

# 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 15<sup>th</sup> 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 14<sup>th</sup> 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 26<sup>th</sup> Annual Wills and Probate Institute, Houston 2011
- Author/Speaker, “The Role of the Guardian,” 13<sup>th</sup> 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” 9<sup>th</sup> Annual Intermediate Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 2007
- Speaker, “Attorney Ad Litem Duties” and Panel Member, “Ask the Experts,” 8<sup>th</sup> 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 86<sup>th</sup> 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 6**.

**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](http://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 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 sponsors<sup>1</sup> 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.

**1.6 Obtaining Copies of Bills.** If you want to obtain copies of any of the bills discussed here, go to [www.legis.state.tx.us](http://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. REPTL has hired Clint Hackney, who has assisted with the passage of REPTL legislation for many sessions.

**2.2 The 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.

**2.3 The 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.

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

**2.4The Texas Legislative Council.** Among other duties, the Texas Legislative Council<sup>2</sup> 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 Package.** REPTL<sup>3</sup> 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.

**3.3Actual Language is Drafted by the Committees, With Council Input and Approval.** 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.

**3.5Legislative 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.

**3.6State 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 will be submitted for

<sup>2</sup> We usually refer to the Texas Legislative Council as simply "Leg. (pronounced "ledge") Council."

<sup>3</sup> 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.

final approval by the full Board of Directors at its September 28, 2019, meeting.

**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](http://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,<sup>4</sup> you'll see that it came from "Acts 1955, 54<sup>th</sup> 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 **54<sup>th</sup> Legislature**, and it's found in **chapter 55**.

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<sup>4</sup> 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

- 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 "54<sup>th</sup> 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, 72<sup>nd</sup> Leg., ch. 895, § 4, eff. Sept. 1, 1991, and by Acts 1993, 73<sup>rd</sup> 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 72<sup>nd</sup> R.S. (1991) (you don't want either of the "called sessions"), type 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

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.



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 83<sup>rd</sup> 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.snplaw.com/resources/EstatesCodeStory](http://www.snplaw.com/resources/EstatesCodeStory)

After the 2015 legislative session, this author discovered numerous references to Probate Code provisions that still remained in other codes and forwarded those references to Leg. Council (they are too numerous to list in this paper). The 2017 Leg. Council code update bill, **SB 1488** (West | Landgraf), updated most of those references.<sup>5</sup> The changes in that bill relating to the codification of the Probate Code are found in Art. 22 of the bill, amending obsolete references in the following codes: Business Organizations, Civil Practice and Remedies, Election, Family, Government, Health and Safety, Insurance, Local Government, Occupations, Penal, and Property, and Articles 6243h and 6243o, Vernon’s Texas Civil Statutes.

**3.13 The REPTL Substantive Code Update Bill.** But Leg. Council 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 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 Estates Code Sections 501.001, 501.002, 501.003, 501.004, 501.005, 501.007, 501.008, 503.002, 504.003, and 505.052. Changing that 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 isn’t allowed to make substantive changes, even if they’re teensy weensy.

**(b) REPTL to the Rescue.** That’s where REPTL has come in. Its 2019 Substantive Code Update bill clarifies these references by substituting Chapter 503 of the Estates Code for the reference to Section 95 of the Probate Code, and Section 501.006 of the Estates Code for the reference to Section 105 of the Probate Code. The codes amended by this bill include the Civil Practice and Remedies Code, 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:

- **Tuesday, November 6, 2018** – General election for federal, state, and county offices.
- **Monday, November 12, 2018** – Prefiling of legislation for the 86<sup>th</sup> Legislature begins.

<sup>5</sup> Earlier code update bills relating to the Estates Code were **S.B. 1303** (2011), **S.B. 1093** (2013), and **S.B. 1296** (2015).

- **Tuesday, January 8, 2019** (1<sup>st</sup> day) – 86<sup>th</sup> Legislature convenes at noon. [*Government Code, Sec. 301.001*]
- **Friday, March 8, 2019** (60<sup>th</sup> 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** (119<sup>th</sup> 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** (122<sup>nd</sup> 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** (123<sup>rd</sup> 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** (131<sup>st</sup> 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** (134<sup>th</sup> 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** (135<sup>th</sup> 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** (137<sup>th</sup> 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 135<sup>th</sup> day (two days earlier) is the last day for third*

*reading in the senate; practical deadline for senate committees is before the 135<sup>th</sup> day; Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills*]

- **Sunday, May 26, 2019** (139<sup>th</sup> 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** (140<sup>th</sup> day) – Last day of 86<sup>th</sup> 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** (20<sup>th</sup> day following final adjournment) – Last day Governor can sign or veto bills passed during the previous legislative session. [*Section 14, Art. IV, Texas Constitution*]<sup>6</sup>
- **Monday, August 26, 2019** (91<sup>st</sup> 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 1<sup>st</sup> 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](http://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,

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 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 17<sup>th</sup> in order to avoid the 20-day post adjournment deadline.

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<sup>6</sup> 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



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.<sup>7</sup>**

**7.1 REPTL Decedents’ Estates Bill.** REPTL’s Decedents’ Estates bill is **HB \_\_\_\_\_** (\_\_\_\_|\_\_\_\_).

**(a) Representative’s Access to Nonprobate Asset Information (Secs. 111.051 and 111.055).** 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](https://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 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

<sup>7</sup> Section references are to the Texas Estates Code unless otherwise noted.

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 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, 301.052, and 304.001).** Every 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 will 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.<sup>8</sup> 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) Conversion of Muniment to Administration (Sec. 257.151).** 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 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)).

**(k) 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.

**(l) 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.

**(m) 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 1/3<sup>rd</sup> of the property sought to be recovered.

**(n) 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.

**(o) 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.

**(p) 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

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<sup>8</sup> The designee wouldn't be an executor since the designee wasn't directly named in the will.

change clarifies the procedures to be followed in that situation.

**(q) 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. 356.401-356.405).** 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 1<sup>st</sup> or July 4<sup>th</sup>, 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. 356.501-356.502).** 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.

**(r) 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.

**(s) Claims Procedures for Medicaid Recovery in Independent Administrations (Sec. 403.058).** 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.

**(t) Public Probate Administrators (Ch. 455).** Ch. 455, dealing with “public probate administrators,”

was added in 2013. This change relates to the authority of and procedures for a PPA.

**(u) 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.

## **8. Guardianships and Persons With Disabilities.<sup>9</sup>**

**8.1 The REPTL Guardianship Bill.** REPTL's Guardianship bill is **HB** \_\_\_\_\_ (\_\_\_\_|\_\_\_\_\_).

**(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 all other counties. This change leaves subsection (a) to define those matters in counties without **either** a statutory probate court or a county court at law, inserts a new subsection (b) 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), and reletters former subsection (b), applicable to counties with a statutory probate court, as new subsection (c).

**(b) Required Findings for Appointment of Guardian (Sec. 1101.102).** Additional required findings are added relating to supports and services and alternatives to guardianship before a court may appoint a guardian.

- The court must find by clear and convincing evidence that the alternatives to guardianship listed in Sec. 1002.0015(1)-(5) and (8)-(9) (medical and financial powers of attorney, declaration of mental health treatment, representative payee, joint bank accounts, execution of declaration for mental health treatment, designation of guardian, person-centered planning) are not feasible under certain common circumstances.
- The court must find by clear and convincing evidence that supports and services are not feasible under certain common circumstances.
- The “common circumstances” listed in the bill are not exhaustive.

**(c) 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

<sup>9</sup> Again, section references are to the Texas Estates Code unless otherwise noted.

modification or termination of a guardianship, which is consistent with the procedure set forth in Sec. 1202.054.

**(d) 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.)

**(e) 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.

**(f) 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).

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

**(i) Notice (Sec. 1301.051A).** 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 18<sup>th</sup> birthday (unless the court provides for a later date no later than the beneficiary's 25<sup>th</sup> 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.

**8.2 Guardianship Abuse, Fraud, and Exploitation Deterrence Program (Gov't Code Secs. 72.121 – 72.124).** **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.

**8.3 Task Force on Appropriate Care Settings for Persons With Disabilities.** **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.

**8.4 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." **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.



**Drafting Tip**

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

**8.5 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.

**9. Trusts.**<sup>10</sup>

**9.1 The REPTL Trusts Bill.** REPTL's Trust bill is **HB \_\_\_\_\_** (\_\_\_\_|\_\_\_\_).

**(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 Reforms (Sec. 112.054).** This change clarifies that a judicial reformation of a trust (as opposed to a modification), because of the very nature of reforms, is effective as of the creation of the trust.

**(d) Effect of Divorce on Certain Transfers in Trust (Secs. 112.061-112.066).** 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.<sup>11</sup>

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

**(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 10).

**(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 \_\_\_\_\_** (\_\_\_\_|\_\_\_\_). 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.

**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.

**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 **HB \_\_\_\_\_** (\_\_\_\_|\_\_\_\_). It makes the statutory

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

<sup>10</sup> Section references are to the Texas Property Code unless otherwise noted.

<sup>11</sup> These provisions are inserted as new Subchapter D of Chapter 112. Current Subchapter D, which contains the

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. After negotiations with the Health Law Section of the State Bar, which adopted the objections expressed previously by TMA and THA, a compromise was reached that inserts a new Sec. 166.152(b). The new provision first provides that 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 remain intact, including making the statutory form optional, rather than mandatory.

**10.3 The REPTL Anatomical Gift Bill (Health & Saf. Code Ch. 692 & Secs. 692A.005-007).** REPTL's Anatomical Gift bill is [SB 258](#) (Rodriguez). 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.<sup>12</sup>

### **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 [SB 259](#) (Rodriguez). 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 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.

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

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.

<sup>12</sup> 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

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 6<sup>th</sup> 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.

#### **11. Nontestamentary Transfers.**

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

#### **12. Exempt Property.**

12.1 **The REPTL Exempt Savings Plan Bill (Prop. Code Secs. 42.0021 & 42.0022).** 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 9.

13.3 **The REPTL Disposition of Remains Bill – Courts With Jurisdiction.** See Sec. 10.4 on page 12.

13.4 **Venue for Probate of Wills (Sec. 33.1011).** **SB 192** (Perry) authorizes 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.)

#### **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 **New Travis County Probate Court Building Update.** As practitioners in Travis County know, the facilities available for the counties 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) would be 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. At the time of the announcement, it was hoped that the new probate courthouse would be ready by 2020. However, in a conversation with this author in early September, 2018, Judge Guy Herman indicated that a bill to authorize a second probate court would likely not be introduced in the 2019 session since the county wants to make sure it has a building for the new court before authorizing that court. It seems that sometimes government construction contracts end up being completed late and over-budget...

#### **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 **Same-Sex Marriages and Conduct.** Here are some bills relating to this area:

- **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.

- **SJR 9** (Rodríguez) is 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.

### 16. Stuff That Doesn't Fit Elsewhere.

**16.1 Proposed Change to Disciplinary Rules Regarding Clients with Diminished Capacity.** On October 5<sup>th</sup>, 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 31<sup>st</sup> 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](#). A public hearing was held on these proposed changes by the CDRR on October 10<sup>th</sup>, and comments are being accepted through November 1<sup>st</sup> at [texasbar.com/CDRR](http://texasbar.com/CDRR).

**16.2 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 **“Goin’ 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](https://tlc.texas.gov/docs/policy/Def_Rural_Statutes.pdf)

17.2 **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.

17.3 **Lemonade, Anyone? HB 234** (Krause) prevents local governments from enforcing any ordinance or rule that prohibits a minor from temporarily selling lemonade or other nonalcoholic beverages on private property. 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.

### **18. The End.**

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