

Is There Meat in Those Beans?

The 2019 Texas Estate and Trust Legislative Update

(Including Decedents' Estates, Guardianships, Trusts,
Powers of Attorney, and Other Related Matters)

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Legal Experience

Bill Pargaman has been a partner in the Austin law firm of Saunders, Norval, Pargaman & Atkins since July of 2012. He has been certified as a specialist in Estate Planning and Probate Law by the Texas Board of Legal Specialization (since 1986) and has been a Fellow in the American College of Trust and Estate Counsel (since 1994). He is very active in the Real Estate, Probate and Trust Law Section of the State Bar of Texas, having served as REPTL's Chair for the 2015-2016 bar year, as chair of its Estate and Trust Legislative Affairs Committee for the 2009, 2011, and 2013 legislative sessions, and as a Council member and chair of REPTL's Trusts Committee from 2004 to 2008.

Bill's practice involves the preparation of wills, trusts and other estate planning documents, charitable planning, and estate administration and alternatives to administration. He advises clients on the organization and maintenance of business entities such as corporations, partnerships, and limited liability entities. He represents nonprofit entities with respect to issues involving charitable trusts and endowments. Additionally, he represents clients in contested litigation involving estates, trusts and beneficiaries, and tax issues.

Education

- Doctor of Jurisprudence, *with honors*, University of Texas School of Law, 1981, Order of the Coif, Chancellors
- Bachelor of Arts, Government, *with high honors*, University of Texas at Austin, 1978, Phi Beta Kappa

Professional Licenses

- Attorney at Law, Texas, 1981

Court Admissions

- United States Tax Court

Prior Experience

- Brown McCarroll, L.L.P. (now Husch Blackwell LLP), 1981 – 2012

Speeches and Publications

Mr. Pargaman has been a speaker, author, or course director at numerous seminars, including:

- State Bar of Texas (TexasBarCLE) – Advanced Estate Planning and Probate Course, Advanced Estate Planning Strategies Course, Estate Planning and Probate Drafting Course, Advanced Guardianship Law Course, Advanced Real Estate Law Course, Advanced Real Estate Drafting Course, Advanced Tax Law Course, State Bar College Summer School, State Bar Annual Meeting, Practice Skills for New Lawyers, Essentials for the General Practitioner, Miscellaneous Webcasts, and more
- Real Estate, Probate and Trust Law Section Annual Meeting
- University of Texas Estate Planning, Guardianship, and Elder Law Conference
- South Texas College of Law Wills and Probate Institute
- Estate Planning & Community Property Law Journal Seminar
- Texas NAELA Summer Conference
- University of Houston Law Foundation General Practice Institute, and Wills and Probate Institute

William D. Pargaman (cont.)

- Austin Bar Association Estate Planning and Probate Section Annual Probate and Estate Planning Seminar
- Austin Bar Association and Austin Young Lawyers Association Legal Malpractice Seminar
- Dallas Bar Association Probate, Trusts & Estate Section
- Houston Bar Association Probate, Trusts & Estate Section
- Tarrant County Probate Bar Association
- Hidalgo County Bar Association Estate Planning and Probate Section
- Bell County Bench Bar Conference
- Midland College/Midland Memorial Foundation Annual Estate Planning Seminar
- Austin Chapter, Texas Society of Certified Public Accountants, Annual Tax Update
- Texas Bankers Association Advanced Trust Forum
- Texas Credit Union League Compliance, Audit & Human Resources Conference
- Estate Planning Councils in Austin, Amarillo, Corpus Christi, Lubbock, San Antonio, and Tyler
- Austin Association of Life Underwriters

Professional Memberships and Activities

- American College of Trust and Estate Counsel, Fellow
- State Bar of Texas
 - Real Estate, Probate and Trust Law Section, Member (Chair, 2015-2016)
 - Real Estate, Probate, and Trust Law Council, Member, 2004–2008
 - Estate and Trust Legislative Affairs Committee, Member, 2000–Present (Chair, 2008–2013)
 - Public Service Committee, Chair, 2013–2014
 - Trusts Committee, Member, 2000–2010 (Chair, 2004–2008)
 - Uniform Trust Code Study Project, Articles 7–9 & UPIA, Subcommittee Member, 2000–2003
 - Continuing Legal Education Committee, 2018-2021
 - Texas Board of Legal Specialization (Estate Planning and Probate Law), Examiner, 1995-1997
- Estate Planning Council of Central Texas, Member (President, 1991-1992)
- Austin Bar Association, Member
 - Estate Planning and Probate Section, Member (Chair, 1992-1993, Board Member, 1997-1999)

Honors

- Recipient, TexasBarCLE STANDING OVATION award, 2014
- Listed in The Best Lawyers in America® (2019 Trusts & Estates “Lawyer of the Year” in Austin, TX)
- Listed in *Texas Super Lawyers* (Texas Monthly)
- Listed in The Best Lawyers in Austin (Austin Monthly)

Community Involvement

- St. Stephen’s Episcopal School Professional Advisory Council, Past Member
- City of Austin, XERISCAPE Advisory Board, Past Member
- Volunteer Guardianship Program of Family Eldercare, Inc. of Austin, Past Member, Advisory Board

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AREAS OF PRACTICE

Probate litigation, probate administration, guardianship administration, trust administration, and estate planning law.

EDUCATION

Juris Doctor degree, Duke University School of Law, 1995.

Bachelor of Arts degree with high honors, Plan II program, University of Texas at Austin, 1990

PROFESSIONAL HISTORY

Hopper Mikeska, PLLC, 2012-Present

Hopper & Associates, P.C., 2005 - 2012

Shareholder, Graves, Dougherty, Hearon & Moody, 1998 - 2005

Law Clerk, Honorable Guy Herman, Travis County Probate Court No. 1, 1996-1998

PROFESSIONAL AFFILIATIONS

Board Certified in Estate Planning and Probate Law, Texas Board of Legal Specialization

Fellow, American College of Trusts and Estates Counsel

Member, Austin Bar Association

Member, State Bar of Texas

Member, SBOT Real Estate, Probate and Trust Law (REPTL) Section Council Member 2010-2014; Chair of Estate and Trust Legislative Affairs Committee 2014-Present

Member, Estate Planning Council of Central Texas; Director 2008-2014; Chair 2012-2013

Member, Travis County Bar Association Probate and Estate Planning Section; Director, 1999- 2004; Chair, 2003

PUBLICATIONS

O'Connor's Texas Probate Law Handbook, 2018-Present

Texas Guardianship Manual, State Bar of Texas, Manual Committee 2013-Present

O'Connor's Estates Code Plus, co-author, 2012-Present

RECENT PRESENTATIONS/PAPERS

- Speaker, 2017 Trusts and Estates Legislative Update, numerous locations in 2017
- Author/Moderator, "How 2015 [Guardianship] Changes Are Affecting Your Practice," SBOT Advanced Guardianship Course 2016, Dallas
- Panelist, "Peace Treaties: Considerations when Negotiating, Drafting & Enforcing Settlement Agreements and Releases," SBOT Estate Planning and Probate Drafting Course, Houston 2015
- Speaker, 2015 Trusts and Estates Legislative Update, numerous locations in 2015-2016 Author/Speaker, "Extraordinary Remedies in Probate Proceedings," SBOT Probate and Estate Planning Drafting Course 2014, Dallas
- Author/Speaker, "Whack-a-Mole: Handling Problem Litigants and the Occasional Overzealous Ad Litem," SBOT Advanced Guardianship Course 2014, Dallas;
- Speaker, "Mock Guardianship Hearing—How and When to Put Your Ward on the Stand," SBOT Advanced Guardianship Course 2014, Dallas; Tarrant County Bar Association Probate Litigation Seminar 2014, Ft Worth
- Speaker, "Basic Guardianship," Docket Call in Probate Court, San Antonio, Texas 2014
- Speaker, "Ask the Experts" panel 15th Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2013
- Author/Speaker, "Creating a Travis County Guardianship," Austin Advisors Forum, Austin 2013
- Course Director, SBOT Advanced Guardianship and Elder Law Courses, Houston, 2013
- Speaker, "Alternatives to Guardianship" and "Ask the Experts" panel 14th Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2012
- Author/Speaker, "Drafting the Estate and Trust Distribution Documents," SBOT Advanced Drafting Course, Dallas 2011

CRAIG HOPPER (cont.)

- Speaker, “Contested Guardianships,” SBOT Advanced Guardianship Course 2011, Houston; South Texas College of Law 26th Annual Wills and Probate Institute, Houston 2011
- Author/Speaker, “The Role of the Guardian,” 13th Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2011
- Speaker, “Call in the Sheriff: Handling Overzealous Ad Litem and Other Outlaws,” SBOT Advanced Guardianship Course 2010, Houston
- Author/Speaker, “Extraordinary Preparation for Mediation in Guardianship Disputes,” SBOT Advanced Guardianship Course 2009, Houston
- Author/Speaker, “Extraordinary Remedies in Probate Proceedings,” SBOT Advanced Estate Planning and Probate Course 2008, Dallas
- Panel Member, “Ask the Experts,” and “Former Statutory Probate Court Staff Attorneys Panel” 9th Annual Intermediate Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 2007
- Speaker, “Attorney Ad Litem Duties” and Panel Member, “Ask the Experts,” 8th Annual Intermediate Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 2006
- Speaker/Panel Member, SBOT Building Blocks of Probate and Estate Planning: Probate Administration, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013
- Author/Speaker, “Using Independent Facilitators to Resolve Probate Disputes,” Guardianship and Elder Law Conference, Galveston, Texas, August 2004

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1. The Preliminaries.

1.1 Introduction and Scope. The 86th Regular Session of the Texas Legislature spans the 140 days beginning January 8, 2019, and ending May 27, 2019. This paper presents a summary of the bills that relate to probate (*i.e.*, decedents' estates), guardianships, trusts, powers of attorney, and several other areas of interest to estate and probate practitioners. Issues of interest to elder law practitioners are touched upon, but are not a focus of this paper. (And, to be honest, sometimes I go off on a tangent and discuss a bill of interest to me that has nothing to do with any of the areas mentioned above.)

1.2 CMA Disclaimers. While reading this paper, please keep in mind the following:

- I've made every reasonable attempt to provide accurate descriptions of the contents of bills, their effects, and in some cases, their background.
- Despite rumors to the contrary, I am human. And have been known to make mistakes.
- In addition, some of the descriptions in this paper admittedly border on editorial opinion, in which case the opinion is my own, and not necessarily that of REPTL, Craig Hopper, or anyone else.
- I often work on this paper late at night, past my normal bedtime, perhaps, even, under the influence of strategic amounts of Johnnie Walker Black (donations of Red, Black, Green, Gold, Blue, Platinum, or even Swing happily accepted!). Craig Hopper has informed me that he's also happy to accept donations of Scotch.
- As companion bills make their way through the legislative process, I usually base descriptions on the most recently approved version in either chamber. In the case of REPTL bills, I sometimes have access to drafts of substitutes before they are officially posted, in which case the descriptions may be based on what we think the bill will look like, rather than what the currently-online version looks like.
- As a consequence, while the descriptions contained in this paper are hopefully accurate at the time they are written, they may no longer accurately reflect the

contents of a bill at a later stage in the legislative process.

Therefore, you'll find directions in Section 1.6 on page 2 for obtaining copies of the actual bills themselves so you may review and analyze them yourself before relying on any information in this paper.

1.3 If You Want to Skip to the Good Stuff ... If you don't want to read the rest of these preliminary matters and want to skip to the legislation itself, you'll find it beginning with **Part 6 on page 7**.

1.4A Note About Linking to the Electronic Version. Feel free to link to the electronic version of this paper if you'd like. If you do, use the URL found on the cover page to link to the most recent version of the paper:

www.snpalaw.com/resources/2019LegislativeUpdate

Once you click on that link, you'll open a PDF version of this paper. However, **don't** copy the URL that you'll find in your browser's address bar when you open the PDF! That's likely to be a 100+ character web address that will take you to that particular version of the paper only, and only so long as that version remains posted. Trust me – the link I've given you will take you to the right version each time.

And note that you can bring up my previous legislative updates going back to 2009 by substituting the appropriate odd-numbered year for "2019" in the URL.

1.5 Where You'll Be Able to Find the Statutory Language After the Session's Over. In previous legislative updates, after the session was over and we knew what had passed, I added attachments to the update that included the actual language of bills marked to show what had been added or deleted. But this was quite lengthy. It took over 100 pages in the 2017 update, more than doubling the size of the paper. So, in an effort to be green (for anyone getting a hard copy), we're going to change things up. Sometime after the session is over, I'll publish a separate supplement that will contain all of that statutory language. You'll be able to download it by pointing your browser to:

www.snpalaw.com/resources/2019LegislativeSupplement

I anticipate it will be posted mid-June of 2019. If you try going there before it's posted, you'll get a message that the page you're looking for wasn't found.

1.6 Acknowledgments. A lot of the effort in every legislative session comes from the Real Estate, Probate & Trust Law Section of the State Bar of Texas ("REPTL"). REPTL, with over 9,000 members, has been active in proposing legislation in this area for more than three decades. During the year and a half preceding a session, the REPTL Council works hard to come up with a package that addresses the needs of its members and the public, and then works to get the package enacted into law. In addition to myself, others who have been deeply involved in this legislative process include:

- Craig Hopper of Austin, Chair, Estate and Trust Legislative Affairs Committee; and principal presenter of this paper
- Eric Reis of Dallas, Chair-Elect/Secretary of REPTL (and Chair beginning in July of 2019)
- Tina Green of Texarkana, Immediate Past Chair of REPTL
- Melissa Willms of Houston, Chair, Decedents' Estates Committee
- Catherine Goodman of Fort Worth, Chair, Guardianship Committee
- Shyla Buckner of Amarillo, Chair, Trusts Committee
- Lora Davis of Dallas, Chair, Powers of Attorney and Advance Directives (PAADs) Committee
- Clint Hackney of Austin, Lobbyist
- Barbara Klitch of Austin, who provides invaluable service tracking legislation for REPTL

REPTL is helped along the way by the State Bar, its Board of Directors, and its staff (in particular, KaLyn Laney, Assistant Deputy Director).

Other groups have an interest in legislation in this area, and REPTL tries to work with them to mutual advantage. These include the statutory probate judges (Judge Guy Herman of Austin, Presiding Statutory Probate Judge) and the Wealth Management and Trust Division of the Texas Bankers Association.

Last, but of course not least, are the legislators and their staffs. You'll note the names of our authors and sponsors¹ in the parenthetical following the first mention of a bill in this paper. These are the legislators who have volunteered their time and effort to help REPTL get its bills passed. Thanks go to all of these persons, their

staffs, and the many others who have helped in the past and will continue to do so in the future.

Hopefully, the effort that goes into the legislative process will become apparent to the reader. In the best of circumstances, this effort results in passing good bills and blocking bad ones. But in the real world of legislating, the best of circumstances is never realized.

1.7 Obtaining Copies of Bills. If you want to obtain copies of any of the bills discussed here, go to www.legis.state.tx.us. Near the top of the page, in the middle column, you'll see **Search Legislation**. First, select the legislative session you wish to search (for example, the 2019 regular legislative session that spans from January through May is "86(R) - 2019). Select the Bill Number button, and then type your bill number in the box below. So, for example, if you wanted to find the Decedents' Estates bill prepared by the Real Estate, Probate, and Trust Law Section of the State Bar of Texas ("REPTL"), you'd type "HB _____" and press Go. (It's fairly forgiving – if you type in lower case, place periods after the H and the B, or include a space before the actual number, it's still likely to find your bill.)

Then click on the Text tab. You'll see multiple versions of bills. The "engrossed" version is the one that passes the chamber where a bill originated. When an engrossed version of a bill passes the other chamber without amendments, it is returned to the originating chamber where it is "enrolled." If the other chamber does make changes, then when it is returned, the originating chamber must concur in those amendments before the bill is enrolled. Either way, it's the "enrolled" version you'd be interested in.

2. The People and Organizations Most Involved in the Process.

A number of organizations and individuals get involved in the legislative process:

2.1 REPTL. REPTL acts through its Council. Many volunteer Section members who are not on the Council give much of their time, energy and intellect in formulating REPTL legislation. REPTL is not allowed to sponsor legislation or oppose legislation without the approval of the Board of Directors of the State Bar. There is no provision to support legislation offered by someone other than REPTL, and the ability of REPTL to react during the legislative session is hampered by the necessity for Bar approval. Therefore, REPTL must receive prior permission to carry the proposals discussed in this paper that are identified as REPTL proposals.

¹ See Sec. 2.5 on page 3 if you want to learn the difference between an author and a sponsor.

REPTL has hired Clint Hackney, who has assisted with the passage of REPTL legislation for many sessions.

2.2The Statutory Probate Judges. The vast majority of probate and guardianship cases are heard by the judges of the Statutory Probate Courts (18 of them in 10 counties). Judge Guy Herman of the Probate Court No. 1 of Travis County (Austin) is the Presiding Statutory Probate Judge and has been very active in promoting legislative solutions to problems in our area for many years.

2.3The Bankers. There are two groups of bankers that REPTL deals with. One is the Wealth Management and Trust Division of the Texas Bankers Association (“TBA”), which tends to represent the larger corporate fiduciaries, while the other is the Independent Bankers Association of Texas (“IBAT”), which tends to represent the smaller corporate fiduciaries, although the distinctions are by no means hard and fast.

2.4The Texas Legislative Council. Among other duties, the Texas Legislative Council² provides bill drafting and research services to the Texas Legislature and legislative agencies. All proposed legislation must be reviewed (and usually revised) by Leg. Council before a Representative or Senator may introduce it. In addition, as part of its continuing statutory revision program, Leg. Council was the primary drafter of the Texas Estates Code, a nonsubstantive revision of the Texas Probate Code.

2.5The Authors and Sponsors. All legislation needs an author, the Representative or Senator who introduces the legislation. A sponsor is the person who introduces a bill from the other house in the house of which he or she is a member. Many bills have authors in both houses originally, but either the House or Senate version will eventually be voted out if it is to become law; and so, for example, the Senate author of a bill may become the sponsor of a companion House bill when it reaches the Senate. In any event, the sponsor or author controls the bill and its fate in their respective house. Without the dedication of the various authors and sponsors, much of the legislative success of this session would not have been possible. The unsung heroes are the staffs of the legislators, who make sure that the bill does not get off track.

2.6The Committees. All legislation goes through a committee in each chamber. In the House, most bills in our area go through the House Committee on Judiciary and Civil Jurisprudence, or “Judiciary.” In the

Senate, most bills in our area go through the Senate Committee on State Affairs, or “State Affairs.”

3. The Process.

3.1The Genesis of REPTL’s Legislative Package. REPTL³ begins work on its legislative package shortly after the previous legislative session ends. In August or September of odd-numbered years – just weeks after a regular legislative session ends, the chairs of each of the main REPTL legislative committees (Decedents’ Estates, Guardianship, Trust Code, and Powers of Attorney) put together lists of proposals for discussion by their committees. These items are usually gathered from a variety of sources. They may be ideas that REPTL Council or committee members come up with on their own, or they may be suggestions from practitioners around the state, accountants, law professors, legislators, judges – you name it. Most suggestions usually receive at least some review at the committee level.

3.2Preliminary Approval by the REPTL Council. The full “PTL” or probate, guardianship, and trust law side of the REPTL Council reviews each committee’s suggestions and gives preliminary approval (or rejection) to those proposals at its Fall meeting (usually in September or October) in odd-numbered years. Draft language may or may not be available for review at this stage – this step really involves a review of concepts, not language.

3.3Statutory Language is Drafted. Following the Fall Council meeting, the actual drafting process usually begins by the committees. Proposals may undergo several redrafts as they are reviewed by the full Council at subsequent meetings. By the Spring meeting of the Council in even-numbered years (usually in April), language is close to being final, so that final approval by the Council at its June annual meeting held in conjunction with the State Bar’s Annual Meeting is mostly *pro forma*. Note that items may be added to or removed from the legislative package at any time during this process as issues arise.

3.4REPTL’s Package is Submitted to the Bar. In order to obtain permission to support legislation, the entire REPTL package is submitted to the other substantive law sections of the State Bar for review and comment by June. This procedure is designed to assure that legislation with the State Bar’s “seal of approval” will be relatively uncontroversial and will further the State Bar’s goal of promoting the interests of justice.

² We usually refer to the Texas Legislative Council as simply “Leg. (pronounced “ledge”) Council.”

³ Note that the “RE” or real estate side of REPTL usually does not have a legislative package, but is very active in monitoring legislation filed in its areas of interest.

3.5 Legislative Policy Committee Review.

Following a comment period (and sometimes revisions in response to comments received), REPTL representatives appear before the State Bar's Legislative Policy Committee in August to explain and seek approval for REPTL's legislative package. By letter dated August 20, 2018, the Legislative Policy Subcommittee notified REPTL that it would recommend approval of all of REPTL's proposals to the State Bar's Board of Directors.

3.6 State Bar Board of Directors Approval.

Assuming REPTL's package receives preliminary approval from the State Bar's Legislative Policy Committee, it is submitted to the full Board of Directors of the State Bar for approval in September. At times, REPTL may not receive approval of portions of its package. In these cases, REPTL usually works to satisfy any concerns raised, and then seeks approval from the full Board of Directors through an appeal process. REPTL's 2019 legislative package received approval from the full Board of Directors in the Fall of 2019.

3.7 REPTL is Ready to Go. After REPTL receives approval from the State Bar's Board of Directors to carry its package, it then meets with appropriate Representatives and Senators to obtain sponsors, who submit the legislation to Leg. Council for review, revision, and drafting in bill form. REPTL's legislation is usually filed (in several different bills) in the early days of the sessions that begin in January of odd-numbered years.

3.8 During the Session. During the legislative session, the work of REPTL and members of its various committees is not merely limited to working for passage of their respective bills. An equally important part of their roles is monitoring bills introduced by others and working with their sponsors to improve those bills, or, where appropriate, to oppose them (in their individual capacities – not on behalf of REPTL without State Bar approval).

3.9 Where You Can Find Information About Filed Bills. You can find information about any of the bills mentioned in this paper (whether or not they passed), including text, lists of witnesses and analyses (if available), and actions on the bill, at the Texas Legislature Online website: www.legis.state.tx.us. The website allows you to perform your own searches for legislation based on your selected search criteria. You can even create a free account and save that search criteria (go to the "My TLO" tab). Additional

information on following a bill using this site can be found at:

<http://www.legis.state.tx.us/resources/FollowABill.aspx>

3.10 Where You Can Find Information About Previous Versions of Statutes. I frequently see requests on Glenn Karisch's [Texas Probate E-Mail List](#) for older versions of statutes, such as the intestacy laws applicable to a decedent dying many years ago. You can find old law on your own (for free) rather than asking the list, and I'll use our intestacy statutes as an example.

- Former Texas Probate Code Sec. 38 had the rules for non-community property. If you've got a copy of it with the enactment information,⁴ you'll see that it came from "Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956." That means it was part of the original Probate Code, and was never amended. The key information you'll need is that it was from the **54th Legislature**, and it's found in **chapter 55**.
- Next, go to the search page of the Legislative Reference Library:

<http://www.lrl.state.tx.us/legis/billsearch/lrlhome.cfm>

- Since you've got the session and chapter number, use the option to "Search by session law chapter." Click the down arrow and scroll down to "54th R.S. (1955)." Then type "55" as the Chapter number. Click "Search by chapter."
- You'll arrive at a page that has a hyperlink to chapter 55. Click on that and Voilà – you've got a PDF of the entire original Probate Code! Since Sec. 38 was never amended prior to its repeal on December 31, 2013 (and replacement by Estates Code Secs. 201.001 and 201.002), you've got the language of that section as it existed before 1993.
- Former Texas Probate Code Sec. 45 had the rules for community property. The PDF you just downloaded had the version in effect when the Probate Code went into effect in 1956. But if you've got the enactment information, you'll see that it was amended by Acts 1991, 72nd Leg., ch. 895, § 4, eff. Sept. 1, 1991, and by Acts 1993, 73rd Leg., ch. 846, § 33, eff. Sept. 1, 1993.
- If you're researching the law applicable to someone who died before September 1, 1991, look no further – the original version was still the law. But if your decedent happened to die on or after September 1, 1991, but before September 1, 1993, you need to see what the 1991 amendment did. So back to the search page mentioned above. Scroll to 72nd R.S. (1991) (you don't want either of the "called sessions"), type

⁴ If you don't have a copy of the Probate Code with enactment information, you can get one! Prof. Gerry Beyer's website (<http://professorbeyer.com/>) contains a copy of the Probate Code as it existed immediately prior to its repeal effective

December 31, 2013, with post-1955 amendment information following each section. Click on Legal Updates | Texas Estates Code, and you'll find the link to the final Probate Code at the upper left.

in 895 for the chapter number, and click on the search button. Again, click on the hyperlink to chapter 895, and you'll download all of that chapter. You need to scroll down to Section 4 of the act to find the 1991 amendment to Texas Probate Code Sec. 45.

- The same procedure should work for any bill or amendment.

3.11 Summary of the Legislative Process.

Watching the process is like being on a roller coaster; one minute a bill is sailing along, and the next it is in dire trouble. And even when a bill has "died," its substance may be resurrected in another bill. The real work is done in committees, and the same legislation must ultimately pass both houses. Thus, even if an identical bill is passed by the Senate as a Senate bill and by the House as a House bill, it cannot be sent to the Governor until either the House has passed the Senate bill or vice-versa. At any point in the process, members can and often do put on amendments which require additional steps and additional shuttling. It is always a race against time, and it is much easier to kill legislation than to pass it. You can find an "official" description of how a bill becomes a law prepared by the Texas Legislative Council at:

<http://www.tlc.state.tx.us/pubslegref/gtli.pdf#page=7>

3.12 The Legislative Council Code Update Bill. As statutes are moved around pursuant to the legislature's continuing statutory revision program, Legislative Council prepares general code update bills for the purposes of (and I quote):

- (1) codifying without substantive change or providing for other appropriate disposition of various statutes that were omitted from enacted codes;
- (2) conforming codifications enacted by the 83rd Legislature to other Acts of that legislature that amended the laws codified or added new law to subject matter codified;
- (3) making necessary corrections to enacted codifications; and
- (4) renumbering or otherwise redesignating titles, chapters, and sections of codes that duplicate title, chapter, or section designations.

As an aside, if you're interested in learning more about the creation of the Estates Code as part of this statutory revision, you can download this author's paper, *The Story of the Estates Code*, at:

www.snpalaw.com/resources/EstatesCodeStory

By the end of the 2017 session, Leg. Council had updated most, but not all, of references to old Probate Code provisions found outside of the Estates Code.⁵ They found a couple of other items to fix this session. The 2019 Leg. Council code update bill is **HB 4170** (Leach). One change corrects a typographical error by deleting an unnecessary indefinite article (*i.e.*, "a") in Estates Code Sec. 752.113(c). The other updates references to a subchapter of Gov't Code Ch. 155 found in Estates Code Sec. 1104.359(a) required by redesignation of that subchapter in another portion of the code update bill.

3.13 The REPTL Substantive Code Update Bill. But Leg. Council still couldn't update all references to the Probate Code. Its mandate under Chapter 323, Government Code, only allows it to make **nonsubstantive** changes, and updating certain provisions in an appropriate manner could potentially result in making **substantive** changes. These provisions were identified and forwarded to REPTL for potential inclusion in a **substantive** code update bill.

(a) Example of a "Substantive Change." An example provided by Leg. Council to this author is a reference to Texas Probate Code Sec. 95 contained in Civ. Prac. & Rem. Code Sec. 71.012:

Sec. 71.012. QUALIFICATION OF FOREIGN PERSONAL REPRESENTATIVE. If the executor or administrator of the estate of a nonresident individual is the plaintiff in an action under this subchapter, the foreign personal representative of the estate who has complied with the requirements of *Section 95, Texas Probate Code*, for the probate of a foreign will is not required to apply for ancillary letters testamentary under *Section 105, Texas Probate Code*, to bring and prosecute the action.

The provisions of Probate Code Sec. 95 found their way into seven sections of Ch. 501 of the Estates Code, and one section each of Chs. 503 through 505. Changing the Sec. 95 reference to Chapter 501 alone would ignore portions of Sec. 95 that were ultimately incorporated into Chapter 503, and would also include reference to a provision (Sec. 501.006) that was not originally derived from Sec. 95. Therefore, in order to update the reference to Sec. 95 in a manner that would not lead to confusion, a substantive, albeit minor, change was necessary. But Leg. Council takes the position that it isn't allowed to make substantive changes, even if they're teensy weensy.

⁵ Previous Leg. Council code update bills relating to the Estates Code are **S.B. 1303** (2011), **S.B. 1093** (2013), **S.B. 1296** (2015), and **SB 1488** (2017).

(b) **REPTL to the Rescue.** That's where REPTL has come in. Its 2019 Substantive Code Update bill, **HB 2780** (Wray) and **SB 1166** (Rodríguez), clarifies these references by revising Civ. Prac. & Rem. Code Sec. 71.012 as follows:

Sec. 71.012. QUALIFICATION OF FOREIGN PERSONAL REPRESENTATIVE. If the executor or administrator of the estate of a nonresident individual is the plaintiff in an action under this subchapter, the foreign personal representative of the estate who has complied with the requirements of Chapter 503, Estates Code [~~Section 95, Texas Probate Code~~], for the probate of a foreign will is not required to apply for ancillary letters testamentary under Section 501.006, Estates Code, to bring and prosecute the action.

In addition to the Civil Practice and Remedies Code, the other codes amended by this bill include the Education Code, the Estates Code, the Government Code, the Health and Safety Code, the Occupations Code, and the Property Code.

4. Key Dates.

Key dates for the enactment of bills in the 2019 legislative session include:⁶

- **Tuesday, November 6, 2018** – General election for federal, state, and county offices.
- **Monday, November 12, 2018** – Prefiling of legislation for the 86th Legislature begins.
- **Tuesday, January 8, 2019** (1st day) – 86th Legislature convenes at noon. [*Government Code, Sec. 301.001*]
- **Friday, March 8, 2019** (60th day) – Deadline for filing most bills and joint resolutions. [*House Rule 8, Sec. 8; Senate Rule 7.07(b); Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills*]
- **Monday, May 6, 2019** (119th day) – Last day for House committees to report House bills and joint resolutions. [*a “soft” deadline that relates to House Rule 6, Sec. 16(a), requiring 36-hour layout of daily calendars prior to consideration, and House Rule 8, Sec. 13(b), the deadline for consideration*]
- **Thursday, May 9, 2019** (122nd day) – Last day for House to consider nonlocal House bills and joint resolutions on **second** reading. [*House Rule 8, Sec. 13(b)*]

- **Friday, May 10, 2019** (123rd day) – Last day for House to consider nonlocal House bills and joint resolutions on **third** reading. [*House Rule 8, Sec. 13(b)*]
- **Saturday, May 18, 2019** (131st day) – Last day for House committees to report Senate bills and joint resolutions. [*relates to House Rule 6, Sec. 16(a), requiring 36-hour layout of daily calendars prior to consideration, and House Rule 8, Sec. 13(c), the deadline for consideration*]
- **Tuesday, May 21, 2019** (134th day) – Last day for House to consider most Senate bills and joint resolutions on **second** reading. [*House Rule 8, Sec. 13(c)*]
- **Wednesday, May 22, 2019** (135th day) – Last day for House to consider most Senate bills or joint resolutions on **third** reading. [*House Rule 8, Sec. 13(c)*]
Last day for Senate to consider any bills or joint resolutions on third reading. [*Senate Rule 7.25; Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills*]
- **Friday, May 24, 2019** (137th day) – Last day for House to consider Senate amendments. [*House Rule 8, Sec. 13(d)*]
Last day for Senate committees to report all bills. [*relates to Senate Rule 7.24(b), but note that the 135th day (two days earlier) is the last day for third reading in the senate; practical deadline for senate committees is before the 135th day; Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills*]
- **Sunday, May 26, 2019** (139th day) – Last day for House to adopt conference committee reports. [*House Rule 8, Sec. 13(e)*]
Last day for Senate to concur in House amendments or adopt conference committee reports. [*relates to Senate Rule 7.25, limiting a vote on the passage of any bill during the last 24 hours of the session to correct an error in the bill*]
- **Monday, May 27, 2019** (140th day) – Last day of 86th Regular Session; corrections only in House and Senate. [*Sec. 24(b), Art. III, Texas Constitution; House Rule 8, Sec. 13(f); Senate Rule 7.25*]
- **Sunday, June 16, 2019** (20th day following final adjournment) – Last day Governor can sign or veto bills passed during the previous legislative session. [*Section 14, Art. IV, Texas Constitution*]⁷

⁶ As we pass each deadline, I'll mark it in red.

⁷ A few words of further explanation about this deadline. This provision states the general rule that if the Governor doesn't return a vetoed bill to the Legislature within 10 days (*excluding Sundays*) after it's presented to him (*gender specific pronoun in original*), it becomes law as if [s]he'd

signed it. Regular sessions of the Legislature always end on a Monday, which means that there are two Sundays included in the 10 calendar days preceding adjournment. Since we don't count those Sundays, this means that for regular sessions, the 10-day period is really a 12-day period. **However**, if the Governor can't return it because the Legislature has adjourned

- **Monday, August 26, 2019** (91st day following final adjournment) – Date that bills without specific effective dates (that could not be effective immediately) become law. [*Sec. 39, Art. III, Texas Constitution*] (Note that most bills in recent years include a standard specific effective date of September 1st of the year of enactment.)

5. If You Have Suggestions ...

If you have comments or suggestions, you should feel free to contact the chairs of the relevant REPTL committee[s] identified in Section 1.4 on page 1. Their contact information can be found on their respective committee pages at www.reptl.org.

6. The REPTL Bills.

6.1 The Original REPTL Legislative Package. In addition to REPTL's Substantive Code Update bill (see Sec. 3.13 on page 5), REPTL's 2019 legislative package consisted of a number of bills covering four general areas: (i) decedents' estates; (ii) guardianships; (iii) trusts; and (iv) powers of attorney and advance directives. In addition, REPTL's legislative package includes a Texas version of the revised Uniform Fiduciary Access to Digital Assets Act. However, Sec. 35(a), Article III, of the Texas Constitution contains the "one-subject" rule:

No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject.

Because of this rule, we (or sometimes Leg. Council) strip out provisions from one or more of the "general" bills that may violate the one-subject rule and place them in separate, smaller bills. In each of the substantive sections of this paper, we will identify any REPTL bills and begin with descriptions of them.

6.2 Consolidation Into REPTL Bills. As hearings begin, legislators often ask interested parties to try to consolidate as many of the various bills on similar subjects as possible, in order to reduce the number of bills that would need to move through the legislature. Pursuant to this request, REPTL representatives and the statutory probate judges usually agree to consolidate all or a portion of a number of other bills into one or more of REPTL's bills. Therefore, keep in mind that not everything that ends up in a REPTL bill by the time it passes was originally a REPTL proposal. Where non-REPTL provisions have been added to REPTL bills,

we've attempted to identify the original bill[s] that served as the source of the amendments.

7. Decedents' Estates.⁸

7.1 REPTL Decedents' Estates Bill. REPTL's Decedents' Estates bill is **HB 2782** (Wray) and **SB 1208** (Rodríguez).

(a) Representative's Access to Nonprobate Asset Information (Secs. 111.101-111.102). This change requires a third party who held nonprobate property to provide the personal representative information about the decedent's interest prior to death, even if the estate has no interest in the asset. This assists the representative in preparing an estate tax return, or in determining whether nonprobate assets should be pursued to pay debts and expenses.

(b) Liability of Nonprobate Assets (Sec. 113.252). This change corrects a previous amendment to make clear that a personal representative has no duty to pursue nonprobate assets to pay claims, expenses, and taxes unless a written demand is made by a surviving spouse, a creditor, or someone acting on behalf of a minor child of the decedent.

(c) Memorandum of Conveyance Voids TODD (Sec. 114.102). This change clarifies that a memorandum of conveyance recorded before the transferor's death voids a prior TODD covering the property (as an alternative to recording the conveyance itself).

(d) Repeal of Statutory TODD Forms (Secs. 114.151-114.152). The optional statutory forms for a TODD and a revocation of a TODD found in Subchapter D have been criticized as confusing, and there is an ongoing desire to move away from statutory forms. Rather than trying to fix them, they're repealed, since alternative forms (that can be modified as needed without legislative action) satisfying the statute are readily available.

Drafting Tip

TexasLawHelp.org has a handy, dandy toolkit for TODDs, currently available to download at:

texaslawhelp.org/resources/transfer-death-deed-forms

(e) Community Property Intestacy Clarification (Sec. 201.003). Sec. 45 of the Probate Code originally provided that when a person died without a will, survived by a spouse and descendants, the

by the end of this 12-day period, the Governor has until 20 days (*no Sunday exclusion*) after adjournment to veto it. Therefore, bills passed in the 2017 regular session must be

sent to the Governor by May 17th in order to avoid the 20-day post adjournment deadline.

⁸ Section references are to the Texas Estates Code unless otherwise noted.

survivor is entitled to retain half of the community estate, and the other half passes to the decedent's descendants. There's no confusion because the section is dealing with the passage of the entire community estate. In 1993, Sec. 45(a) was added to provide that all of the community estate passed to the survivor if all of the decedent's descendants were also descendants of the survivor. If not, the old rule now contained in Sec. 45(b), continued to apply. Again, the section was still dealing with the entire community estate.

However, when Sec. 45 was moved to Estates Code Sec. 201.003, Leg. Council drafted three subsections. Subsection (a) stated that the section governed the disposition of the community estate *of a deceased spouse* who dies intestate. This doesn't seem to deal with the community estate of the surviving spouse. Subsection (b) contained the 1993 amendment that the community estate *of a deceased spouse* passes to the surviving spouse if all of the decedent's descendants are also descendants of the surviving spouse. Ditto as to the community estate of the surviving spouse. But now subsection (c) provided that if the deceased spouse had a descendant who was not a descendant of the surviving spouse, "one-half of the community estate is retained by the surviving spouse and the other one-half passes to the deceased spouse's children or descendants." Even though subsection (a) said the section was only dealing with the decedent's community estate, this subsection is dealing with the entire community estate, just like former Sec. 45. Unfortunately, REPTL has received anecdotal evidence that some lawyers (and even judges) are interpreting subsection (c) to apply to just the deceased spouse's half of the community estate, so that the surviving spouse keeps his or her half, "retains" half of the deceased spouse's half, and the other half of the deceased spouse's half, or one-fourth of the entire community estate, passes to the descendants. *This interpretation is wrong*, and REPTL's solution is to change subsection (c) so that it only discusses the passage of the deceased spouse's half of the community estate to the descendants, and makes no mention of the surviving spouse's interest.

(f) Number of Disinterested Witnesses in an Heirship (Sec. 202.151). This change requires two disinterested and credible witnesses in an heirship proceeding unless the court is satisfied that only one can be found. Keep in mind that this section does not require that any of the witnesses personally knew the decedent. A genealogist who never met the decedent could be a disinterested witness who proves up the heirship solely by documentation found by the witness.

(g) Ability to Delegate Appointment of Administrator (Secs. 254.006, 256.051, 301.051, 301.052, and 304.001). Ever wish you could give someone the ability to name successor executors the same way you can give someone the ability to name successor trustees? Then this change is for you. New Sec. 254.006 allows a testator to grant to a named executor or other person designated by name, office, or function the authority to name one or more persons to serve as administrator.⁹ By default, the designee(s) would act only if all named successors were unable or unwilling to act, but the will could provide otherwise (*i.e.*, the person with the designation power could be given the ability to override the default order of succession). Unless the will or designation provides otherwise, the designee would have the same rights, powers, and duties of any named executor, including the rights to serve as independent administrator and exercise any power of sale granted in the will without the need for consent of the distributees. Of course, the designee would still need to offer the normal proof to the court that the designee is qualified to act, not disqualified, etc.

Drafting Tip

You may be able to adapt language you already have for the selection of trustees if your testator wishes to delegate this authority in the will.

(h) Removal of Will Reformation from Constitutional County Court (Sec. 255.456). This change allows removal of a will reformation action in a constitutional county court without a statutory probate court to a county court-at-law exercising original probate jurisdiction, or to a district court if there is no statutory county court exercising original probate jurisdiction.

(i) Elimination of Reference to Unwritten Will (Sec. 256.051). An unnecessary reference to unwritten wills is deleted since we don't have unwritten wills anymore (and haven't since 2007).

(j) Custody of Will (Secs. 256.053 & 256.202). Once an original will is filed for probate, it must remain in the clerk's custody unless removed for inspection pursuant to a court order (in which case it must be redelivered to the clerk following the inspection) or the case is transferred under Ch. 33 (*e.g.*, venue reasons or convenience of the estate).

(k) Conversion of Muniment to Administration (Secs. 257.151 & 257.152). Ever find a need for appointment of an executor after the will has already been admitted as a muniment of title? This new section clarifies that admission of a will as a muniment

⁹ The designee wouldn't be an executor since the designee wasn't directly named in the will.

does not preclude the subsequent appointment of an executor or administrator, so long as the application is filed within the original time frame for opening administrations, or the court otherwise finds administration necessary (see Estates Code Sec. 301.002(b)). The deadline for granting letters, for giving notice to the beneficiaries, and for filing the affidavit or certificate of that notice will then run from the date of qualification rather than the date the will was originally admitted to probate.

(l) Clarification of Proof Required for Letters (Sec. 301.151). Two different 2015 bills amended Sec. 301.151(2). This change repeals the less desirable of the two of them.

(m) Executor's Access to Digital Assets (Secs. 351.106 & 402.003). This change clarifies the ability of an executor or administrator (including an independent one) to obtain a court order to access digital assets of a decedent.

(n) Court Approval of Contingent Fee Agreements (Sec. 351.152). This change clarifies that court approval of a contingent fee agreement in a dependent administration is required only if the agreement calls for a fee in excess of $\frac{1}{3}$ rd of the property sought to be recovered.

(o) Fees Awarded to Successful Contestant (Sec. 352.052). This change allows (but does not require) a successful will contestant who does not offer an alternative will for probate to be awarded costs, including attorney's fees.

(p) Separate \$15,000 Class 1 Claim Limits (Secs. 355.102 & 355.103). This change creates separate \$15,000 limits for Class 1 funeral expenses and expenses of last illness, rather than a single combined \$15,000 limit for both types of expenses, and clarifies that claims for reimbursement of those expenses benefit from the same classification.

(q) Claim Holder's "Reasonable Time" Duty (Sec. 355.1551). Sec. 355.1551, added in 2015 (but not by REPTL!), attempted to require a secured creditor electing preferred debt and lien status to take possession of or sell the security within a reasonable time. This change clarifies the procedures to be followed in that situation.

(r) Procedures to Sell Real Estate. These changes clarify the procedures to be followed in dependent administrations where there is no will granting a power of sale.

(i) Auctions (Secs. 356.105, 356.401-356.405). References to public "sales" are changed to public "auctions." An auction is completed upon the bid

of the highest bidder. Instead of the auction taking place in the county where the probate proceeding is pending, it will take place in any county where the real estate is located, unless the court supervising the probate orders the auction to be held in its county (this flips the existing priority). The auction must take place either at the courthouse or another place designated by the commissioners court. If the first Tuesday of the month is either January 1st or July 4th, then the auction will take place on the first Wednesday of the month. (The changes relating to the time and location of the auction make the provisions identical to sales under contractual liens. See Prop. Code Sec. 51.002.

(ii) Private Sales (Secs. 356.451 & 356.502). For private sales, "sales" terminology is revised to refer to the contract entered into by the representative.

(iii) Report and Approval (Secs. 356.551-356.558). Rather than a "sale" "being reported to the court, a "successful bid or private contract" is reported regarding the "proposed disposition" of the property, rather than referring to the "sale" as if it had already occurred. If the court is satisfied with the terms of the proposed disposition, it "approves," rather than "confirms," the sale.

(s) Waiver of Bond Where Will Doesn't Waive Bond (Sec. 401.005). This change allows the distributees to waive bond for an independent executor or administrator where the will doesn't waive it.

(t) Claims Procedures for Medicaid Recovery in Independent Administrations (Sec. 403.05851). Sec. 403.058 states that most of the claims procedures in dependent administrations don't apply to independent administrations. However, this change makes the dependent administration claims procedures apply to Medicaid Estate Recovery (MERP) claims in an independent administration where without the change, no statute of limitations applies without opening a full dependent administration.

(u) Public Probate Administrators (Secs. 455.008, 455.009, & 455.012). Ch. 455, dealing with "public probate administrators," was added in 2013. This change relates to the authority of and procedures for a PPA.

(v) Recusal of Presiding Statutory Probate Judge (Gov't Code Secs. 25.002201 and 25.00255). This change clarifies procedures related to a motion to recuse a judge who is the presiding judge of the statutory probate courts.

7.2 Online Notice by Publication (Secs. 51.054, 51.103, 1051.054, & 1051.153). See Sec. 14.2 on page 21.

7.3 Miscellaneous Decedents' Estates Changes. SB 1975 (Zaffirini) makes several changes related to decedents' estates.

(a) Personal Service in Heirships (Sec. 202.054). A court may already require citation on distributees by personal service in an heirship proceeding. This change allows any disinterested person to serve the citation on a distributee who is absent or a nonresident,

(b) References Changed from Independent Executor to Administrator (Secs. 351.351, 404.0036, & 404.005). Several references to "independent executor" are changed to "independent administrator."

(c) Notice of Appointment of Temporary Administrator (Sec. 452.006). A temporary administrator is already required to notify the decedent's known heirs of the appointment by certified mail. This change requires the administrator to file proof of service in the same manner required for service by mail under Sec. 51.103.

(d) Recording of Non-English Foreign Wills (Sec. 503.002). When an authenticated copy of a foreign will and its probate is recorded in the deed records, if any portion is not in English, it must be accompanied by an English translation, the accuracy of which is sworn to.

7.4 Electronic Wills Act (Ch. 259). HB 3848 (Longoria) would adopt the Electronic Wills Act. Note that this is based on a current version of a uniform law in the process of being drafted by the Uniform Laws Commission, and the earliest the ULC might adopt the act is the summer of 2019. Its adoption in Texas prior to then seems premature. However, should it be enacted, we'll include a more detailed discussion at that time.

7.5 Actions Without Court Approval (Sec. 351.052). HB 2762 (Landgraf) adds additional actions that may be taken by a dependent administrator without court approval, including hiring an accountant, bookkeeper, or other tax professional; a real estate agent; or an appraiser to assist with valuations. In addition, the administrator would have authority to pay all reasonable costs necessary to exercise their duty of care or related to any of the other powers listed in Sec. 351.052.

7.6 Claims for Cost of Certain Electrical Service (Secs. 355.102 & 355.103). HB 3777 (Krause) would add claims for the cost of electrical service if the decedent had been designated as a critical care residential customer to funeral expenses and expenses of last illness as Class 1 claims.

7.7 Recovery of Unclaimed Funds from Comptroller (Secs. 551.051-551.055; Prop. Code Sec. 74.501). Apparently, the claims process under the Estates Code for recovery of unclaimed funds held by

the Comptroller is different from the process for all other unclaimed property (*see* Ch. 74, Prop. Code). It requires the claimant to sue the Comptroller, and the suit must be brought in a district court in Travis County within a four-year deadline. **HB 2064** (Murphy) and **SB 1420** (Zaffirini) amend the Estates Code provisions to adopt the Property Code claims process. Also, the current Property Code claims process provides that if the reported owner dies intestate, either the owner's legal heirs or the court-appointed administrator of the owner's estate may file a claim with the Comptroller. **HB 3598** (Martinez Fischer) amends that provision to allow claims by the administrator only if appointed before the 4th anniversary of the owner's death.

7.8 Exemption From Reporting Requirements (Gov't Code Secs. 36.003 & 37.002). *See* Sec. 14.7 on page 22.

7.9 Finality of Foreclosures (Prop. Code Secs. 51.0001, 51.002, & 51.0022). HB 2069 (Wray) revises foreclosure procedures to deal with the problems arising from the possibility that the opening of an administration following a foreclosure might provide an avenue for avoiding the foreclosure sale. If the decedent's secured debt is in default, the mortgage servicer must provide notice send notice at least 45 days prior to the proposed foreclosure sale as follows:

- If there's a pending independent administration, to the independent executor at the last address shown for the executor in the probate proceedings.
- If the deceased debtor is the sole obligor, the servicer is **not** required to send a notice with an opportunity to cure.
- If no administration is pending, and the sale will take place before the fourth anniversary of the debtor's death, the notice should be sent to the debtor's surviving spouse, if any.
- If no administration was opened before the fourth anniversary, the servicer should address the notice to the deceased debtor and his or her "unknown heirs" (what about known heirs?), post the notice outside a main entry door if the property is a residence, send the notice by certified mail to the last known address of the person who most recently paid any installment on the debt, and file an affidavit with the county clerk stating the method used to provide notice.

The actual foreclosure sale may not take place before the 180th day following the debtor's death. If these notice rules are followed, then a subsequent administration of the debtor's estate (whether dependent or independent) won't affect the validity of the foreclosure sale.

7.10 **Vacating Lease After Tenant's Death (Prop. Code Sec. 92.0162).** **HB 69** (Minjarez) allows the estate or a family member of a deceased tenant to terminate a residential lease early by giving the landlord (1) timely notice of the death and identification of the tenant's PR or authorized family member, (2) removing the tenant's property before the next rent payment is due, and (3) paying delinquent rent and repairing damages. The lease is terminated on the later of (1) the 30th day following the notice to the landlord or (2) the date on which the above conditions are met. The landlord must provide a copy of the lease and may not impose a penalty just because the lease was terminated because of the tenant's death. Note that this act would only apply to leases entered into on or after its effective date.

7.11 **Disclosure of Insurance Beneficiary to Funeral Director (Ins. Code Secs. 1103.201 & 1103.202).** **HB 2378** (Raymond) and **SB 2436** (West) require a company issuing a life insurance policy to disclose the beneficiary of the policy upon request of a funeral director directing the insured's funeral.

7.12 **Property Taxation of "Heir Property."** **SB 1943** (Watson) defines "heir property" as real property owned by one or more persons, at least one of whom claims the property as the person's residence homestead, and acquired by the owners by will, TODD, or intestacy. The person claiming the property as a residence homestead is called the "heir property owner," and is considered the sole owner of the property for purposes of the property tax homestead exemption. This homestead exemption does not, however, affect actual legal title.

7.13 **Expedited Death Certificate.** **HB 3957** (Turner) requires the Department of Health Services to establish a procedure to expedite the issuance of a death certificate if an authorized requestor demonstrates a need for religious purposes.

7.14 **Obtaining Medical Records From State Hospital (H&S Code Sec. 611.0041).** As introduced, **HB 1901** (Bonnen, G.) would have authorized the appointment of a descendant of deceased state hospital patient for the sole purpose of obtaining the patient's medical records from the state hospital. However, when it emerged from House Judiciary, it merely permits a professional to release mental health records of a deceased patient of a state hospital to a descendant if (1) the patient has been deceased at least 50 years and (2) there is no indication that the release is inconsistent with any prior expressed preference of the deceased patient or his or her personal representatives.

8. Guardianships and Persons With Disabilities.¹⁰

8.1 **The REPTL Guardianship Bill.** REPTL's Guardianship bill is **HB 3543** (Thompson, S.) and **SB 667** (Zaffirini).

(a) **Matters Related to Guardianship Proceeding (Sec. 1021.001).** This section has contained two definitions of a matter related to a guardianship proceeding: subsection (a) for counties **without** a statutory probate court, and subsection (b) for counties **with** a statutory probate court. This change leaves subsection (a) to define those matters in counties without **either** a statutory probate court or a county court at law and inserts a new subsection (a-1) applicable to counties without a statutory probate court but with a county court at law (adding the interpretation and administration of a trust in which a ward is a beneficiary).

(b) **Wards' Bill of Rights (Sec. 1151.351).** This change amends the right set forth in subsection (b)(12) to clarify that only a court investigator or guardian ad litem (and not an attorney ad litem) may be appointed to investigate a complaint relating to modification or termination of a guardianship, which is consistent with the procedure set forth in Sec. 1202.054.

(c) **Notice to Creditors (Sec. 1153.001).** This change requires that the general notice to creditors be published in a newspaper of general circulation in the county, rather than one printed in the county. The notice must be posted only if there's no newspaper of general circulation. (This is similar to the 2017 change relating to publication of the notice to creditors in decedents' estates.)

(d) **Attorney's Fees (Sec. 1155.054).** This is a terminology change. Instead of **requiring** a party to reimburse certain attorney's fees, a court may **order** the party to reimburse those fees.

(e) **Costs (Sec. 1155.151).** This change subjects the payment of costs out of a guardianship estate under subsection (a)(1) to a "best interests" standard, similar to the existing standard with respect to payment out of a management trust found in subsection (a)(2).

(f) **Agency References (Secs. 1163.005 & 1163.101).** References to the Department of Aging and Disability Services are changed to the Health and Human Services Commission, while references to the Guardianship Certification Board are changed to the Judicial Branch Certification Commission.

¹⁰ Again, section references are to the Texas Estates Code unless otherwise noted.

(g) Ch. 1301 Management Trusts. Several changes are made relating to management trusts under Ch. 1301.

(i) Notice (Sec. 1301.0511). The notice provisions when an application for creation of a management trust are made identical to the provisions applicable to the creation of a guardianship. Plus any currently serving guardian must also be served.

(ii) Termination Provisions (Secs. 1301.101 & 1301.203). The terms of a management trust must provide for its termination upon a minor beneficiary's death or 18th birthday (unless the court provides for a later date no later than the beneficiary's 25th birthday), whichever occurs first, or upon an adult incapacitated beneficiary's death, a finding by the court that continuation of the trust is no longer in the beneficiary's best interests, or when the adult beneficiary regains of capacity.

(iii) Accounting (Sec. 1301.154). Both the guardian of the estate and the guardian of the person must receive a copy of the annual account (not either).

(h) Sale of Property by Nonresident Guardian (Secs. 1355.002 & 1355.105). These changes clarify that money held in the clerk's registry is to be paid to the nonresident guardian, not the nonresident minor or incapacitated ward.

(i) Criminal History Record of Proposed Nonresident Guardian (Gov't Code Sec. 155.202). A criminal history record is currently required for any *applicant* if the proposed ward's liquid assets exceed \$50,000. A non-REPTL addition to the bill makes this requirement apply to any *proposed guardian*, rather than applicant, and expands the requirement to any proposed guardian who is not a Texas resident, regardless of the liquid asset value.

8.2 Parental Administration (Mostly New Ch. 1359). HB 4562 (Metcalf) hit my computer after midday on the last day for filing bills this session. The Word version of the bill as filed is 57 pages long. My eyes glazed over at the thought of preparing a description of such a lengthy bill in an area (guardianships) in which I no longer practice. But while the bill creates a completely new type of fiduciary (called a "parental administrator"), after reading it, I decided it isn't that hard to describe for purposes of this paper. (Although if this passes, I expect there will be papers prepared by others that are devoted solely to the changes made by this bill.)

(a) A Few Definitions. New Ch. 1359 is titled "Parental Administration." For purposes of the chapter, an "incapacitated adult" means an incapacitated person who is an adult. "Parent" has the same meaning as for

guardianship purposes, except that it also includes a person appointed conservator of a child under the Family Code. "Parental administrator" means a person appointed under this chapter, and "proposed incapacitated adult" has a meaning essentially equivalent to a "proposed ward" in a guardianship proceeding.

(b) Parallel Provisions. Rather than detailing all of the provisions of the new chapter, I think it's safe to say that it essentially creates a new type of fiduciary with similar procedures as are applicable to a guardianship, and mostly with respect to a guardianship of the person. Those parallel provisions comprise most of the bill.

(c) Differences. Here are some of the differences between a guardianship and a parental administration:

- A parental administrator must be a parent (or conservator under the Family Code) of the proposed incapacitated adult.
- The court must find "that the proposed incapacitated adult lacks the capacity to do some, **but not all**, of the tasks necessary to care for himself or herself or to manage his or her property with or without supports and services."
- The powers that a court may grant to a parental administrator (and the reason I analogize a parental administration to a guardianship of the person) include:
 - (A) the right to have physical possession of the incapacitated adult and to establish the incapacitated adult's legal domicile;
 - (B) the duty to provide care, supervision, and protection for the incapacitated adult;
 - (C) the duty to provide the incapacitated adult with clothing, food, medical care, and shelter;
 - (D) the power to consent to medical, psychiatric, and surgical treatment of the incapacitated adult;
 - (E) the power to establish a [special needs] trust ... and direct that the income of the incapacitated adult ... be paid directly to the trust ...;
 - (F) the power to sign documents necessary or appropriate to facilitate employment of the incapacitated adult;
 - (G) the power to receive funds for the incapacitated adult from a government source;
 - (H) the power to obtain insurance and communicate with insurance issuers on behalf of the incapacitated adult;
 - (I) the power to file suit on behalf of the incapacitated adult; and

(J) other powers as determined necessary by the court.

- Significantly, while an incapacitated adult must be an incapacitated person as defined for guardianship purposes, **an incapacitated adult retains all legal and civil rights and powers**. The powers of the parental administrator are subordinate to those of the incapacitated adult.
- Therefore, the order appointing a parental administrator **may not remove** the rights of the incapacitated adult nor grant a power to the parental administrator to manage the incapacitated adult's property or financial affairs beyond the powers specifically authorized above.

8.3 Miscellaneous Guardianship Changes. SB 1975 (Zaffirini) makes a number of changes, described below and elsewhere throughout the paper

(a) Attorney Certification (Sec. 1054.201 & Gov't Code Sec. 81.114). Any attorney representing any person in a guardianship proceeding must obtain guardianship education certification, not just the applicant's attorney and any court-appointed attorney. (An attorney who doesn't have the certification may enter an appearance but must complete the course requirements within 14 days and prior to filing any substantive pleading.) In addition, the provider of a guardianship certification course may not charge more than necessary to cover the costs of the course.

(b) Applicant's Former Name and Liquid Assets (Sec. 1101.001). An application for guardianship must include the applicant's former name of the applicant, if any, and the approximate value of the proposed ward's liquid assets (instead of "property").

(c) Waiver of Guardianship Training (Sec. 1101.153). If an order appointing a guardian waives the training requirement, it must contain a finding that the waiver is in accordance with rules adopted by the Supreme Court.

(d) Criminal History Record Fee (Sec. 1104.402, 1104.403, & 1104.405). The clerk's authority to charge a \$10 fee for obtaining criminal history information relating to a proposed private professional guardian or his or her representatives is repealed.

(e) Attendance at Legal Proceeding (Sec. 1151.005). A guardian may not be excluded from attending a legal proceeding in which the ward is a party or participating as a witness.

(f) Transfer of Guardianship to Foreign Jurisdiction (Sec. 1253.001). A court may transfer a guardianship to a foreign jurisdiction to which the ward

has permanently moved on its own motion, not just on motion of the guardian.

8.4 Mediation and Termination of Guardianships Bill. SB 1783 (Zaffirini) contains provisions relating to mediation and termination of guardianships. The bill also contains provisions regarding initial venue of guardianships and transfer of guardianships to another county. *See* Sec.13.6 on page 21 for a discussion of those other provisions.

(a) Mediation (Secs. 1055.151-1055.153, 1101.001, 1101.052, 1201.053). A court may refer a guardianship to mediation at any time. The proposed ward's capacity may not be mediated and must still be proved to the court. Probate courts may also apply for grants to fund guardianship mediation projects or participate in national or state studies of the effects of mediation on promotion of least restrictive alternatives.

(b) Termination (Secs. 1202.001, 1202.231-1202.235). A court must terminate a guardianship when it finds that the ward's needs can be managed without a guardianship by an alternative or with supports and services. Detailed procedures for that determination are provided.

(c) Mediation Training (Gov't Code Sec. 155.301). The Office of Court Administration is directed to establish a 24 hour training course for use by approved dispute resolution training providers for those persons appointed to facilitate mediations.

(d) No Liability (Sec. 1023.011). A judge ordering a transfer to another county in compliance with the Estates Code has no liability for anything that may happen after the transfer. Similarly, the judge in the new county has no liability for anything that happened before the transfer.

8.5 Compensation of Guardians of Medicaid Recipients (Sec. 1155.202). **SB 1784** (Zaffirini) increases the compensation that may be paid to a guardian appointed to receive Medicaid from \$175/month to \$250/month.

8.6 Notice and Filing Under Mental Health Code (H&S Code Secs. 571.013 & 571.014). **HB 2936** (Hinojosa) and **SB 395** (Zaffirini) would require personal delivery of notices in proceedings under the under the Texas Mental Health Code to be made by a county constable or sheriff. In addition, copies of papers may be filed in the proceedings. Anyone filing a reproduced, photocopied, or electronically transmitted paper must maintain possession of the originals and make them available for inspection on request by the parties or the court.

8.7 Online Notice by Publication (Secs. 51.054, 51.103, 1051.054, & 1051.153). *See* Sec. 14.2 on page 21.

8.8 Office of Public Guardian. SB 1426 (Zaffirini) appears to be a second attempt to pass 2017's **SB 1325** (Zaffirini | Thompson, S.). It authorizes a commissioners court to establish an "office of public guardian." The position may be full or part-time, may be shared with another county, and may be filled through an agreement with a nonprofit guardianship program or private professional guardian in that county or an adjacent county. The term of the public guardian is five years, and the public guardian may employ personnel to facilitate carrying out the duties of the office. The public guardian is compensated by the commissioners court, and is not entitled to standard guardian commissions, which makes sense since the office may be appointed to serve in cases where there are not enough assets or resources to pay a private professional guardian. A public guardian may also be appointed if the court finds the ward resides in the county and (1) the ward does not have sufficient assets to pay a private professional guardian and the appointment of a public guardian is in the ward's best interest, or (2) the ward has sufficient assets to pay a private professional guardian, the appointment of a public guardian is in the ward's best interest, and (a) the ward's family members who are eligible for appointment agree to the appointment of the public guardian to serve as guardian, or are unable to agree on the person that should serve, or (b) the ward does not have any family member, friend, or other suitable person is willing to act. No single person in the office of public guardian may be appointed as guardian in more than 35 cases.

8.9 Provision of Mental Health Services to Minor (H&S Code Sec. 572.001). **HB 1318** (Moody) and **SB 218** (Rodríguez) authorizes a grandparent, adult sibling, or adult aunt or uncle who's had actual care, custody, and control of a minor for at least six months to seek a court order for temporary inpatient mental health services.

8.10 Authority for Emergency Detention (H&S Code Sec. 573.001). The same two bills, **HB 1318** (Moody) and **SB 218** (Rodríguez), clarify that the authority of a peace officer to take a person into custody for an emergency detention without a warrant applies *regardless of age*.

8.11 Investigations of Abuse of Elderly or Person With Disability (Hum. Res. Code Secs. 48.002 & 48.151). The Department of Family & Protective Services already has the ability to investigate claims of abuse of an elderly person or a person with a disability by the person's caretaker, family member, or other

individual who has an ongoing relationship with the person. **HB 3774** (Davis, Y.) eliminates the requirement that the "other individual" have an ongoing relationship with the person.

8.12 Referral of Alleged Incapacitated Person by DFPS to Probate Court (Hum. Res. Code Sec. 48.209). DFPS may refer individuals who may be appropriate for a court-initiated guardianship to a probate court. **HB 3572** (Meza) requires DPFS to first investigate the individual's condition and circumstances to determine whether an alternative to guardianship is available. The DPFS must prepare a report after the investigation and provide a copy of the report to the court.

8.13 Exemption From Reporting Requirements (Gov't Code Secs. 36.003 & 37.002). *See* Sec. 14.7 on page 22.

8.14 Electronic Database for Settlement Agreements Involving Minors or Incapacitated Persons (Gov't Code Sec. 72.034). **HB 770** (Davis, S.) would have the Office of Court Administration establish an electronic database containing personal injury or wrongful death settlement agreements for which a minor or incapacitated person is the beneficiary. The agreement would remain confidential, would be accessible only by the parties, their attorneys, or the guardian, next friend, or guardian ad litem of a party. The OCA may charge a fee, not to exceed \$50, for recording a settlement agreement in the database. That fee is a considered a court cost to be included for payment in the settlement agreement.

8.15 Guardianship Abuse, Fraud, and Exploitation Deterrence Program (Gov't Code Secs. 72.121 – 72.124). **HB 1286** (Smithee) and **SB 31** (Zaffirini, *et al.*) would establish a guardianship abuse, fraud, and exploitation deterrence program within the Office of Court Administration designed to provide additional resources and assistance to courts that have jurisdiction over guardianship proceedings. This could include engaging guardianship compliance specialists who could review guardianships to identify deficiencies by guardians, audit annual accounts, develop best practices for managing guardianships, and report concerns of potential abuse, fraud, or exploitation to the appropriate courts. The program could also maintain a database monitoring filings of inventories, annual reports, and annual accounts. Courts selected by the OCA for review and audit would be required to participate, or courts could apply to participate. The director of the OCA may notify the State Commission on Judicial Conduct if the OCA has reason to believe that a judge's actions or failure to act with respect to a

report received from the OCA may constitute judicial misconduct.

8.16 Task Forces Concerning Persons With Disabilities. Several bills establish task forces concerning persons with disabilities:

(a) **Access to Legal Services.** **HB 4462** (Meza) would establish a task force to study access to legal services for persons with disabilities.

(b) **Best Practices for Detention.** **HB 3116** (White) would establish a task force to conduct a comprehensive study on best practice standards for the detention of a person with an intellectual or developmental disability.

(c) **Appropriate Care Settings.** **SB 47** (Zaffirini) would establish a task force to assist in developing a comprehensive, effectively working plan to ensure appropriate care settings for persons with disabilities.

8.17 Use of Person First Respectful Language. In 2011, the legislature enacted Gov't Code Ch. 392, the intent of which is found in Sec. 392.001:

Sec. 392.001. FINDINGS AND INTENT. The legislature finds that language used in reference to persons with disabilities shapes and reflects society's attitudes toward persons with disabilities. Certain terms and phrases are demeaning and create an invisible barrier to inclusion as equal community members. It is the intent of the legislature to establish preferred terms and phrases for new and revised laws by requiring the use of language that places the person before the disability.

Sec. 392.002 put the following terms on the "naughty" list: disabled; developmentally disabled; mentally disabled; mentally ill; mentally retarded; handicapped; cripple; and crippled. Instead, the legislature encouraged the use of the following phrases on the "nice" list in enacting or revising statutes or resolutions: "persons with disabilities;" "persons with developmental disabilities;" "persons with mental illness;" and "persons with intellectual disabilities." Several bills along these same lines have been filed this session:

- **SB 1768** (Zaffirini) directs Leg. Council and other state agencies to avoid the term "ward" in any new legislation and to replace, as appropriate, any existing term as that law is amended with the following preferred terms: "person," "incapacitated person," and "person with a guardian." The definitions of "incapacitated person" and "supports and services" are revised, a definition of "community-based informal and formal resources

and assistance" is added, and if an alleged incapacitated person expresses a desire to oppose a guardianship, directs the attorney ad litem to advocate zealously on the person's behalf and seek alternatives to guardianship or supports and services to avoid a guardianship.

- **HB 588** (González, M.) and **SB 281** (Zaffirini) are similar bills that add the following terms to the "naughty" list: hearing impaired; hearing loss; audiologically impaired; auditory impairment, and speech impaired. And the following phrases are added to the "nice" list: "deaf," "persons who are deaf;" "hard of hearing," and "persons who are hard of hearing." Note that statutes and resolutions aren't invalid for failure to use the preferred terms.
- **HB 965** (González, M.) and **SB 896** (Zaffirini) are similar bills that change the terms "mentally retarded" or "mental retardation" to "intellectual or developmental disability[ies]" and the term "the mentally retarded" to "persons with intellectual disabilities" in a number of Education Code statutes.
- **HB 2890** (Johnson, Julie) encourages avoidance of the phrases "admission, review, and dismissal committee" or "ARD committee" and the use of the phrases "individualized education program team" or "IEP team."

Drafting Tip

While there's certainly no requirement that you follow the same guidelines in the documents you prepare, it certainly wouldn't hurt.

8.18 Court-Ordered Support Paid to SNT. **HB 558** (Thompson, S.) and **SB 262** (Rodríguez) would allow a court to direct that support for an adult child with a disability be paid to a special needs trust for the child. The bill provides that this change constitutes a material and substantial change of circumstances under Family Code Sec. 156.401 sufficient to warrant modification of an existing court order.

8.19 Property Tax Exemption. **HB 160** (Raymond) and **HJR 19** (Raymond) would extend the \$10,000 property tax exemption currently available to individuals who are disabled or 65 or over to the parent or guardian of a minor who is disabled and resides with the parent or guardian. **HB 322** (Geren) and **HJR 26** (Geren) would extend the limitation of annual property tax valuation increases currently available to individuals who are disabled or elderly and their surviving spouses beyond school districts to other taxing units.

8.20 Possession of Firearm by Certain Persons. **HB 544** (Nevárez) makes it a misdemeanor for a person to possess a firearm while subject to any of the

following judicial determinations: court-ordered inpatient mental health services, acquittal of crime by reason of insanity, determination to be an individual with an intellectual disability and committed for long-term placement, guardian appointment based on lack of mental capacity, or determination to be incompetent to stand trial. **SB 1945** (Watson) allows a judge to issue an order prohibiting a proposed patient ordered to receive outpatient mental health services from owning, possessing, or purchasing a firearm for 90 days if the court finds by clear and convincing evidence that proposed patient's possession of a firearm would present a substantial risk of serious harm to the proposed patient's self or to others.

8.21 Financial Abuse of Elderly. **HB 977** (Thierry) and **SB 2279** (West) create an offense if a person knowingly engages in financial abuse of an elderly individual, including the financial exploitation by a person who has a relationship of confidence or trust with the elderly individual (such as breach of a fiduciary duty under a power of attorney).

8.22 Abuse or Exploitation of Elderly or Person With Disability. **HB 4476** (Davis, Y.) makes a person liable for damages, including mental anguish, punitive damages, and attorney's fees, for abuse or exploitation of an elderly person or person with a disability.

8.23 Phishing Against the Elderly. **HB 883** (Thierry) allows a court to triple the actual damages awarded under our Anti-Phishing Act (found in Bus. & Comm. Code Ch. 325) if the target of the phishing is an elderly individual.

8.24 Abandoning Elder or Disabled Individual. **HB 2874** (Davis, Y.) expands the current criminal offense of abandoning a child to include abandonment of an elderly or disabled individual.

8.25 Sexual Assault Against Elder or Person With Disability. **HB 4531** (Neave) and **SB 2237** (Zaffirini) allow a sexual assault examiner or nurse examiner to provide medical care and collect forensic evidence for a survivor of sexual assault who either an incapacitated person at least 14 years of age or a ward in a guardianship regardless of whether the legal guardian consents.

8.26 Admission of Person for Voluntary Mental Health Services. **HB 3536** (Rose) and **SB 1238** (Johnson) require a person admitted to a facility for voluntary mental health services to receive a physical and psychiatric exam within 72 hours before or 24 hours after admission. If the exam is after admission, the

person must be discharged if the examining physician determines the person does not meet clinical standards for inpatient mental health services (and the facility may not bill the patient for temporary admission).

8.27 Mental Health Public Defenders. **HB 2938** (Hinojosa) and **SB 1293** (Zaffirini) allow counties to employ attorneys as mental health public defenders in proceedings for court-ordered mental health services.

8.28 Signature Authority Over ABLE Account. If the designated beneficiary of an ABLE account under IRC Sec. 529A is not able to exercise signature authority or chooses not to exercise signature authority, **HB 2947** (Klick) and **SB 1184** (Perry) allow a parent, *legal guardian*, or other fiduciary of the beneficiary to do so if permitted by Sec. 529A.

9. Trusts.¹¹

9.1 The REPTL Trusts Bill. REPTL's Trust bill is **HB 2245** (Wray) and **SB 631** (Rodríguez).

(a) Mandatory Rules – Trustee's and Attorney's Fees (Sec. 111.0035). Added to the list of mandatory trust terms that may not be altered by the settlor are the court's ability to deny or order the return of trustee's fees and to make an "equitable and just" award of costs and attorney's fees under Sec. 114.064.

(b) Incorporation of Will Construction Concepts Into Revocable Trusts (Sec. 112.0335). The provisions of Estates Code Ch. 255, relating to the construction and interpretation of wills (*e.g.*, pretermitted children, advancements, lapsed gifts, class closing, and more) are made applicable to trusts revocable by the settlor, or the settlor and the settlor's spouse. In addition, the abatement provisions of Estates Code Sec. 355.109 are made applicable to those trusts.

(c) Effective Date of Reformations (Sec. 112.054). This change clarifies that a judicial reformation of a trust (as opposed to a modification), because of the very nature of reformations, is effective as of the creation of the trust.

(d) Decanting Into the Same Trust? (Sec. 112.071) This change "clarifies" that the second trust to which trust assets are decanted may be created under the same trust instrument as the first trust, in which case the property need not be retitled, or under a different instrument. The language specifically states that it's intended to be a clarification of the common law. What's the point? Well, it's hoped that this will allow a trustee to decant into a new trust with the same name and

¹¹ Section references are to the Texas Property Code unless otherwise noted.

TIN as the original trust, reducing the transaction costs of changing title to the assets. We'll see.

(e) Effect of Divorce on Certain Transfers in Trust (Secs. 112.101-112.105). The provisions currently found in Estates Code Secs. 123.051-123.056, relating to the effect of divorce on revocable dispositions in trust in favor of a former spouse and the former spouse's family are copied to the Trust Code (where they really belong). At some point, they may be repealed from the Estates Code.¹²

(f) Termination of Ch. 142 Trusts (Sec. 142.005). The required termination provisions of a court-created trust governed by Property Code Ch. 142 are revised in a manner similar to the revisions found in REPTL's Guardianship bill to court-created trusts governed by Estates Code Ch. 1301 (*see* Sec. 8.1(g)(ii) on page 12).

(g) Pooled Trust Subaccounts (Sec. 142.010 and Ch. 143). New Ch. 143 provides for pooled trust subaccounts, and the transfer of assets from a Ch. 142 management trust to a pooled subaccount, for example, if the initial trustee can no longer serve and no suitable replacement for the unpooled trust can be found.

9.2 The REPTL Directed Trusts Bill (Sec. 114.0031). REPTL's Directed Trust bill is **HB 2246** (Wray) and **SB 309** (Rodríguez). It amends our directed trust provision to clarify that the person with the authority to direct, consent to, or disapprove the trustee's decisions is an "advisor," and is a fiduciary. An exception to the fiduciary characterization is the power solely to remove and appoint trustees, advisors, trust committee members, or other protectors, and the advisor does not exercise the power to appoint himself or herself. Also, the fiduciary requirement does not prohibit the exercise of a power that must be exercised in a nonfiduciary capacity for someone to be treated as the owner of a trust for federal income tax purposes.

9.3 300-Year RAP (Sec. 112.036). **HB 3744** (Burrows) attempts to modify the statutory rule against perpetuities to a fixed 300-year time limit measured from the "effective date" of the trust. The "effective date" is not defined (*e.g.*, when created? when irrevocable?). It would apply to trusts with an effective date on or after September 1, 2019, and to trusts with an earlier date if the trust instrument provides that interests vest under the statutory provision applicable to trusts on the date the interest vests (which seems a bit circular).

This year's bill appears identical to 2017's **HB 2842** (Burrows), which never emerged from committee. I raised the question at the time whether a statutory change

would pass constitutional muster. If you're interested, see the discussion in the Special Supplement on the Delaware Tax Trap in [2017's legislative update](#).

I believe this is a complete list of all previous attempts to modify Sec. 112.036:

- 1999's **HB 1553** (repeal of statutory RAP)
- 2001's **HB 1608** and **SB 698** (RAP doesn't apply to trusts but interests in trusts must vest within 1,000 years)
- 2003's **HB 2239** and **SB 534** (same as 2001 bills)
- 2005's **HB 2561** (RAP doesn't apply to trusts)
- 2009's **HB 990** (200-year RAP)
- 2011's **HB 372** and **SB 261** (same as 2009 bill)
- 2013's **HB 2189** (500-year RAP)
- 2017's **HB 2842** (300-year RAP)

10. Disability Documents.

10.1 The REPTL Financial Power of Attorney Bill. REPTL's Financial Power of Attorney bill is ... Just kidding. After the significant overhaul of the financial power of attorney statutes in 2017, REPTL decided to give them a rest this session. (However, the nonsubstantive Leg. Council code update bill does repeal an extra "a" from Est. Code Section 752.113(c). *See* Sec. 3.12 on page 5.)

10.2 The REPTL Medical Power of Attorney Bill (Health & Saf. Code Secs. 166.152, 166.160 & 166.164). REPTL's Medical Power of Attorney bill is **SB 310** (Rodríguez). It makes the statutory form of medical power of attorney optional, so people who want to can use other forms, such as the [Five Wishes](#) document, the [ABA's simple form](#), or some other form as a standalone document. To be valid, a medical power must:

- be in writing;
- be signed by the principal (or another person at the principal's express direction) before two witnesses or a notary; and
- contain the principal's name, date of execution, and designation of an agent.

In order to make this more palatable to the Texas Medical Association and the Texas Hospital Association, both of which opposed this change in 2017, an attending physician, health or residential care provider, or agent of either will not be considered to have engaged in unprofessional conduct for assuming that a medical power was valid when made so long as they have no actual knowledge to the contrary. This time around, the Health Law Section of the State Bar adopted

¹² These provisions are inserted as new Subchapter D of Chapter 112. Current Subchapter D, which contains the

decanting statutes, is relettered as Subchapter E. Don't worry though – none of the section numbers have changed.

the objections expressed previously by TMA and THA. REPTL reached a compromise with the Health Law Section in the form of new Sec. 166.152(b). The new provision first provides that if two or more agents are named to act concurrently, unless the medical power provides otherwise, the agents will have authority to act as sole agent in the order in which their names are listed. If two or more agents are acting and cannot agree on a treatment decision in the manner provided in the medical power, again, they'll have authority to act as sole agent in the order in which their names are listed. In that case, they may continue to act in the manner provided in the medical power on matters on which they agree. In exchange for this addition, the rest of the changes in REPTL's proposal remained intact, including making the statutory form optional, rather than mandatory.

However, after the bill was filed, THA indicated that the compromise still did not satisfy its concerns. We'll see how this plays out. *See also* Section 10.5 below

10.3 The REPTL Anatomical Gift Bill (Health & Saf. Code Ch. 692 & Secs. 692A.005-007). REPTL's Anatomical Gift bill is **HB 2247** (Wray) and **SB 258** (Rodríguez). It allows a statement of anatomical gift, a revocation of same, or a refusal to make an anatomical gift to be acknowledged in the presence of a notary instead of two witnesses.¹³

Drafting Tip

If you prepare these for clients and have already switched from two witnesses to one notary for the rest of your advance directives, you may do so now for this anatomical gift document.

However, when my clients bring this up, I usually encourage them to register at the Glenda Dawson Donate Life Texas Registry, since the client's wishes will be documented and readily available to health care providers at the time of donation, while access to the anatomical gift form you've prepared may not be. Anyone can register at:

<https://www.donatelifetexas.org/>

The registry also has partnerships with the Texas DPS and DMV that allow individuals to join the donor registry when applying for or renewing their driver's license, ID, or vehicle registration.

10.4 The REPTL Disposition of Remains Bill (Health & Saf. Code Secs. 711.002 & 711.004). REPTL's Disposition of Remains bill is **HB 2248**

(Wray) and **SB 259** (Rodríguez). The bill revokes the authority of a spouse if the marriage is dissolved before the decedent's death. It clarifies that a court with jurisdiction over probate proceedings for the decedent (whether or not commenced) has jurisdiction over a dispute regarding disposition of remains. However, a dispute over removal of remains is heard in a county court in the county where the cemetery is located.

10.5 Creditor's Duty to Notify Agent (Secs. 751.231 & 751.251). **SB 763** (Menéndez) has a relatively narrow scope. If a principal who is at least 65 is delinquent under an agreement relating to the principal's living quarters, **and** the creditor knows that the principal has given a power of attorney to an agent that would allow the agent to make the delinquent payment, then before the creditor takes adverse action against the principal (like eviction proceedings), the creditor must submit a written request to the agent by certified mail. If the delinquency remains after 30 days, the creditor must bring an action requesting a court to review the agent's conduct. Further actions by the creditor that are adverse to the principal are delayed until the court takes appropriate action.

10.6 Form of Advance Directive (Health & Saf. Code Secs. 166.032, 166.0325, 166.036, 166.102, & 166.163). **HB 1082** (Raymond) and **SB 1786** (Zaffirini) do not make the statutory medical power form optional, but do allow the executive commissioner of the Department of State Health Services to designate alternate allowable forms. A designated alternate form must:

- 1 be promulgated by a national nonprofit;
- 2 be written in plain language;
- 3 allow a declarant to provide health care instructions;
- 4 require a declarant to name an adult agent;
- 5 allow a declarant to name an alternate adult agent;
- 6 allow the declarant to specify or limit treatment decisions an agent may make;
- 7 allow the declarant to specify treatments he or she approves (or doesn't);
- 8 allow the declarant to specify personal, spiritual, and emotional care he or she approves (or doesn't);
- 9 allow the declarant to detail information to be conveyed to family members and friends, including wishes for a memorial service or burial;
- 10 require the declarant to sign and date the directive before two witnesses; and
- 11 be accepted as valid in at least 40 other states.

¹³ In 2009, when **HB 2027** replaced the Uniform Anatomical Gift Act found in Ch. 692 with the *Revised* Uniform Anatomical Gift Act found in new Ch. 692A, **SB 1803** separately amended Sec. 692.003(d) of the old act. That left

subsection (d) in place, but the rest of Sec. 692.003 was repealed, along with the rest of Ch. 692. The REPTL bill repeals the scrap of Ch. 692 that's left.

Based on the required criteria, this sounds like a bill advanced by Aging with Dignity, the nonprofit that promulgates the [Five Wishes](#) document.

10.7 **Texas Health Care Right of Conscience Act (Health & Saf. Code Secs. 161.701-161-708).** [HB 2892](#) (Oliverson) and [SB 1107](#) (Kolkhorst) allow a person to refuse to be involved in any way with a health care treatment contrary to that person's conscience. However, it doesn't apply to life-sustaining treatment subject to Ch. 166, nor a decision made by an agent under a medical power of attorney.

10.8 **Other Bills Relating to Directives to Physicians.** There are a number of bills relating to directives to physicians and family or surrogates.

(a) **Advance Directive and DNR of Pregnant Patient (Health & Saf. Code Secs. 166.033, 166.049, 166.083, & 166.098).** [HB 1071](#) (Hinojosa) would allow a woman of child-bearing age to make her own decision regarding the effect of pregnancy on a decision regarding life-sustaining treatment, and makes conforming amendments to the statutory forms.

(b) **The Respecting Texas Patients' Right to Life Act of 2019 (Health & Saf. Code Secs. 166.045, 166.046, 166.051, & 166.052; Gov't Code Sec. 25.0021).** [HB 3158](#) (Raymond) and [SB 2089](#) (Hughes) appear to be another attempt to pass what was called the Texas Patient Autonomy Restoration Act of 2017 two years ago ([HB 4090](#) (Klick) and [SB 1213](#) (Hughes, *et al.*)). When an attending physician refuses to comply with a patient's advance directive or a patient's or family's decision to choose treatment necessary to prevent the patient's death, these changes require that life-sustaining treatment continue to be provided until the patient can be transferred to a health care provider willing to honor the directive or treatment decision. (rather than going through the procedure currently set forth in Sec. 166.146). The provisions making the patient responsible for the costs of transfer, and limiting the physician's and health care facility's obligation to provide treatment for only ten days, are repealed. Because there is no time limit on the obligation to continue to provide life-sustaining treatment, the statutory statement advising the patient or decision maker of their options is repealed.

(c) **Limits on Refusal to Honor Patient's Wish for Life-Sustaining Treatment (Health & Saf. Code Ch. 166).** [HB 3369](#) (Parker) and [SB 2129](#) (Creighton) make a number of changes throughout Ch. 166. Essentially, they prohibit physicians, health care facilities, and ethics committees from refusing to honor a patient's directive to provide life-sustaining treatment based on:

- the lesser value the physician, facility, or committee places on sustaining the life of an elderly, disabled, or terminally ill patient compared to the value of sustaining the life of a patient who is younger, not disabled, nor terminally ill;
- a disagreement between the physician, facility, or committee and the patient over the greater weight the patient places on sustaining the patient's life than the risk of disability; or
- the patient's financial condition.

10.9 **Anatomical Gifts.** Here are several bills related to anatomical gifts:

- [HB 406](#) (Price) and [SB 516](#) (Zaffirini) require a person issuing a fishing or hunting license, and [HB 407](#) (Kacal) and [SB 517](#) (Zaffirini) require a person issuing a motor vehicle registration, to specifically ask each applicant "Would you like to register as an organ donor?" If yes, the issuer must forward the applicant's information to the statewide donor registry.
- [HB 609](#) (Thierry) changes the procedures for an applicant for a driver's license or personal identification certificate. Currently, the applicant is asked "Would you like to register as an organ donor?" If yes, the applicant's information is forwarded to the statewide donor registry. This bill changes the question for adult applicants to "Would you like to *refuse* inclusion in an organ donor registry?" If no, the applicant's information is forwarded.
- [HB 1350](#) (Oliverson) prohibits the hospital administrator, a person who exhibited special care and concern for the decedent and is associated with the hospital in possession of the decedent's body, and any other person having the authority to dispose of the decedent's body from making an anatomical gift. Nor may a procurement organization or any person associated with the hospital in possession of the decedent's body acting as a guardian make an anatomical gift.
- [HB 2734](#) (Burrows) directs the DSHS executive commissioner to promulgate a form allowing the guardian of a resident of a state supported living center to make an anatomical gift on the resident's behalf.
- [HB 3874](#) (Sheffield) directs the DSHS to publish information on its website on the steps necessary to be placed on the national waiting list for organ transplants.

10.10 **In-Hospital DNR Orders (Health & Saf. Code Secs. 166.201-166.209).** The 2017 special

session led to the passage of **SB 11** (Perry, *et al.* | Bonnen, G., *et al.*), a bill that for the first time outlined procedures for issuing and revoking **in-hospital DNR orders**, as opposed to out-of-hospital DNR orders that are already dealt with in Subch. C of Health & Saf. Code Ch. 166. (See the description of the bill in [the 2017 legislative update](#) for further description of the bill). The changes contained in the bill went into effect April 1, 2018.

(a) **September 2018 Hearing.** According to an article in the September 7, 2018, edition of the *Austin American-Statesman*, a hearing the previous day before the Senate State Affairs Committee included accusations by its chairman of violations of unwritten rules of conduct by several legislators relating to the bill. In accordance with directions contained in **SB 11**, shortly after the changes took effect, the Health and Human Services Commission published proposed rules implementing the law (see [43 TexReg 2355](#)). During the public comment period, Sen. Charles Perry and Rep. Greg Bonnen, who shepherded **SB 11** through the special session, sent a letter to the agency seeking changes to the proposed rules that would prevent hospital ethics committees from approving a doctor's request to halt life-sustaining care. In Texas, if a doctor believes continued treatment would inhumanely extend suffering, the doctor may appeal to an ethics committee for approval to halt life-sustaining care. The ethics committee may then order that treatment be halted in 10 days.

SB 11 is silent on whether ethics committee intervention is allowed with respect to the DNR orders dealt with by the changes, and that was intentional in order to obtain passage of the bill through a carefully-crafted compromise. Perry and Bonnen were specifically directed to ensure that no changes were made to **SB 11** on either chamber's floor. At the September 6th hearing, Sen. Byron Cook, chair of the State Affairs Committee, stated that the letter sent by Perry and Bonnen regarding the proposed rules violated the special session compromise. Cook also said that several of the over 60 other legislators who signed the Perry-Bonnen letter felt misled about its contents and wanted their names removed from it. As of the date of this version, no final rules have been adopted.

(b) **Revocation of In-Hospital DNR Orders (Health & Saf. Code Sec. 166.205).** This session, **HB 3332** (Frank) directs a physician to revoke a patient's DNR order if the advance directive on which the DNR order is based is revoked.

10.11 **Treatment Contrary to Declaration for Mental Health Treatment (Civ. Prac. & Rem. Code Sec. 137.008).** **HB 3666** (Murr) limits a health

care provider's ability to subject a principal to treatment contrary to wishes expressed in a declaration for mental health treatment only following a **judicial determination** that the principal was mentally incompetent at the time the declaration was executed.

11. Nontestamentary Transfers.

11.1 **The REPTL Decedents' Estates Bill – Repeal of Statutory TODD Forms** See Sec. 7.1(d) on page 7.

11.2 **TODD Forms (Gov't Code Sec. 22020 & Est. Code Ch. 114).** Back in 2015, **SB 512** directed the Supreme Court to promulgate forms with accompanying instructions for use in certain probate matters or in making certain wills. (They're still working on it.) While REPTL's Decedents' Estates bill repeals the statutory TODD forms, this session's **HB 3562** (Farrar) and **SB 874** (Huffman) go a step further. They repeal those statutory forms, but add TODD forms, and forms for revoking TODD's, to the list of forms the Supreme Court should promulgate.

12. Exempt Property.

12.1 **The REPTL Exempt Savings Plan Bill (Prop. Code Secs. 42.0021 & 42.0022).** REPTL's Exempt Savings Plan bill is **HB 2779** (Wray) and **SB 1167** (Rodríguez). The provisions of current Prop. Code Sec. 42.0021, previously relating solely to the creditor exemption for retirement plans, are clarified and reorganized to be more readable and incorporate the provisions of Sec. 42.0022, relating to the creditor exemption for college savings plans. (The latter section is repealed.)

13. Jurisdiction and Venue.

13.1 **The REPTL Decedents' Estates Bill – Removal of Will Reformation.** See Sec. 7.1(h) on page 8.

13.2 **The REPTL Guardianship Bill – Matters Related to Guardianship Proceeding.** See Sec. 8.1(a) on page 11.

13.3 **The REPTL Disposition of Remains Bill – Courts With Jurisdiction.** See Sec. 10.4 on page 18.

13.4 **Jurisdiction of Contested Matters in Counties Without Statutory Court (Sec. 32.003).** Sec. 32.003 provides that if a contested matter arises in a county without a statutory probate court or county court at law, the county judge or any party may file a motion for the assignment of a statutory probate judge to the contested matter or to transfer the contested matter to a district court. Currently, if a party files a motion for assignment of a statutory probate judge before the contested matter is transferred to a district court, the

judge must grant the motion. **HB 2928** (King, P.) changes this so that if more than one party files a motion, the motion filed first must be granted (unless withdrawn). In addition, a party may file an anticipatory motion with the party's initial pleadings to make sure theirs is the first motion.

13.5 **Venue for Probate of Wills (Sec. 33.1011).** **HB 2857** (Murr) and **SB 192** (Perry) authorize transfer of a probate proceeding to the county of the executor's residence after issuance of letters if no immediate family member resides in the county of the decedent's residence. (This is in addition to the current grounds for transfer for the convenience of the estate under Sec. 33.103.)

13.6 **Venue and Transfer of Guardianships.** **SB 1783** (Zaffirini) mostly addresses venue and transfers of guardianships.

(a) **Venue (Sec. 1023.001).** The permissive venue in the county in which the proposed ward's principal estate is located would only apply in a proceeding for the appointment of a guardian of the estate, not the person.

(b) **Transfer (Sec. 1023.005).** The court must grant a motion to transfer a guardianship to another county if it appears to be in the ward's best interests and the ward has resided in that other county for at least six months. In determining the ward's best interests, the court may consider the interests of justice; the convenience of the parties; and the preference of a ward who is at least 12 years of age.

(c) **Effect of Transfer (Sec. 1023.008).** Once a guardianship is transferred, the transferee court becomes the court of continuing exclusive jurisdiction, proceedings commenced in the original county continue in the new county, judgments rendered in the original county have the same effect in the new county, and the original court retains no jurisdiction over the ward or authority to enforce any orders.

(d) **No Liability (Sec. 1023.011).** A judge ordering a transfer to another county in compliance with the Estates Code has no liability for anything that may happen after the transfer. Similarly, the judge in the new county has no liability for anything that happened before the transfer.

13.7 **Transfer of Guardianship to Foreign Jurisdiction (Sec. 1253.001).** See Sec. 8.3(f) on page 13.

13.8 **Jurisdiction of Certain Courts.** **HB 1033** (Murr) and **SB 793** (Alvarado) (which are companions), and **HB 1380** (Murr) increase the amount in controversy limits for county and justice courts from \$10,000 to

\$20,000. **SB 561** (Zaffirini), does that too, and in addition, among other things, increases the lower limit of district and statutory county court jurisdiction from \$500 to \$10,000. **HB 3336** (Leach) and **SB 2342** (Creighton) increase the upper limit of statutory county court jurisdiction in civil cases from \$200,000 to \$250,000 and makes other jurisdictional changes. **HB 4207** (Lozano) increases the jurisdictional limit by the same amount but omits the other jurisdictional changes.

14. Court Administration.

14.1 **The REPTL Decedents' Estates Bill – Recusal of Presiding Statutory Probate Judge.** See Sec. 7.1(u) on page 9.

14.2 **Miscellaneous Decedents' Estates Changes.** **SB 1975** (Zaffirini) makes several additional court administration changes.

(a) **Transfer of Clerk's File (Secs. 33.101-33.103 & 1023.006-1023.007).** One change authorizes transfer of the clerk's file in **either** electronic or paper form when a case is transferred (i) because venue is proper in another county, (ii) because the transferring court does not have priority of venue, or (iii) for the convenience the estate.

(b) **Last Three Digits (Civ. Prac. & Rem. Code Sec. 30.014).** Another change extends the Civil Practice & Remedies Code provision requiring a party's initial pleading in a civil action to include the last three numbers of the party's driver's license and social security numbers in district, county, and statutory county courts to specifically include probate and guardianship proceedings, and to specifically apply to statutory probate courts.

(c) **Bond Extended to Visiting Judge (Gov't Code Secs. 25.0006, 25.00231, and 26.001).** The coverage of the bond of the judge of a constitutional county court, statutory county court, or statutory probate court is extended to any visiting judge assigned to the court.

14.3 **Online Notice by Publication (Secs. 51.054, 51.103, 1051.054, & 1051.153; C.P. & R. Code Sec. 17.032).** **HB 2120** (Leach) and **SB 891** (Huffman) are omnibus bills that make a number of changes affecting the judicial branch. However, of interest to us are several changes relating to serving notice by publication. The Senate committee substitute provides that in addition to publication in a newspaper, notice would be required to be posted on a public information website created and maintained by the Office of Court Administration. Exceptions to publication are provided based on inability to afford

payment, the newspaper's publication cost, or lack of a newspaper in the county of publication.

14.4 Expedited Action Rules (Gov't Code Secs. 22.004 and 22.023). **HB 3336** (Leach) amends the statute directing the Supreme Court to adopt rules expediting certain actions by increasing the amount in controversy to which those rules should apply from \$100,000 to \$250,000, and eliminates the express inclusion of exemplary damages, attorney's fees, and other costs in the amount in controversy. The bill also establishes a pilot program (subject to the legislature providing funding) directing the Supreme Court to select 10 counties in which trial courts may experiment with practices and procedures to enhance access to the civil justice system.

14.5 Payment of Costs Associated with Assigned Statutory Probate Judge (Sec. 352.054; Gov't Code Sec. 25.0022). **HB 3267** (Murr) is similar to 2017's **HB 1744** (Murr | Perry). The 2019 version provides that if a party to a contested probate proceeding requests the assignment of a statutory probate judge under Est. Code Sec. 32.003, the court, on its own motion, or on the motion of the party requesting the assignment, may order that the county be reimbursed for the costs of the assignment out of the estate. The county may seek reimbursement from one or more of the parties as apportioned by the judge. If the judge does not order that the county be reimbursed from the estate, the county can seek reimbursement from the party requesting the assignment. If more than one party requested the assignment, then the judge must apportion the costs among those parties.

As I pointed out in 2017, setting aside situations where parties agree to hire a "private judge," I am not aware of any other situation under Texas law where a party is required to pay for a judge.

14.6 State Contribution for Statutory Probate Judges (Gov't Code Sec. 25.00211). **HB 586** (Thompson, S.) changes the state's annual contribution towards a statutory probate judge's compensation from a flat \$40,000 to 60% of a district court judge's salary, but only if the judge does not engage in a private law practice. **HB 1624** (Thompson, S.) is the same, but omits the requirement that the judge not have a private practice.

14.7 Exemption From Reporting Requirements (Gov't Code Secs. 36.003 & 37.002). Gov't Code Sec. 36.004 requires court clerks to prepare monthly reports listing court appointments for an

attorney ad litem, guardian ad litem, guardian, mediator, or competency evaluator. Gov't Code Sec. 37.003 requires courts to maintain lists of attorneys registered with the court as qualified to serve as attorney ad litem; attorneys and other persons registered with the court as qualified to serve guardian ad litem; persons registered with the court to serve as a mediator; and attorneys and private professional guardians registered with the court as qualified to serve as a guardian. **HB 1285** (Smithee) and **SB 41** (Zaffirini) exempt from these reporting requirements attorneys ad litem, guardians ad litem, and guardians who serve pro bono or are volunteers of a nonprofit organization that provides pro bono legal services. The bill also allows a court to appoint a person other than the first person on the normal appointment rotation list if a state of disaster had been declared for the area served by the court within the preceding 30 days.

14.8 Associate Judges for Guardianship and Protective Services Proceedings (Gov't Code Ch. 54A). Existing Subchapter C of Gov't Code Ch. 54A authorizes associate judges in statutory probate courts. **HB 2803** (Murr) and **SB 536** (Zaffirini) add a new Subchapter D that would authorize the appointment of associate judges to hear guardianship and protective services proceedings in courts other than statutory probate courts.

14.9 Bar Card Access to Courthouses (Gov't Code Sec. 75.601; Local Gov't Code Sec. 291.010). **HB 1359** (Wu) allows attorneys to skip the security entrance at courthouses by presenting their Texas bar card. Counties and municipalities may not adopt or enforce rules that conflict with this provision (like the special identification cards that some counties issue following an application process). This applies to buildings that house a justice court, municipal court, county court, county court at law, or district court. So it doesn't apply to appellate courts. But what about buildings that house only statutory probate courts? (See Sec. 14.10 below.)

14.10 New Travis County Probate Court and Building.¹⁴ As practitioners in Travis County know, the facilities available for the county's lone statutory probate court are cramped, to say the least. That's why, despite the overwhelming need for a second court, Travis County still has only one statutory probate court. However, after standing vacant since 2012 when the federal courts moved to their new courthouse, it was announced at the end of 2016 that the old federal courthouse (dating back to about 1935)¹⁵ would be

¹⁴ This is only included in the paper because I practice in Travis County, and therefore care about it.

¹⁵ The old federal courthouse has been described both as art deco, and as "Depression-era Moderne." I don't know if those

donated to Travis County for use by its probate court(s) and the probate division of the county clerk's office. The county will need to spend an estimated \$28 million (or more, since that estimate dates back to 2016) to modernize the old courthouse while maintaining many of the architectural details. In a conversation with this author in January, 2019, Judge Guy Herman indicated that they hope to move into the new facility by late 2020, and that a bill to authorize a second probate court would likely follow in the 2021 session.

15. Selected Marital Issues.

15.1 **Agreements Incident to Divorce or Annulment Incorporated by Reference (Fam Code Sec. 7.006).** **HB 559** (Thompson, S.) and **SB 261** (Rodríguez) provide that if a court approves a written agreement incident to a divorce or annulment and incorporates the agreement by reference in the final decree, the agreement itself is no longer required to be filed with the court or the clerk. This change applies whether the decree was signed before or after the effective date of the amendment.

15.2 **Disclosure of Gestational Agreement; Standing (Fam Code Secs. 6.406 & 102.003).** **HB 1689** (Deshotel) and **SB 1204** (Miles) provides that if the parties in a divorce proceeding are the intended parents under a gestational agreement, the petition must state those facts, whether the gestational mother is pregnant or a child subject to the agreement has been born, and whether the agreement has been validated under Fam. Code. Sec. 160.756. An intended parent under a gestational agreement is also granted standing to file a SAPCR if that person files jointly with the other intended parent, or files against the other intended parent.

15.3 **Divorce.** Here are some other bills relating to divorce:

- **HB 922** (Krause) requires both spouses to agree in order for the court to grant a divorce on the grounds of insupportability.
- **HB 926** (Krause) extends the waiting period for a divorce granted on the grounds of insupportability if the household includes a minor child, an 18-year old child in high school, or an adult disabled child.

15.4 **Same-Sex Marriages and Conduct.** Here are some bills relating same-sex marriage and conduct:

- **SB 114** (Menéndez) repeals statutes regarding the criminality or unacceptability of homosexual

conduct and statutes that don't recognize certain same-sex relationship statuses.

- **SB 153** (Rodríguez) amends certain Family Code and Health & Safety Code provisions to recognize same-sex relationships. It also repeals a Penal Code statute making homosexual relations illegal.
- **HJR 64** (Beckley) and **SJR 9** (Rodríguez) are a proposed constitutional amendment that repeals the constitutional ban on same-sex marriages and the prohibition against creating or recognizing any legal status identical or similar to marriage.
- **HB 978** (Beckley) begins by adding new Fam. Code Sec. 1.0015 directing that gender-specific terminology be construed in a neutral manner to implement the rights and duties of spouse or parents in a same-sex marriage. It then makes a number of changes to specific statutes to implement that goal. It also repeals Penal Code Sec. 21.06 which criminalizes homosexual conduct (the statute was ruled unconstitutional by the U.S. Supreme Court in 2003¹⁶ but has never been taken off the books in Texas.
- **HB 2109** (Flynn) and **SB 1009** (Birdwell) allow a person authorized to conduct a marriage ceremony to recuse himself or herself from doing so (without liability) if the recusal is based on the person's sincerely held religious belief or conscientious objection.

15.5 **Persons Conducting Marriage Ceremonies.** **HB 1572** (Moody) would add criminal law magistrates to the list of judges authorized to conduct marriage ceremonies.

16. Stuff That Doesn't Fit Elsewhere.

16.1 **Fraudulent Securing of Document Execution.** **SB 1199** (Miles) creates a criminal offense if a person, with intent to defraud, by deception, or without consent, causes another person to sign or execute a document affecting property, a service, or the pecuniary interest of a person.

16.2 **Abeyance of Grievance Proceedings.** **SB 2115** (West) allows a grievance committee to hold a complaint in abeyance pending a settlement agreement between the complainant and the responding attorney. After the settlement, the complaint would continue in abeyance until the attorney fully satisfies the settlement conditions of the. At that point, the grievance committee may dismiss the complaint.

two descriptions conflict. More information about the old building can be found [here](#).

¹⁶ See *Lawrence v. Texas*, 123 S.Ct. 2472, 539 U.S. 558 (2003)

16.3 **Protection of Religious Beliefs and Moral Convictions.** **HB 3172** (Krause) and **SB 1978** (Hughes) add new Ch. 2400 to the Gov't Code. It prohibits any *governmental entity* from taking any *adverse action* against any *person* based on the person's belief or action in accordance with the person's sincerely held religious belief or moral conviction, including beliefs or convictions regarding marriage. (Italicized words are defined in the statute.) Remedies for violation of this prohibition include damages, injunctive relief, declaratory relief, and anything else appropriate, including attorney's fees. Exhaustion of administrative remedies is **not** required. Sovereign immunity is waived. The AG's office may bring an action against a governmental entity to enforce compliance.

16.4 **Proposed Change to Disciplinary Rules Regarding Clients with Diminished Capacity.** On October 5th, we all received an e-mail from the State Bar notifying us that the [Committee on Disciplinary Rules and Referenda](#), established by the 2017 legislature to review the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure and provide annual reports on their adequacy to the Supreme Court and the State Bar Board of Directors, had published [proposed changes to three disciplinary rules](#):

- Current Rule 1.02(g), which requires a lawyer to take reasonable action to secure the appointment of a guardian or other legal representative, or seek other protective orders, for a client the lawyer reasonably believes lacks legal competency, would be repealed.
- Rule 1.05(c)(9) would be added to allow a lawyer to reveal confidential information in order to secure legal advice about the lawyer's compliance with the rules.
- And most important, new Rule 1.16 would be added dealing solely with clients with diminished capacity. Here is the text of the proposed rule as it appeared in August 31st issue of the Texas Register and the September Texas Bar Journal:

Rule 1.16 Clients with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the

client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

This proposed change appears to be based on [the ABA's Model Rule 1.14](#). Following a public hearing on these proposed changes held by the CDRR on October 10th, and a comment period that ended November 1st, the CDRR voted at its November 7th meeting to forward these proposed rule changes to the State Bar's Board of Directors, and they appear to have been forwarded January 10th. The board has up to 120 days to vote on the changes (its only remaining meeting within that period is at the end of April). If approved, the changes are submitted to the Supreme Court, which then distributes a copy of the changes to the members of the State Bar in ballot form at least 30 days before voting begins, with a subsequent 30-day voting period.

16.5 **Comment Change to Disciplinary Rule Regarding Competent and Diligent Representation.** Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct establishes the general rule that a "lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence" By order dated February 26, 2019, the Texas Supreme Court amended comment 8 to Rule 1.01 to add technological competence to the rule. That comment now reads:

8. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.

16.6 **Ethics Opinion No. 678 -- Serving as Executor and Attorney for Executor.** The following

is Prof. Gerry Beyer's description of this nonlegislative development:

In September, 2018, the Professional Ethics Committee for the State Bar of Texas clarified the ethical rules that apply when the same person serves as both the executor and the attorney for the executor:

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer is not prohibited from serving as both executor and as counsel for the executor; however, the lawyer must evaluate whether there are conflicts of interests before and during the representation including any arising from the lawyer serving in the dual roles. If the representation of the executor will be adversely affected by the lawyer's or law firm's own interests, then the lawyer may not serve as counsel for the executor unless the lawyer can obtain the consent required under the Texas Disciplinary Rules of Professional Conduct. If a lawyer cannot serve as counsel for the executor because of such a conflict, the other lawyers in the lawyer's law firm are also prohibited from representing the executor. Finally, additional limitations can arise if the lawyer, serving as executor, should or may be a witness in a probate or other legal proceeding related to the estate, which limitations may affect whether the lawyer can be both a fact witness and an advocate before a tribunal in the same proceeding.

Moral: Although this opinion authorizes the same person to serve as the executor and the attorney for the executor under proper circumstances, prudent practice would be, IMHO, to avoid dual roles.

Note: That moral is Prof. Beyer's, not mine. While I personally wouldn't serve as executor for persons other than family members and close friends, my "moral" would be that under "proper" circumstances, *i.e.*, where there appear to be no complications or disagreements related to the administration of an estate, a lawyer could serve in both roles, but that dual capacity should end at the **first** sign of any complication or disagreement.

17. A Little Lagniappe.

We are [mostly] happy to report the following developments critical to the future of Texas:

17.1 **"Go in' Up the Country."** In June, 2018, the Texas Legislative Council issued a report compiling definitions of "rural" found in Texas statutes and state agency rules. They found 46 of 'em, and included maps for 18 definitions. Notably, there's no reference to "rural" homesteads. Art. 16, Sec. 51, of the Texas Constitution does not use the term "rural." It refers to a homestead, "not in a town or city," of no more than 200 acres, and a homestead "in a city, town or village" of no more than 10 acres. And Prop. Code Sec. 41.002 uses the term "rural homestead" without defining what's

"rural," although in all fairness, it does provide guidelines for what is considered an urban homestead. One *might* conclude that if it doesn't fit the definition of an urban homestead, it would be *rural*. (Also, it appears that the report was designed to address what's "rural" over larger geographic areas, hence the statewide maps.) If you're interested, you can find the report here:

https://tlc.texas.gov/docs/policy/Def_Rural_Statutes.pdf

17.2 **Lemonade, Anyone? HB 234** (Krause, *et al.*) and **SB 824** (Nelson) prevent local governments from enforcing any ordinance or rule that prohibits a minor from temporarily selling lemonade or other nonalcoholic beverages on private property. By the time the House version passed out of that chamber, it also prohibited property owners' associations from adopting or enforcing similar restrictive covenants. According to Ken Herman of the Austin American-Statesman, in 2015 the police chief in Overton, Texas, shut down the lemonade stand of two sisters, ages 7 and 8, that they had set up to pay for a Father's Day trip to a water park. The chief relied on a state law covering homemade food that allows the sale of products such as candy, nuts (coated and uncoated), fruit butters and pies, popcorn, vinegar, pickles and mustard – but does not mention lemonade.

17.3 **Repeal of Marihuana Laws!** Not really. **HB 1196** was introduced by Rep. Terry Meza, a former Spanish teacher who was irked by the fact that "marihuana" is misspelled many times throughout Texas statutes. But rather than correct those references to "mariijuana," her bill would replace all the "marihuana" references to "cannabis," the plant's scientific name that she believes is less controversial.

17.4 **Hook 'Em vs. Gig 'Em. HB 412** (Larson) requires UT and A&M to play a football game against each other on Thanksgiving weekend each year, beginning in 2020. If one of them refuses to do so, that university may not award any athletic scholarship funded by state funds the following year.

17.5 **Dangerous Wild Animals, Oh My! HB 1268** (Lucio, III) and **SB 641** (Huffman) generally prohibit the ownership, possession, sale, transfer, breeding, or custody or control of "dangerous wild animals." They're listed in the statute, and neither longhorn steers nor rough collies appear on the list, so UT and A&M can breathe easy. However, bears and cougars are on the list (we're looking at you, Baylor and UH!). There are numerous exceptions to the prohibition, including a college or university that displayed a dangerous wild animal as a mascot before September 1, 2019, and does not allow direct contact between the public and the mascot. So there you go.

17.6 **One Plate or Two?** Here are a veritable potpourri of bills relating to license plates:

- **HB 666** and **HB 673** (King, K.) add “luxury passenger cars” (those with a base model MSRP of at least \$60,000) to the current list of vehicles (tractors, motorcycles, trailers, and semis) exempt from the requirement that a license plate be displayed on the front bumper. According to a Ken Herman column in the Austin American-Statesman,¹⁷ Rep. King’s constituents who buy Corvettes “don’t particularly want to drill a hole in their brand new car’s bumper.” King claims that Texas is unique in that most states don’t require front license plates. While our neighboring states may have dropped the front-plate requirement, a majority (31 states) still require one.. King denies this is “a rich people bill. Almost every car costs \$60,000 anymore, particularly a sports car.” Herman points out that due to an unintentional 2011 change, while it’s still illegal to drive without a front plate, there’s no longer any penalty for it.
- Or forget the minimum MSRP requirement. **HB 2149** (Shaheen) and **SB 805** (Fallon) do away with front license plates for all passenger cars and light trucks.
- If those bills don’t pass, perhaps **HB 688** (Guillen), which authorizes display of the front plate inside the windshield, will.
- Or we may enter the digital age. **HB 1711** (Paddie | Canales) and **SB 2076** (Paxton) authorize the issuance of “digital license plates” A DLP (my acronym, not anyone else’s) would be attached to the rear of the vehicle in lieu of two physical plates, and it could display the vehicle’s registration insignia so you wouldn’t need that messy little sticker inside your windshield. But wait, there’s more! It could be used to collect tolls. It could display emergency alerts, factory recall notices, logos, or **advertising**. If only they would allow the vehicle owners to use the DLP to transmit “customized” messages to nearby drivers who aren’t operating their vehicles the way the owner would prefer. Think of the possibilities...
- Finally, **SB 1271** (Watson) neither changes the number of required plates nor changes the medium in which the plates are displayed. However, it directs the issuance of license plates that include the words “Keep Austin Weird.”

17.7 Thank You For Your Service, Mr. Overton. I’m not sure how well-known Richard Overton was outside of Austin (and he wasn’t all that well known in Austin for the first 100 years or so

of his life), but he passed away on December 27, 2018, at the age of 112. At the time, he was the oldest living veteran of WWII and the third-oldest man in the world. You can view a brief documentary of his life at <https://youtu.be/bYc5XNfnYNs>. In 2017, the Austin City Council renamed the portion of Hampton Avenue on which he’d lived for over 70 years Richard Overton Avenue. Now, **HB 1821** (Cole) and **SB 946** (Watson) designate the portion of Airport Blvd. in Austin between IH-35 and U.S. 183 as the Richard Overton Memorial Highway. (This is in addition to its current name of Airport Blvd., so residents and merchants won’t need to change their addresses.)

17.8 The Texas Sovereignty Act. HB 1347 (Bell, C., *et al.*) is a repeat of 2017’s **HB 2338** (Bell) and **SB 2015** (Creighton). It’s a silly attempt to ignore the Supremacy Clause of the U.S. Constitution (**Article VI, Clause 2**). If you’re interested in a further description of the bill, read about it in [my 2017 legislative update](#) in the attachment discussing bills that didn’t pass. The 2019 version will also end up in that section of this paper by the time the session’s over.

17.9 Government Efficiency. These three filings seem to promote government efficiency, based upon their captions:

- **HB 4181** (Geren) relating to “the organization and efficient operation of the legislative branch of state government.”
- **SB 2287** (Fallon) relating to “the random drug testing of members of the legislature during a legislative session.” (No penalties for a positive test other than posting the results on the Texas Ethics Commission’s website. Also, the bill uses the old-fashioned spelling “marihuana.” See Sec. 17.3 above.)
- **HJR 16** (Raymond) proposing “a constitutional amendment providing honesty in state taxation.” (This amendment would prohibit the legislature’s use of the terms fee, levy, surcharge, assessment, fine, penalty, or other charge of any kind, and instead would require all of those measures to be called a “tax.”)

17.10 TBs and TLAs. No, “TB” doesn’t refer to an ailment. **HR 901** (Bonnen, G.) would do away with House and Senate bills, joint resolutions, and concurrent resolutions in future sessions. Bills would be designated as “Texas Bill XXXX.” Or T.B. for short. Similarly, joint resolutions and concurrent resolutions from either chamber would become T.J.R.s and T.C.R.s. Etc.

¹⁷ I often find inspiration for the bills described in this part of the paper in Herman’s columns.

Apparently, the purpose would be to eliminate the stigma or rivalry that may arise from being designated as coming from the House or Senate. But you'd still be able to tell from whence the filing originated by the number. In years when the general appropriations bill will originate from the House, filings from a Representative would receive an odd number (so filings from a Senator would receive an even number). In other years, things would be reversed. Even if this passes, it's dependent on a complementary resolution passing in the Senate.

But wait, there's more! **HCR 135** (Bonnen, G.) would have enrolled bills (*i.e.*, those that have passed both chambers in the same form) assigned a Texas Legislative Act number before being sent to the governor, and all future references would be only to "Texas Legislative Act XXXX." Or T.L.A. for short.

(Note that both resolutions were filed March 19th and reported favorably without amendment the following day by the House Administration Committee.)

17.11 **"I Like Beer!"** **HB 1083** (Raymond) exempts the sale of beer or ale from sales tax on July 4th. Stock up! Meanwhile:

- **HB 469** (Springer) expands the hours certain retailers may sell beer or wine on Sundays to include 10 am to noon.
- **HB 1100** (Raymond) allows certain retailers to sell liquor between noon and 10 pm on Sundays, and between 9 am and 10 pm every other day of the week.
- **HB 1337** (Pacheco) allows certain retailers to sell beer or wine on Sundays beginning at 7 am (like every other day of the week).
- **SB 785** (Johnson) eliminates holiday and Sunday sales restrictions for certain retailers, except that they may not sell liquor on more than six days during a week.

17.12 **Just Add Water!** **HB 1610** (Ashby) designates powdered alcohol as an illicit beverage, whether or not reconstituted. I didn't even know there was such a thing!

17.13 **Sit in the Driver's Seat.** **HB 3646** (Guillen) and **SB 2084** (Hinojosa) prohibits operating a motor vehicle while a person is occupying the trunk. Presumably not the driver. (By the way, a "trunk" is enclosed on all sides and accessible only by a door or lid. I think this would preserve the practice during my youth of putting the kids in the "way-back" of a station wagon.)

17.14 **Places.** Here are some official place designations:

- **Wine Capital.** **HCR 37** (Biedermann) designates Fredericksburg as the official Wine Capital of Texas, replacing its previous designation as the Polka Capital of Texas.
- **Pie Capital.** **HCR 89** (Zwiener) and **SCR 18** (Campbell) designate Kyle as the official Pie Capital of Texas.
- **Hot Link Capital.** **HCR 122** (Hefner) designates Pittsburg as the official Hot Link Capital of Texas.
- **Film Hospitality Capital.** **HCR 131** (Cyrier) designates Bastrop County as the official Film Hospitality Capital of Texas.
- **City of Mosaics.** **SCR 58** (Perry) designates Levelland as the official City of Mosaics of Texas.

17.15 **Symbols.** Here are some official designations of state symbols:

- **State Food.** **HCR 57** (Hinojosa) designates tacos as the State Food of Texas. (This is sure to raise the hackles of the BBQ lobby!)
- **State Breakfast Item.** **HCR 123** (Klick) designates breakfast tacos as the State Breakfast Item of Texas.
- **State Pets.** **HCR 77** (Dominguez) designates rescue shelter cats and dogs as the official State Pets of Texas.
- **State Knife.** **HCR 86** (Springer) and **SCR 20** (Fallon) designate the Bowie knife as the official State Knife of Texas.

17.16 **Dates.** Here are some official date designations:

- **Orange and Maroon Legislative Day.** **HR 123** (Raney) and **SR 97** (Watson, *et al.*) recognize February 5, 2019, as Orange and Maroon Legislative Day (*see* Sec. 17.4 above!)
- **Homemade Pie Day.** **HR 617** (Cain) recognizes February 16, 2019, as Texas Homemade Pie Day. (All Texans who bake their own pies and share them with their friends and loved ones are commended.)
- **Hard to Get Your Arms Around This?** **HCR 140** (Herrero) recognizes 2020 as "The Year to Embrace the Gulf."

18. The End.

Except for any attachments I may add following the session's end.

