THE 86TH SESSION

OVERVIEW
By Royce Poinsett

Following the exceptionally chaotic and combative 2017 session, many journalists found the 2019 session of the Texas Legislature to be downright dull. The 2017 spectacle featured open tension between the conservative and moderate factions of the Texas Republican Party, public insults traded between Republican leaders, a heated “bathroom bill” debate, fisticuffs between legislators, and a special session on dozens of hot-button issues.
In contrast, the 2019 session has been widely named the “Kumbaya Session.” The Republican “Big Three” (governor, lieutenant governor, and speaker) remained politically unified, focusing their legislative energies on substantive “meat and potatoes” policy issues. They largely sidestepped debates on the most divisive social issues. And they shepherded legislators into passing landmark (if not universally popular) reforms to the state’s property tax and school finance systems.

This newfound Republican unity and focus can be traced directly to the November 2018 midterm election results, which delivered a jolting “wake up call” to the GOP from Texas voters. Energized Democrats produced a turnout not seen since 1994, with more than one million voters showing up at the polls, while hundreds of thousands of traditionally reliable suburban Republican voters (especially educated women) crossed party lines. Democrats picked up 12 seats in the Texas House and two seats in the Texas Senate, and came within three percentage points of winning their first statewide election since 1994.

Suddenly alerted that their decades-long dominance was in peril, most Republicans quickly resolved to moderate their political tone and to shift their legislative energies toward delivering tangible solutions to the everyday problems that concerned mainstream voters.

On social issues, the legislative leadership could not completely avoid debate on controversial topics like abortion and LGBTQ rights. But they managed to sideline the most divisive proposals in favor of passing far less controversial measures.

The Republican leadership settled on “property tax relief and school finance reform” as their legislative mantra. And a boring but productive session commenced.

**Major Legislation of the 2019 Session**

Texas legislators filed more than 7,300 bills in 2019 and enacted over 1,400 into law. Some of the most significant legislative action is summarized here.

**State Budget.** HB 1 enacts a two-year balanced state budget with $250.7 billion in overall spending. This is an increase of more than 16% over the prior biennium, made possible by a healthy Texas economy and energy sector. Much of the new spending went to top legislative priorities: $6.5 billion for public schools and $5.1 billion to “buy down” Texas’ property tax bills (see below).

The Legislature also authorized a record-breaking $6.1 billion withdrawal from the Economic Stabilization Fund (or “rainy day fund”) for large-scale infrastructure projects and Hurricane Harvey recovery. However, the state continued its stinginess on health and human services programs, budgeting just 1% more than in the prior budget and cutting Medicaid spending by $900 million.

**Property Tax Reform.** SB 2 bars cities, counties, and special districts from increasing property tax collections by more than 3.5% in any year without a vote of the public; school districts are capped at 2.5%. (This is a major reduction from the current cap of 8%.) Democrats and local officials warn that the new tighter revenue limits could seriously disrupt local budgets and services.

**School Finance Reform.** The Legislature accomplished something many insiders thought impossible: enacting wholesale school finance reform without a court mandate. HB 3 provides a total of $11.6 billion in new state funding for public education: (i) $4.5 billion for a 20% general increase in per student baseline funding, and targeted funding increases for pre-kindergarten programs, third grade reading proficiency, and dyslexia; (ii) $2 billion for an average salary increase of $4,000 for teachers, librarians, nurses, and counselors; and (iii) over $5 billion for “buying down” school districts’ maintenance and operation tax rates to provide taxpayer relief (an average of 8 cents per $100 property valuation in 2020 and an additional 5 cents per $100 property valuation in 2021).

HB 3 will also provide future school tax relief by limiting local school property tax growth to 2.5% per year (absent voter approval). Because the state government is increasing its share of public education funding from 38% to 45%, it is decreasing the “Robin Hood” recapture payments required from wealthy districts by $3.6 billion per biennium, or 47%, overall.

Even with the passage of SB 2 and HB 3, Texans are unlikely to see their property tax bills fall in absolute terms, as increasing home values will continue to drive those bills upward. But the reform package should prevent the dramatic increases Texans have been seeing in high growth areas.

Many observers caution that the state may need to seek new revenue sources in future sessions if it is to sustain these billions in new school spending commitments in future budgets.

**Abortion.** The Legislature declined to consider Alabama-style challenges to Roe v. Wade but did enact less ambitious restrictions. SB 22 prevents state and local governments from partnering with abortion providers like Planned Parenthood, even on non-abortion health programs.

**Guns.** The Legislature failed to enact the “constitutional carry” handgun rights (i.e., carry without licensing) promoted by some gun rights activists. But it did enact HB 302, which permits tenants to possess lawfully owned firearms in leased dwellings regardless of landlord objections, and SB 535, which allows licensed handgun owners to carry their arms in places of worship (unless expressly prohibited by the institution).

**State Versus Local Control.** The revenue limitations in SB 2 and HB 3 are obviously fairly extreme examples of state preemption over local control. On the other hand, cities were successful in defeating legislation that would have removed their ability to enact local ordinances requiring employers to provide paid sick leave or regulating short-term rental companies like Airbnb.

**Tobacco.** SB 21 prohibits the sale of cigarettes, e-cigarettes, and other tobacco products to Texans younger than 21.

**Cannabis.** The Legislature failed to pass legislation decriminalizing “marihuana” (or even a bill updating its...
anachronistic statutory spelling). But HB 3703 does expand the medical conditions for which low-THC medical cannabis, or CBD oil, can be legally prescribed to include MLS, ALS, Parkinson's disease, terminal cancer, autism, and many kinds of seizure disorders.

Red light cameras. HB 1631 bans red light cameras across the state, although it does permit current contracts for the devices to continue until their expiration dates.

Breastfeeding and pumping. HB 541 clarifies state law to make clear that women in Texas are allowed to pump breast milk, not just breastfeed, anywhere in public.

New Laws That Affect the Real World

Attorneys should always be prepared to answer the eternal cocktail party question: “Did this year’s Legislature change any laws that affect my daily life?”

But Don’t Drink Alone. SB 132 and SB 1450 allow for expanded legal home delivery of alcoholic products and beverages, and HB 1545 permits Texans to buy “beer to go” directly from craft brewery taprooms.

Competition for the Grackles. SB 476 prohibits cities from enacting restrictions on restaurants that want to let diners bring pets onto their outdoor patios.

Win for Big Lemon. HB 234 allows young Texans to legally run lemonade (and other nonalcoholic beverage) stands on private property and public parks, overriding any local government or neighborhood association objections.

Swipe Left. HB 2789 criminalizes the sending of nude or sexually explicit photos to unwilling recipients through text message, social media, and online dating applications.

Back in Brass. Building on the Legislature’s legalization of switchblades in 2013, HB 446 ends the state’s ban on “brass knuckles.”

Looking Forward

Capitol observers are already looking toward the 2020 elections and the 2021 session. Texas Democrats will seek to win a statewide election for the first time since 1994 and to flip the nine seats necessary to win the Texas House for the first time since 2000. The Texas races will receive plenty of outside attention and funding, as the national parties view control of the Texas House as a critical objective going into the 2021 redistricting process.

Texas Republicans are optimistic that their newly moderated tone and their legislative accomplishments will lure suburban voters (especially women) back into the fold. They are hopeful that the Democratic Party will field a left-leaning presidential nominee that energizes the Texas Republican base.

Texas Democrats expect record turnout again in 2020 and sense continued momentum on their side. They predict that Texas will be frustrated by ever-increasing property tax bills and that Texas suburban voters (especially women) will increasingly abandon President Donald Trump and the GOP.

As for the 2021 Texas legislative session, it is hard to imagine that a redistricting session will be anything close to “Kumbaya.”

ACCESS TO JUSTICE

By Bruce P. Bower

This article will treat developments in the 86th Texas Legislature affecting access to justice and will address HB 1, HB 2235, and SB 41 of the regular session. HB 1, the appropriations bill for the 2020-2021 “biennium,” included provisions for funding for legal aid (“basic civil legal services”). HB 1 will be referred to as the “state budget.” HB 2235 amended Texas Government Code § 402.007 regarding deposits from consumer protection settlements to the judicial fund. SB 41 amended Texas Government Code §§ 36.004 and 37.004 in regard to volunteer (pro bono) attorneys.

The state budget for fiscal years 2020-2021 adopted by the Legislature provides $42,034,392 for basic civil legal services for fiscal year 2020 and $32,034,392 for basic civil legal services for fiscal year 2021. The 2020-2021 biennium starts September 1, 2019.

HB 1 can be viewed at capitol.texas.gov/billlookup/Text.aspx?LegSess=86R&Bill=HB1. Article IV of the bill contains provisions regarding basic civil legal services, as part of the budget of the Texas Supreme Court.

From the $74,068,784 basic civil legal services amount for the 2020-2021 biennium, $10 million must be used for basic civil legal services to victims of sexual assault.3 This is an increase for the biennium of $400,000 in this allocation for basic civil legal services to victims of sexual assault.

The state budget specifies that $3 million in general revenue each year be for basic civil legal services to veterans and their families.4 This doubles the amount of allocation that was in the budget for 2018-2019. This increase in funding for basic civil legal services for veterans and their families is an initiative of Gov. Greg Abbott.

The budget for fiscal years 2020-2021 includes funds from the settlement with Wells Fargo for consumer protection violations. On February 28, 2019, Attorney General Ken Paxton announced Texas’ share of the Wells Fargo settlement—$47,378,217.69.5 By virtue of the Chief Justice Jack Pope Act, Texas Government Code § 402.007(h), the Texas Supreme Court received $42.6 million in one-time civil penalties as a result of that settlement.6

HB 2235 amends the Chief Justice Jack Pope Act in regard to Texas Government Code § 402.007(d). Previously, the $50 million limit in the act on amounts (recovered for consumer protection violations) to be deposited to the judicial fund for basic civil legal services was a limit “per state fiscal biennium.” HB 2235 changes this to a limit “per state fiscal
year.” This increases the potential amounts that will be deposited to the judicial fund for basic civil legal services. HB 2235 is effective May 24, 2019.

SB 41 facilitates the deployment of volunteer attorneys as attorneys ad litem, guardians ad litem, amicus attorneys, and mediators, when providing services “without expectation or receipt of compensation,” or “as a volunteer of a nonprofit organization that provides pro bono legal services to the indigent.” SB 41 does this by amending Texas Government Code §§ 36.004 and 37.004. Such volunteer attorneys will (once SB 41 takes effect) be able to be appointed even if they are not “the person whose name appears first on the applicable list maintained by the court as required by Section 37.003.” Moreover, the monthly list of appointments, which clerks are required by Texas Government Code § 36.004 to submit to the Office of Court Administration, will not have to include such attorneys. SB 41 also suspends the “first name on the list” requirement of Texas Government Code § 37.003, if the appointment is made within 30 days of the initial declaration of a state disaster. SB 41 is effective September 1, 2019.

Readers may want to know who authored a bill or who testified regarding a bill. One can search bills by number at capitol.texas.gov/billlookup/billnumber.aspx and see who the author of the bill was, who the sponsor of any “companion” in the other chamber was, and who the witnesses for and against were. A wide range of other data about bills can also be viewed at that location.

The Texas Access to Justice Foundation has additional information about state funding for legal aid at tajf.org. Donations to the foundation are tax-deductible. The foundation states “less than 10 percent of the civil legal needs of low-income and poor Texans are being met.” A website for self-help information is TexasLawHelp.org. A growing number of self-help tools are available there.

The appropriations and enactments mentioned in this summary only occurred thanks to the support of the governor, the lieutenant governor, the speaker of the House of Representatives, the attorney general, and the members of the Legislature. The Texas Access to Justice Commission and the Texas Access to Justice Foundation also contributed. The provisions discussed are above all a testament to the leadership of the Supreme Court of Texas. Chief Justice Nathan L. Hecht stated, “Justice for only those who can afford it is neither justice for all nor justice at all.” Hecht always gives credit to the entire Supreme Court for the enduring support of basic civil legal services in Texas. A very clear demonstration of the support of the Supreme Court for basic civil legal services is the fact that, in Texas, appropriations for basic civil legal services are part of the court’s budget—the largest part.

Notes
1. HB 1, Rider 6
2. HB 1, Rider 7
4. See Page B9 of the settlement agreement (which can be accessed through the above-referenced news release).

BUSINESS LAW
By Daryl B. Robertson

This article summarizes several bills passed by the Texas Legislature in its 2019 regular session that affect business law and does not purport to describe all passed bills in this area. This article contains summaries only and should not be relied on as complete description of any bill. All bills are effective September 1, 2019, unless otherwise indicated.

Assumed Name Filings
HB 3609 amends the Texas Business and Commerce Code to provide that an assumed name certificate for a domestic or foreign filing entity need only be filed with the Texas secretary of state and not with any county. This bill modernizes the Texas assumed name statute to conform to most other states. Assumed name certificates are available online to the public from the secretary of state’s website. County filings of assumed name certificates continue to be required for joint ventures, general partnerships, real estate investment trusts, estates, sole proprietors, and trusts.

Derivative Proceedings
HB 3603 amends the Texas Business Organizations Code, or TBOC, to harmonize the derivative proceedings provisions governing for-profit corporations, limited liability companies, and limited partnerships. These provisions for limited partnerships were previously substantially different than those for for-profit corporations and LLCs. As a result of the changes, the demand futility exception was eliminated for limited partnerships. However, an exception from most of the derivative proceeding requirements has been added for limited partnerships that have 35 or fewer limited partners. This exception for all entities has been limited to claims or actions against managers, directors, officers, general partners, or other owners of the entity. While the prior provisions for LLCs and for-profit corporations applied to beneficial owners,
the revised provisions also apply to assignees of membership interests of LLCs or partnership interests in limited partnerships. New provisions clarified how a determination of disinterested and independent governing persons to pursue a derivative claim on behalf of a limited partnership or LLC is to be accomplished where there is a multi-level entity governance structure. Other amendments clarified which provisions apply to foreign limited liability companies, corporations, and limited partnerships.

Delayed Effectiveness of Filing
SB 1859 provides greater flexibility to specify the delayed effectiveness of an instrument filed with the secretary of state that is conditioned on occurrence of a future event or fact. As amended, a filing instrument is permitted to take effect not only upon the occurrence of a specified future event or fact but also upon a specified date and time, or after the passage of a specified period of time, in each case after the occurrence of a specified future event or fact. The revised provisions continue to require a subsequent statement to be filed not later than the 90th day after the filing date to specify when the filing instrument took effect.

Authorizing Use of Electronic Data Systems
SB 1859 and SB 1971 make various changes to the TBOC to authorize use of electronic data systems in the maintenance of entity records, including blockchain or distributed ledger technology. A definition of “share transfer records” has been added that recognizes use of electronic data systems to maintain records. SB 1971 makes other clarifying changes to allow electronic data systems for sending of required notices. Provisions relating to nonprofit corporations have been updated to conform to provisions of other entities to allow meetings of members and directors by means of conference telephone and other suitable electronic communication systems.

Ratification of Defective Corporate Acts by Nonprofit Corporations
SB 1969 amends the TBOC to add provisions for ratification of void or voidable corporate acts by nonprofit corporations. These provisions were modeled on the prior provisions in the TBOC applicable to for-profit corporations. Ratification of the defective corporate act requires the board of directors to adopt ratifying resolutions, and, if the corporation has members with voting rights, the ratification must be submitted to such members for approval in appropriate circumstances. Detailed quorum and voting requirements are specified in the new provisions. The filing of a certificate of validation with the secretary of state is required if the defective corporate act being ratified would have required the filing of a document with the secretary of state. After the effective time of the ratification, the defective corporate act is no longer deemed void or voidable as a result of the failure of authorization, and the effect is importantly retroactive to the time of the defective corporate act. If approval of the voting members was not required, a notice of the board’s ratification must be given to all members having voting rights. The new provisions also specify court procedures by which the ratification can be effected through a district court order. The ratification by action of the board of directors and voting members can also be challenged through filing of an action in the district court.

Voting Agreements
SB 1971 amends TBOC provisions governing voting agreements. The formality of depositing a copy of the voting agreement with the domestic entity is no longer mandatory. A voting agreement is specifically enforceable against an owner who either executes it or acknowledges in writing that the owner or ownership interest is subject to it. Other changes clarify the circumstance in which a voting agreement is specifically enforceable against a subsequent owner of the ownership interests.

Two-Step Offer-Merger Transactions
SB 1971 amends TBOC provisions relating to two-step offer-merger transactions to conform to recent changes to the Delaware General Corporation Law, which served as the original basis for these provisions. The amendments also conform these mergers to the exceptions to dissenters’ rights applicable to other types of mergers. The effect of the various amendments is to make this kind of merger transaction more available to potential acquirers.

Other Corporation Amendments
SB 1971 makes other changes to TBOC provisions governing corporations. First, clarifications were made to the provisions governing ratification of defective corporate acts for for-profit corporations that were intended to match recent amendments made to the Delaware General Corporation Law, which served as the original basis for these provisions. Second, a definition of “director” of a nonprofit corporation has been added and is defined to mean any person who is a voting member of the board of directors regardless of the name or title used to designate the person. A person who has a right to receive notice of or to attend meetings of the board, such as an ex-officio or honorary director, will not be deemed to have the duties or liabilities of a director unless the person has a right to vote as a director. Third, the bill revised the provisions on notice of redemption by a for-profit corporation to holders of its redeemable shares to clarify that the terms of the applicable shares can specify the time period for the sending of the notice of redemption, in lieu of the time period specified in the statutory provisions.

Other Limited Liability Company Amendments
SB 1859 makes other changes to the TBOC affecting limited liability companies. First, the amendments clarified that a decrease in the number of managers effected by an amendment to the company agreement executed by the members can result in a shortening of the term of an incumbent manager. Second, an assignee of a membership interest is
CONSTRUCTION LAW

By Ben L. Aderholt

The following bills the governor signed typically become effective September 1, 2019.

School Construction Defects

Section 46.0111 of the Texas Education Code was amended to require school districts to spend funds to actually repair construction defects awarded in a court judgment or settlement resulting from those defects. The legislation came about as attorneys pursued suits for school districts against contractors over construction defects before notifying the parties of defects or giving them a chance to inspect or fix them. Sometimes settlement funds awarded to a district were not actually used to repair defects.

The amendment requires school districts to notify the Texas Education Agency of a defects suit once it has been filed and requires the district to itemize any repairs made and report them to the agency. It requires the written approval of the commissioner to use net proceeds of the lawsuit for anything other than repair or replacement. The attorney general may enjoin the district for violations, seek cost of investigation, and impose a penalty of up to $20,000. A school district's case is subject to dismissal without prejudice if the school district fails to provide notice to the commissioner and the attorney general within 30 days of the action being filed.

Right to Repair

The “right to repair” allows those involved in designing or constructing public works to inspect and repair defects before being sued. It covers defects in the original construction along with improvements, repairs, or alterations. It applies to government projects commissioned by the state, cities, counties, school districts, and local government bodies. The bill does not apply to transportation and highway projects.

The amendment to Texas Government Code § 2272 only applies to public projects. It requires a report by the owner that identifies original construction and design defects, current condition, and proposed repair. It requires a 30-day notice to the contractor and known subcontractors for inspection and provides 120 days to repair or correct if the contractor chooses. The added requirements are not mandatory if the contractor or subcontractor was terminated for cause, unable to bond, had no insurance, or had a felony conviction; nor are they necessary if the party previously attempted repair and made the defect worse.

The first failure to comply with the new requirements will result in dismissal of the action without prejudice. The second failure will result in dismissal with prejudice.

A report made in the last year before the statute of limitations will be tolled for one year.

Contingent Fee Approval

HB 2826 provides new procedure for a contingent-fee
agreement with a political subdivision. The award of a contingent fee contract must be based on competence, qualification, and experience and at a reasonable price.

Before a political subdivision may execute a contingent attorney fee contract, it must first submit the contract to the attorney general for approval.

In an open public meeting the owner must state that: (1) there is a substantial need for legal services; (2) the services cannot be performed in-house; (3) the services cannot be reasonably obtained at hourly rates; and (4) the relationship between any member and the attorney is not improper. The attorney general has 90 days to review the proposed contract and may handle the matter itself.

Contingent fee expenses must be actually incurred, reasonable and necessary, and may not be paid until time records have been verified. The amendment also allows for attorney indemnity for attorney negligence.

**Design Defects for Transportation Work**

HB 2899 confirms the Spearin Doctrine. It clarifies that a highway or bridge contractor is not civilly liable for: (a) the accuracy, adequacy, sufficiency, or suitability of plans or specifications; or the (b) errors or omissions of the owner in the rendition of professional services. The bill voids conflicting contract language and is effective June 2, 2019.

**Third-Party Certificate of Merit**

SB 1928 extends the certificate of merit requirements to all claimants, including third-party claims against a licensed professional, and is effective June 10, 2019.

**State Construction Audit**

State agency procurement practices were amended. Certification of vendor assessment. Before a state agency may accept a bid from, or award a contract to, an applicant, SB 65 requires the agency to review the process and all documents used by the agency to assess each vendor who has responded to the solicitation. After written certification, a state agency may not change the score of a vendor without first providing a written justification.

Statement regarding vendor selection. If a state agency accepts a bid from, or awards a contract to, a vendor who did not receive the highest score in the assessment process, the state agency must state in writing the reason for accepting the bid or making the award.

Assessment by state auditor. Before July 1 of each year, the state auditor is required to assign a ranking to each of the 25 largest state agencies stating (1) additional monitoring is warranted; (2) no additional monitoring is warranted; or (3) reduced monitoring is warranted. The state auditor is required to report by September 1 to the comptroller describing each agency’s ranking and specifications for additional or reduced monitoring.

File and certification of agency compliance. Each state agency is required to include in its contract file a written explanation of the agency’s compliance with state laws and rules relating to the acquisition of goods and services.

Liability provisions. Each state agency is required to include in its contract file a written explanation of the agency’s decision to include or not include in the contract a provision for liquidated damages or another form of liability for damages caused by the contractor.

**Limitations on Local Code**

HB 2439 relates to regulations adopted by governmental entities for building products, materials, or methods used in the construction or renovation of residential or commercial buildings. The government may not adopt an ordinance that prohibits the use or installation of a building product or material that was approved for use by the national model code in the last three cycles. This will eliminate the government’s ability to prohibit the use or apply more stringent standards for items previously approved. Exceptions exist for ordinance or standards relating to federal funding programs, windstorm and hailstorm coverage, light pollution, and historical preservation.

**Neutrality in State Government Contracting**

HB 985 provides the state may not require, prohibit, discourage, or encourage a person bidding on public work from using collective bargaining agreements. It applies to projects using state money or credit, which includes universities and school districts, but excludes the Texas Department of Transportation.

**State Procurement**

SB 646 provides that agencies such as the Texas Real Estate Commission, Texas Department of Banking, and Texas Board of Professional Engineers must obtain written authorization from the governor before spending money on land purchase or a construction project. To apply for authorization, a state agency must submit to the Texas Facilities Commission a description of the property purchase or construction project, the agency’s need for the purchase or project, and a request for an analysis by the commission of any available state property that satisfies the agency’s need. The state agency must also submit to the governor a request for written authorization for the purchase or project that includes the description submitted to the commission, the amount of money required to complete, and the agency’s justification for the purchase or project.

**Fees on Motion to Dismiss**

HB 3300 amends Section 30.021 of the Texas Civil Practices & Remedies Code, which changes the mandatory award to a permissive award of attorneys’ fees.

**Public Information Act**

Contracting transparency. SB 943, effective January 1, 2020, relates to disclosures required under the Public Information Act changing the Texas Supreme Court’s holding in Boeing Co. v. Paxton, in which public access information was significantly limited.
The bill rebalances private companies’ interest in protecting proprietary information with the public’s right to know about government spending. It requires the disclosure of “contracting information” and an explanation of why the contractor or vendor was selected and communications and other information sent between a governmental body and a vendor or contractor related to the performance of a contract.

The government may limit access to certain information by showing that the information demonstrates harm to competition where competition will reoccur. A third party may limit access to information by demonstrating that information qualifies as a trade secret provided the third party shows that reasonable steps were taken to protect the trade secret.

**Closing the Custodial Loophole**

SB 944 was designed to close the loophole in *City of El Paso v. Abbott* by which public information was located on private email accounts. The amendment clarifies that employees of governmental bodies do not have personal property rights or privacy rights to public information created as part of their official duties. It requires the employees to surrender privately held public information and gives the governmental body the ability to compel privately held public information.

**Walking Quorums Under the Texas Open Meetings Act**

SB 1640 amends the Texas Open Meetings Act, or TOMA, that prohibited “walking quorums.” The Texas Court of Criminal Appeals in *State v. Doyal* struck down restrictions on walking quorums. The amendment resuscitates the ban on walking quorums and is effective June 10, 2019.

**Open Meetings During a Disaster**

SB 494 concerns how TOMA functions in natural or man-made disasters or terrorist attacks. The amendment allows temporary suspension of several TOMA requirements in situations of disasters, including the advance-notice requirement.

**Open Meeting Laws**

HB 2840 ensures that the public is provided greater opportunities to participate in governmental decisions. The amendment requires that governing bodies adopt reasonable rules governing public participation in meetings. It requires governing bodies to allow each member of the public the opportunity to testify regarding an item on the agenda. It also prohibits a governing body from prohibiting public criticism of the governing body.

Grateful recognition is made to Ben Westcott for his paper on 2019 Amendments to Construction Law.

---

**CRIMINAL LAW**

By Allen D. Place Jr. and Shea Place

State jail and bail reform, along with human trafficking, were the noteworthy issues leading into the 86th session of the Texas Legislature. While there were numerous bills filed and passed affecting human trafficking, no substantive changes were made to state jails. A bail reform bill passed the House but did not pass the Senate. While school finance and property taxes received most of the headlines this past session, the Legislature passed a number of criminal justice bills.

**Driver Responsibility Program**

HB 2048 repeals the driver responsibility program, commonly known as the “surcharge” program, which is eliminated as of September 1, 2019. This has become one of the most unpopular state programs of all time, even with legislators. Justice and municipal courts report a high percentage of defendants in their courts appearing with no valid driver license who are not able to pay the assessed local fine due to owing hundreds, if not thousands, of dollars under this program. All unpaid surcharges will no longer be an obligation and every Texas driver with a suspension will have it lifted on the effective date. It has been estimated one million drivers will have their surcharges lifted on September 1, 2019. For many years, trauma services have been the recipient of assessed surcharges and these medical services will continue to be funded by different revenue streams, namely from various fees, including a new fine on driving while intoxicated convictions.

**Sexual Assault, Human Trafficking, Indecent Assault, and Revenge Porn**

HB 8 provides that DNA evidence from sexual assault cases must be analyzed within 90 days, starting in 2021. This bill also addresses the statute of limitations for sexual assault cases by eliminating it completely when biological matter is collected and the material has not yet been subject to forensic testing or where there is no DNA match.

SB 20 is a broad bill addressing human trafficking and provides for sex trafficking prevention programs and for victim treatment programs. Specifically, the bill creates the third-degree felony offense of online promotion of prostitution and the second-degree felony offense of aggravated online promotion of prostitution. In this context, “aggravated” refers to the intent to promote the prostitution of five or more persons or facilitating five or more persons to engage

---

**Notes**

1. 466 S.W.3d 831 (Tex. 2015).
2. 444 S.W.3d 315 (Tex. App.—Austin 2014).
in prostitution. It also provides for mandatory community supervision for Class B prostitution cases.

Under HB 3106, sexual assault investigations must now be entered into the Violent Criminal Apprehension FBI database, listing the suspect’s name, date of birth, specific offense, description of manner in which committed, and any other information required by the FBI for inclusion. HB 1399 amends Texas Government Code Section 411.1471 by requiring the mandatory DNA sample taken from a defendant to occur at post-arrest as opposed to post-indictment.

SB 194 creates the new offense of indecent assault. This offense is a Class A misdemeanor and is intended to address the unwanted groping of an individual 17 or younger.

HB 98 clarifies Texas Penal Code Section 21.16(b), commonly referred to as the “revenge porn” statute. A court of appeals decision struck down the prior version of this section and it is pending at the Texas Court of Criminal Appeals. The new language specifies a person commits a civil or criminal offense, if, without consent, a person discloses intimate visual material with the intent to harm the depicted individual.

Thief and Presumption of Theft of Service

HB 37 is a mail theft statute that was amended on the House floor with a “porch pirate” amendment that states the mail can be removed from either a mailbox or premises. HB 2789 creates a new Class C misdemeanor offense of unlawfully transmitting explicit visual material.

HB 1279 clarifies and corrects references to the effect of parole in felony jury charges. The current jury charge is factually incorrect in that it indicates a sentence may be reduced by parole as opposed to the bill correctly stating the term of imprisonment may be reduced. This bill eliminates all references to good conduct time.

HB 2524 amends Texas Penal Code Section 31.04 by creating a presumption of theft of service; however, the bill provides that the term “written rental agreement” does not include an agreement permitting an individual to use personal property for personal or household purposes, which is automatically renewable with each payment and permits the individual to become the owner. It is the intent of this legislation to exempt personal property and household items from this section, following criticism that this section criminalized a civil transaction.

Hemp and Smoking

A bill to lessen penalties for small amounts of marijuana passed the House but failed in the Senate. However, HB 1325 passed, creating the Hemp Farming Act, which intends to regulate the commercial production of hemp. Hemp is defined as the plant Cannabis sativa L. with a THC concentration of not more than 0.3%. HB 1325 is effective June 10, 2019.

SB 21 raises the smoking age in Texas to 21 except for military personnel. The bill also requires identification of anyone under 30 who attempts to purchase tobacco products, cigarettes, or e-cigarettes.

Licensing

HB 1342 removes the blanket prohibition on professional licenses due to a past criminal conviction. Specifically, it removes as grounds for disqualification for a professional license a conviction within the past five years for an offense not directly related to the licensed occupation. The intent of this legislation is to “enhance opportunities for a person to obtain gainful employment” following conviction and discharge of the sentence.

HB 121 creates a new defense for a person with a concealed handgun license who promptly departs a premises prohibiting handguns when asked to do so. This bill intends to address a situation where a CHL holder mistakenly carries a handgun onto premises prohibiting such but promptly departs after receiving notice to depart.

Red Light Cameras

HB 1631, effective June 2, 2019, prohibits the use of red light cameras in Texas. Over the years, numerous legislators have pushed for this effort and it finally had enough votes for passage.

Capital Murder

SB 719 amends the capital murder statute. It is now a capital offense to murder a child 10 or older but younger than 15; however, the death penalty may not be assessed upon conviction. Upon a conviction under this new provision, the penalty will automatically be life without parole.

Criminal Court Costs

SB 346 consolidates and allocates state criminal court costs in a new manner. New and differing percentages were made to a significant number of groups receiving money from these court costs, with the fair defense account now receiving approximately 20% of all court cost revenue. SB 346 is effective January 1, 2020.

DWI Offenses

For approximately 20 years, the Legislature has debated passing a bill that would allow deferred adjudication for DWI offenses. HB 3582 allows deferred adjudication for certain first-time DWI offenders, although a successful completion of the probation can be used for enhancement purposes. The bill does allow for a nondisclosure upon receiving a discharge and dismissal in a manner similar to legislation passed in 2017. The original bill provided for a mandatory ignition interlock device, but the enrolled version allows a judge to waive installation of an IID following an alcohol or substance abuse evaluation.

Criminal justice policy continues to evolve in Texas and the 87th Legislature will have plenty of issues awaiting it, such as the applicability of intellectual disability and severe mental illness to the death penalty, reclassification of all controlled substances and marijuana punishment, and the “arrest” status of Class C or fine-only misdemeanors.
ESTATE, GUARDIANSHIP, AND TRUST LAW
By William D. Pargaman

This article contains a summary of 2019 statutory changes affecting decedents’ estates, guardianships, trusts, powers of attorney, and other areas of interest to estate and probate practitioners. Due to space constraints, many changes in these areas are omitted. However, a more-detailed version of these materials, including a list of effective dates, is available on the website of the author’s law firm at snpalaw.com/resources/2019legislativeupdate.

Decedents’ Estates
The decedents’ estates bill (HB 2782) of the Real Estate, Probate, and Trust Law Section, or REPTL, contained a number of “miscellaneous” changes, but perhaps the most significant one authorizes a testator to include a provision in the will giving someone else authority to name successor administrators. By default, the designees would act only if none of the successors named in the will were able and willing to act, but the will could provide otherwise. Other significant provisions require a third party who held nonprobate assets to provide information about the decedent’s interest to the executor or administrator. Two witnesses will be required in heirship determinations unless the court is satisfied that only one can be found. Muniment of title orders won’t preclude later application for administrations, if needed, so long as the application is filed within four years of death. Several changes are designed to clarify existing law, such as the community property intestacy provisions, availability of an affidavit in lieu once the inventory deadline has been extended, an executor’s ability to obtain a court order to access digital assets of a decedent, and lack of need for court approval of a contingent fee that does not exceed one-third of the property sought to be recovered. Fees may be awarded to a successful will contestant even if an alternative will is not offered. The current combined $15,000 limit for Class 1 claims (funeral expenses and expenses of last illness) is split into two separate $15,000 limits. Sales procedures in dependent administra-

trations are clarified, with certain terminology changes, such as public auctions instead of public sales; contracts to sell instead of private sales; reports to the court of successful bids or private contracts instead of sales, and court approval of sale instead of confirmation. Another provision repeals the statutory transfer on death deed forms, but SB 874 not only repeals them, but also directs the Texas Supreme Court to promulgate transfer on death deed, or TODD, forms and instructions.

Several non-REPTL decedents’ estates provisions were added to REPTL’s guardianship bill (SB 667). However, as mentioned below, that guardianship bill was vetoed by the governor.

The procedures found in Texas Property Code Chapter 74 are made applicable to the recovery of unclaimed funds from the comptroller by an estate (SB 1420). New procedures allow the early termination of the residential lease of a decedent who was the sole occupant if the landlord is given timely notice, the tenant’s property is timely removed, and an inventory of removed property is provided to the landlord (HB 69). The estate remains liable for rent through the lease termination and any damages to the premises.

Guardianships and Persons With Disabilities
The REPTL guardianship bill (SB 667) also contained a number of “miscellaneous” changes, including several non-REPTL provisions added as the bill moved through the Legislature. However, on June 15, the governor vetoed the bill based on one of the added non-REPTL provisions that would have allowed counties to establish an office of public guardian. The governor based his veto on the fact that private attorneys could adequately handle the job. A description of the vetoed provisions can be found in the full legislative update mentioned in the introductory paragraph.

Compensation that may be paid to a guardian of a Medicaid recipient is increased from $175 to $250 a month (SB 1784). The Office of Court Administration, or OCA, is directed to establish an electronic database containing personal injury or wrongful death settlement agreements for which a minor or incapacitated person is the beneficiary (HB 770). 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. SB 31 establishes a guardianship abuse, fraud, and exploitation deterrence program within the OCA, while HB 3116 establishes a task force to study best practices for detention of persons with an intellectual or developmental disability. SB 1184 expands signature authority over an Achieving a Better Life, or ABLE, account to a legal guardian of the beneficiary. HB 558 allows a court to direct the support for an adult child with a disability be paid to a guardian of the beneficiary. HB 558 allows a court to direct the transfer of assets to a special needs trust for the child. Read the full legislative update for descriptions of additional bills relating to criminal matters, emergency detentions, and mental health services.

Trusts
The REPTL trust bill (HB 2245) incorporates Texas Estates Code Chapter 255 provisions relating to the construction and
interpretation of wills (e.g., pretermitted children, advancements, lapsed gifts, class closing, and more) to revocable trusts. In addition, Estates Code abatement provisions are made applicable to those trusts. Other provisions prohibit limiting a court’s ability to deny or order the return of a trustee’s fees or to make an “equitable and just” award of costs and attorneys’ fees and clarify that reformations are effective as of creation of a trust. An interesting provision “clarifies” that trusts may be decanted to a second trust under the same trust instrument or another instrument. The intent is to potentially eliminate the need to retile decanted assets or obtain a new tax identification number, or TIN, but only time will tell if this change achieves its goal. A separate REPTL directed trust bill (HB 2246) clarifies that the person with authority to direct, consent to, or disapprove the trustee’s decisions is an “advisor,” and usually is a fiduciary.

Powers of Attorney and Advance Directives

After REPTL’s significant revision of financial power of attorney laws in 2017 (HB 1974), there were no further changes this session. For the second consecutive session, REPTL’s attempt to make the mandatory medical power of attorney form optional (SB 310) was unsuccessful due to continued opposition by the Texas Medical Association, or TMA, and the Texas Hospital Association, or THA. According to the American Bar Association, Texas is one of only five states with a mandatory medical power form.

REPTL’s disposition of remains bill (HB 2248) renews a spouse’s authority following divorce and clarifies that a court with jurisdiction over a decedent’s probate proceeding can order the disposition of remains. For a second consecutive session, and despite lack of apparent opposition, REPTL’s anatomical gifts bill, which would have allowed an anatomical gift document to be notarized in lieu of two witnesses, failed to pass.

Other Stuff

REPTL’s exempt savings plan bill (HB 2779) clarifies and reorganizes the Texas Property Code exemptions for retirement and college savings plans, hopefully making them more readable. Posting notice on a website created by the OCA will be an additional requirement where notice is required to be published in a newspaper (SB 891). In addition, new provisions will allow substituted service through social media. SB 2342 increases the upper limit of statutory county court jurisdiction in civil cases from $200,000 to $250,000 and makes other jurisdictional changes. The monthly reports clerks maintain listing certain court appointments and the lists courts maintain of persons qualified to serve in certain positions will no longer need to include persons serving pro bono (SB 41). A court may also appoint a person who’s not at the top of the rotation list if a state of disaster had been declared for the area within the preceding 30 days.

The author would like to acknowledge the contributions of Craig Hopper, who took over as legislative chair in 2015.

FAMILY LAW

By Brian L. Webb and Brant M. Webb

This article provides a summary of notable family law-related legislation passed by the Texas Legislature during the 2019 legislative session. A complete listing of family law-related legislation may be found on the State Bar of Texas Family Law Section website at sbtfam.org. Unless otherwise noted, all legislation applies to proceedings commenced on or after the effective date. The full text of the bills discussed in this article may be accessed online using the Texas Legislature Online Bill Lookup tool at legis.state.tx.us/BillLookup/BillNumber.aspx.

The Texas Family Law Foundation and State Bar of Texas presented a comprehensive discussion of family law-related legislation passed during this session. To watch or listen to the webcast, go to texasbarcle.com/CLE/AABuy1.asp?ProductId=E&IID=17351. The MCLE course number is 174046372.

Title 1: The Marriage Relationship

SB 891: Citation by Publication

Among other things, SB 891 amends Section 3.305 of the Texas Family Code to allow for citation by publication via the internet. SB 891 provides that, in addition to the traditional publication in a newspaper of general circulation published in the county in which the petition was filed, citation shall be published on a website established and maintained by the Office of Court Administration of the Texas Judicial System, or OCA. Notice shall be published on the website, which must be accessible to the public and easily searchable, for at least two consecutive weeks before the hearing. According to SB 891, the Texas Supreme Court must establish procedures for the submission of information to this website by persons required to publish such information by June 1, 2020.

SB 891 also amends Section 102.010 of the Texas Family Code to allow for citation by publication via the internet in Suits Affecting the Parent-Child Relationship, or SAPCRs. Additionally, the bill adds a section to the Texas Government Code (51.3032) that allows for a district clerk to post official and legal notices by electronic display instead of posting a physical document. Finally, the bill adds a section to the Texas Civil Practice and Remedies Code (17.033) that allows for substituted service of citation via social media as the court prescribes. Substituted service of citation must be authorized under the Texas Rules of Civil Procedure and the Texas Supreme Court shall adopt rules under the new section by December 31, 2020. Effective: September 1, 2019.

HB 1689: Mandatory Joiner of SAPCR

HB 1689 amends Section 6.406 of the Texas Family Code and requires divorce petitions between married individuals who are the intended parents under an effective gestational agreement that establishes a parent-child relationship between the parties to state: (1) the existence of the gestational agreement; (2) whether the gestational mother is pregnant or a child the subject of the agreement has been born; and
and nonparents (Section 153.371) appointed as sole managing

Sole Managing Conservator

HB 555: Rights and Duties of Party Appointed

Sole Managing Conservator

HB 555 expands the rights of both parents (Section 153.132) and nonparents (Section 153.371) appointed as sole managing conservators under the Texas Family Code and grants a sole managing conservator the right to apply for, renew, and maintain possession of a child’s passport. Effective: September 1, 2019.

HB 553: Parents Who Reside 100 Miles or Less Apart

HB 553 requires the possessory conservator of a child under a standard possession order in which the parents live 100 miles or less apart to give the managing conservator of the child written notice of the location at which the managing conservator is required to pick up and return the child for a certain designated weekend during the summer. The possessory conservator would have to give this notice at least 15 days before the Friday beginning the weekend in which the managing conservator has possession.

This provision applies to the managing conservator’s summer weekend designated under Texas Family Code § 153.312(b)(3) that occurs during the possessory conservator’s extended period (e.g., 30 days) of summer possession. Prior to HB 553, disclosure of a specific location where the child should be picked up and dropped off by the managing conservator for that weekend was not required. Effective: September 1, 2019.

Other Legislation From the 2019 Session

(and Notable Legislation That Was Not Passed)

SB 325: Protective Order Registry

SB 325 amends Chapter 72 of the Texas Government Code and establishes a protective order registry for certain protective orders and applications for protective orders filed in Texas. The bill requires the OCA, in consultation with the Texas Department of Public Safety and the courts of the state, to establish and maintain a centralized internet-based registry for applications for protective orders filed in this state and protective orders issued in this state.

The registry includes applications filed under Chapter 82 (Applying for a Protective Order) of the Texas Family Code or Article 17.292 (Magistrate’s Order for Emergency Protection) of the Texas Code of Criminal Procedure. Also included are protective orders issued under Chapters 83 (Temporary Ex Parte Orders) or 85 (Issuance of Protective Order) of the Texas Family Code involving family violence.

SB 325 requires the OCA to establish the registry by no later than June 1, 2020, with certain information regarding each protective order to be made publicly accessible. Effective: September 1, 2019.

HB 922: No-fault Divorce

HB 922 would have effectively ended “no-fault” divorce on the ground of insupportability, except where both parties agree. Effective: Did not pass.

HB 926: Waiting Period for Divorce

HB 926 would have extended the waiting period for divorce with children from 60 days to 180 days. Effective: Did not pass.

HB 2157: Equal Parenting Time

HB 2157 would have amended Chapter 153 of the Texas Family Code and gives standing to an intended parent in a gestational agreement to file an original SAPCR if that parent files jointly with the other intended parent under the gestational agreement or files suit against the other intended parent. Effective: September 1, 2019.

The bill also amends Section 102.003 of the Texas Family Code to require a petition in a suit in which adoption of a child is requested to state that the court has continuing exclusive jurisdiction is not required to transfer the SAPCR to the court in which the adoption suit is filed. Additionally, the bill amends Section 103.001(b) of the Texas Family Code to provide an exception under Section 155.201 (Mandatory Transfer) to the provision providing that a court that has continuing exclusive jurisdiction is not required to transfer the SAPCR to the court in which the adoption suit is filed. Section 155.201 now requires the court with continuing exclusive jurisdiction to, on the filing of a motion showing that a suit in which adoption of the child is requested has been filed in the county where the child resides, transfer the proceedings to the court in which the suit for adoption is pending upon request. Effective: September 1, 2019.

HB 369: Venue for Original Adoption Suit

Among other things, HB 369 amends Section 102.008(b) of the Texas Family Code to require a petition in a suit in which adoption of a child is requested to state that the court in which the petition is filed has jurisdiction of the suit under Section 103.001(b).

Additionally, the bill amends Section 103.001(b) of the Texas Family Code to provide an exception under Section 155.201 (Mandatory Transfer) to the provision providing that a court that has continuing exclusive jurisdiction is not required to transfer the SAPCR to the court in which the adoption suit is filed. Effective: September 1, 2019.

HB 369: Venue for Original Adoption Suit

Among other things, HB 369 amends Section 102.008(b) of the Texas Family Code to require a petition in a suit in which adoption of a child is requested to state that the court in which the petition is filed has jurisdiction of the suit under Section 103.001(b).

Additionally, the bill amends Section 103.001(b) of the Texas Family Code to provide an exception under Section 155.201 (Mandatory Transfer) to the provision providing that a court that has continuing exclusive jurisdiction is not required to transfer the SAPCR to the court in which the adoption suit is filed. Effective: September 1, 2019.

HB 2157: Equal Parenting Time
INSURANCE LAW

By Ryan Brannan

When it comes to insurance legislation, there is an old adage: If you aren’t talking about accessibility and affordability, no one is listening. That tenet, coupled with the pressing public policy issues of rising health care costs and the impact of Hurricane Harvey, proved to be central motifs of passed legislation for the 86th Texas Legislature. With so many insurance-related bills passing this session, the article below is to be viewed as a summary of the more significant legislation. All bills are effective September 1, 2019, unless otherwise indicated.

Rising Health Insurance Costs

The Legislature attempted to tackle rising costs primarily through balance billing and price transparency legislation.

Balance Billing and Related Legislation

SB 1264 prohibits all non-network facility-based providers at network hospitals and all non-network emergency care providers from sending surprise balance bills to consumers. The legislation requires health plans, including preferred provider organizations, or PPOs, exclusive provider organizations, or EPOs, and health maintenance organizations, or HMOs, to pay reasonable or agreed-upon amounts to out-of-network emergency care and facility-based providers. The bill also allows providers to dispute payment amounts through the existing Texas Department of Insurance, or TDI, mediation program. Consumers will still be responsible for their applicable copay, coinsurance, and deductible amounts.

SB 1742 amends Chapter 843 and Chapter 1301 of the Texas Insurance Code, regarding HMO and health benefit plans respectively, to clearly identify which radiologists, anesthesiologists, pathologists, emergency physicians, neonatologists, and assistant surgeons are in-network at network facilities. The bill makes significant changes to preauthoriza-

tion and utilization review, requiring at least 60 days’ notice to providers for changes or new requirements and creates an interim committee to make recommendations on increasing transparency and improving patient outcomes.

HB 3911 expands the authority of the insurance commissioner to examine plans for network adequacy by expanding Section 1301.0056 of the Texas Insurance Code to apply to PPOs—the section already applied to EPOs. Notably, the bill changes a “may” to a “shall,” requiring these examinations to be performed at least every three years or more as determined by TDI.

SB 1037 prohibits a consumer credit reporting agency from furnishing a consumer report that includes information on a medical collection account when the consumer had health insurance at the time services were received and the collection relates to billing for an outstanding balance owed to an emergency care provider or a facility-based provider for an out-of-network benefit claim. SB 1037 went into effect immediately upon the governor’s signature on May 31, 2019.

Pharmaceutical Transparency

HB 2536 adds Chapter 441 to the Texas Health and Safety Code and adds Subchapter K to Chapter 1369 of the Texas Insurance Code, requiring pharmaceutical drug manufacturers to submit a report to the Texas Health and Human Services Commission, or HHSC, stating the current wholesale acquisition cost information for drugs sold in or into Texas by that manufacturer, and requires the HHSC to develop a website providing the general public with drug price information. The final passed version of the bill also requires that the bill apply to any rate increase of 40% or more over the preceding five calendar years or 15% or more in the preceding 12 months.

HB 1455 attempts to inhibit current audit practices on pharmacies by health benefit plans and pharmacy benefit managers, or PBMs, to require the plans and PBMs to accept as evidence documentation that shows the quantity of dispensed drugs matches the quantity purchased from wholesalers.

Transparency and Freestanding Emergency Rooms

HB 2041 requires freestanding emergency rooms to give patients a printed disclosure in English and Spanish that lists the in-network health plans and the average price a patient may be charged for a procedure, including facility fees. Under the bill, freestanding emergency rooms will also be barred from advertising that they “take” or “accept” certain insurance if the facility is not an in-network provider.

HB 1941 will allow the Texas attorney general to take action against freestanding emergency rooms that charge “unconscionable” rates, which the bill defines as prices that are 200% more than the average hospital charge for a similar treatment.

Additional Health Insurance Related Bills of Significance

SB 1940 permits the insurance commissioner to create a temporary health insurance risk pool if federal funds are
available to warrant the pool. After the Affordable Care Act became law, Texas wound down its high-risk health insurance pool.

Legislation making telemedicine and telehealth more accessible passed the 86th Legislature. HB 3345 requires a health benefit plan to provide coverage for a service or procedure delivered by a provider to a patient as a telemedicine or telehealth service in the same manner as it would for an in-person setting. The bill prohibits a health benefit plan from limiting, denying, or reducing coverage for telemedicine services and prohibits a separate deductible for telehealth.

Health benefits were also slightly expanded by this Legislature. HB 170, HB 1584, and SB 747 require diagnostic mammograms, easier access to medications for plans that cover stage-four cancer, and increased access to newborn screenings, respectively, for relevant covering plans.

Hurricane Harvey and Catastrophe Coverage
Several transparency and consumer protection bills passed in the wake of Hurricane Harvey; the most significant were related to flood, wind, and hail, although significant adjuster legislation also passed.

Flood Insurance
SB 442 requires any insurer that issues a residential property insurance policy without coverage against flood loss to provide written notice to the insured. The bill gives the insurance commissioner rulemaking authority to issue the form and content of the notice.

HB 1306 provides for additional flood coverage access under insurance policies issued by surplus lines insurers. Surplus lines coverage is only to be used if the full amount of coverage cannot be obtained in the Texas market. There were also significant pieces of flood legislation that passed through infrastructure changes and funding projects not directly related to insurance coverage.

Windstorm and Hail Insurance
SB 615 was the Texas Windstorm Insurance Association, or TWIA, Sunset bill. Through this process, significant transparency measures were introduced into TWIA’s ratemaking process. Among other things, the bill requires TWIA to publicly post notice of potential rate increases as well as its methodology for justifying the proposed increase. It also improves customer service processes and increases transparency in the claims process.

HB 1900 requires insurers to pay for any reinsurance TWIA authorizes above the statutory 1 in 100-year storm. It also notably sets up two interim studies, one on making recommendations for changes to the current funding structure and another to look at combining TWIA and the fair access to insurance requirements, or FAIR, plan. HB 1900 went into effect upon the governor’s signature on June 10, 2019.

Other TWIA legislation includes HB 1902, which tweaks the approval process for the insurance commissioner regarding maximum liability limits; HB 1944, which extends certain TWIA claims deadlines to give claimants and TWIA sufficient time to resolve disputes; and HB 1940, establishing that eligible surplus lines insurers can sell windstorm and hail insurance in Texas.

Contracting and Adjusting Legislation
The 86th Legislature passed several consumer protection bills related to contracting and adjusting practices. HB 2102 creates a criminal offense for any roofer that offers to pay insurance deductibles related to property insurance policies. HB 2103 expands the roofing contractor prohibition from acting as a public adjuster for any property the contractor is servicing to include all contractors. HB 2659 prohibits a public insurance adjuster from using a name other than the one under the license, except for valid assumed name certificates under Chapter 71 of the Texas Business & Commerce Code.

Additional Property and Casualty Bills of Significance
Even with a focus on health care and Harvey, significant legislation passed affecting other lines as well.

The Legislature did away with named driver policies. HB 259 prohibits an insurer writing automobile insurance in Texas from delivering, issuing for delivery, or renewing a named driver policy unless the named driver policy is an operator’s policy.

The Legislature also addressed title insurance transparency. HB 3228 authorizes an interested person to request a public hearing regarding title insurance rates. After a public hearing on the request, the insurance commissioner can either move forward as a contested case hearing or give a written denial explaining his reasons for the denial.

The successful “Texas Model” of workers’ compensation went largely untouched, except for first responder legislation: HB 2143 expands the presumption for first responders to include PTSD under Chapter 504 of the Texas Labor Code, HB 2503 expands death benefits for spouses of first responders killed in the line of duty, and SB 2551, effective June 10, 2019, clarifies the cancer presumption for first responders with workers’ compensation claims under the Presumptive Act in Chapter 607 of the Texas Government Code.

HB 2587 creates a uniform regulatory framework for travel insurance by standardizing protections and encouraging fair competition among market participants. This legislation links to the Texas Deceptive Trade Practices Consumer Protection Act, or DTPA, if there is no recourse for recovery for the policyholder.

SB 590 expands on current law requiring insurers to clearly describe material changes in personal and casualty policies to apply to commercial and liability policies as well.

SB 1063 amends Chapter 462 of the Texas Insurance Code to update the Texas Property and Casualty Insurance Guaranty Association, or TPCIGA, operational and administrative processes. Notable changes include authorization for the use of loss portfolio transfers and clarifying TPCIGA’s right to recovery extends to an insured’s successor entity.
The 86th Legislature was a busy one in the fields of legislative and campaign law. State lawmakers tackled the operation of the Legislature with HB 4181. The statutes governing legislative organization and operation had not been updated in some time and in many places did not reflect actual legislative practice. For example, the statutes governing House committees and committee procedure did not match the requirements the Texas House adopted in the House Rules. This led to ambiguity about whether those statutory provisions or the Texas legislative rules adopted under explicit constitutional authority controlled. Additionally, there had been questions about access to the Texas State Library and Archives Commission by legislators. The bill made clear that the Legislature had a right to legislative records. The Legislature went on to further clarify rights and privileges. Lawmakers codified the common law of legislative privilege, developed from the speech and debate clause of the Texas Constitution. This legislation now makes clear that members of the Legislature retain the right to decide when to waive legislative, attorney-client, and other privileges. This bill is effective June 14, 2019.

This session, lawmakers found other ways to respond to the mandates of the courts as well. In 2016, Harris County state district court determined that Government Code Section 306.005 (titled “Use of Legislatively Produced Audio or Visual Materials in Political Advertising Prohibited”) was in violation of the First Amendment of the U.S. Constitution and Article 1, Section 8 of the Texas Constitution because legislatively produced video and audio recordings of floor and committee proceedings belong to the public, including for use in political advertising. In response, the Texas Legislature passed HB 368, which removes the outdated law banning use of legislative footage in political ads. This bill is effective June 10, 2019.

They also tackled changes to officeholder provisions in the Texas Constitution. Article 16, Section 40 generally prohibits a person from holding more than one paid public office at the same time, regardless of whether the person was elected or appointed to each office. This requires voter approval via a constitutional amendment. If approved by voters, this bill is effective January 1, 2020.

Lawmakers also sought to change the duties of political actors in the campaign finance space. HB 2677 prohibits registered lobbyists who were formerly candidates or officeholders from using the political contributions that they received as candidates or officeholders to make contributions to other candidates, officeholders, or political committees. The bill targets a registered lobbyist or anyone acting on the lobbyist’s behalf and with the lobbyist’s consent. It prohibits them knowingly making or authorizing lobbying expenditures, political contributions, or political expenditures from political contributions accepted by the lobbyist when the lobbyist was a candidate or officeholder or by PACs related to the lobbyist. This bill is effective September 27, 2019.

The Legislature did not stop there when it came to changes to campaign finance law. HB 3044 allows corporations to make fully or partially matching contributions to a nonprofit organization that was exempt from federal income tax in order to finance the solicitation of political contributions to a general-purpose committee from the corporations’ stockholders, employees, and their families. This bill is effective September 1, 2019. Additionally, HB 2586 allows a corporation or labor organization to make campaign contributions to political committees and to a committee to use such a political contribution to make a direct campaign expenditure if certain requirements were met. Before a general-purpose committee or a specific-purpose committee could use a political contribution from a corporation or labor organization to make a direct campaign expenditure in connection with a campaign for an elective office, the campaign treasurer would have to submit an affidavit stating that the committee was not established or controlled by a candidate or officeholder and that the committee would not use any political contribution from a corporation or labor organization to make a political contribution to a candidate for elective office, an officeholder, or a political committee that had not filed an affidavit under this provision as a general-purpose or specific-purpose committee. The bill expands the definition of “direct campaign expenditure” to specify that a campaign expenditure would not constitute a contribution by the person making the expenditure if it was made without the prior consent or approval of the candidate or officeholder on whose behalf it was made. The bill also clarifies “in-kind contributions.” This bill is effective September 1, 2019. Lawmakers also passed HB 3580, which authorizes a corporation or labor organization to make a political contribution from its own property to super PACs and direct expenditure only committees. This bill is effective September 1, 2019.

The Legislature also voted with the passage of SB 548 to require the Texas Ethics Commission to dismiss complaints against campaign finance and lobby reports if the reports are corrected quickly. This bill is effective September 1, 2019.
REAL ESTATE
By Richard L. Spencer and Richard A. Crow

The 86th legislative session was relatively uneventful with respect to real estate law. This may be explained, in part, by the Legislature’s attention being particularly focused on ad valorem tax reform (e.g., SB 2) and Hurricane Harvey-related legislation. While this session was less impactful, overall, than some recent legislative sessions, a number of important bills were passed that will be of interest to Texas real estate lawyers. This article briefly describes some of those bills. All bills are effective September 1, 2019, unless otherwise indicated.

Among the Hurricane Harvey-related bills, perhaps the most significant affecting real estate law is SB 339, which expands the residential seller disclosure form required by Section 5.008 of the Texas Property Code to include new, more specific disclosures concerning flooding.

HB 3167 is the so-called development “shot clock” bill, which restricts regulatory authority over plats and plans and makes some significant changes to bring clarity and consistency to the land development process, especially in connection with the timing of approvals. Such changes include the following: (i) the applicable municipal authority must “approve, approve with conditions, or disapprove” (as opposed to merely “act on” a filing in the current law) within 30 days after the plan or plat was filed; (ii) plans and plats previously conditionally approved or disapproved must be approved or disapproved within 15 days after the date the response was submitted; and (iii) disapprovals must be in writing and must provide specific reasons for the determination and citations to applicable law. The bill also places a high burden of proof (clear and convincing evidence) on the municipality in any legal proceeding challenging the propriety of a disapproval of a plan or plat.

HB 2782 and SB 874 amend existing law relating to transfer on death deeds, or TODDs. The former allows TODDs to be voided by the recording of “a memorandum sufficient to give notice of the conveyance of the interest” (which is in addition to the provision under current law allowing for TODDs to be voided by the recording of a valid instrument conveying the interest). The latter bill repeals the statutory forms for creating and revoking TODDs and directs the Texas Supreme Court to promulgate such forms.

SB 489 relates to personal information that may be omitted from certain records, licenses, and reports and to other court security measures. This bill broadens the application of Section 11.008 of the Texas Property Code (which pertains to the notice that a person may remove or strike a Social Security number or driver’s license number from deeds and deeds of trust) so that the notice now applies to any other record recorded by a county clerk related to real property, including mineral leases, mechanic’s liens, or releases of mechanic’s liens. This bill also requires removal or redaction from certain public records and reports of addresses of state and federal judges and their spouses, municipal court judges (including judicial candidates for municipal judge) and their spouses, and county attorneys or state judges (including candidates for those offices) and their spouses.

Under SB 2128, county clerks shall record copies of electronic records that have been declared to be true and correct copies by a notary public or other officer who may take an acknowledgment or proof of a written instrument under Section 121.001 of the Texas Civil Practice and Remedies Code. It establishes that a paper copy of an instrument that is declared to be true and correct, in accordance with this statute, satisfies requirements for recording, including requirements that the document be original, in writing, and acknowledged. This bill creates a “declaration of authenticity” form for a notary (or other permitted officer under the statute) to declare that the document is a true and correct copy.

HB 1833 amends Chapter 12 of the Texas Property Code by adding Section 12.019, which permits certain for-profit entities and estates, and other owners of an interest in real property, to file an affidavit in the real property records identifying the person authorized to transfer that real property for the entity. This new law defines “transfer” as a transaction not only to sell or convey property, but also to lease, plat, rezone, “or otherwise dispose of an estate … or a right incident to real property.” This affidavit must include the name and address of the owner of the property, a description of the property, and the name and title of the individual authorized to transfer property on behalf of the entity, estate, or owner. Unless earlier terminated in accordance with this statute, such an affidavit automatically expires one year from the recording date. Guidelines are established about who is authorized to file the affidavit—in the case of limited liability companies, members or managers; limited partnerships, a general partner; and professional entities, directors or officers. Generally, the person signing the affidavit may not be the same person authorized to transfer the property unless that person is the sole person authorized to transfer the property. A person who acts in good faith in reliance on an unexpired affidavit may avoid liability for such reliance, even if he or she acts “without inquiry,” unless they have actual knowledge of incorrect facts in the affidavit. If a person enters a transaction relying on an unexpired affidavit that complies with this law, the transacting party may enforce the transaction unless that person has actual knowledge of incorrect facts in the affidavit.
Several new laws affecting the residential landlord-tenant relationship passed this session. Section 92.0132 of the Texas Property Code is added, effective January 1, 2020, by HB 1002. This new section of the Texas Property Code requires the term of a landlord-issued parking permit to end on the same date as the tenant’s lease. Section 92.0132 will prohibit a landlord from terminating or suspending a tenant’s parking permit until the date the tenant’s right of possession of the leased premises ends.

Another new law affecting landlords and tenants facilitates the termination of a residential lease due to family violence. SB 234 amends Texas Property Code Section 92.016(b), (c), and (c-1) and adds Section 92.016(b-1). This law allows a tenant to provide additional documentation to satisfy the statutory requirements for lease termination, including a magistrate’s emergency protective order or documentation of violence from a licensed health care services provider, a mental health services provider, or a trained advocate from a family violence center who has treated or assisted a victim.

SB 1414, which amends Section 92.019 and adds Section 92.0191 to the Texas Property Code, clarifies the standard for late fees that a residential landlord may charge to “reasonable” fees. It lengthens the time period that a landlord is forbidden from charging a late fee from one full day after rent is due to two full days. These sections of the Texas Property Code establish a safe harbor for “reasonable” fees: not more than 12% of the rental amount for a 1-to-4 family complex and not more than 10% of the rental amount for complexes with five units or more. This bill also clarifies the definition of treble damages against landlords for improper collection of late fees and establishes that a residential tenant may request a written statement of whether the tenant owes a late fee and the amount of such fee.

HB 69 adds Texas Property Code Section 92.0162, which allows an estate’s representative, starting January 1, 2020, to terminate a decedent-tenant’s residential lease, if the decedent was the sole occupant and the representative satisfies the following requirements: (1) written notice of termination is provided to the landlord or its agent; (2) the tenant’s property is removed from the leased premises; and (3) the representative signs a removed property inventory, if the landlord requires it. Such a termination is effective 30 days after these requirements are met. A landlord must provide a copy of the lease to the representative. The tenant’s estate is not released from pre-termination liabilities, including delinquent rent and damage beyond normal wear and tear, and landlords are not liable for acts or omissions related to their representatives’ entry into a decedent’s leased premises.

For more information about bills enacted this session relating to real estate law, the reader is invited to refer to the final report for the 86th Legislature prepared by the Real Estate Legislative Affairs Committee, or RELACs, of the State Bar of Texas Real Estate, Probate, and Trust Law Section. A copy of the RELACs report may be downloaded at reptl.org.

THE 2019 ANTI-SLAPP REFORM LEGISLATION

By Amy Bresnen and Steve Bresnen

Few laws enacted by the Texas Legislature in recent decades have been more consequential for civil litigation than the Texas Citizen Participation Act, or TCPA. After eight years of experience and an escalating number of appellate court decisions, the 2019 Legislature enacted HB 2730, substantially revising the TCPA effective September 1, 2019.

Enacted in 2011, the TCPA is an “anti-SLAPP” statute, a species of law found in 31 other states, although the original TCPA was broader than any other state’s statute except Oklahoma’s, which replicated the TCPA. “SLAPP” stands for “strategic lawsuit against public participation.” Anti-SLAPP laws provide a motion to dismiss to obtain an early end to lawsuits brought to intimidate or silence a defendant who exercises rights associated with the First Amendment to the U.S. Constitution.

While the TCPA states that its purpose is to “encourage and safeguard ... constitutional rights,” the Texas Supreme Court and courts of appeals held that the old TCPA was considerably broader than the protection of constitutional rights. The TCPA’s broad definitions of the rights of free speech and association and “legal action” led to its application in unanticipated cases, including family law, probate, trade secret protection, and even State Bar of Texas enforcement actions. The statute’s seemingly boundless application confounded judges, who are obligated to apply statutes as written. The desire to narrow the statute’s scope united an array of legal and business organizations, including groups frequently at odds, who agreed on one thing: The Legislature must fix the TCPA in order to save the statute from itself.

The 2019 revisions fall into four categories: narrowing key definitions, increasing the number of exemptions, broad express protections for the media, and new procedures for resolving anti-SLAPP motions to dismiss.

Narrowed Definitions

“Exercise of the right of association.” Going forward, the right of association covered by the TCPA must relate to joint pursuits regarding a governmental proceeding or a matter of public concern. Under the old law, virtually any communication between two or more persons regarding an interest they shared was covered by the TCPA.
“Legal action.” Suits for declaratory relief are now covered by the TCPA. Procedural motions, alternative dispute proceedings, and post-judgment matters are not covered. Suits for legal or equitable relief remain covered.\textsuperscript{10}

“Matter of public concern.” No change narrows the scope of the TCPA more than the revised definition of “matter of public concern.” The TCPA’s free speech and association provisions cover a communication if it is about a matter of public concern and not subject to an exemption.

Previously, the phrase included any issue related to one of 11 subject areas, allowing lawyers to tailor pleadings to fit the TCPA to virtually any fact situation, which legislators expressly described as a primary reason for revising the TCPA.

The new definition includes communications regarding: (1) those in the public eye, including public officials, public figures, and others; (2) matters of political, social, or other interest to the community; and (3) subjects of concern to the public.\textsuperscript{11}

These separate tests are broad but may be easier to navigate because the language is informed by two notable cases.\textsuperscript{12} The definitions mirror tests of “public concern” from Snyder v. Phelps, a 2011 U.S. Supreme Court case, and “public issue” from FilmOn v. DoubleVerify, a California case construing that state’s anti-SLAPP law.\textsuperscript{13}

The first test varies little from the old law and is also found in the lower court’s opinion in FilmOn. First Amendment jurisprudence holds defamation suits by public figures to a higher burden than common defamation actions, so courts should be on familiar ground when applying this test.\textsuperscript{14}

The second test takes language verbatim from Snyder, which applied First Amendment protections to public protests on public property about homosexuality, as contrasted by the court with information about an individual’s credit report that was not widely disseminated. The opinion documents the concept of public concern as one well known to constitutional law.\textsuperscript{15}

The third test truncates language from Snyder and is also consistent with the California Supreme Court’s FilmOn holding. In Snyder, the test included a reference to a “subject of legitimate new interest,” a phrase omitted from the revised TCPA.\textsuperscript{16} (The TCPA media provision discussed below protects news reporting.) In FilmOn, the topics discussed, adult content and copyright infringement, were, broadly speaking, of public interest. Much like the individual credit reports discussed in Snyder, due to the confidential distribution of information about FilmOn being made only to DoubleVerify’s subscribers, the connection to the public’s interest was too remote for the statute to apply.\textsuperscript{17}

Litigants and courts should look to the factors enumerated in Snyder and FilmOn that make distinctions between public and private concerns. While the definition is broad, one thing is certain: The new law should put the public back into the phrase “public concern.”

**Additional Exemptions**

The existing exemptions to the application of the TCPA for cases involving governmental enforcement actions, commercial speech, personal injury, and insurance remain unchanged. Eleven new exemptions were added for cases involving misappropriation of trade secrets or corporate opportunities; non-compete or non-disparagement agreements; family law; Chapter 17, Business and Commerce Code; medical peer review, eviction; State Bar disciplinary actions; government employee whistleblowers; and common law fraud.\textsuperscript{18} Located in the TCPA’s “Motion to Dismiss” section, a new provision prohibits governmental entities from filing motions to dismiss under the TCPA, effectively another exemption.\textsuperscript{19}

**Broad Express Media Protections**

HB 2730 enacts the broadest anti-SLAPP protection in the country for media defendants, covering every kind of medium—from the oldest to the newest—under virtually any scenario connected to creating or disseminating an artistic, academic, or journalistic work, including when that work is never made public. These protections are independent of, and not limited to, communications regarding matters of public concern, unlike the provisions regarding exercises of free speech or association by non-media defendants.\textsuperscript{20}

While a media defendant’s authorization to move for dismissal is located in TCPA’s “Motion to Dismiss” section, the description of the protected activities is located in the section titled “Exemptions.” The media provision is an exception to several exemptions to application of the chapter, a technique the California Legislature used when amending its anti-SLAPP law to combat abuses without depriving a key industry of protections under its prior law.\textsuperscript{21} Otherwise, several of the exemptions might eliminate or reduce the broad protections for media defendants the Legislature considered justified, given the media’s unique role in public life.

**New Procedures**

HB 2730’s revised procedures for TCPA cases address the timing of motions to dismiss and their resolution, grounds for and evidence supporting dismissal, the effects of dismissal if the case is not disposed of by the motion, and the circumstances in which sanctions and attorneys’ fees may be imposed.\textsuperscript{22} These revisions could make for more timely and systematic consideration of TCPA motions to dismiss at the trial court level while reducing some of the leverage movants previously enjoyed.

Under the old law, a moving party was entitled to dismissal if the non-movant failed to provide clear and specific evidence of its prima facie case, which remains unchanged. A movant has also previously been entitled to dismissal if it established “by a preponderance of the evidence each essential element of a valid defense[.]” Instead, the revised law requires dismissal if the moving party “establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.”\textsuperscript{23}

Under the old law, the parties could only support their positions using pleadings and affidavits. Dismissal under the revised law may also be supported by “evidence a court could consider under Rule 166a.”\textsuperscript{24}


Previously, both attorneys’ fees and sanctions were mandatory if the moving party prevailed. The revised law retains mandatory attorneys’ fees but sanctions are discretionary based on a finding that sanctions are needed to deter the non-movant from bringing similar actions in the future. An exception to the mandatory attorneys’ fee requirement applies to motions to dismiss compulsory counterclaims. In such cases, attorneys’ fees may only be awarded if the counterclaim is frivolous or solely intended for delay.

Conclusion

The revised TCPA substantially narrows the reach of the Texas anti-SLAPP law. Simultaneously, the new definition of “matter of public concern” offers new challenges for determining whether a communication is of sufficient public importance to merit anti-SLAPP protection. Litigants and courts can meet those challenges by recognizing that the language chosen by the Legislature harmonizes the statute with established constitutional jurisprudence, which defines the protection of rights that is the TCPA’s express purpose, and with the appropriate construction of a state law intended to protect “public” participation.

The new provisions related to media defendants will extend anti-SLAPP protections for their activities and, given their breadth, may also invite “new media” types to look to extend anti-SLAPP protections for their activities and, given their breadth, may also invite “new media” types to look to take advantage of the new protections. At the same time, new procedures should help resolve cases more promptly and systematically.

Notes

5. Id.
6. 466 S.W.3d 352, 394-95 (Tex. App.—Austin 2015, no pet.).
9. Id.
10. Id.
11. Supra note 9.
16. Id.
17. Id.
18. Id.
19. Supra note 9.
20. Id.
21. Id.
22. Id.
23. Id.
24. Supra note 9.
25. Id.; see also Tex. R. Civ. P. 166(a).
26. Id.
• **0-4 years of service** receive current base pay:
  ✷ $140,000 for district judges, $154,000 for Court of Appeals (COA), $168,000 for Supreme Court (SCOTX)/Court of Criminal Appeals (CCA)
• **4-8 years of service** receive 110% of base pay:
  ✷ $154,000 for district judges, $169,400 for COA, $184,800 for SCOTX/CCA
• **8-12 years of service** receive 120% of base pay:
  ✷ $168,000 for district judges, $184,800 for COA, $201,600 for SCOTX/CCA

Additionally, the bill includes statutory county court and probate judges as well as state elected prosecutors on the tiered system. The bill also provides for compensation increases for child protection and child support court associate judges, adjusts the monthly longevity pay for judges or justices who have completed 12 years of service, and changes the calculation of retirement annuities for certain members of the Judicial Retirement System Plan Two.

**HB 3040 Judicial Selection Commission**

HB 3040 creates the Texas Commission on Judicial Selection to study and review the method by which judges and justices are selected for office in Texas. The commission is staffed by the OCA and includes membership by appointment: four members including the presiding officer appointed by the governor, four members appointed by the House speaker, four members appointed by the lieutenant governor, one member appointed by the chief justice of the Texas Supreme Court, one member appointed by the presiding judge of the Court of Criminal Appeals, and one member appointed by the board of directors of the State Bar of Texas. The bill is effective June 14, 2019. The bill requires the commission to deliver a report on its findings and recommendations by December 31, 2020, and abolishes the commission on January 2, 2021.

**SB 40 Improving the Judiciary’s Response to Disasters**

A major focus of the session was continued recovery efforts from Hurricane Harvey that devastated the Houston region and Gulf Coast in August 2017. SB 40, effective June 7, 2019, aids in the court system’s administrative response during a time of disaster. Specifically, the bill allows the presiding judge of the administrative judicial region to authorize a court to operate in another precinct or county, it extends the effective period of an emergency order from 30 to 90 days, and it allows the chief justice of the Supreme Court to renew an emergency order instead of the full court. The Texas Supreme Court issued 11 emergency orders including four joint orders with the Court of Criminal Appeals following Hurricane Harvey.1

**SB 31 Creating the Guardianship Fraud Abuse and Exploitation Deterrence Program**

SB 31 expands the OCA’s Guardianship Compliance Project, or GCP, statewide and renames the project as the Guardianship Abuse, Fraud, and Exploitation Deterrence Program. The bill requires OCA to employ guardianship compliance specialists to conduct reviews and audits of guardianships and to maintain a database to monitor guardianship filings, annual reports, and annual accounts. As of June 2019, the GCP has reviewed more than 31,000 guardianship files in Texas and found 40% to be out of compliance with state law.

**HB 2955 Specialty Court Oversight Within the Judiciary**

HB 2955 moves Texas closer to national best practices by centralizing oversight of specialty courts within the judiciary. More than 190 specialty courts including drug courts, DWI courts, and family violence courts operate across the state.2 The bill requires specialty court programs to register with the OCA, rather than the governor’s Criminal Justice Division, before beginning operation. Additionally, it requires the OCA to provide technical assistance to specialty court programs and to monitor them for compliance with programmatic best practices. Under the bill, funding for the specialty courts remains with the Office of the Texas Governor.

**SB 1887 Addressing the Needs of Dually Involved Youth**

Spurred by the one family, one judge approach to improve case outcomes for dually involved youth (that is youth that are involved in both the juvenile justice and the child welfare system)—the Legislature passed SB 1887. The bill allows a court that is exercising juvenile jurisdiction over a case to transfer that case to a court that has jurisdiction of the youth’s welfare case.

**HB 598 Increasing Access to Judicial Training**

HB 598 adds part-time masters, magistrates, referees, and associate judges appointed under Government Code Chapter 54 or 54A to the list of officials for whom the Court of Criminal Appeals can expend judicial and court personnel training funds under Account No. 540 for continuing legal education purposes.

**SB 2342 Civil Jurisdiction and Jury Size**

SB 2342 increases the civil jurisdiction for constitutional county courts and justice courts from $10,000 to $20,000. The bill also increases civil jurisdiction of statutory county courts exercising concurrent jurisdiction with districts courts from $200,000 to $250,000. The bill requires 12-member juries, unless otherwise agreed to by the parties, in a civil case in statutory county court in which the amount in controversy exceeds $250,000. Additionally, the bill requires the Supreme Court to adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000. This bill is effective September 1, 2020.

**SB 560 Cost of Court-Ordered Representation in CPS Cases**

SB 560 requires the Texas Judicial Council to create a
statewide plan for counties and courts to report information on court-ordered representation and associated costs in CPS cases. The bill requires the council to submit a report to the Legislature on the information received.

SB 346 Court Costs Consolidation
The Legislature passed SB 346 to simplify the difficult-to-administer criminal court cost system and to remedy constitutional issues that have developed from criminal court costs being used for non-criminal justice purposes. Under the bill, a convicted defendant now pays two court costs: 1) state consolidated court cost and 2) local consolidated court cost. Additionally, the defendant will pay any fines or reimbursement fees assessed. This bill is effective January 1, 2020.

SB 891 NewCourts and Citation by Publication
The 86th Legislature created nine new district courts and eight new county courts at law with various creation dates.

New district courts: 454th Judicial District in Medina County, 455th Judicial District in Travis County, 456th Judicial District in Guadalupe County, 457th Judicial District in Montgomery County, 461st Judicial District in Brazoria County, 466th Judicial District in Comal County, 467th Judicial District in Denton County, and the 468th and 471st Judicial Districts in Collin County.

New county courts at law: County Court at Law of Chambers County, County Court at Law No. 3 of Comal County, County Court at Law No. 3 of Ellis County, County Court at Law of Gillespie County, County Court at Law No. 9 and 10 of Hidalgo County, County Court at Law No. 2 of Liberty County, and County Court at Law No. 2 of Rockwall County. SB 891 also requires OCA to develop and maintain a public information internet website to effectuate service of citation by publication. The bill requires the Supreme Court to establish procedures for submission of public information to the website. This bill has various effective dates through January 2021.

HB 1 Uniform Case Management System
The Legislature appropriated the OCA $29.7 million to fund a uniform case management system with a focus on counties with a population under 20,000. A uniform case management system will assist counties in reporting case level data to the state, will improve magistrates’ access to case information, and will assist in mental health and protective order reporting to the National Instant Criminal Background Check System that is used before an individual can purchase a firearm.

Notes

WATER LAW
By Mary K. Sahs

For the past decade, every legislative session has been expected to be a “big” water session, and the 86th was no exception. Numerous water bills were introduced and important legislation became law relating to flooding and disasters, aquifer recharge, storage and recovery, and producing the state’s relatively untapped brackish water reserves. This article summarizes some of the major bills of general applicability affecting Texas water resources enacted into law by the 86th regular session. It does not attempt to cover all water bills from the session.

Flooding/Water-Related Disaster Relief
Hurricane Harvey and its aftermath became motivating forces behind a dozen or so bills designed to address flooding and disaster relief in the state. A discussion of non-water disaster related legislation is beyond the scope of this article.

The two major flooding bills enacted into law are SB 7 and SB 8, covering funding and requiring study and improved preparation and response to flooding, respectively. Beginning with SB 8, the law establishes a flood-planning process similar in structure to the state water-planning process, but focused on flooding rather than on water resources. Texas Water Code Chapter 16 is amended to require the Texas Water Development Board, or TWDB, to develop a statewide flood plan by September 1, 2024, and every five years thereafter. The state flood plan will incorporate regional flood plans corresponding to each river basin. The regional planning groups will include stakeholders from listed interest groups. The regional plans must assess within the river basin: flood control infrastructure, land use changes, population growth, areas prone to flooding, and possible solutions to anticipated flooding. Initially, this process will be guided by the State Flood Plan Implementation Advisory Committee created by the bill and set to be dissolved on September 1, 2021.

SB 7 amends Texas Water Code Chapters 15, 16, and 17 to finance flood-related activities. Flood control planning will be financed from the TWDB research and planning fund. Counties to receive financing are weighted in importance based on median household income. A Flood Infrastructure Fund, or FIF, will provide low-interest loans and grants to water districts, water authorities, cities, and counties for flood projects. Grants are restricted to certain areas described in the legislation. Once the SB 8 state flood plan is issued, only flood projects listed in the plan may receive financing from the FIF. The FIF is created only if a constitutional amendment under HJR 4 is approved by the voters.

The law also creates the Texas Infrastructure Resiliency Fund, administered by TWDB. The four accounts under the fund are for (1) financing flood planning, the collection and analysis of flood-related information, and other flood activities; (2) financing eligible political subdivisions for flood projects related to Hurricane Harvey; (3) matching funds for federal
money; and (4) financing projects in the state flood plan, once adopted.

The flooding destruction wrought by Hurricane Harvey showed the need to notify residents of flood prone properties and particularly those downstream of dams. Notice was addressed in at least four bills.

HB 26 creates a comprehensive system for notifying communities downstream of a gate-operated dam before water is released. Amending Texas Water Code Chapter 12, the legislation requires dam owners and operators to work with local emergency management, without admitting any liability, to provide notice including potential impacts of the releases. The Texas Commission on Environmental Quality, or TCEQ, has oversight responsibilities.

While notice under HB 26 would occur just before or during flooding, HB 137 provides expanded required warnings about unsafe dams. The TCEQ monitors and regulates dams, periodically inspecting them and ranking their safety. The legislation requires the TCEQ to report dams with high or significant hazard classification to municipalities, counties, councils of government, and local and regional development councils for the area in which the dam is located.

Further, HB 3815 and SB 339 amend current law regarding residential property sellers’ notice by mandating sellers of residential property to provide notice related to flooding. The bills amend the Texas Property Code to require sellers of residential real property to provide notice, for example, if the property is located in a floodplain, flood pool, floodway, or reservoir; and whether the property has flood insurance or has been previously flooded.

Aquifer Storage and Recovery and Aquifer Recharge

As the state continues to study and develop alternate ways to meet its demand for fresh water, the Legislature continues to address and refine the law related to aquifer storage and recovery, or ASR, and aquifer recharge. ASR is a method by which water is injected into underground formations and stored for future use, at which time it is withdrawn from storage through production wells. Aquifer recharge is a process whereby surface water is introduced into an aquifer formation by physical means, such as through injection wells, to increase the amount of groundwater in the aquifer.

As background, the 84th session’s HB 655 simplified ASR project permitting.1 During the following session, HB 3987 would have established a sub-account in the TWDB state participation account to provide financing for ASR and desalination projects and directed the TWDB to facilitate and prioritize such projects. The bill was enacted but was vetoed by the governor.

During the 86th session, ASR was again supported and aquifer recharge was encouraged. HB 720 amends Texas Water Code Chapter 11 to authorize appropriation of state water for aquifer recharge under Section 11.023 and establish a technical review process specifically for such applications. The TCEQ rules will establish the frequency that the water for recharge must be available before it may be appropriated. Additionally, the bill adds new Subchapter H to Texas Water Code Chapter 27, prescribing procedures for TCEQ consideration of an aquifer recharge project as a Class V injection well.

Further, HB 720 allows a water right, authorizing storage in a reservoir that has not been constructed or that has been lost to sedimentation to be amended to convert to ASR use. The TCEQ is authorized to adopt an expedited process for acting on these applications. For unbuilt storage amendments, the rules must establish evaporation credits, taking into account the amount of water that would have evaporated if the surface reservoir had been constructed. Such an amendment does not require notice and hearing “if the requested change will not cause a negative effect on other water rights holders or the environment that is greater than the effect that the original permit would have had were the permit rights exercised to the full extent of the original permit.”

HB 721 amends Texas Water Code Chapter 11 to add aquifer recharge to currently required studies and surveys of ASR projects and fleshes out the report preparation requirements. The legislation is contingent, however, on the appropriation of money for the specific purposes prescribed.

Desalination

The Legislature continued to support conversion of saline water into freshwater to increase much-needed water supplies. In the way of background, the 84th Legislature’s HB 30 encouraged seawater and brackish groundwater desalination projects in a number of ways, including designation of brackish groundwater production zones by the TWDB. HB 2230 expanded the types of regulated underground injection disposal wells that can be used to dispose of concentrate from desalination operations. Seawater desalination was encouraged by HB 2031 and 4097, which streamlined seawater desalination permitting through changes to water rights and wastewater discharge requirements.2

The 85th Legislature passed two bills, in addition to HB 3987, to encourage desalination projects. SB 1525 would have required the TWDB to study locations for marine seawater and brackish groundwater desalination facilities, and would have addressed the allocation of desalinated water distribution infrastructure costs. HB 2377 would have addressed rules for permits in brackish groundwater production zones. Both bills were vetoed.

In an effort to address the concerns expressed by the governor in his veto of HB 2377, HB 722 was enacted in the 86th session. The law amends Texas Water Code Chapter 36 to establish special permit procedures for groundwater conservation districts for production wells in brackish groundwater production zones designated by the TWDB. A groundwater conservation district can adopt the rules on its own motion and must adopt the rules if petitioned to do so by a person with a legally defined interest in groundwater in the district. One feature of the law is the requirement that the TWDB provide a technical review of the project before a permit may be issued.

Notes

2. Id.
the section’s 2015-2016 chair.

W. RYAN BRANNAN
is the principal attorney and a registered lobbyist with the Austin firm of W.R. Brannan & Associates. He was previously appointed by Gov. Greg Abbott and Gov. Rick Perry to serve as the commissioner of Workers’ Compensation at the Texas Department of Insurance and served as an adviser to Gov. Rick Perry. Brannan currently represents businesses, associations, nonprofits, and other entities at the Texas Capitol.

AMY BRESNEN and STEVE BRESNEN
are attorneys and lobbyists with BresnenAssociates in Austin. During consideration of HB 2730, they participated in the negotiations on behalf of AT&T, the Texas Trial Lawyers Association, and the Texas Family Law Foundation. Amy has a J.D. from St. Mary’s University School of Law and an M.P.A. from Texas State University. She currently serves on the State Bar Committee on Disciplinary Rules and Referenda. Steve has a J.D. from the University of Texas School of Law. He formerly served as general counsel and policy director to former Lt. Gov. Bob Bullock.

RICHARD A. CROW
is chair of the Real Estate Legislative Affairs Committee of the State Bar of Texas Real Estate, Probate, and Trust Law Section, certified in commercial real estate law by the Texas Board of Legal Specialization, and a fellow of the American College of Real Estate Lawyers.

WILLIAM D. PARGAMAN
is a partner in the Austin firm of Saunders, Norval, Pargaman & Atkins and is a fellow in the American College of Trust and Estate Counsel. He was chair of the State Bar of Texas Real Estate, Probate, and Trust Law Section’s Estate and Trust Legislative Committee for the 2009-2013 legislative sessions and served as the section’s 2015-2016 chair.

ROSS O. PEAVEY
is a partner in the Austin firm of Brady & Peavey. He serves as chair of the State Bar of Texas Legislative and Campaign Law Section and is an editor of Texas Senate Practice. Working in the Texas Legislature and politics for more than 15 years, Peavey represents businesses, nonprofits, and other entities as an attorney and lobbyist.

ALLEN D. PLACE JR.
has been practicing law for 40 years. He is a former member of the Texas Legislature and was House author of the Texas Penal Code. For the past 11 sessions, Place has represented the Texas Criminal Defense Lawyers Association at the Capitol.

SHEA PLACE
is a 2015 graduate of Baylor Law School where she was a member of the Baylor Law Review. Place is an attorney for Place Law Office in Austin and has represented the Texas Criminal Defense Lawyers Association at the Capitol since 2017.

ROYCE POINSETT
is a government relations attorney, registered lobbyist, and principal at Poinsett PLLC. He previously served as an adviser to former Texas Gov. Rick Perry and former Texas House Speaker Tom Craddick, and he now represents businesses and associations at the Texas Capitol.

DARYL B. ROBERTSON
has more than 30 years of experience in business and mergers and acquisitions transactions and corporate finance and securities law. He is chair of the committee that drafted the Texas Business Organizations Code. Robertson is a member of the American Law Institute and a former chair of the State Bar of Texas Business Law Section. He received his J.D., cum laude, from Harvard Law School and his B.A., summa cum laude, from Duke University.

MARY K. SAHS
operates a solo practice under the name Mary K. Sahs, P.C. Sahs served as a hearings examiner and then as the public interest counsel to the Texas Water Commission. Sahs is the managing editor of Essentials of Texas Water Resources. She has been a member of the Texas Bar College since 2001 and a fellow since 2011.

DAVID SLAYTON
is the administrative director of the Office of Court Administration and the executive director of the Texas Judicial Council. He is a graduate of Texas Tech University and Troy University, a fellow of the Institute for Court Management, co-chair of the National Court Joint Technology Committee, and a past president of the National Association for Court Management.

RICHARD L. SPENCER
is a fellow of the American College of Real Estate Attorneys, certified in commercial and residential real estate law and property owners association law by the Texas Board of Legal Specialization, and a former chair of the State Bar of Texas Real Estate, Probate, and Trust Law Section.

BRIAN L. WEBB and BRANT M. WEBB,
of the Webb Family Law Firm in Dallas, focus their practice exclusively on family law matters such as divorce, child custody, child support, and visitation.