claim basis. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 884 (Tex. 2017) (no evidence to support breach of contract claim, but evidence supported Texas Theft Liability Act claim, so remanded for testimony segregating on a claim-by-claim basis); *Chapa*, 212 S.W.3d at 313–14.

Any error in failing to segregate attorney's fees is waived by a failure to object to the lack of segregation. *Green International, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997).

Paralegal expenses. Concerning the inclusion of compensation for a legal assistant's work in an award of attorney's fees, *see Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).

PJC 250.8 Attorney's Fees—Guardianship—Reimbursement of Attorney's Fees

QUESTION _____

Did *PARTY* act in bad faith or without just cause in *prosecuting* the application for appointment of a guardian *of the person* of *PROPOSED WARD*?

"Bad faith" means an action that is prompted by some improper motive rather than by an honest mistake or a reasonable belief that the action was probably correct.

"Just cause" means that the action was based on reasonable grounds and there was a fair and honest cause or reason for the action.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. A party in a guardianship proceeding who acts in bad faith or without just cause in prosecuting or objecting to the application may be ordered to reimburse the ward's estate for all or part of the attorney's fees awarded under Tex. Est. Code § 1155.054.

Source. The foregoing submission is based on Tex. Est. Code § 1155.054(d).

Definitions. The Committee has found no case providing a specific definition of "bad faith" in the context of reimbursement of attorney's fees. The definition above is based on *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 897 (Tex. App.—Texarkana 1987, no writ) (citing *King v. Swanson*, 291 S.W.2d 773, 775 (Tex. App.—Eastland 1956, no writ); *Ford v. Aetna Insurance Co.*, 394 S.W.2d 693, 698 (Tex. App.—Corpus Christi–Edinburg 1965, writ ref'd n.r.e.)) (improper motive); and *Black's Law Dictionary* (2d ed. 1910) ("the opposite of 'good faith' "). The definition of "just cause" is derived from *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.), and *Collins v. Smith*, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Rewording. In an appropriate case, the words *objecting to* should be substituted for the word *prosecuting*, and the phrase *of the estate* or *of the person and the estate* should be substituted for the phrase *of the person.*

PJC 251.1 Preservation of Charge Error (Comment)

The purpose of this Comment is to make practitioners aware of the need to preserve their complaints about the jury charge for appellate review and to inform them of general considerations when attempting to perfect those complaints. It is not intended as an in-depth analysis of the topic.

Basic rules for preserving charge error.

Objections and requests. Errors in the charge consist of (1) defective questions, instructions, and definitions actually submitted (that is, definitions, instructions, and questions that, while included in the charge, are nevertheless incorrectly submitted); and (2) questions, instructions, and definitions that are omitted entirely. Objections are required to preserve error as to any defect in the charge. In addition, a written request for a substantially correct question, instruction, or definition is required to preserve error for certain omissions.

- Defective question, definition, or instruction: *Objection*

  Affirmative errors in the jury charge must be preserved by objection, regardless of which party has the burden of proof for the submission. Tex. R. Civ. P. 274. Therefore, if the jury charge contains a *defective* question, definition, or instruction, an objection pointing out the error will preserve error for review.

- Omitted definition or instruction: *Objection and request*

  If the omission concerns a definition or an instruction, error must be preserved by an objection and a request for a substantially correct definition or instruction. Tex. R. Civ. P. 274, 278. For this type of omission, it does not matter which party has the burden of proof. Therefore, a request must be tendered even if the erroneously omitted definition or instruction is in the opponent's claim or defense.

- Omitted question, Party's burden: *Objection and request*;
  Opponent's burden: *Objection*

  If the omission concerns a question relied on by the party complaining of the judgment, error must be preserved by an objection and a request for a substantially correct question. Tex. R. Civ. P. 274, 278. If the omission concerns a question relied on by the opponent, an objection alone will preserve error for review. Tex. R. Civ. P. 278. To determine whether error preservation is required for an opponent's omission, consider that, if no element of an independent ground of recovery or defense is submitted in the charge or is requested, the ground is waived. Tex. R. Civ. P. 279.

- Uncertainty about whether the error constitutes an omission or a defect: *Objection and request*

  If there is uncertainty whether an error in the charge constitutes an affirmative error or an omission, the practitioner should both request and object to ensure the error is preserved. *See State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 239–40 (Tex. 1992).

Timing and form of objections and requests.

- Objections, requests, and rulings must be made—
  1. before the reading of the charge to the jury, Tex. R. Civ. P. 272; or
  2. by an earlier deadline set by the trial court, *King Fisher Marine Service, L.P. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014) (providing that such a deadline must "afford[] the parties a 'reasonable time' to inspect and object to the charge").
- Objections must—
  1. be made in writing or dictated to the court reporter in the presence of the court and opposing counsel, Tex. R. Civ. P. 272; and
  2. specifically point out the error and the grounds of complaint, Tex. R. Civ. P. 274.
- Requests must—
  1. be made separate and apart from any objections to the charge, Tex. R. Civ. P. 273;
  2. be in writing and tendered to the court, Tex. R. Civ. P. 278; and
  3. be in substantially correct wording, Tex. R. Civ. P. 278, which does not mean that the request be absolutely correct, nor does it mean that the request be merely sufficient to call the matter to the attention of the court, but instead means that the request is substantively correct and not affirmatively incorrect. *Placencio v. Allied Industrial International, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987).

Rulings on objections and requests.

- Rulings on objections may be oral or in writing. Tex. R. Civ. P. 272.
- Rulings on requests must be in writing and must indicate whether the court refused, granted, or granted but modified the request. Tex. R. Civ. P. 276.

Submitting wrong theory. "[Where] the wrong theory of recovery was submitted and the correct theory of recovery was omitted entirely, the defendant has no obligation

to object." *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 481 (Tex. 2017). The court held that error had been preserved by raising the argument in the trial court in a motion for judgment notwithstanding the verdict. *Levine*, 537 S.W.3d at 482; *see also* Tex. R. Civ. P. 279.

Common mistakes that may result in waiver of charge error.

- Failing to submit requests in writing (oral or dictated requests will not preserve error).
- Failing to make requests separately from objections to the charge (generally it is safe to present a party's requests at the beginning of the formal charge conference, but separate from a party's objections).
- Offering requests "en masse," that is, tendering a complete charge or obscuring a proper request among unfounded or meritless requests (submit each question, definition, or instruction separately, and submit only those important to the outcome of the trial).
- Failing to file with the clerk all requests that the court has marked "refused" (a prudent practice is to also keep a copy for one's own file).
- Failing to make objections to the court's charge on the record.
- Failing to make objections to the court's charge before the reading of the charge to the jury or by an earlier deadline set by the trial court.
- Making objections on the record while the jury is deliberating even if by agreement and with court approval.
- Adopting by reference objections to other portions of the court's charge.
- Dictating objections to the court reporter in the judge's absence (the judge and opposing counsel should be present).
- Relying on or adopting another party's objections to the court's charge without obtaining court approval to do so beforehand (as a general rule, each party must make its own objections).
- Relying on a pretrial ruling. *See Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 919–20, 920 n.3 (Tex. 2015) (per curiam).
- Failing to assert at trial the same grounds for charge error urged on appeal (grounds not distinctly pointed out to the trial court cannot be raised for the first time on appeal).
- Failing to obtain a ruling on an objection or request.

Principle of error preservation. In *State Department of Highways & Public Transportation v. Payne*, the supreme court stated:

> There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

Payne, 838 S.W.2d at 241. The goal is to apply the charge rules "in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them." *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) (per curiam). The keys to error preservation are (1) when in doubt about how to preserve, both object and request; and (2) in either case, clarity is essential: make your arguments timely and plainly enough that the trial court is aware of the claimed error, and get a ruling on the record. *See, e.g., Wackenhut*, 453 S.W.3d at 919–20.

PJC 251.2 Broad-Form Issues and the *Casteel* Doctrine (Comment)

In *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), the supreme court held that inclusion of a legally invalid theory in a broad-form liability question taints the question and requires a new trial. *Casteel*, 22 S.W.3d at 388–89. The court has since extended this rule to legal sufficiency challenges to an element of a broad-form damages question, *see Harris County v. Smith*, 96 S.W.3d 230, 235–36 (Tex. 2002), and to complaints about inclusion of an invalid liability theory in a comparative responsibility finding, *see Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 226–28 (Tex. 2005).

The supreme court has recently clarified that harmful error must be presumed, as in *Casteel*, when an appellate court cannot determine whether the jury found liability on an improper basis because a necessary limiting instruction was not submitted despite a timely request or objection. *Benge v. Williams*, 548 S.W.3d 466, 475–76 (Tex. 2018) (reiterating this proposition and stating that "we have twice held that when the question allows a finding of liability based on evidence that cannot support recovery, the same presumption-of-harm rule [from *Casteel*] must be applied"); *see Texas Commission on Human Rights v. Morrison*, 381 S.W.3d 533, 535 (Tex. 2012) (per curiam); *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 863 (Tex. 2009).

When a broad-form submission is infeasible under the *Casteel* doctrine and a granulated submission would cure the alleged charge defect, a specific objection to the broad-form nature of the charge question is necessary to preserve error. *Thota v. Young*, 366 S.W.3d 678, 690–91 (Tex. 2012) (citing *In re A.V.*, 113 S.W.3d 355, 363 (Tex. 2003); *In re B.L.D.*, 113 S.W.3d 340, 349–50 (Tex. 2003)). But when a broad-form submission is infeasible under the *Casteel* doctrine and a granulated submission would still be erroneous because there is no evidence to support the submission of a separate question, a specific and timely no-evidence objection is sufficient to preserve error without a further objection to the broad-form nature of the charge. *Thota*, 366 S.W.3d at 690–91.

APPENDIX

Following are the tables of contents of the other volumes in the *Texas Pattern Jury Charges* series. These tables represent the 2018 editions of these volumes, which were the current editions when this book was published. Other topics may be added in future editions.

The practitioner may also be interested in the *Texas Criminal Pattern Jury Charges* series. Please visit **http://texasbarbooks.net/texas-pattern-jury-charges/** for more information.

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[Chapters 41–49 are reserved for expansion.]

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STATUTES AND RULES CITED

[Decimal references are to PJC numbers.]

Texas Constitution

Texas Business & Commerce Code

Texas Business Corporation Act

Texas Business Organizations Code

Texas Civil Practice & Remedies Code

Texas Estates Code

Texas Family Code

Texas Finance Code

Texas Government Code

Texas Health & Safety Code

Texas Penal Code

Texas Property Code

Texas Rules of Civil Procedure

Texas Rules of Evidence

United States Code

CASES CITED

[Decimal references are to PJC numbers.]

SUBJECT INDEX

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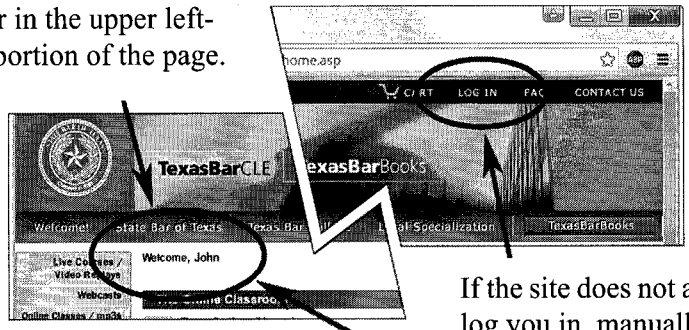

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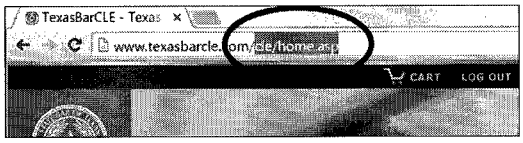

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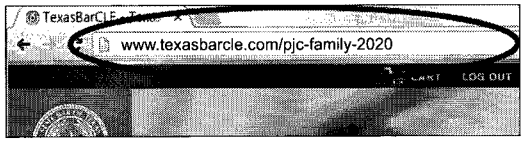

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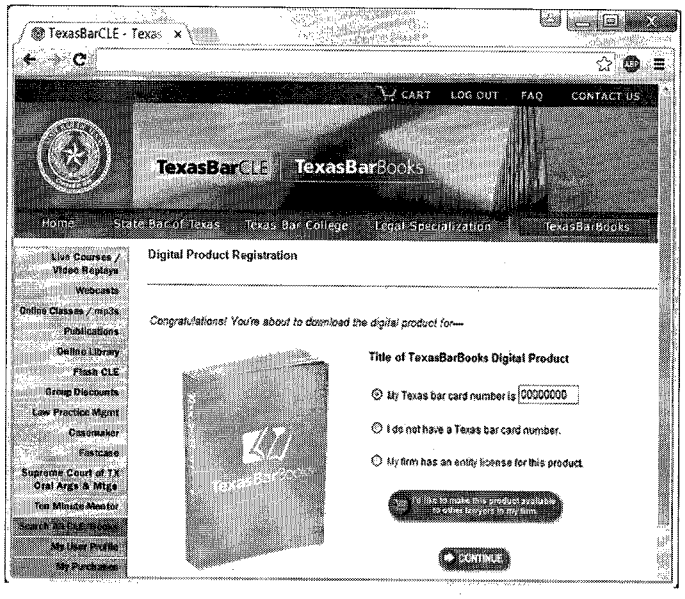

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