ANALYZING THE PAST, SHAPING THE FUTURE: A DATA-DRIVEN APPROACH TO PROBATE LITIGATION

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Jimmy Carter has built a reputation as a trial attorney with a proven track record trying complex cases throughout the southern United States. He is uncompromising, formidable, confident, and is a determined driver to high achievement for his clients.

He has successfully presented numerous cases to juries and courts involving fiduciary and estate litigation, including issues such as lack of testamentary capacity, document validity challenges, fraud, and breach of fiduciary duty. Mr. Carter also has successful involvement in appeals / reported opinions issued by the Texas Courts of Appeal, the Texas Supreme Court, and the Fifth Circuit Court of Appeals.

Mr. Carter, board certified in Civil Trial Law by the Texas Board of Legal Specialization, graduated *summa cum laude* from Texas Tech University's Honors College and earned his law degree from Baylor University. A fellow of the Texas Bar Foundation and member of the American Board of Trial Advocates, he received the 2017 Peacemaker Award from the San Antonio Bar Foundation for his work on David's Law, aiding minors against bullying. He was honored with the 2016 Outstanding Lawyer Award by the San Antonio Business Journal and holds Martindale-Hubbell's AV-Preeminent rating, based on peer and judge reviews, as well as a 5/5 client rating for communication, responsiveness, value, and quality of legal representation.

An active author and speaker on legal matters of keen interest to Texans, Mr. Carter presents subjects important to estate beneficiaries, rural landowners, developers, and business owners. Mr. Carter can often be found practicing his love of oil painting Texas landscapes and enjoying the thrill and challenge of piloting the Cirrus SR-20 when not practicing law.

Representative Decisions

- *Matter of Estate of Crapps*, No. 04-23-00761-CV, 2023 WL 7006289 (Tex. App.—San Antonio Oct. 25, 2023, no pet. h.)
- *Estate of Burns*, 619 S.W.3d 747 (Tex. App.—San Antonio 2020, pet. denied)
- *In re Estate of Mahaffey, Deceased*, 2019 WL 7196618 (Tex. App.—San Antonio 2019, no pet.)
- *Cash v. King*, 2017 WL 3701781 (Tex. App.—San Antonio 2017, no pet.)
- *In re: Estate of Sperber*, 2017 WL 2124481 (Tex. App.—San Antonio 2017, no pet.)
- *Saenz v. Saenz*, 2017 WL 2351101 (Tex. App.—San Antonio 2017, no pet.)

- *In re Estate of Bedell*, 2016 WL 416374 (Tex. App.—San Antonio 2016, pet. denied)
- *Bank of America, N.A., as Trustee of the Bettye Baker Brown Trust, et al. v. Prize Energy Resources, L.P., et al.*, 2014 WL 4257865 (Tex. App.—San Antonio 2014, pet. denied)
- *Vela v. GRC Land Holdings, Ltd.*, 383 S.W.3d 248 (Tex. App.—San Antonio 2012, no pet.)
- *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333 (Tex. 2009)
- *In re: Estate of Oma Bell Perry*, 2008 WL 182860 (Tex. App.—San Antonio 2008, no pet.)

Bar Admissions

- The State of Texas, 1998
- United States Supreme Court, 2005
- United States Court of Appeals, Fifth Circuit, 2005
- United States District Court, Western/Southern/Northern Districts of Texas, 2004

Education

- Baylor University School of Law, J.D., 1998
- Texas Tech University, B.A., *summa cum laude*, 1995

Certifications and Accolades

- Board Certified in Civil Trial Law, Texas Board of Legal Specialization, 2018
- Legal Innovators Award Finalist, The Texas Lawyer, 2024
- The American Lawyer / The National Law Journal Top Rated Litigator, 2021
- Peacemaker Award, San Antonio Bar Foundation, 2017
- Outstanding Lawyer Award, San Antonio Business Journal, 2016
- Texas Bar College (2016–present)
- FAA Private Pilot, 2025
- Martindale Hubbell AV Preeminent Rated

Professional Affiliations and Community Involvement

- American Board of Trial Advocates, Member (2022–present)
- San Antonio – American Board of Trial Advocates: Secretary (2024), Vice Chair / President Elect (2025)
- TransPecos Banks / TransPecos Financial Corporation, Director (2015–present)
- David's Legacy Foundation (Director, 2016-present) and DBM Project (Co-Founder / Chair)
- Man of the Year, Leukemia Lymphoma Society (2015)
- Leadership Committee, Leukemia Lymphoma Society (2016–2018) (2018, Chair)
- Alamo Heights School Foundation Director (2015–2017) and Executive Committee (2016–2017)
- Texas Bar Foundation, Fellow (2014–present)
- San Antonio Bar Association, District Courts Committee (2014–2017)
- Ecumenical Center for Religion and Health, Director (2012–2013)
- Youth Soccer and Alamo Heights Little League Softball Head Coach (2010–2015)

Articles/Presentations

- *Analyzing the Past, Shaping the Future: A Data-Driven Approach to Probate Litigation*, presentation and paper to San Antonio Estate Planners Council at the Docket Call in Probate Court series, February 16, 2024

- *Testamentary Capacity* article and Moderated Virtual Dementia Tour Panel Debrief, presentation to San Antonio Estate Planners Council at the Docket Call in Probate Court series, February 14, 2020
- *Guardianship Litigation Update*, presentation to San Antonio Estate Planners Council at the Docket Call in Probate Court series, February 16, 2018
- *Texas Rule of Civil Procedure 202 Update*, State Bar of Texas Advanced Evidence and Discovery Continuing Legal Education Series, Paper and Presentation 2017
- *David Bartlett Molak's Legacy: Don't Bully Me!*, San Antonio Lawyer Magazine, March–April 2017
- *Strategies in Fiduciary Litigation*, San Antonio Bar Association Lunch Series, October 20, 2016
- *Use of Declaratory Judgments in Probate Court*, presentation and paper to San Antonio Estate Planners Council at the Docket Call in Probate Court series, February 11, 2016
- *Inside the Minds: Best Practices for Structuring Trusts and Estates*, Ch. 6 (co-author with Ashley Ressmann Gray, Thomson Reuters, 2015 ed.)
- *Hot Topics from Four Legal Experts: Panel discussion* (December 3, 2014, San Antonio CPA Society continuing education class)
- *Shale boom puts mineral rights under spotlight*, San Antonio Express News, June 2, 2014, Business Section
- *Texas Landowner Notes–Prescribed Land Burns*, Bandera County Courier, May 1, 2014, Farm & Ranch Section
- *Amid shale boom, law is evolving*, San Antonio Express News, March 30, 2014, Eagle Ford & Energy Section
- *Eagle Ford Land Notes*, Frio-Nueces Current News (March 27, 2014, Oil & Gas Section)
- *Disclosing Taxpayer Information: A Guide for the Wary Accountant*, (November 2013, paper presented to various accounting firms and seminars)

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Sarah Maldonado, a Texas litigator with fifteen years of experience, specializes in probate and trust matters. Her impressive track record includes successfully litigating hundreds of cases statewide, where her deep understanding of estate litigation ensures her clients' interests are fiercely and effectively represented. Beyond her exceptional trial work, Sarah leads JW Carter Law's appellate practice, providing comprehensive guidance to clients throughout their legal journey.

As a graduate of St. Mary's University School of Law (J.D., 2010) and The University of Texas at Austin (2007), Sarah demonstrates a strong commitment to advancing legal knowledge. She and firm partner, Jimmy Carter, dedicated three years to a comprehensive research project, analyzing Texas probate appellate decisions dating back to the 1800s. Sarah actively leverages this research in her practice to improve probate litigation for the legal community and secure optimal outcomes for her clients. In 2025, the San Antonio Business Journal recognized Sarah's outstanding achievements with a "*40 Under 40*" Award, highlighting her skills as an innovator and litigator, as well as her significant industry and community involvement.

Outside the courtroom, Sarah serves as a Community Educator with the Alzheimer's Association's San Antonio and South Texas Chapter, offering support and resources to families affected by dementia. In her free time, she cherishes spending time with her husband, Ricky, and their two daughters.

Representative Cases

- *In re Estate of Walleck, Deceased, Cause No. PR-2022-0061, County Court, Karnes County. April 28, 2025*
- *In re Crapps, Deceased,* 2003 WL 7006289 (Tex. App.—San Antonio 2023, no pet.)
- *In re Estate of Burns, Deceased,* 619 S.W.3d 747 (Tex. App.—San Antoino 2020, pet. denied)
- *In re Estate of Mahaffey, Deceased*, 2019 WL 7196618 (Tex. App.—San Antonio 2019, no pet.)
- *Salinas v. Splash Transport,* District Court of Texas, Bexar County. January 21, 2016

Education

- St. Mary's University School of Law, J.D., 2010
- The University of Texas at Austin, 2007

Certifications and Accolades

- 40 Under 40 Award – San Antonio Business Journal (2025)
- Texas Legal Awards – Finalist for the Legal Innovators Award (2024)
- Top Lawyer in Trust and Estate Litigation – S.A. Scene Magazine (2023–present)
- Top Lawyer in Insurance Defense – S.A. Scene Magazine (2017)
- Order of the Barristers (2010)
- Outstanding Moot Court Award – St. Mary's University (2010)

Professional Affiliations and Community Involvement

- Texas Bar College (2024–present)
- Texas Bar Foundation, Fellow (2023–present)
- San Antonio Estate Planner's Council, Member (2023–present)
- San Antonio Bar Association (2023–present)
- Alzheimer's Association – San Antonio and South Texas Chapter (2023–present)
- Phi Delta Phi Legal Fraternity (2010–present)

Articles/Presentations

- *Analyzing the Past, Shaping the Future: A Data-Driven Approach to Probate Litigation*, presentation to San Antonio Estate Planners Council at the Docket Call in Probate Court series, February 16, 2024

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"There is an epidemic failure within the game to understand what is really happening. And this leads people who run Major League Baseball teams to misjudge their players and mismanage their teams."

— Peter Brand in *Moneyball*

A. Introduction.

As probate and trust litigators, we want to deeply understand what is happening in Texas will contest cases to accurately understand a client's case, provide sound advice, and effectively manage our practice. Just like the Oakland Athletics in the movie *Moneyball,* we use historical data to achieve a winning record. Over a year in the making, we have read and analyzed every will contest appellate decision from the inception of Texas case law to the present. Our research focused on cases in which a will was challenged for (1) testamentary incapacity, (2) undue influence, (3) a lack of formalities and solemnities, (4) forgery, and (5) fraud. We extracted over seventy-five data categories (many of these having up to another 45 discrete data entries) from each decision and compiled these data points into a comprehensive database.

As just a small sample, our database tracks:

- The types of claims alleged in each case and whether the trial court decided the claim in favor of the contestant or proponent;
- Whether a claim was resolved by a jury trial, bench trial, motion for summary judgment, motion to dismiss, or some other procedural mechanism;
- The number of days between the date of the will execution and the testator's date of death;
- The age of the testator at the time of the will execution;
- The relation of the proponent(s) and contestant(s) to the testator (sibling, child, spouse, subsequent spouse, non-family, etc.);
- The gender of the proponent(s) and contestant(s);
- Whether the will was holographic or non-holographic;
- In cases in which the will was drafted by an attorney, whether the drafting attorney testified as a witness;
- Whether a treating or retained physician testified as a witness;
- Whether and to which party attorney's fees were awarded;
- In testamentary capacity and undue influence cases, the alleged physical and mental ailments of the testator; and,
- In undue influence cases, the methods used by the influencer to overpower the will of the testator.

Charts and figures developed from the data provide insight to will contest litigation that we hope judges, litigators, mediators, and clients will find helpful. The insights may be equally helpful to estate planners and fiduciaries when dealing with a client intent on executing a legal document but showing signs of incapacity or

undue influence. What are the risk factors for your elderly client signing an important legal document while hospitalized, medicated, and with her new husband standing at her bedside? Common sense says to tread lightly in such a situation, but the data tells us how to statistically assess whether the document will be challenged in the future and what steps can be taken to reduce the likelihood that the document is later invalidated. When the risk is known to be high, additional protective measures to mitigate against challenges can be considered. In addition, clients typically find statistical information comforting. Attorneys ask much of clients, some of whom they've only known for a brief period of time, to trust them with phrases like "in my experience . . . ." Although the attorney's experience may be incredibly deep, the client – viewing the statement in a vacuum – cannot really measure the statement. Normal people are quite familiar with a percentage coming back in response to the question "what are my *chances*?"

Of course, the models and predictions gleaned from the research are not guarantees of success. The Oakland Athletics used a statistical approach to achieve a winning record but fell short of clinching the division series. Other intangible factors, such as a player's drive or clutch performance, were shown to affect the outcome of the game. Similarly, intangible factors – such as the likeability of the witnesses, the talent and skill of the attorneys, and the makeup of the juries – are at play in probate contests.

In addition to helping the individual attorney succeed, we hope the research improves the overall practice of probate litigation by shedding light on ways the system is working and ways it can be improved. For example, does the fact that reversal rates are lower for appeals from statutory probate courts as opposed to appeals from county courts mean that we should designate more specialty courts? In a surprising 58% of cases, the court of appeals made no mention of the testator's age at the time of execution. Would overt consideration of the testator's age lead to more meaningful analyses? In 33.2% of cases involving dementia, the appellate courts did not specify the type of dementia at issue. Should attorneys and judges pay more heed to the medical aspects of capacity cases? Although tricky to answer, data seems to be one key to answering these questions.

The following pages contain various illustrations and models taken from our data collected, to date, as well as a brief explanation of each figure. The data is currently limited to appellate cases involving the various causes of action found in will contests but is in process to expand to trial court cases (subject to certain data availability limitations). This paper focuses on the two most common grounds for invalidating a will: incapacity and undue influence.

Except where otherwise noted, when included, the decade 2020 has been prorated so that the years 2020-2022 represent the entire decade. Cases reviewed for this version include through calendar year 2022.

B. The Populations Studied.

1. The Human Population.

The population of Texas has changed tremendously over recent history, which we examine in great detail in this section.

A statistical analysis of will contest appeals must include a basic understanding of the changing Texas population over time. The following figures explore the overall population growth of Texas since the 1900s as well as the age breakdown of recent Texas net migration data.

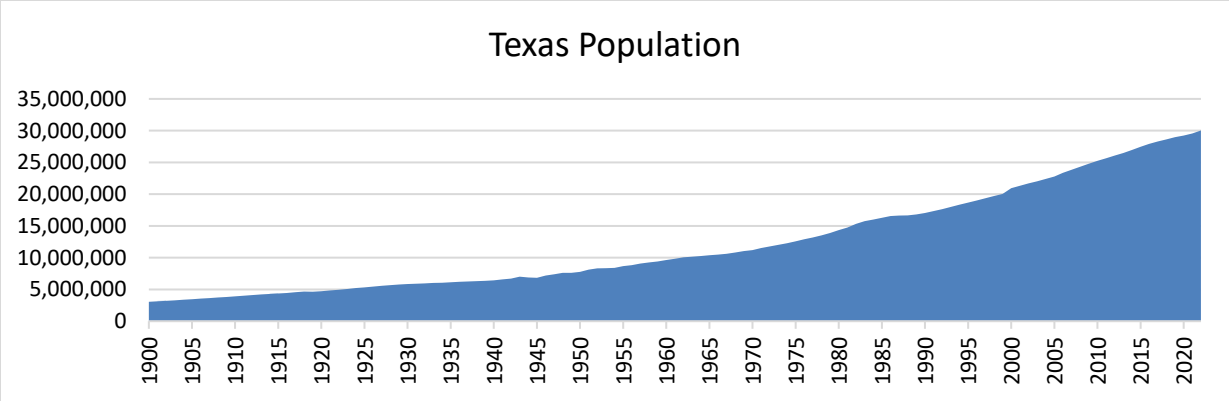

Figure 1. Texas Population over time. Source: https://www.macrotrends.net/states/texas/population compiling data from U.S. Census Bureau.

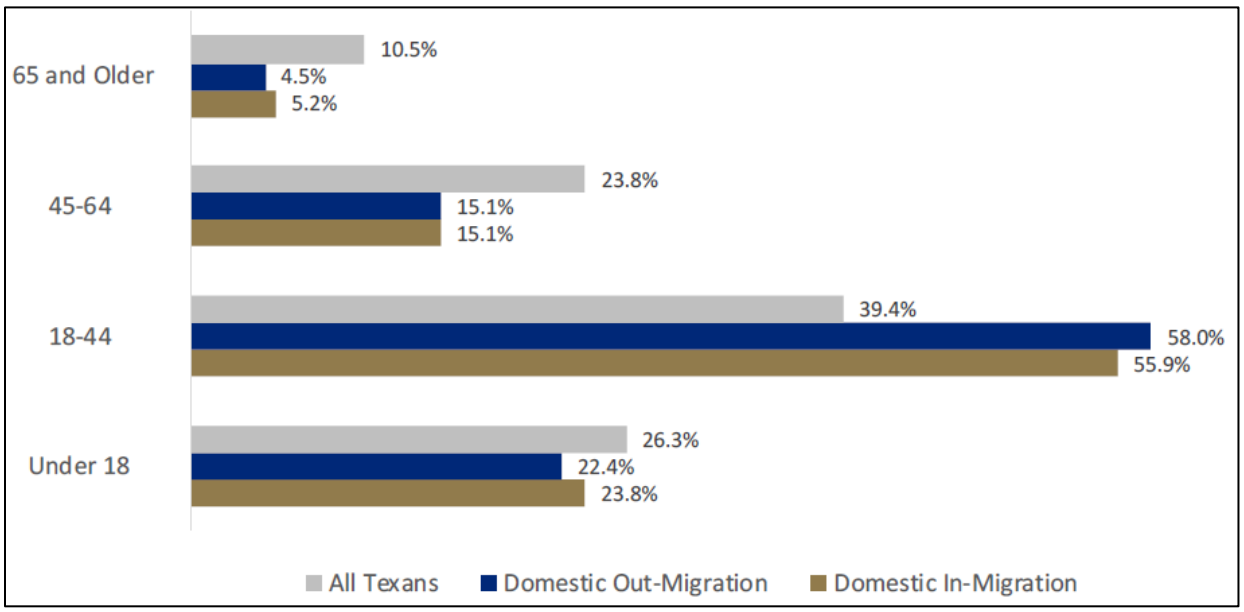

Figure 2. Texas Net Migration. Source: Texas Office of the State Demographer, Introduction to Texas Domestic Migration, April 2016.

Figure 1 depicts the population growth in Texas from 1900 to 2020 using federal census data. During that period, the population grew steadily and by a factor of almost ten.

Significant events have impacted the courts, Texas population, and society since 1900. Obviously, the COVID-19 pandemic looms large in recent memory. Interestingly, the Texas Judicial Branch, Office of Court Administration 2022 Annual Statistical Report, wrote the following about probate filings overall: "Estate (probate) cases continued to grow but at a much slower rate than during the COVID pandemic ...."

Figure 2 examines the 2005-2013 mean age distributions for domestic migrants and the total Texas population. A Texan's life expectancy in 2023 was 76.5 years.[1] It appears, therefore, reasonable to conclude that the resulted in Texans who have not achieved 76.5 years of age and therefore would not significantly impact probate court data. If not obvious, this is because they have not reached the end of their life expectancy. Combining the 18-44 (39.4%) and Under 18 (26.3%) categories, then, accounts for approximately 65.7% of Texans. Indeed, a portion of the 45-64 category would also logically not contribute to our data. Correspondingly, the 65+ age group's *net* migration only slightly favored in-migration. All in all, most in-migrants to Texas (and most Texans, generally) during the last 20 years were not in the older age groups that predictably would see the most involvement in will contests.

Because of the significant population growth, the data in this paper has, in most cases, controlled the numbers for population, and where indicated, has provided both raw data statistics and population controlled figures.

2. The Appellate Opinion "Population."

Texas has 14 courts of appeal as well as a supreme court through which will contest appeals are handled. Since the underlying research looked at all Texas will contest appeals, our data comes from each of the 15 courts.

From the court's standpoint, it bears to keep in mind that Texas has 19 Statutory Probate Courts (as of 2022), 257 Statutory County Courts, and 254 Constitutional County Courts. Also, the statutory probate court did not become part of the Texas court system until around 1951 and continued to send trial work to the district court until legislation beginning in the 1970s delegated that work to the probate courts.[2]

Rank	Court of Appeals District	Percentage
1	Houston (1st Dist.)	11.02%
2	San Antonio	9.71%
3	Dallas	8.92%
4	Houston (14th Dist.)	8.40%
5	Corpus Christi	8.14%
6	Fort Worth	7.09%
7	Texarkana	6.82%
8	Beaumont	6.30%
9	El Paso	6.04%
10	Amarillo	5.51%
11	Tyler	5.51%
12	Austin	4.46%
13	Waco	4.46%
14	Eastland	3.94%
15	Supreme Court of Texas	3.67%

Chart 1. Opinion frequency by appellate court.

[1] CDC, National Center for Health Statistics. https://www.cdc.gov/nchs/pressroom/sosmap/life_expectancy/life_expectancy.htm.

[2] Boone Schwartzel & Doug Wilshusen, Texas Probate Jurisdiction—"There's a Will, Where's the Way?", 53 Tex. L. Rev. 323, 335-36 (1975).

Courts of appeal in urban areas have seen the bulk of will contest cases since the 1970s. Chart 1. Annual Statistical Reports for the Texas Judiciary show that the appellate districts with the heaviest dockets have roughly followed the same order as Chart 1. This suggests that the percentage of will contests in each district is more a product of case volume rather than the urban versus rural makeup of the districts.

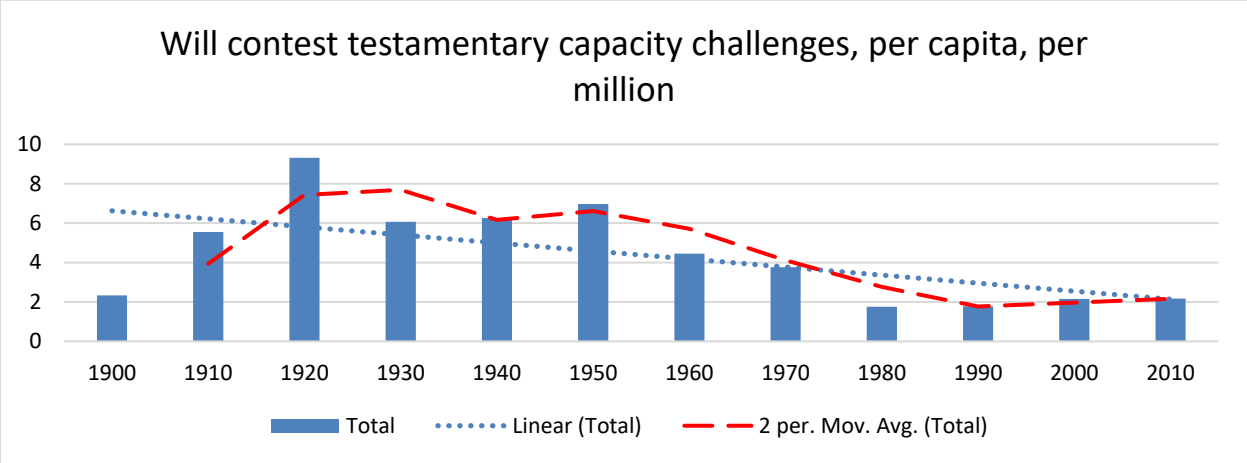

Figure 3. Frequency of Will Contest Appeals

Figure 3, above, depicts the total number of will contests in the appellate courts adjusted for population growth (*see* Figure 1). The y-axis represents the number of will contests per million of population. The dashed line uses an average of the prior two years to create a trend line. The dotted line is a linear trend.

The raw numbers (*see* Figure 18, page 19) depict growth of will contest appeals by just over 11% in the twenty years of the 2000 and 2010 decades. According to federal census data, Texas' population grew from 20,944,499 in 2000 to 29,232,474 in 2020 – an almost 40% increase (i.e., almost 30% more growth than will contest frequency). To consider the oft predicted baby boomer effect, our data tracked testator age at time of the will execution ceremony. Appellate court data reflects no significant deviations in average testator age during the same decades:

Year	Testator Age at Execution (avg.)
2000	81.26
2010	78.36
2020	79.90

So why hasn't the frequency of will contests increased? More data will be needed to reach a certain conclusion. However, some possibilities could be that those entering the Texas population are generally younger. According to the Texas Office of the State Demographer (*see* Figure 2), 58% of domestic migration into the state was in the 18-44 age range. Thus, of the more than 8 million new residents, 5+ million of these new Texans would not likely impact our data (and likely more, especially if you consider all the Under 18 in-migrants and the portion of 45+ year olds who are not in the life expectancy "danger zone").

It is reasonable to conclude that significant growth within the probate court system is imminent – perhaps a *Perfect Storm*, of sorts? This growth is likely to come from a combination of the baby boomer phenomenon and the explosive growth of new in-migrants to Texas who will eventually become part of the statistical probate pool.

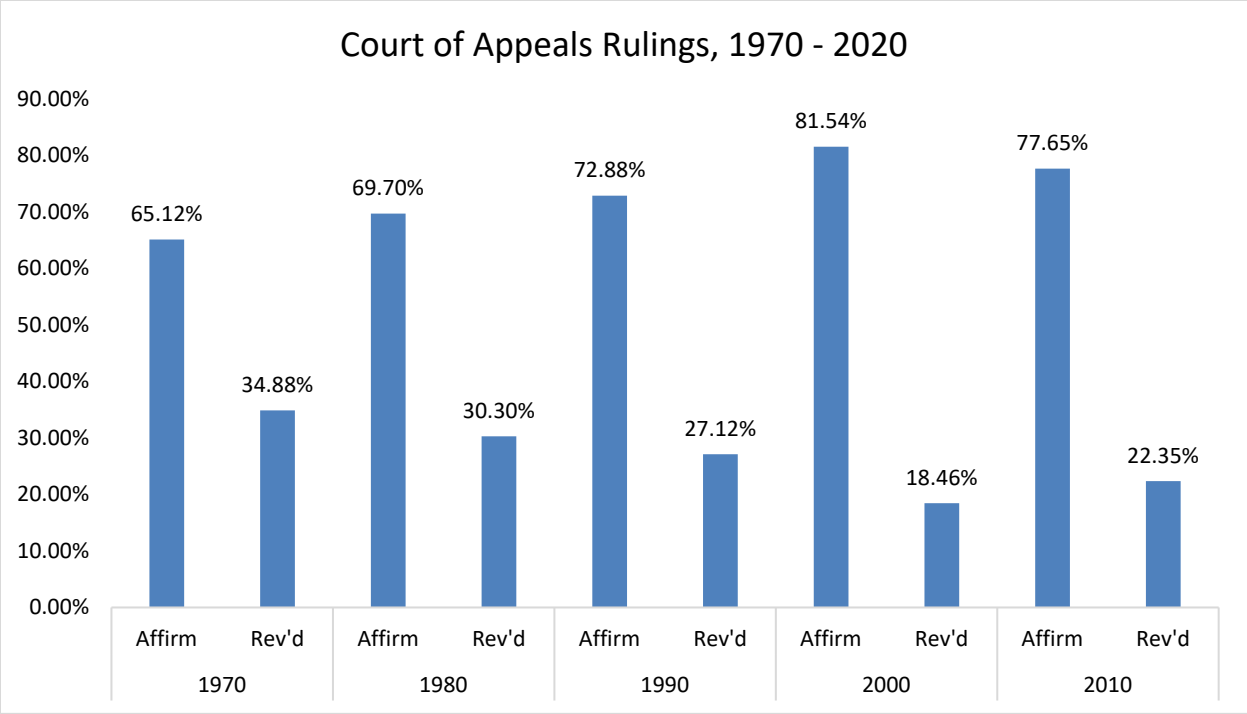

Figure 3. High level analysis, Will Contest Court of Appeals Rulings; 1970 - 2019.

The above figure shows the reversal rates of will contest cases in the courts of appeal over time. The reversal rates have mostly declined since the 1970s. The courts of appeal have, broadly, decreased reversals by a statistically significant margin of around 12%, and affirmations have increased by the same margin.[3] These changes appear to have occurred systematically over the preceding 40-50 year period. Appellees should take solace in the fact that reversals have occurred in less than 23% of will contest cases since the 2000s decade.

3. The "Parties" populations.

The research underlying this paper examined the makeup of will contest litigants in Texas using data compiled from the opinions published by the various Texas courts of appeals. It includes factors such as the relation of the contestant and proponent to the testator, whether the proponent served as a caregiver to the testator, and whether the will designated the proponent to serve as executor. The following figures provide some analysis of the typical parties to a will contest.

Rank	Who is the Contestant?	Percentage
1	Son	17%
2	Daughter	15%
3	Children	12%
4	Other family	7%
5	Grandchildren	6%
6	Brother	6%
7	Non-family	5%

[3] This is a high level analysis. We excluded mixed rulings and mandamus to simplify the data.

8	Wife	5%
9	Niece	4%
10	Sister	4%

Chart 2. Ranking the typical contestant.

Rank	Who is the Proponent?	Percentage
1	Non-family	16%
2	Unspecified	12%
3	Son	9%
4	Daughter	9%
5	Subsequent wife	9%
6	Executor	5%
7	Child	5%
8	Other family	5%
9	Sister	4%
10	Wife	4%

Chart 3. Ranking the typical Proponent.

As shown in Chart 2, the children of the testator are by far the most likely to challenge a will's validity. Devises to children have been held as "natural" by the courts so children may feel entitled to a parent's property even when excluded from the will.[4] The Texas Supreme Court in 1856 explained:

> One of the main objects of the acquisition of property by the parent is to give it to the child, and that child in turn will give it to his, and in this way the debt of gratitude we owe to our parent is paid to our children. Each generation pays what it owes to the preceding one to the succeeding one. This seems to be the natural law for the transmission of property.[5]

Any entitlement felt by children may also explain their likelihood of offering a will to probate. A child served as the proponent in 23% of cases on appeal. Another reason for the prevalence of children as parties could be that children are the most likely devisees under a will.

The most common proponent was a non-member of the testator's family. This would include caregivers, friends, and romantic but unmarried partners. In a surprising 12% of cases reviewed, the proponent's identity was unspecified, suggesting that courts focus more on the identity of the contestant than the proponent in reaching its decisions. Also notable is that a subsequent wife (such as a second or third wife) served as the proponent in 9% of cases on appeal.

[4] *Craycroft v. Crawford*, 285 S.W. 275, 278 (Tex. Comm'n App. 1926).

[5] *Saufley v. Jackson*, 16 Tex. 579, 581 (1856).

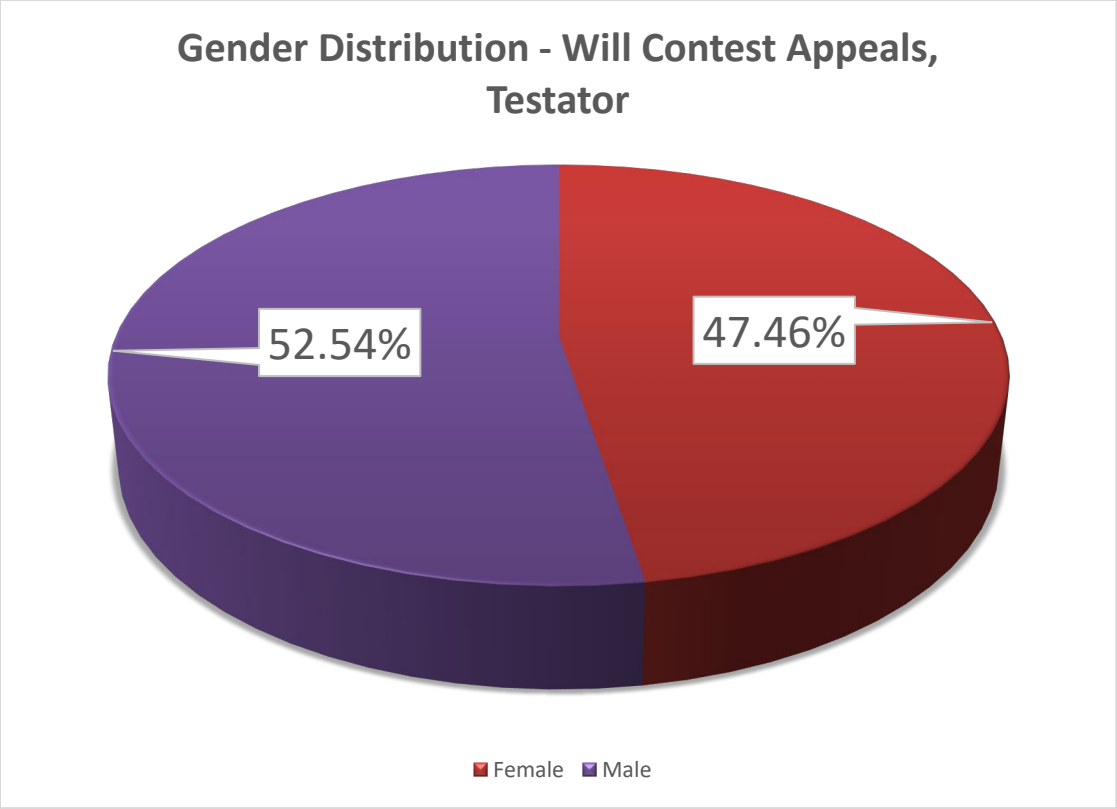

Figure 4. Testators' Gender - Distribution in Will Contest Appeals.

Informative though not very exciting, the above Figure 4 calculates the percentage of female testators in will contest appeals versus male testators. A will executed by a male testator was slightly more likely to be challenged on appeal but, overall, the breakdown between female and male testators was about 50/50.

C. Trial Court Breakdown.

1. Winners and Losers.

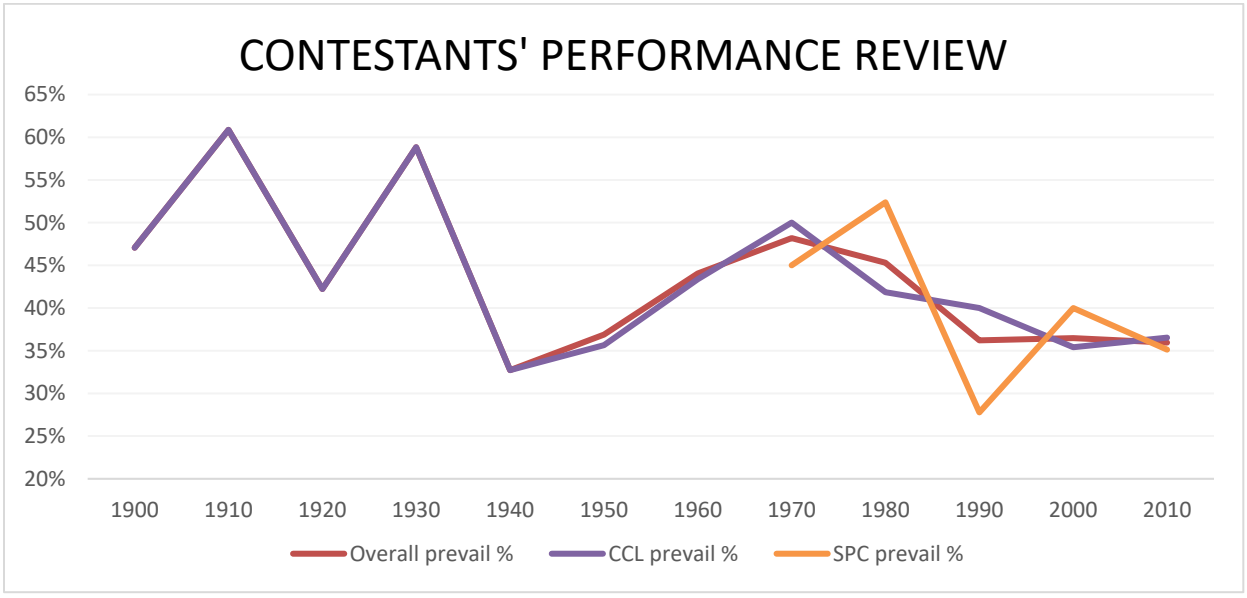

Figure 5. Contestants' Performance Review - all time.

Figure 5 tracks the contestant's success rate by decade. It further breaks down the success rate by trial court. Note that statutory probate courts (courts devoted to and specializing in probate and guardianship matters) did not become widespread until approximately the 1970s.[6] Contestants in the statutory probate courts saw varied success rates but, on average, prevailed only about 40% of the time. Unfortunately for contestants, their success rates have declined over time in both county courts and statutory probate courts.

Does the decline in wins for contestants indicate that society has generally grown distrustful of will contests? After all, Texas has long been careful not to disturb a person's final wishes absent sufficient justification. Consider the following common passage in the opinions:

> Though a testator may be aged, infirm, and sick he has the right to dispose of his property in any manner that he may desire if his mental ability meets the law's tests. It is not for courts, juries, relatives, or friends to say how property should be passed by will, or to rewrite a will for a testator because they do not believe he made a wise or fair distribution of his property.[7]

Perhaps skilled litigators are fewer and further between than the days of old (not because of the prevailing rate with juries, but because of the decline in overall frequency of the jury trial). With the rise of dispositive motions, a contestant's attorney must often overcome motions to dismiss and/or motions for summary judgment before ever seeing a trial. Interestingly, the prevalence of jury trials has seen a declining trend line similar to the contestant's success rate. *See* Figure 12, page 14.

The decline in contestant wins may also be linked to the increased popularity of mediations and the increased mandatory requirement of mediations by most courts. Proponents might now be settling cases in which the contestant produces convincing evidence to support his or her claims. The remaining claims that proceed to trial likely involve solid but disputed evidence. In such situations, the contestant, as the party bearing the burden of proof, is statistically more likely to lose.

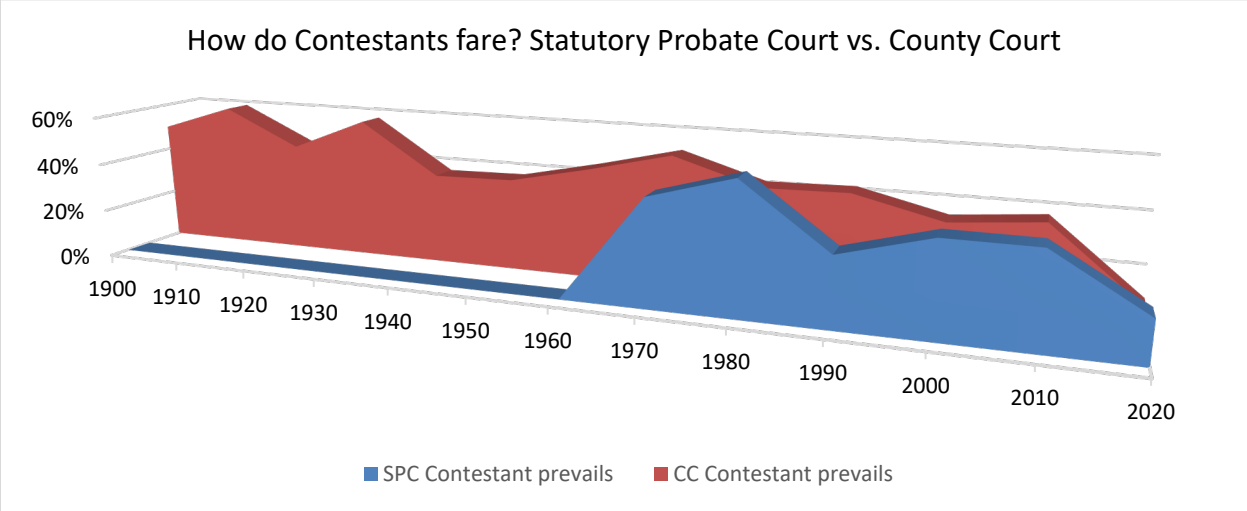

Figure 6. Statutory Probate Court vs. County Court - Judgments for Contestant.

[6] Boone & Wilshusen, 335-36.

[7] *Farmer v. Dodson*, 326 S.W.2d 57, 61 (Tex. App.—Dallas 1959, no writ).

Figure 6 shows that the Texas court systems appear to be healthy – that is, fair and even-handed. In short, there appears to be no inherent bias for or against any party between the statutory probate court or the county courts. Across all time, the dataset revealed that the Proponent prevailed in 60% of will contests and Contestant in 40%.

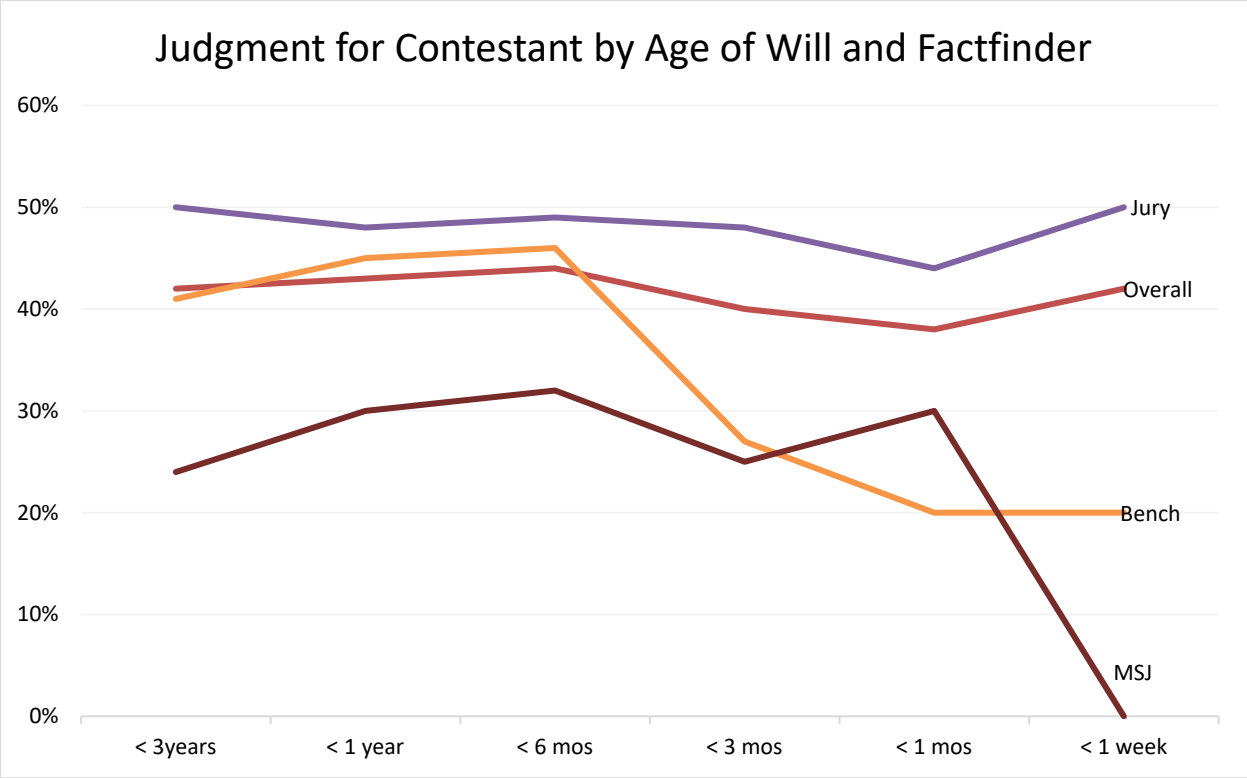

Figure 7. Judgment for Contestant - Age of Will and factfinder.

Will age / Judgment for Contestant	Overall	Jury	Bench	MSJ
< 3 years	42%	50%	41%	24%
< 1 year	43%	48%	45%	30%
< 6 mos	44%	49%	46%	32%
< 3 mos	40%	48%	27%	25%
< 1 mos	38%	44%	20%	30%
< 1 week	42%	50%	20%	0%

Chart 4. Judgment for Contestant statistics vs. age of will - by the numbers.

The appellate courts often identified the amount of time between the date the testator executed his or her will and the date of the testator's death. Statistically speaking, this fact – described in Figure 7 as the "Age of Will" on the X axis – appears to be (and is logically) an important factor for the courts in reaching their decisions regardless of whether the claim was for incapacity, undue influence, a lack of formalities and solemnities, forgery, or fraud. Despite the frequent mention by the appellate courts, the age of the will has not historically affected the overall outcome for contestants. The overall success rate for contestants hovered around 40% regardless of whether the will was executed one week before death or more than three years before death.

The success rate for contestants varies widely depending on the manner of disposition. For example, contestants challenging a will less than one week old won approximately 50% of the time with juries. By contrast, contestants challenging a will less than one week old won only 20% of the time in bench trials and a staggering 0% with summary judgments. *See* Chart 4. Across the board, contestants tended to see considerably more favorable outcomes with juries than with the alternatives.

Presumably, many of the cases that made it to a jury trial had probably already overcome a dispositive motion. Thus, the cases that made it to trial were likely stronger cases for the contestants than those that were resolved adversely to the contestants at an earlier phase. Still, the same can be said for bench trials and, overall, contestants have consistently fared better with jury trials than with bench trials.

Should this information signal to contestants and their attorneys to push their cases to jury trials? The research suggests the answer is probably yes. Conversely, proponents and their attorneys should consider these statistics when negotiating on the doorstep of a jury trial.

An interesting phenomenon is the correlation between the age of the will and contestant's success rate in bench trials and summary judgment proceedings. The data shows that contestants won less often with a will signed within six months of death than a will signed more than six months before death. A recurring fact pattern in the cases involved a testator stricken with a terminal illness who passed away not long after executing his or her will. Perhaps judges are more sympathetic to a testator trying to plan for his or her imminent demise and more understanding of loved ones pushing for the execution of a will in such situations. Anecdotally, in the case of *Ely v. Reiche,* the Sixth Court of Appeals affirmed a judgment notwithstanding the verdict in favor of the proponent where the testator executed her will within one month of death following a terminal cancer diagnosis.[8]

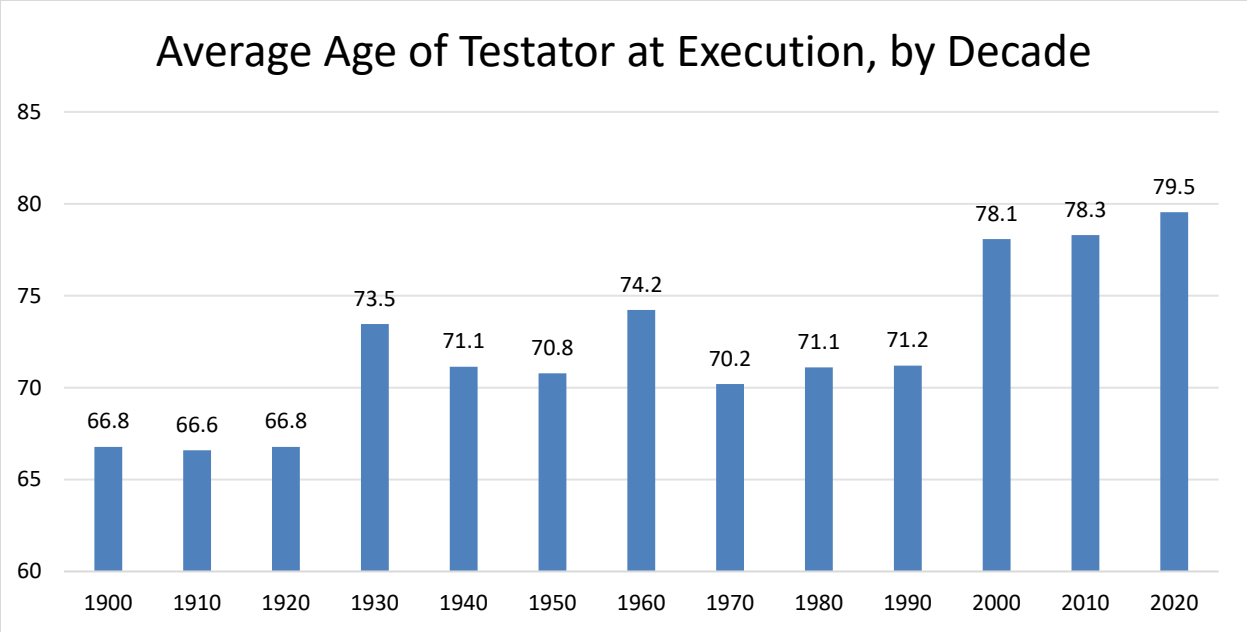

Figure 8. Testator's Age at Will Execution.

[8] *Ely v. Reiche*, 357 S.W.2d 461, 462 (Tex. App.—Texarkana 1962, writ ref'd n.r.e.).

Figure 8 is, at least in part, a reflection of the increase in life expectancy from the early twentieth century. The life expectancy in Texas in 1940 was only 62.8 years compared to 78.8 years in 2019.[9]

Notably, since the 1930s, wills executed by septuagenarians have seen the most challenges on appeal.

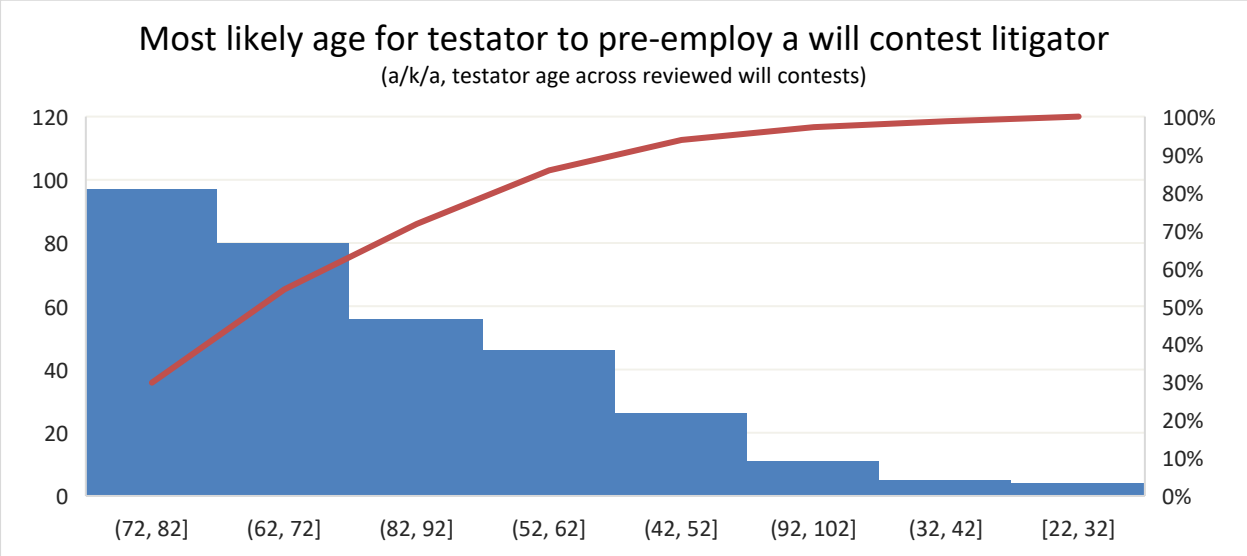

Figure 9. Testator Age - Histogram of Prevalence, 10 yr. bin.

The above facetiously titled (or perhaps not) Figure 9 shows the age distribution of the testator for will contests filed, without regard to outcome. Wills executed by testators in the 73 to 82 age range resulted in the most will contests. Testators in that age range could be the most susceptible to cognitive decline and undue influence. Additionally, or alternatively, testators in that age range may be most likely to execute a will. In other words, if that is the age range when most people engage in estate planning, then that age range would unsurprisingly see the most will contests.

According to the World Health Organization, age is the "strongest known risk factor for dementia," and people over the age of 65 are most at risk.[10] Estate planners would be prudent, then, to advise clients that based on the statistics included in this research, the earlier a will is executed, the less likely it is to be challenged. This advice is often axiomatic, but with our data is now statistically demonstrable.

[9] Woolf S.H., and H. Schoomaker. "Life Expectancy." JAMA, 26 Nov. 2019, https://doi.org/10.1001/jama.2019.16932.

[10] https://www.who.int/news-room/fact-sheets/detail/dementia.

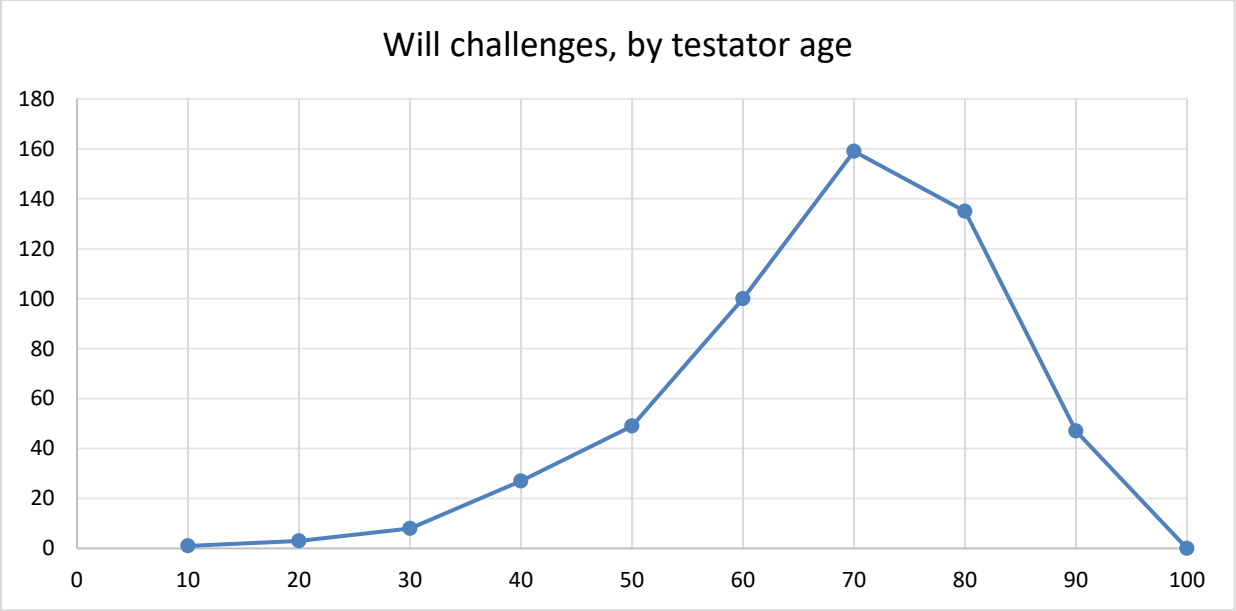

Figure 10. Will Contests by Testator age, simple.

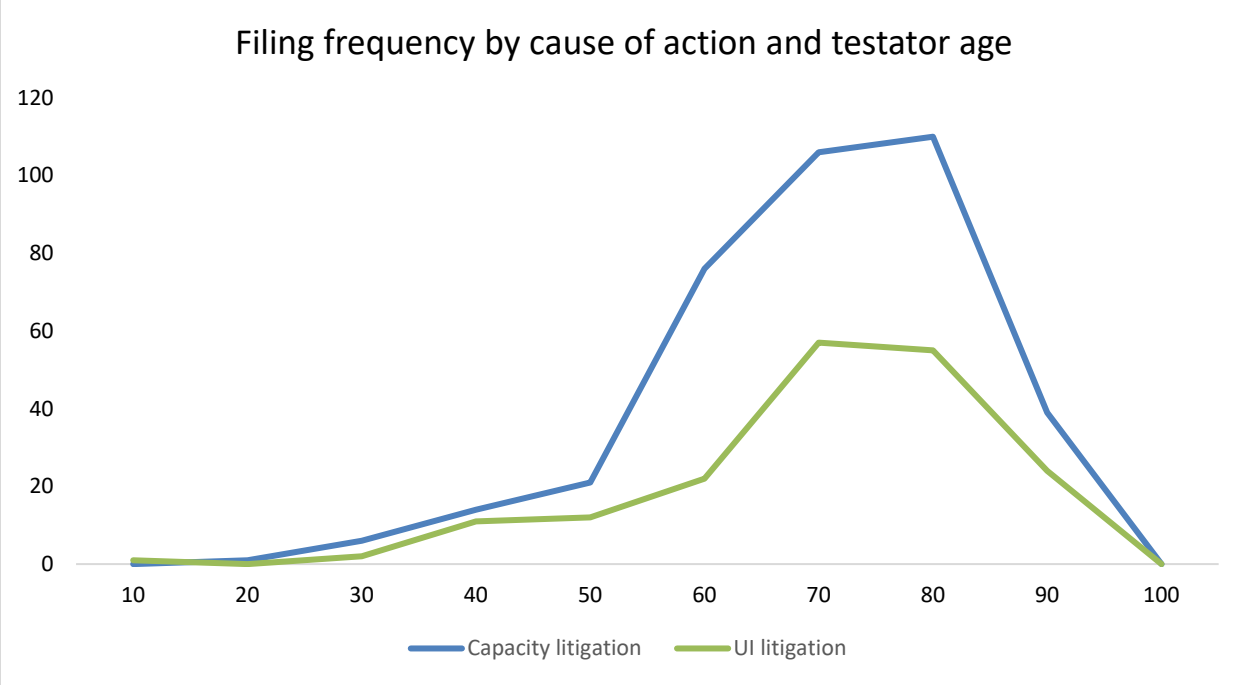

Figure 11. Filing frequency by cause of action.

Figure 11 breaks down the filing frequency between challenges based on testamentary capacity and undue influence.

2. Procedure – Most and Least Effective.

Our research tracked considerable data from trial court outcomes. Our curiosity led us to track not only the trial court victor, but the manner in which that victory was achieved. The figures in this section depict some not so surprising changes in how trial court cases are resolved. However, we also see some beneficial paths for clients and the justice system.

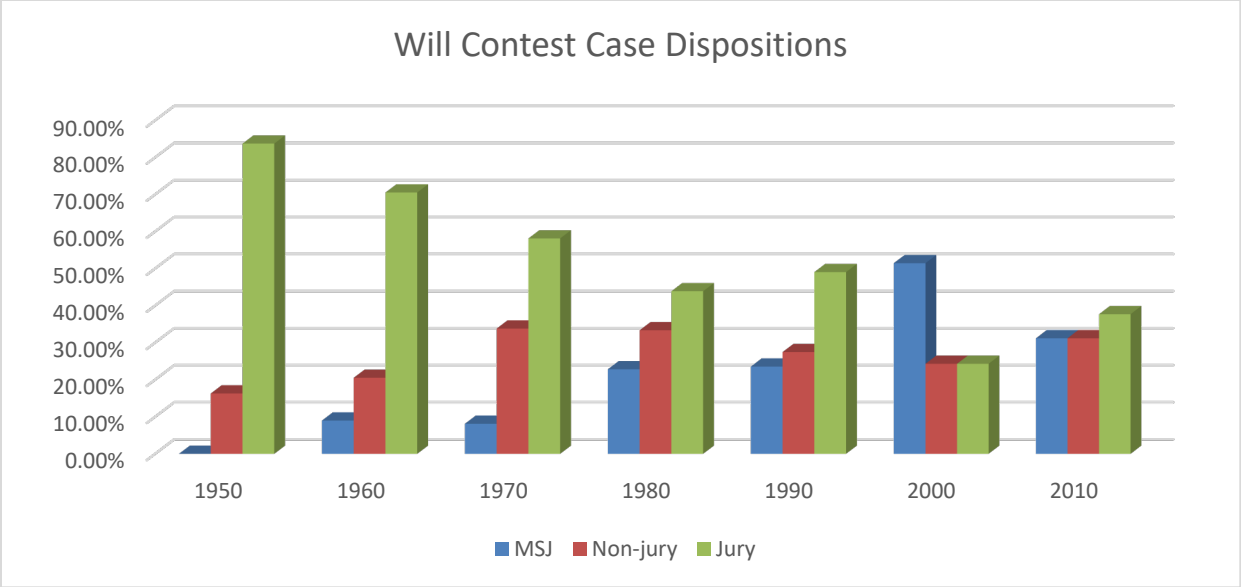

Figure 12. Will Contests - view by manner of trial court disposition.

The above Figure 12 represents the breakdown of will contest dispositions in the trial court. The manners of disposition examined in this figure are limited to the most frequent, including motions for summary judgment, non-jury trials, and jury trials. The number of jury trials has always exceeded or matched the number of bench trials, but jury trials are no longer the predominant manner of resolution compared to combined bench trial and summary judgment figures. For example, 75% of will contests in the 2000s were resolved through either a bench trial or summary judgment and 62% of will contests in the 2010s were resolved through either a bench trial or summary judgment.

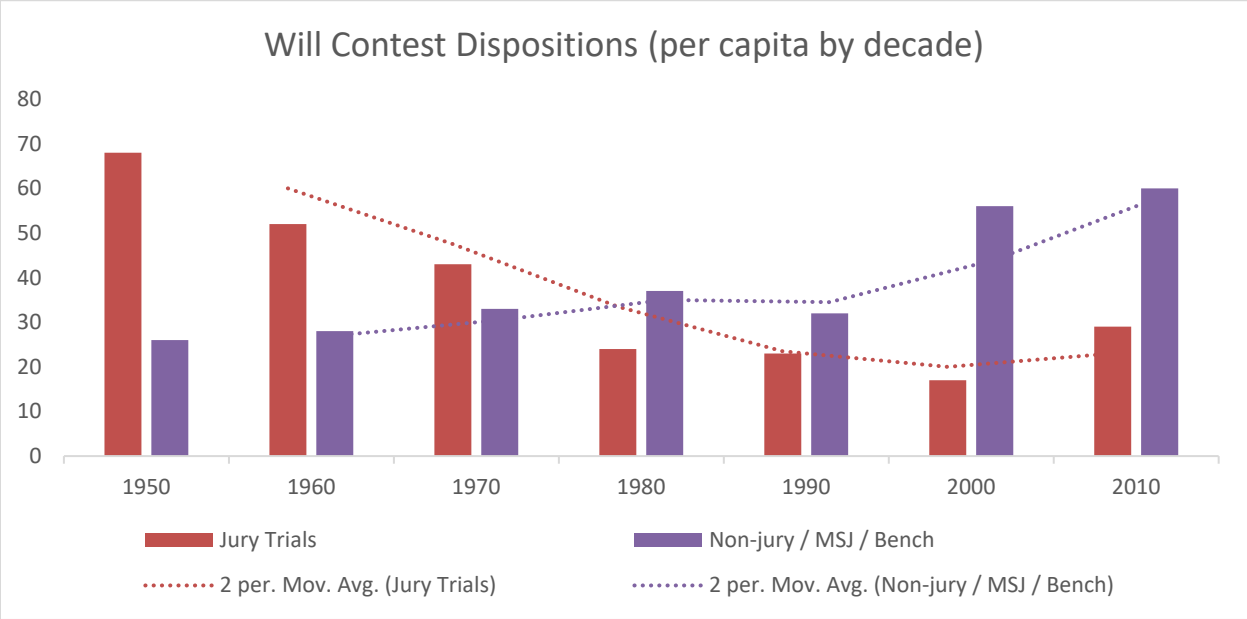

Figure 13. Contest Disposition Chart per capita by decade.

Figure 13 represents the manner of disposition of will contests that reached the appellate courts, by decade.

Possible explanations for the decrease in jury trials in comparison to other manners of disposition include the increasing cost of litigation and the rise of dispositive motions and mediations.[11]

If the trend lines continue to follow a similar trajectory, we will see a widening gap between the number of cases decided by jury trial versus other manners of disposition. The declining jury trial may be indicative of a leaner system that saves the courts, lawyers, clients, and jurors time and resources. On the other hand, it may be indicative of a system bogged down with pre-trial procedural hurdles standing in the way of a litigant in need of justice.

And in any event, the trend appears to be concerning news for Contestants.

3. Who is seeking attorney services, and is that population changing?

D. Appellate Court breakdown.

Our research was derived from appellate opinions, and so naturally contains a wealth of appellate statistics and data. In the following section, we examine a few highlights.

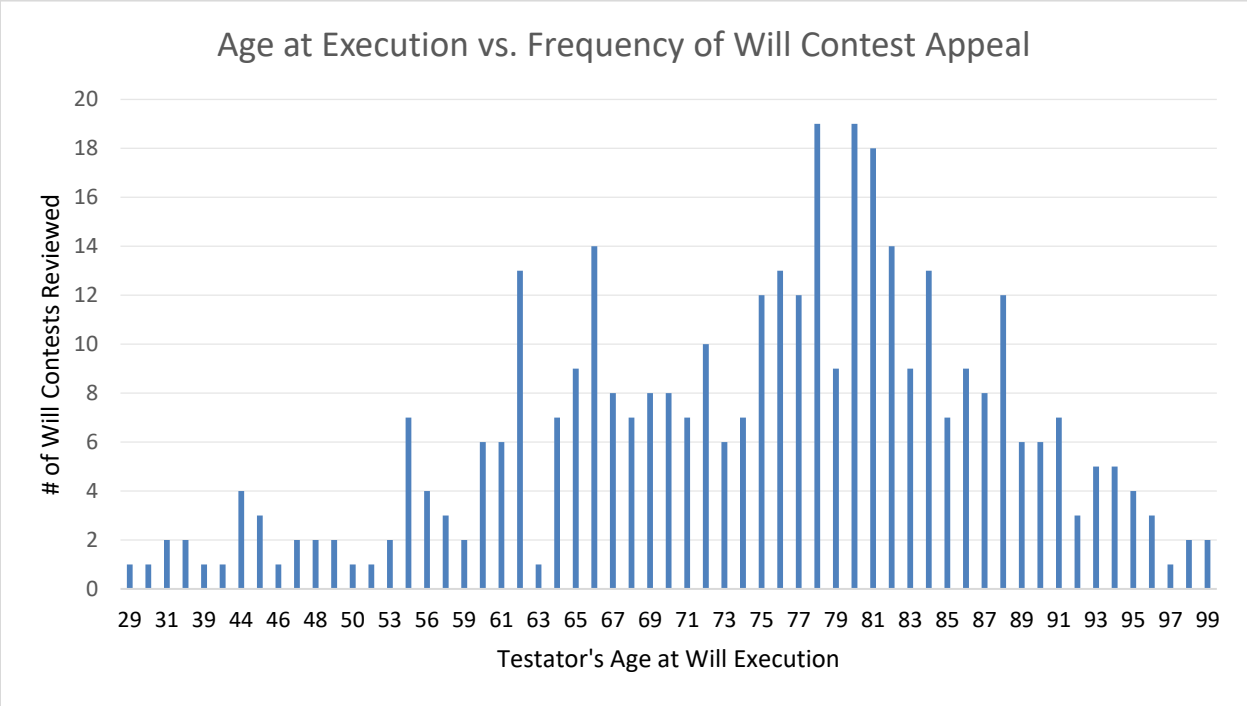

Figure 14. Will Contest appeals - testator age at execution vs. frequency.

Figure 14 breaks down the frequency of will contest appeals by age of the testator at the time of execution. It reinforces that wills executed before the seventy-to-eighty age range may be less likely to face a challenge.

[11] Tracy Walters McCormack & Christopher Bodnar, "Honesty Is the Best Policy It's Time to Disclose Lack of Jury Trial Experience," 78 Tex. B.J. 210 (2015).

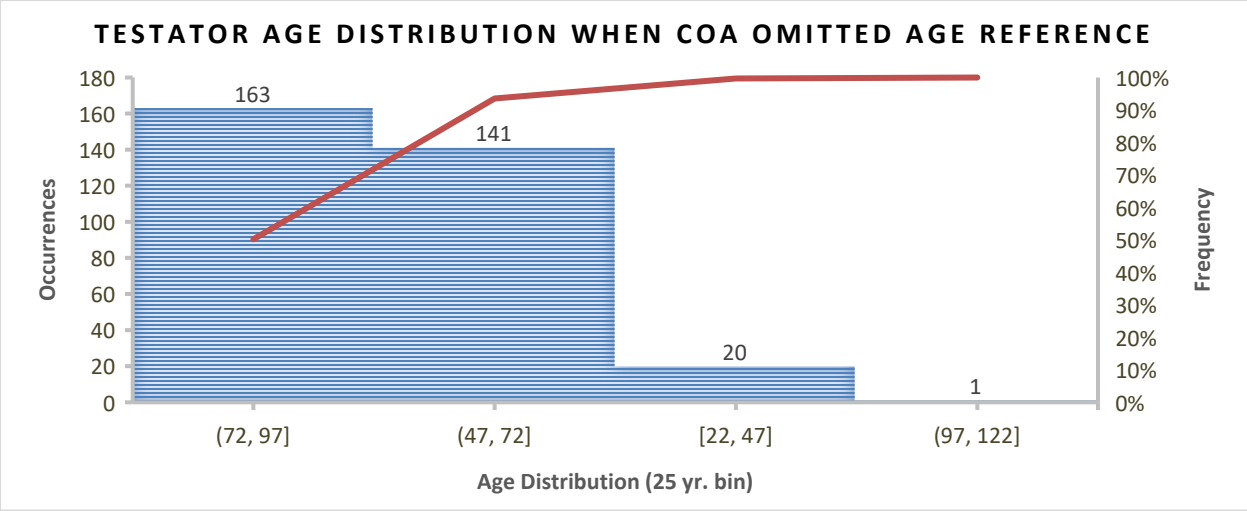

Figure 15. Testator Age Distribution - age reference absent from opinion.

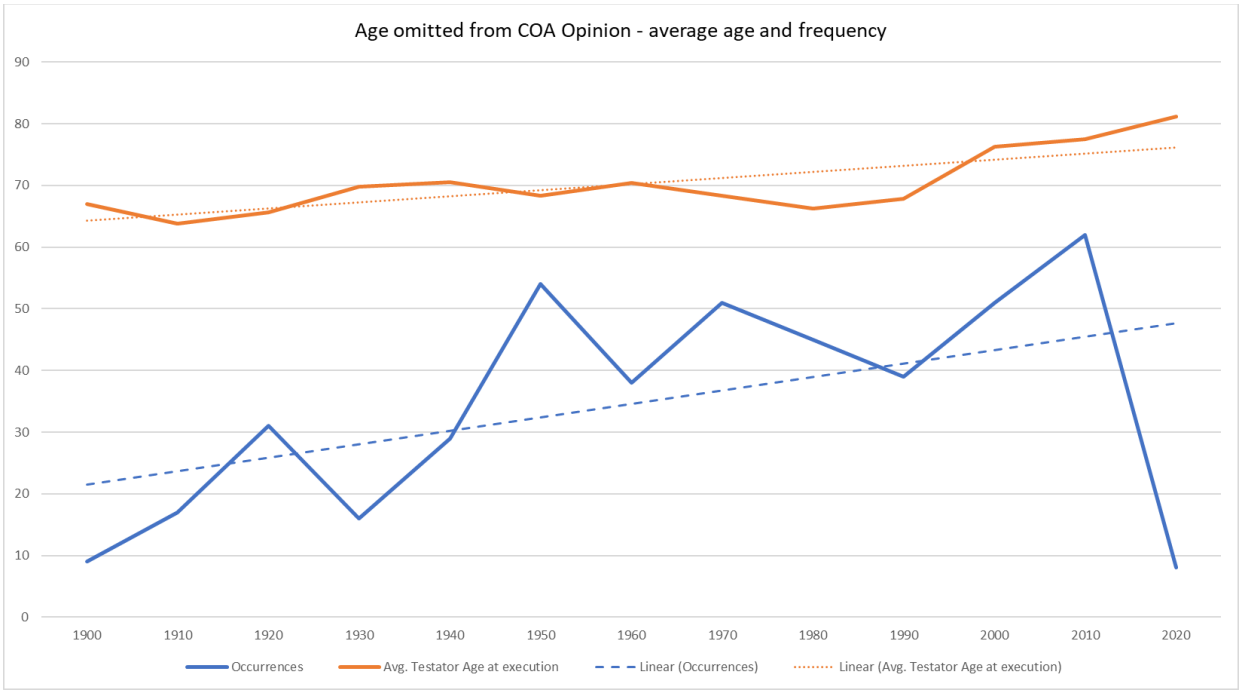

Figure 16. Age omitted from appellate opinion - age and frequency.

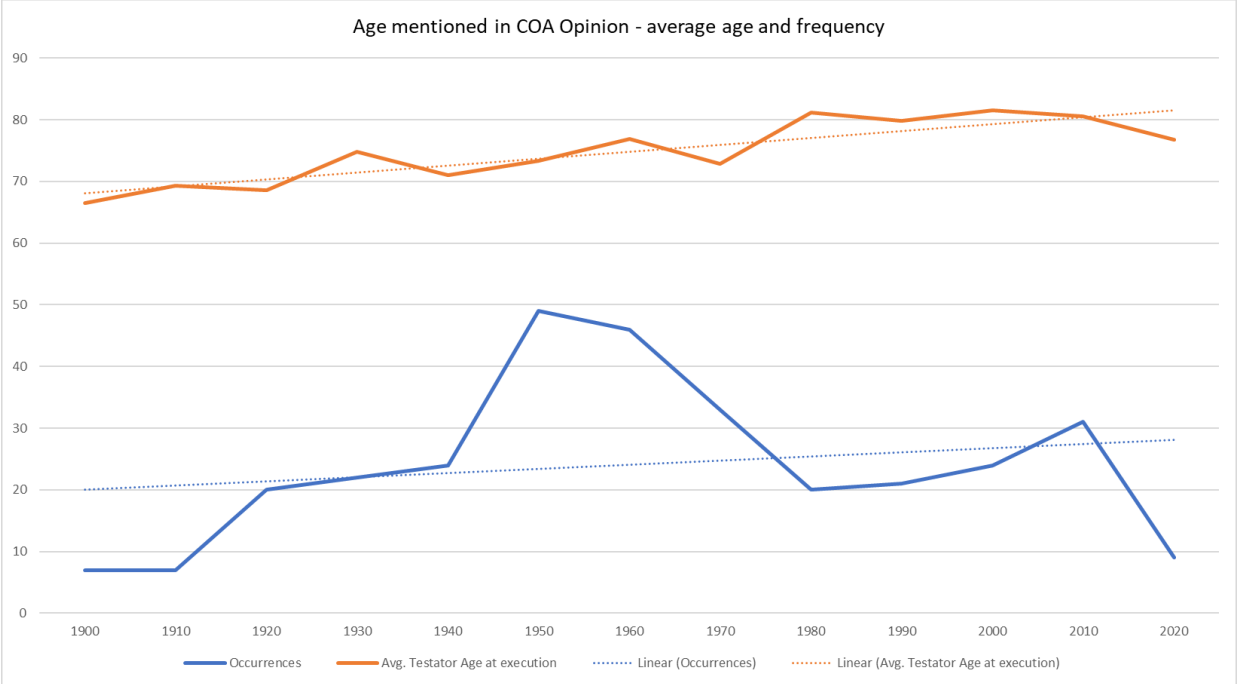

Figure 17. Age included in appellate opinion - age and frequency.

Figure 15 is a histogram. The X axis contains "bins", here set for 25 years each. A histogram then can rank those bins by frequency. Figure 15 considers 25 year testator age brackets by frequency of appeal. By way of further education, in the X axis, numbers that are preceded or followed by parenthesis are excluded from the bin, while those adjacent to a bracket are included. For example, the label "[10, 20]" denotes that both 10 and 20 are within the bin range. The label "(20, 40]" shows that 20 is not within the bin range but 40 is.

According to the cases we reviewed, in approximately 58% of will contest cases on appeal, the appellate courts made no mention of the testator's age at the time of execution. For cases in which the courts omitted the testator's age, the authors determined testator ages by utilizing birth dates and death dates from Ancestry.com when available. Figure 15 shows the testator age distribution when the courts of appeals omitted the testator's age. The most often omitted age range was 73 to 97.

One possible theory for why courts exclude testator ages so often is to steer clear of any bright line tests (such as age). For example, the Seventh Court of Appeals has stated the following:

> The testimony in this case shows that the testator was uneducated, old, sick, had a bad memory, possibly eccentric and he was partially blind because of cataracts on his eyes, but the test is not whether he was educated or not, sick or well, had a strong or weak mind, but the question to be determined is whether or not he had testamentary capacity under the rules of law announced by our courts in such cases.[12]

And the San Antonio Court of Appeals also found that "[t]he fact that a testator is of an advanced age alone is not sufficient to deny probate of a will."[13]

[12] *Jowers v. Smith*, 237 S.W.2d 805, 811 (Tex. App.—Amarillo 1950, no writ).

[13] *Burk v. Mata*, 529 S.W.2d 591, 594 (Tex. App.—San Antonio 1975, writ ref'd n.r.e.).

Courts have also refused to allow age bias on the issue of age alone. For example, in *Salinas v. Garcia*, the Court of Appeals wrote:

> There can be no age limit prescribed at which it can be decreed that 'a sound and disposing memory' has been lost[,] because the mind of a man of 80 or 90, or even 100 years of age, may be bright, active, and brilliant, while the man of 50 or 60 may have entered the pitiable state of garrulous senility or brutal imbecility.[14]

Although the elderly should not be presumed incapacitated, courts can and should consider the testator's age when evaluating cases of incapacity and undue influence. To ignore the testator's age is to ignore clear medical findings that age is closely correlated with cognitive decline. For instance, studies have shown that age is the greatest risk factor for cognitive impairment[15], and that approximately two out of three Americans experience some level of cognitive impairment at an average age of 70 years.[16] The following is a sound approach to the use of age as evidence in will contest cases:

> While old age itself is not sufficient proof of mental incapacity to make a will, or even to raise an issue, yet old age is a fact which may be proved; and old age may be shown by evidence to have produced, or contributed to cause, an intellectual decline.[17]

Figures 16 and 17 further depict the trends with respect to appellate opinions and a direct examination of testator age.

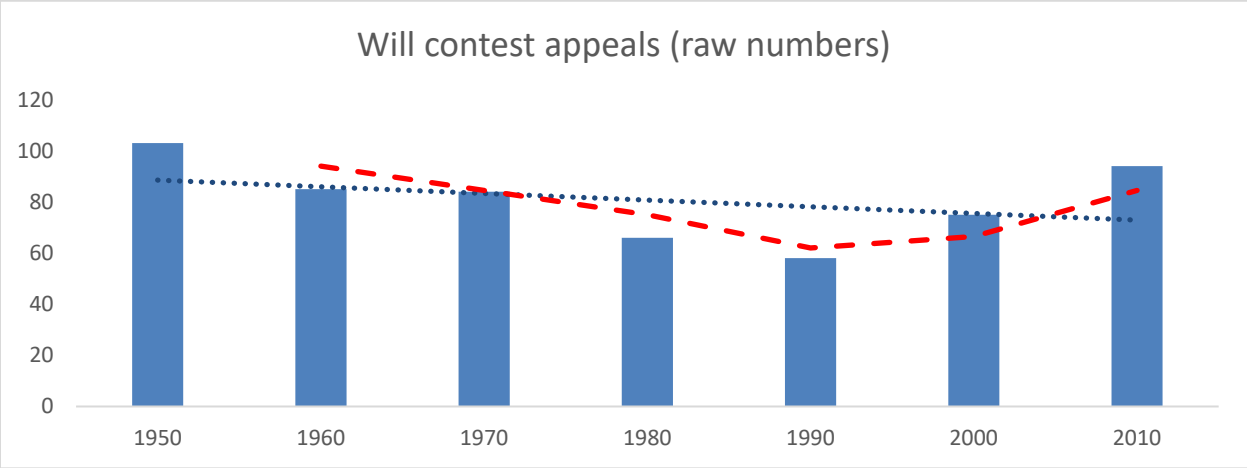

Figure 18. By the numbers: Will Contest Appeals with linear / 2 mo. moving avg. trendlines.

[14] *Salinas v. Garcia*, 135 S.W. 588, 590 (Tex. Civ. App. 1911, writ ref'd).

[15] Herbert LE, Scherr PA, Bienias JL, Bennett DA, Evans DA. "Alzheimer's disease in the U.S. population: Prevalence estimates using the 2000 census." Archives of Neurology 2003; 60:1119–1122

[16] Hale, Jo Mhairi et al. "Cognitive impairment in the U.S.: Lifetime risk, age at onset, and years impaired." SSM - population health vol. 11 100577. 31 Mar. 2020, doi:10.1016/j.ssmph.2020.100577.

[17] *Walston v. Mabry*, 225 S.W.2d 1014, 1016 (Tex. App.—Texarkana 1949, no writ).

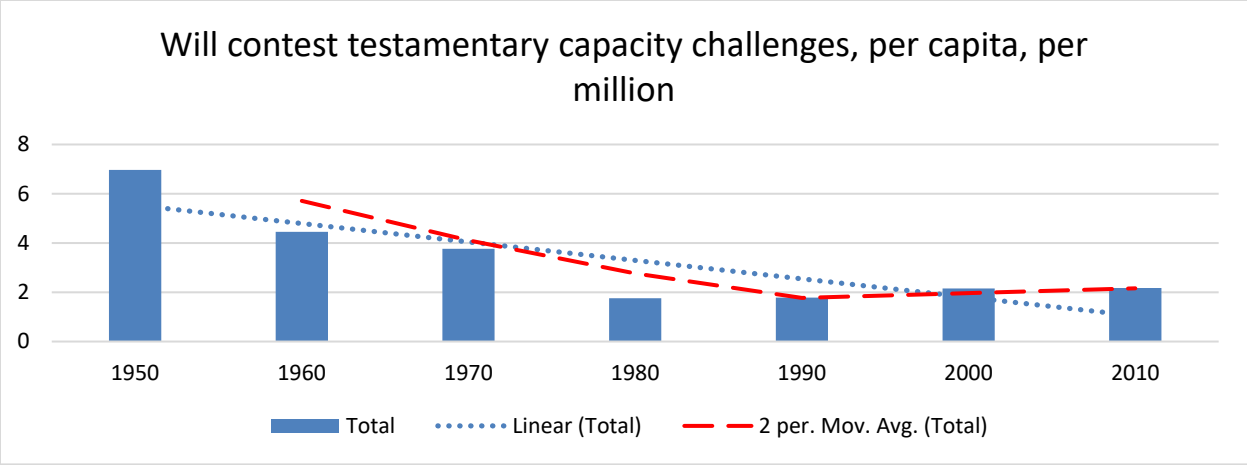

Figure 19. Per capita: Will Contest Appeals with linear / 2 period moving avg. trendlines.

By the raw numbers, will contests are "gently" increasing in frequency since 2010, although the linear trendline continues to show a mathematical decline. Taking the COVID-19 pandemic into account and prorating for the 2020 decade (not depicted here), there would seem to be yet another downturn if looking at the 2 period moving average. In contrast, the data *without* the first three years of 2020 portends an increase. We suspect that, once "normal" litigation trends return (and more importantly, once Texas' extreme population growth factors itself into the probate statistics through natural mortality), the trendline that began in 1990 will resume, if not sharply increase (again, consistent with the segment of age groups that drove the population growth over the last 20 years reaching mortality).

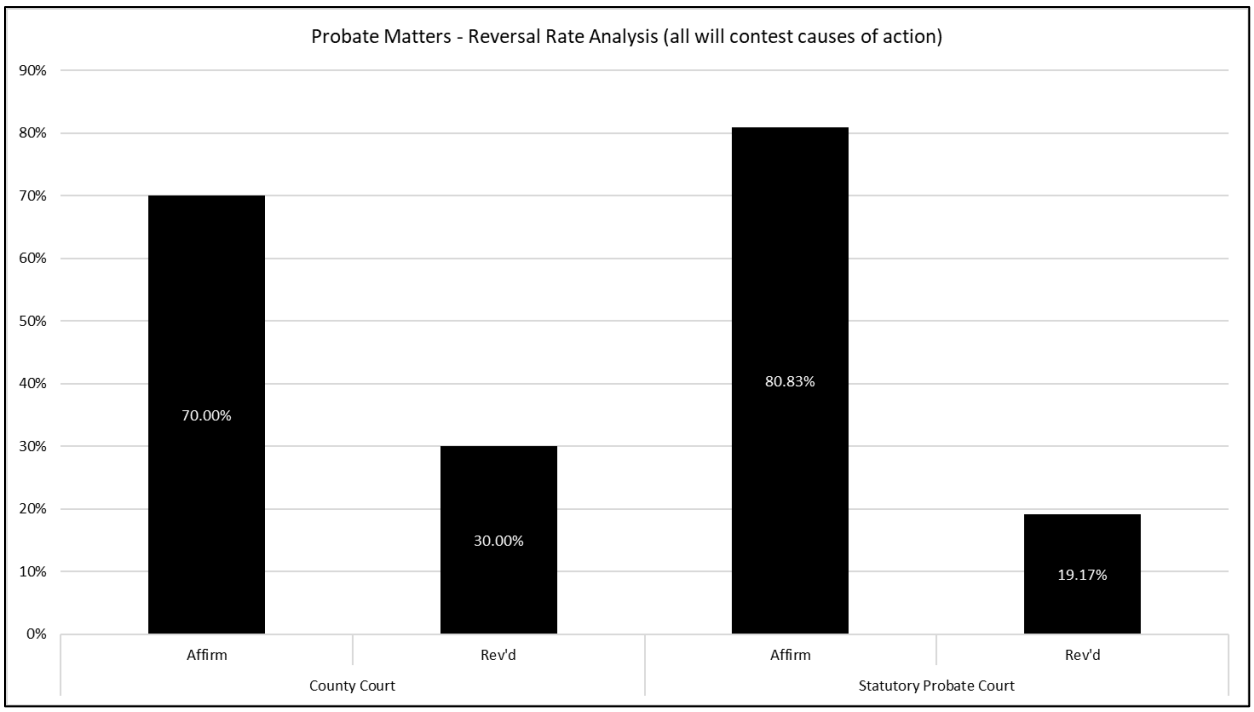

Figure 20. The Basic reversal rate analysis, compare county court and statutory probate court (all causes of action).

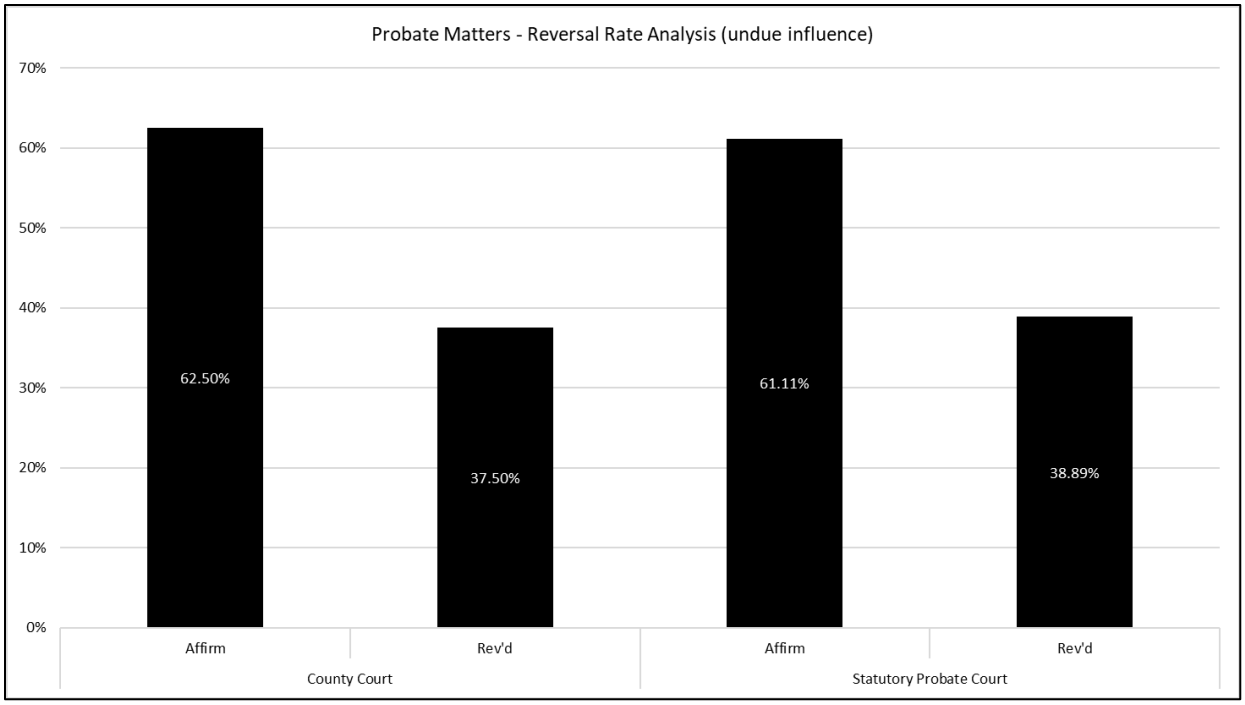

Figure 21. The Basic reversal rate analysis, compare county court and statutory probate court (undue influence).

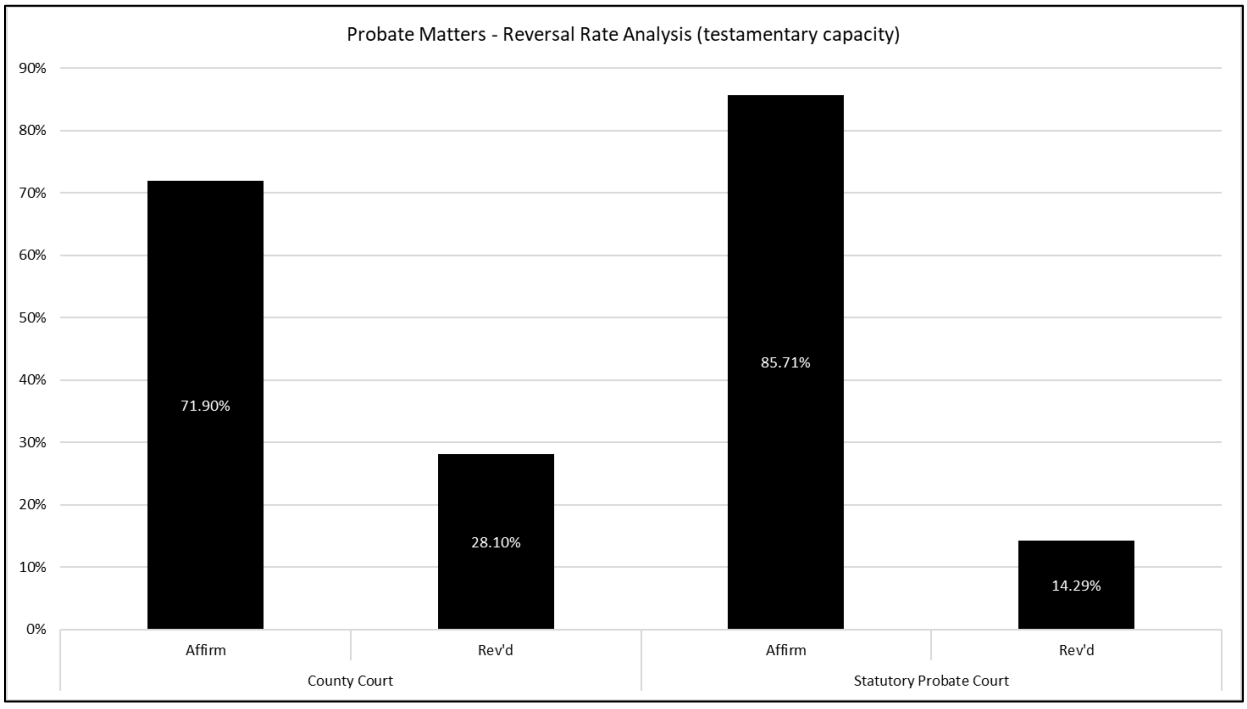

Figure 22. The Basic reversal rate analysis, compare county court and statutory probate court (testamentary capacity).

The three charts above represent the reversal rates of will contest appeals. The first chart shows that appeals from county courts are more likely to be reversed than appeals from statutory probate courts. This comparison reveals that the specialized nature of statutory probate courts might aid the courts in reaching the right decision. County court at law judges often preside over a wide range of disputes including civil, probate, family, and criminal

matters. A discussion about providing more training and support to county court judges in certain areas of will contests may be warranted. By way of comparison, time will tell if the reversal rates of the newly created business courts are similarly lower compared to the district courts.

The second and third charts show that undue influence cases are significantly more likely to be reversed than capacity cases in both the county courts and statutory probate courts. The reason is likely due to the different types of evidence associated with each claim. Undue influence claims typically require more circumstantial evidence than capacity cases. As the Texas Supreme Court long ago recognized, "[i]t is rarely possible to prove undue influence by what is generally known as direct testimony …. Undue influence is usually a subtle thing, and by its very nature it usually involves an extended course of dealings and circumstances."[18]

The circumstantial – i.e., fact intensive – nature of undue claims logically beget a highly complex fact analysis for the courts, and as well for a data project. Nonetheless, we find significant insight in the historical assessment of what has and has not worked in the trial courts.

The third chart may give pause to any party considering an appeal of a capacity case. The chances of victory are less than 30% if appealing from the county court at law and less than 15% when appealing from a statutory probate court. No appeal is impossible, but historically, a sufficiency of the evidence challenge in an undue influence case is a tough hill to climb.

E. Red Flags to the Estate Planner.

1. Cognitive Ailments Analysis.

Cognitive Issue	Frequency of Occurrence
Unspecified Dementia	12.35%
N/A	10.88%
Memory - short-term	9.54%
Confusion	9.05%
Pharmacological induced	5.01%
Communication	4.77%
Insane Delusion	4.28%
Vascular dementia	3.79%
Depression	3.67%
Progressive illness	3.06%
Insanity	2.93%
Memory - long-term	2.57%
Senile Dementia	2.44%
Recognizing familiar objects and persons	2.32%
Alzheimer's	2.20%
Hallucinations	2.08%
Psychiatric treatment / disorder	1.96%
Alcohol induced	1.71%
Paranoia	1.59%

[18] *Long v. Long,* 133 Tex. 96, 99, 125 S.W.2d 1034, 1036 (1939).

Agitation	1.59%
Executive functioning	1.34%
Understanding	1.34%
Logical reasoning	1.34%
Memory - immediate recall	1.34%
Suicidal	1.22%
Permanent illness	1.10%
Problem solving	0.73%
Grasping abstract aspects of situation	0.73%
Temporary illness	0.61%
Non-dementia (bipolar or other psychological)	0.49%
Breaking down complex tasks to simple steps	0.49%
Organic Brain Syndrome	0.37%
Schizophrenia	0.37%
Parkinson's Dementia	0.37%
Creutzfeldt-Jakob Disease	0.24%
Mixed Dementia	0.12%

Chart 5. Will Contest Cognitive Issues sorted by Frequency of Occurrence in Will Contest opinions.

Chart 5 identifies the frequency with which various cognitive issues were referenced in will contest appellate opinions. The chart accounts for cases involving claims of incapacity and / or undue influence. The most cited cognitive impairment was unspecified dementia. The Alzheimer's Association currently identifies eleven types of dementia which all affect the brain in different and often overlapping ways.[19] For example, Dementia with Lewy Bodies can cause spontaneous changes in attention and alertness, recurrent visual hallucinations, and REM sleep behavior disorder whereas frontotemporal dementia can cause deterioration in behavior and personality and difficulty with producing or comprehending language.

In light of the different types of dementia and varied effects on the testator, perhaps it is time for attorneys to take a medical approach to the disease as opposed to the monolithic approach historically taken. The zealous attorney should take the time to understand the specific disease that afflicted the testator and the ways in which it manifested itself. By knowing the symptoms of the different dementias, the skilled attorney will know how to uncover relevant evidence. For instance, a discerning practitioner will know to obtain medical records from the treating cardiologist because the records could contain testing for APOE4 (a gene linked to increased risk of Alzheimer's and carried by 15-25% of the population).[20]

"N/A" – in other words, a circumstance wherein the opinion did not reference any

[19] https://www.alz.org/alzheimers-dementia/what-is-dementia/types-of-dementia.

[20] "Alzheimer's Disease Genetics Fact Sheet." National Institute on Aging, U.S. Department of Health and Human Services, www.nia.nih.gov/health/genetics-and-family-history/alzheimers-disease-genetics-fact-sheet#:~:text=APOE%20%CE%B54%20increases%20risk%20for,to%205%25%20carry%20two%20copies. Accessed 15 Jan. 2024.

specific cognitive ailment –occurred in just over 10% of the opinions we reviewed, which may be important to keep in mind. When there is a diminished capacity challenge to a will, the absence of clear and specific discussion identifying the ailment could be problematic depending on the nature of the appeal.

The prevalence of memory loss and confusion in appellate opinions versus more technical diagnoses might indicate that contestants are not taking a sufficiently scientific approach to will contest cases. The prevalence could also be explained if memory loss and confusion are symptoms of a wide range of other diagnoses like Parkinson's Disease and strokes.

Frequency of Cognitive Deficit - Capacity Involved Contest	
Deficit	**Percentage**
Unspecified Dementia	12.89%
Memory - short-term	9.77%
Confusion	8.85%
N/A	9.90%
Communication	5.08%
Pharmacological induced	5.08%
Insane Delusion	4.56%
Vascular dementia	4.04%
Depression	3.13%
Insanity	3.13%
Progressive illness	2.60%
Senile Dementia	2.60%
Memory - long-term	2.47%
Recognizing familiar objects and persons	2.47%
Alzheimer's	2.21%
Hallucinations	2.08%
Psychiatric treatment / disorder	2.08%
Alcohol induced	1.56%
Paranoia	1.56%
Agitation	1.43%
Logical reasoning	1.43%
Understanding	1.43%
Executive functioning	1.30%
Memory - immediate recall	1.30%
Permanent illness	1.17%
Suicidal	1.17%
Grasping abstract aspects of situation	0.78%
Problem solving	0.78%
Temporary illness	0.65%
Breaking down complex tasks to simple steps	0.52%
Non-dementia (bipolar or other psychological)	0.52%
Parkinson's Dementia	0.39%
Schizophrenia	0.39%

Creutzfeldt-Jakob Disease	0.26%
Organic Brain Syndrome	0.26%
Mixed Dementia	0.13%

Chart 6. Will Contest Cognitive Issues sorted by Frequency of Occurrence in Testamentary Capacity related opinions.

Chart 6 is similar to the previous Chart 5 in that both break down the frequency with which a cognitive deficit was mentioned in will contest appeals. Chart 6 differs, however, in that it only looks at cases involving claims of testamentary incapacity. The similarity between the two charts particularly with regard to the top ten cognitive deficits suggests that the same cognitive deficits are alleged to support both incapacity and undue influence claims.

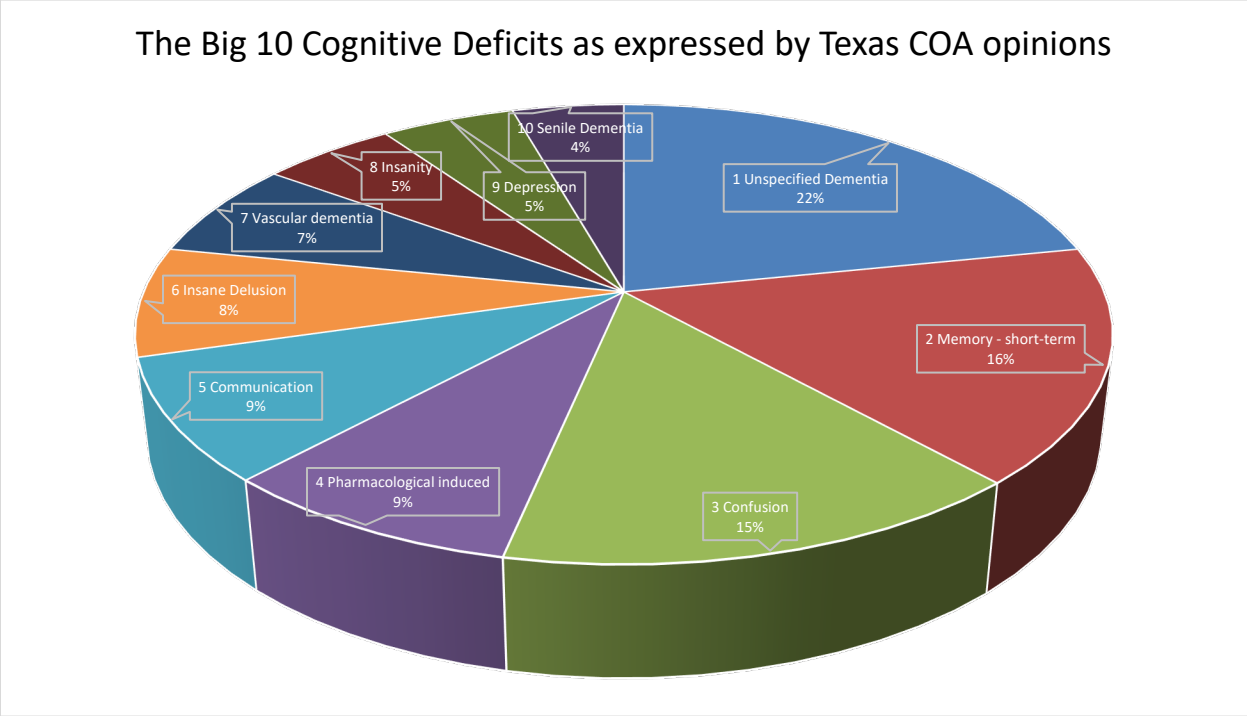

Figure 23. Top 10 Cognitive Deficits expressed by appellate opinions.

Figure 23 shows the top 10 cognitive deficits in order of appearance in appellate opinions. The import of this pie chart is self-explanatory, but notable that depression has made an appearance at number 9. We did not see any particular challenge to a will based solely on depression as the basis for a challenge to testamentary capacity. However, the fact that opinions are mentioning depression is noteworthy.

Frequency Rank	Cognitive Issue	Frequency of Occurrence	Cases Presented to Jury	Jury verdict for Contestant	MSJ for Proponent
1	Unspecified Dementia	12.35%	4.38%		5.68%
2	Not available in opinion (N/A)	10.88%	6.86%	0.30%	22.73%
3	Memory - short-term	9.54%	10.67%	11.25%	7.95%
4	Confusion	9.05%	8.38%	9.12%	11.36%
5	Pharmacological induced	5.01%	4.76%	1.22%	9.09%
6	Communication	4.77%	5.52%	6.38%	3.41%
7	Insane Delusion	4.28%	4.38%	4.26%	4.55%
8	Vascular dementia	3.79%			1.14%
9	Depression	3.67%	2.86%	3.04%	5.68%
10	Progressive illness	3.06%	3.24%	2.13%	
11	Insanity	2.93%	3.62%	3.34%	1.14%
12	Memory - long-term	2.57%	1.52%	1.82%	2.27%
13	Senile Dementia	2.44%	0.95%	1.22%	
14	Recognizing familiar objects and persons	2.32%	2.10%	2.43%	1.14%
15	Alzheimer's	2.20%	0.57%	0.61%	7.95%
16	Hallucinations	2.08%	1.90%	1.82%	
17	Psychiatric treatment / disorder	1.96%	2.10%	2.13%	1.14%
18	Alcohol induced	1.71%	1.90%	1.52%	3.41%
20	Agitation	1.59%	2.10%	2.13%	2.27%
19	Paranoia	1.59%	1.52%	0.30%	2.27%
22	Difficult Understanding	1.34%	15.43%	5.47%	
24	Memory - immediate recall	1.34%	1.90%	2.74%	
23	Logical reasoning	1.34%	1.71%	1.52%	
21	Executive functioning	1.34%	1.14%	1.82%	2.27%
25	Suicidal	1.22%	0.76%	1.82%	2.27%
26	Permanent illness	1.10%	1.71%	5.47%	
28	Grasping abstract aspects of situation	0.73%	0.95%	1.52%	
27	Problem solving	0.73%	0.76%	4.26%	1.14%
29	Temporary illness	0.61%	1.71%	11.55%	
30	Non-dementia (bipolar or other psychological)	0.49%	0.57%	0.30%	
31	Breaking down complex tasks to simple steps	0.49%	0.19%	0.30%	1.14%
33	Schizophrenia	0.37%	2.67%	0.61%	
32	Organic Brain Syndrome	0.37%	0.38%	1.52%	
34	Parkinson's Dementia	0.37%	0.19%	2.43%	
35	Creutzfeldt-Jakob Disease	0.24%	0.38%	0.30%	
36	Mixed Dementia	0.12%	0.19%	3.34%	

Chart 7. Cognitive Issues - sorted by overall frequency in a will contest.

Frequency Rank	Cognitive Issue	Frequency of Occurrence	Cases Presented to Jury	Jury verdict for Contestant	MSJ for Proponent
22	Difficult Understanding	1.34%	15.43%	5.47%	
3	Memory - short-term	9.54%	10.67%	11.25%	7.95%
4	Confusion	9.05%	8.38%	9.12%	11.36%
2	Not available in opinion (N/A)	10.88%	6.86%	0.30%	22.73%
6	Communication	4.77%	5.52%	6.38%	3.41%
5	Pharmacological induced	5.01%	4.76%	1.22%	9.09%
1	Unspecified Dementia	12.35%	4.38%		5.68%
7	Insane Delusion	4.28%	4.38%	4.26%	4.55%
11	Insanity	2.93%	3.62%	3.34%	1.14%
10	Progressive illness	3.06%	3.24%	2.13%	
9	Depression	3.67%	2.86%	3.04%	5.68%
33	Schizophrenia	0.37%	2.67%	0.61%	
14	Recognizing familiar objects and persons	2.32%	2.10%	2.43%	1.14%
17	Psychiatric treatment / disorder	1.96%	2.10%	2.13%	1.14%
20	Agitation	1.59%	2.10%	2.13%	2.27%
16	Hallucinations	2.08%	1.90%	1.82%	
18	Alcohol induced	1.71%	1.90%	1.52%	3.41%
24	Memory - immediate recall	1.34%	1.90%	2.74%	
23	Logical reasoning	1.34%	1.71%	1.52%	
26	Permanent illness	1.10%	1.71%	5.47%	
29	Temporary illness	0.61%	1.71%	11.55%	
12	Memory - long-term	2.57%	1.52%	1.82%	2.27%
19	Paranoia	1.59%	1.52%	0.30%	2.27%
21	Executive functioning	1.34%	1.14%	1.82%	2.27%
13	Senile Dementia	2.44%	0.95%	1.22%	
28	Grasping abstract aspects of situation	0.73%	0.95%	1.52%	
25	Suicidal	1.22%	0.76%	1.82%	2.27%
27	Problem solving	0.73%	0.76%	4.26%	1.14%
15	Alzheimer's	2.20%	0.57%	0.61%	7.95%
30	Non-dementia (bipolar or other psychological)	0.49%	0.57%	0.30%	
32	Organic Brain Syndrome	0.37%	0.38%	1.52%	
35	Creutzfeldt-Jakob Disease	0.24%	0.38%	0.30%	
31	Breaking down complex tasks to simple steps	0.49%	0.19%	0.30%	1.14%
34	Parkinson's Dementia	0.37%	0.19%	2.43%	
36	Mixed Dementia	0.12%	0.19%	3.34%	
8	Vascular dementia	3.79%			1.14%

Chart 8. Cognitive Issues - sorted by cases presented to Jury.

Frequency Rank	Cognitive Issue	Frequency of Occurrence	Cases Presented to Jury	Jury verdict for Contestant	MSJ for Proponent
29	Temporary illness	0.61%	1.71%	11.55%	
3	Memory - short-term	9.54%	10.67%	11.25%	7.95%
4	Confusion	9.05%	8.38%	9.12%	11.36%
6	Communication	4.77%	5.52%	6.38%	3.41%
22	Difficult Understanding	1.34%	15.43%	5.47%	
26	Permanent illness	1.10%	1.71%	5.47%	
7	Insane Delusion	4.28%	4.38%	4.26%	4.55%
27	Problem solving	0.73%	0.76%	4.26%	1.14%
11	Insanity	2.93%	3.62%	3.34%	1.14%
36	Mixed Dementia	0.12%	0.19%	3.34%	
9	Depression	3.67%	2.86%	3.04%	5.68%
24	Memory - immediate recall	1.34%	1.90%	2.74%	
14	Recognizing familiar objects and persons	2.32%	2.10%	2.43%	1.14%
34	Parkinson's Dementia	0.37%	0.19%	2.43%	
10	Progressive illness	3.06%	3.24%	2.13%	
17	Psychiatric treatment / disorder	1.96%	2.10%	2.13%	1.14%
20	Agitation	1.59%	2.10%	2.13%	2.27%
16	Hallucinations	2.08%	1.90%	1.82%	
12	Memory - long-term	2.57%	1.52%	1.82%	2.27%
21	Executive functioning	1.34%	1.14%	1.82%	2.27%
25	Suicidal	1.22%	0.76%	1.82%	2.27%
18	Alcohol induced	1.71%	1.90%	1.52%	3.41%
23	Logical reasoning	1.34%	1.71%	1.52%	
28	Grasping abstract aspects of situation	0.73%	0.95%	1.52%	
32	Organic Brain Syndrome	0.37%	0.38%	1.52%	
5	Pharmacological induced	5.01%	4.76%	1.22%	9.09%
13	Senile Dementia	2.44%	0.95%	1.22%	
33	Schizophrenia	0.37%	2.67%	0.61%	
15	Alzheimer's	2.20%	0.57%	0.61%	7.95%
2	Not available in opinion (N/A)	10.88%	6.86%	0.30%	22.73%
19	Paranoia	1.59%	1.52%	0.30%	2.27%
30	Non-dementia (bipolar or other psychological)	0.49%	0.57%	0.30%	
35	Creutzfeldt-Jakob Disease	0.24%	0.38%	0.30%	
31	Breaking down complex tasks to simple steps	0.49%	0.19%	0.30%	1.14%
1	Unspecified Dementia	12.35%	4.38%		5.68%
8	Vascular dementia	3.79%			1.14%

Chart 9. Cognitive Issues - sorted by jury verdict for Contestant.

Frequency Rank	Cognitive Issue	Frequency of Occurrence	Cases Presented to Jury	Jury verdict for Contestant	MSJ for Proponent
2	Not available in opinion (N/A)	10.88%	6.86%	0.30%	22.73%
4	Confusion	9.05%	8.38%	9.12%	11.36%
5	Pharmacological induced	5.01%	4.76%	1.22%	9.09%
3	Memory - short-term	9.54%	10.67%	11.25%	7.95%
15	Alzheimer's	2.20%	0.57%	0.61%	7.95%
9	Depression	3.67%	2.86%	3.04%	5.68%
1	Unspecified Dementia	12.35%	4.38%		5.68%
7	Insane Delusion	4.28%	4.38%	4.26%	4.55%
6	Communication	4.77%	5.52%	6.38%	3.41%
18	Alcohol induced	1.71%	1.90%	1.52%	3.41%
20	Agitation	1.59%	2.10%	2.13%	2.27%
21	Executive functioning	1.34%	1.14%	1.82%	2.27%
25	Suicidal	1.22%	0.76%	1.82%	2.27%
19	Paranoia	1.59%	1.52%	0.30%	2.27%
12	Memory - long-term	2.57%	1.52%	1.82%	2.27%
27	Problem solving	0.73%	0.76%	4.26%	1.14%
11	Insanity	2.93%	3.62%	3.34%	1.14%
14	Recognizing familiar objects and persons	2.32%	2.10%	2.43%	1.14%
17	Psychiatric treatment / disorder	1.96%	2.10%	2.13%	1.14%
31	Breaking down complex tasks to simple steps	0.49%	0.19%	0.30%	1.14%
8	Vascular dementia	3.79%			1.14%
29	Temporary illness	0.61%	1.71%	11.55%	
22	Difficult Understanding	1.34%	15.43%	5.47%	
26	Permanent illness	1.10%	1.71%	5.47%	
36	Mixed Dementia	0.12%	0.19%	3.34%	
24	Memory - immediate recall	1.34%	1.90%	2.74%	
34	Parkinson's Dementia	0.37%	0.19%	2.43%	
10	Progressive illness	3.06%	3.24%	2.13%	
16	Hallucinations	2.08%	1.90%	1.82%	
23	Logical reasoning	1.34%	1.71%	1.52%	
28	Grasping abstract aspects of situation	0.73%	0.95%	1.52%	
32	Organic Brain Syndrome	0.37%	0.38%	1.52%	
13	Senile Dementia	2.44%	0.95%	1.22%	
33	Schizophrenia	0.37%	2.67%	0.61%	
30	Non-dementia (bipolar or other psychological)	0.49%	0.57%	0.30%	
35	Creutzfeldt-Jakob Disease	0.24%	0.38%	0.30%	

Chart 10. Cognitive Issues - sorted by MSJ for Proponent

Chart 5 shows the frequency of cognitive deficits in will contest opinions and the percentages with which the cases resulted in a trial by jury, a jury verdict for contestant, and a

motion for summary judgment in favor of the proponent. The data suggests that contestants tended to have more success when they alleged specific diagnoses of dementia instead of unspecified dementia. The most frequent ailments listed in Chart 5 are ranked in order on the left side of the chart.

The allegations of vague deficits such as memory loss, confusion, and difficulty understanding were at issue in more jury trials than other deficits suggesting, again, that attorneys may be focusing more on non-medical evidence, such as witness testimony, than scientific evidence, such as diagnostic testing.

When armed with diagnostic evidence of incapacity, attorneys for contestants should be careful to tie the diagnoses to the elements of testamentary incapacity. In one case, a diagnosis of Alzheimer's, alone, was insufficient to raise a fact issue as to incapacity where the contestant failed to show that the disease rendered the testator "incapable of knowing her family or her estate or understanding the effect of her actions."[21]

Proponents obtained a motion for summary judgment in 9.09% of cases in which the contestant alleged the testator was pharmacologically induced to execute the will. The typical fact pattern in these cases involved a testator in pain and on constant medication. The data indicates contestants should endeavor to educate judges on how pain medication affects the brain. A medical expert may help the contestant tie the consumption of pain medication to diminished cognitive capacity and susceptibility to undue influence.

We included nearly the same data four times by including Chart 6 – 8. We suggest that the reader carefully study the original ranking from Chart 5, which is intentionally set to remain when Charts 6 through 8 are re-sorted. Thus, it becomes evident how the frequency of reference for an ailment aligns or diverges from the other statistics.

2. Physical Ailments Analysis.

Physical Ailment Frequency	
1	Age related deterioration
2	Feebleness / weakness
3	Cancer
4	Vascular disease
5	Stroke
6	Cardiac issues
7	Pain
8	Vision issues / blindness
9	Bedridden
10	Fatigue
11	Falls / unsteady gait
12	Alcoholism
13	Deafness
14	Diabetes
15	Pulmonary problems

[21] *In re Estate of Hall*, No. 05-98-01929-CV, 2001 WL 753795, at *4 (Tex. App.—Dallas July 5, 2001, no pet.) (not designated for publication).

16	Grief
17	Blood pressure / hypertension / hypotension
18	Kidney problems
19	Weight loss
20	Belligerent

Chart 11. Top 20 Physical Ailments in Will Contests - Ranked.

While cases of incapacity concern a testator's mental soundness, "the physical condition of a human being" can be "so directly and intimately related to the mental state that the physical condition is a circumstance entitled to consideration by the jury in its ascertainment of the mental condition."[22] "A testator's physical ailments may inform the jury of the testator's mental status, if the evidence sufficiently links the two at the time of a will signing."[23]

Similarly, courts have frequently cited the testator's physical condition as a relevant factor in deciding undue influence cases.[24]

Chart 11 identifies the top twenty physical ailments referenced in will contest opinions and ranks the ailments from most prevalent to least prevalent. Notably, the top two ailments and five of the top ten ailments are generalized conditions as opposed to specific diagnoses (i.e. – age related deterioration, feebleness / weakness, pain, bedridden, and fatigue). Also notable is the prevalence of vascular disease and cardiac issues, both of which have been identified as causes of dementia and other age-related cognitive illnesses.[25]

Although not obviously associated with diminished capacity, a history of falls could indicate that a testator has suffered cognitive decline. Medical testimony admitted in one case explains how the same vascular issues that cause falls can also affect the brain:

> Of significance to *[the testifying doctor]* were the entries of a history of atherosclerotic heart disease, high blood pressure, arthritis, and congestive heart failure. An entry indicating a history of frequent falling was also important because, as [the doctor] explained, when elderly individuals start getting hardening of the arteries they begin falling due to insufficient blood supply to the cerebellar part of the brain that coordinates all voluntary movements.[26]

Similarly, vision impairment may not commonly be associated with cognitive decline, but the medical community has linked the two. Vision impairment often co-occurs with cognitive decline, and adults with vision impairment are thought to have higher levels of difficulties with activities of daily living (e.g., eating and bathing) and instrumental activities of daily living (e.g., managing finances and using a telephone).[27] A jury can infer that a testator is

[22] *Walston*, 225 S.W.2d at 1016.

[23] *In re Estate of Scott,* 601 S.W.3d 77, 96 (Tex. App.—El Paso 2020, no pet.) (considering the testator's physical condition in connection with both capacity and undue influence claims).

[24] *Id; Lowery v. Saunders,* 666 S.W.2d 226, 234 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *Reynolds v. Park*, 485 S.W.2d 807, 813 (Tex. App.—Amarillo 1972, writ ref'd n.r.e.).

[25] https://www.nih.gov/news-events/nih-research-matters/risk-factors-heart-disease-linked-dementia. *See Jones v. LaFargue*, 758 S.W.2d 320, 327 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

[26] *In re Estate of Robinson*, 140 S.W.3d 782, 791 (Tex. App.—Corpus Christi–Edinburg 2004, pet. denied).

[27] Saydah S, Gerzoff RB, Taylor CA, Ehrlich JR, Saaddine J. "Vision Impairment and Subjective Cognitive Decline–Related Functional Limitations — United States," 2015–2017. MMWR Morb Mortal

unable to understand the nature and extent of her property when unable to perform "rudimentary tasks of bathing and dressing."[28]

Trial Court win rate comparison (most prevalent physical ailments from our study)		
Ailment	**Contestant win%**	**Proponent win%**
Stroke	67%	33%
Cardiac issues	65%	35%
Bedridden	63%	38%
Vascular disease	61%	39%
Vision issues / blindness	56%	44%
Feebleness / weakness	51%	49%
Age related deterioration	49%	51%
Pain	49%	51%
Cancer	48%	52%
Fatigue	40%	60%

Chart 12. Trial court success rates by ailment.

Chart 12 identifies the trial court winner (contestant versus proponent) in cases in which the court of appeals referenced the ten most common physical ailments. The contestant won in the trial court more than 65% of the time when the alleged ailments included stroke and cardiac issues. This outcome may be explained by the sudden and dramatic nature of strokes and cardiac events (including heart attacks) where a change in the testator is more readily apparent to physicians and loved ones. These events may also trigger diagnostic testing the results of which may later become evidence for contestants. Contestants also saw success when the testator was bedridden at the time of execution. A bedridden testator is naturally dependent on others to meet their basic needs, and dependence on the alleged influencer is a factor courts examine when deciding undue influence claims.[29]

Contestants and proponents fared almost equally in the trial court when cancer was alleged as a cause of incapacity or undue influence. This may be due to the varied types of cancer, treatment methods, and manners of progression.

3. Last Minute Will.

By "last minute" wills, we are referring to those drafted for a death bed type testator. These wills pose a number of problems – the drafting attorney is faced with the difficulty of various time pressures that can lead to an inability to fully appreciate the family dynamics, the health – and cognitive condition – of the testator. With these and other constraints, the adage that lack of prior proper planning can promote poor performance shines brightly.

We analyzed the results of contests of last minute wills in the trial and appellate courts over time. If prior sections have not made this abundantly clear, "will age" refers to the number of days / months / years between the execution ceremony and the testator's death.

Wkly Rep 2019;68:453–457. DOI: http://dx.doi.org/10.15585/mmwr.mm6820a2.

[28] *Matter of Estate of Durgin*, No. 12-18-00184-CV, 2019 WL 4126616, at *4 (Tex. App.—Tyler Aug. 30, 2019, no pet.).

[29] *See Guthrie v. Suiter,* 934 S.W.2d 820, 831 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Decade	Win %, Age > 6 mos	Win %, Age < 6 mos
1910	35%	50%
1920	16%	62%
1930	25%	53%
1940	26%	30%
1950	31%	33%
1960	32%	47%
1970	30%	52%
1980	30%	50%
1990	20%	60%
2000	19%	53%
2010	24%	33%

Chart 13. Success rates for Contestants and will age - over time.

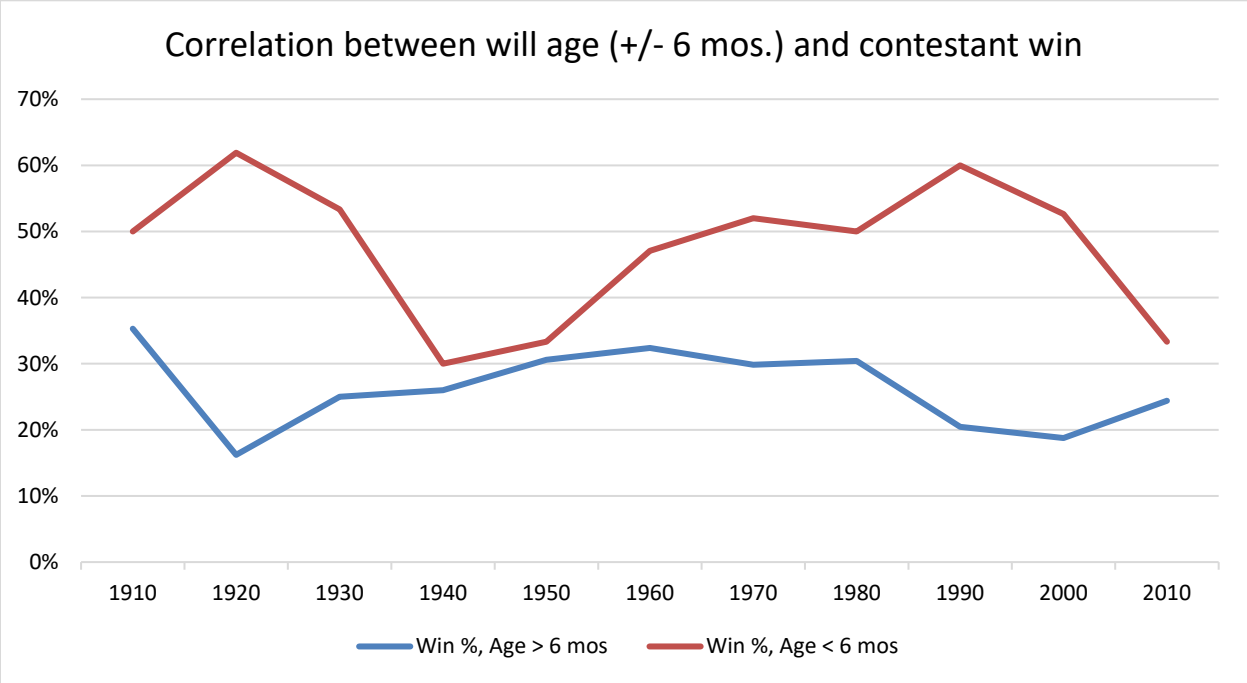

Figure 24. Correlation between will age and Contestant win.

The above figures depict the correlation between the age of the will (the amount of time between the date of execution and the date of death) and the percentage of wins for contestants.

As expected, Contestants historically saw more wins when the will was executed within six months of the testator's death. Estate planners should use this information to encourage their clients to execute estate plans while they are healthy. Prolonging execution until faced with a progressive illness increases the likelihood of the will's invalidation. For example, in the 1990s, contestants successfully challenged a will that was less than six months old approximately 60% of the time whereas contestants successfully challenged a will greater than six months only 20% of the time.

4. The Elderly Testator.

An elderly testator presents a different set of issues to that of the "last minute" will. First, time is on the side of the drafting attorney. So that's great. On the other hand, general life experience, nature, and science collide with the conclusion that, as humans age, cognitive processes naturally decline. Of course, the question is, "to what degree"? In the following section, we consider how trial and appellate court results appear to interpret age in light of wills executed by elderly testators. Note that, in a significant subset of opinions, we were not able to ascertain the age of the testator at time of execution.

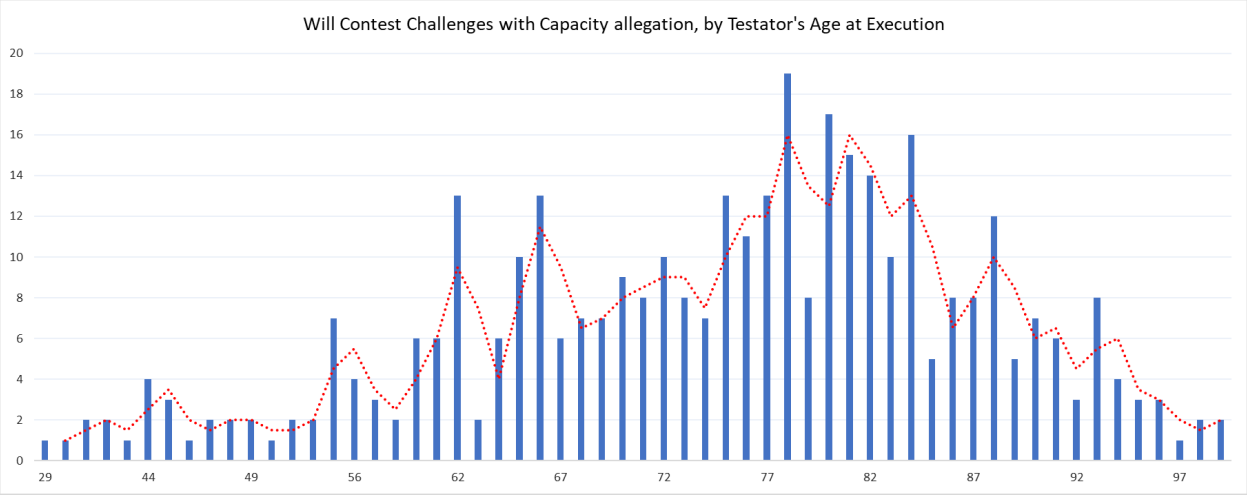

Figure 25. Testamentary capacity challenges compared to Testator's Age at Execution Ceremony.

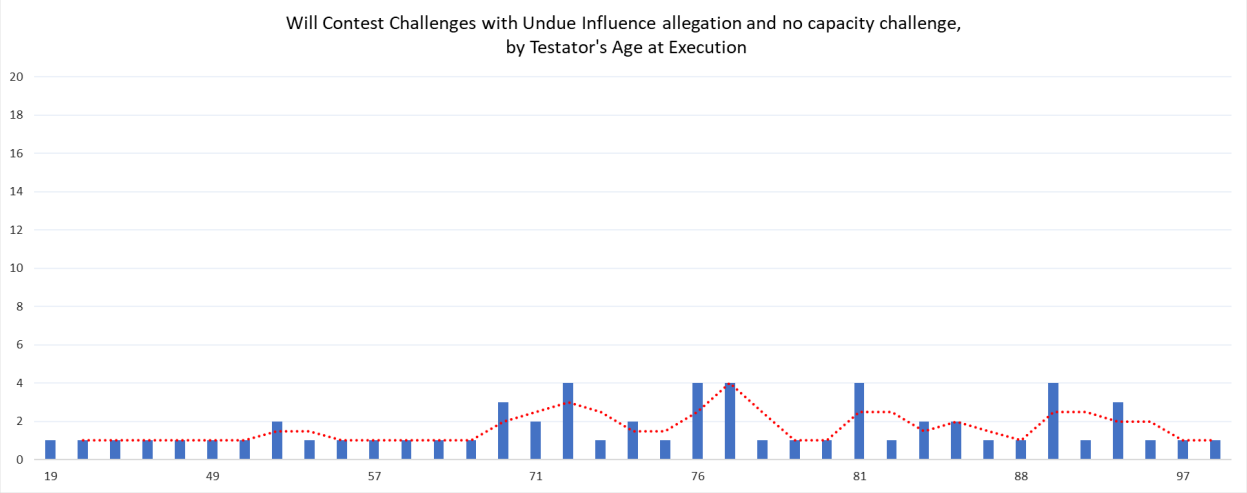

Figure 26. Undue influence challenges (without a capacity challenge) compared to Testator's Age at Execution Ceremony.

Testamentary incapacity and undue influence are two of the most common challenges to a will. Undue influence requires proof of (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence.[30]

[30] *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).

To possess the required testamentary capacity requires sufficient evidence that the testator, at the time of execution: (1) understood the effect of making the will and the general nature and extent of his property; (2) knew his next of kin and the natural objects of his bounty; (3) had sufficient memory to assimilate the elements of executing a will; (4) could hold those elements long enough to perceive their obvious relations to each other; and (5) formed a reasonable judgment as to them.[31]

The testator's state of mind is a relevant factor under the elements of both incapacity and undue influence.[32] However, undue influence is a ground for contesting a will that is "separate and distinct from the ground of testamentary incapacity; for while testamentary incapacity implies the want of intelligent mental power, undue influence implies the existence of a testamentary capacity subjected to and controlled by a dominant influence or power."[33]

Figures 25 and 26 indicate that the testator's age at the time of the will's execution may be more impactful in a challenge for incapacity than a challenge for undue influence. Figures 25 and 26 compare the frequency of capacity challenges by testator age with the frequency of undue influence challenges by testator age. Figure 25 shows that most capacity challenges occurred when the testator was between the ages of sixty-two and eighty-nine at the time of the will's execution with the most challenges occurring when the testator was aged seventy-eight.

Undue influence cases, on the hand, saw a wider disbursement of testator ages.

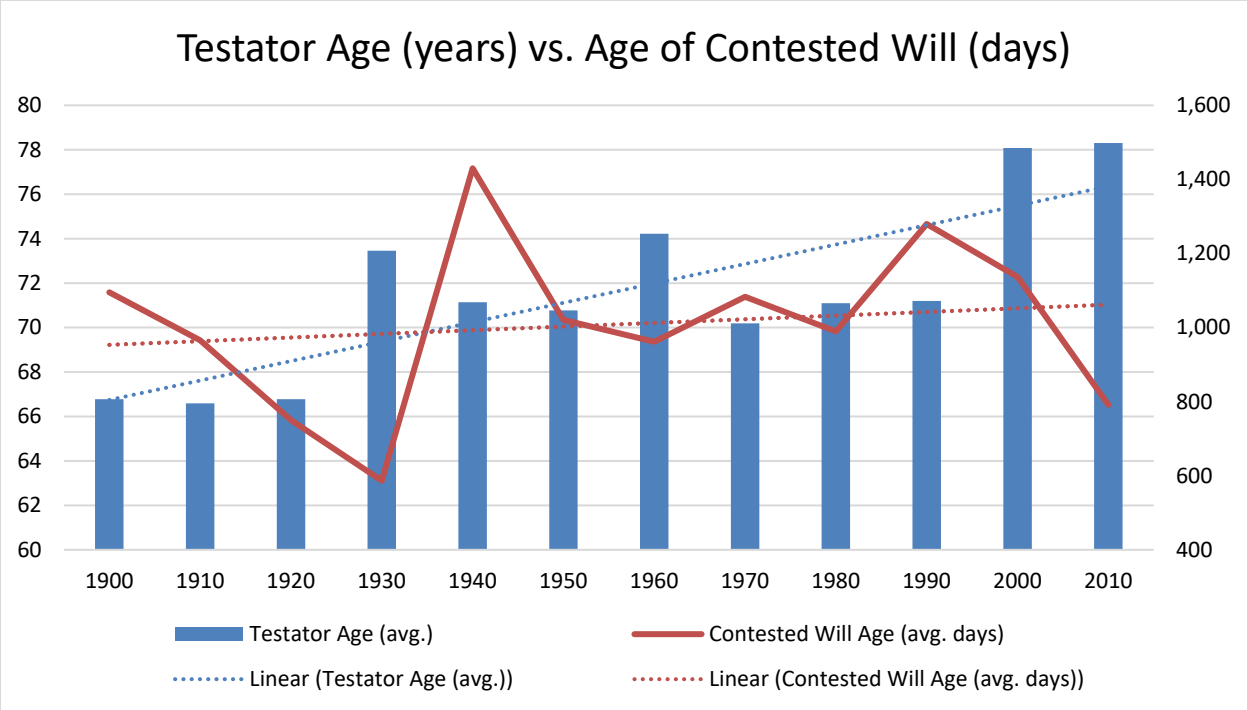

Figure 27. Testator Age vs. Will Age.

Figure 27 depicts the average age of the testator at the time of execution as well as the

[31] *Prather v. McClelland*, 76 Tex. 574, 13 S.W. 543, 546 (Tex. 1890); *In re Estate of Danford*, 550 S.W.3d 275, 281 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

[32] *See id.*

[33] *Id.*

average age of the will. Over time, the average age of the testator in will contest appeals increased as shown by the Testator Age trend line. However, the trend line for the age of the will has stayed mostly flat. We can abstract from this data that people are living longer but executing wills at about the same age. When a testator executes a will at an advanced age, the result is a greater likelihood of a will contest (*see* Figure 9 and related discussion), and when a testator executes a will close to the date of death, the result is also a greater likelihood of a will contest (*see* Chart 4 and related discussion; i.e., more bench trials and MSJs with a lower chance of prevailing using those procedures).

F. Conclusions.

Data offers an amazing resource to understand complex problems. We seriously dispute anyone who would claim that data *replaces* rote experience. After all, every will contest is different – different facts, different personalities, different wills, different lawyers, different courts. Nevertheless, certain trends, when they reveal significant deviations from the ordinary, provide clever insights waiting to be used to better help our clients. We hope you've enjoyed the paper and our presentation.

There's more on the way . . . .