



LEGISLATIVE UPDATE

Probate, Guardianship, and Trust Law

BY WILLIAM D. PARGAMAN



This article contains a summary of statutory changes affecting probate, guardianships, trusts, powers of attorney, and other areas of interest to estate and probate practitioners that passed during the Texas Legislature's 82nd regular and first-called sessions. A more detailed version of these materials, including a list of effective dates, is available to members of the State Bar Real Estate, Probate, and Trust Law Section (REPTL) at www.reptl.org or to members of the public at www.brownmccarroll.com/public/documents/2011_REPTL_Update.pdf.

Completion of Probate Code Recodification

In 2009, the Legislature passed House Bill 2502, which con-

tained a non-substantive codification of most of the portion of the Probate Code dealing with decedents' estates. The new "Estates Code" will replace the Probate Code on Jan. 1, 2014.

This session, H.B. 2759 contains the non-substantive codification of the balance of the Probate Code, primarily dealing with guardianships and powers of attorney. It will also be effective Jan. 1, 2014. The entire Estates Code, as modified by both the 2009 and 2011 sessions, should be available online at www.statutes.legis.state.tx.us by early 2012.

The REPTL Decedents' Estates Bill

The REPTL decedents' estates package — Senate Bill 1198 — contains a number of significant changes, including:



Deadline for Filing Disclaimers

The federal tax bill that went into effect last December extended the disclaimer deadline — for federal tax purposes — for property passing as a result of a 2010 death until nine months from the date of its enactment. REPTL's decedents' estates bill includes a deadline extension for state law purposes as well. (A similar change to our Trust Code disclaimer statute is included in the REPTL Trust Code bill.)

"One-Step" Procedure for Will Execution

Revisions to our self-proving affidavit forms will allow the simultaneous execution, attestation, and self-proof of a will — so that the testator and the witnesses need only sign a will once. Since this is an *optional* method of will execution, wills executed in our traditional two-step method will continue to be valid, self-proved wills.

Foreign Self-Proving Affidavits

The requirements applicable to self-proving affidavits in wills executed outside Texas are loosened. If the self-proving affidavit is not in the form required by Probate Code Section 59, the will still will be considered self-proved if the affidavit complies with the law of the testator's domicile at the time of execution. Further, wills containing a Uniform Probate Code-style self-proving affidavit will be considered self-proved without any need to prove that the affidavit complied with the law of the testator's domicile.

Notice to Beneficiaries

The expanded beneficiary notice requirements enacted in 2007 have been simplified in several respects:

- A contingent beneficiary need not receive notice if the contingency has not in fact occurred;
- No notice is necessary in muniment proceedings;
- Trust beneficiaries need not receive notice when ancestors with similar interests have received notice;
- Beneficiaries who receive gifts valued under \$2,000, or whose gifts have already been satisfied, need not receive notice; and
- A written summary of gifts to a beneficiary may be provided in lieu of a full copy of the will.

Independent Administration

A number of independent administration revisions clarify the authority of an independent representative to sell assets in the absence of an express grant in a will and the procedures for presenting and dealing with creditors' claims and provide a simpler procedure for closing an independent administration.

Affidavit in Lieu of Inventories

In an effort to address privacy concerns, if no debts remain by the inventory due date, an *independent* representative may

file an affidavit in lieu of the inventory stating those facts. The representative must still prepare a sworn inventory and provide a copy to all beneficiaries other than those receiving specific gifts. "Interested persons," including an intestate heir or beneficiary under a prior will, may obtain a copy from the representative upon written request.

Charities as Beneficiaries of POD Accounts

Non-testamentary transfer provisions are clarified to make clear that a charitable organization may be the beneficiary of a pay-on-death (POD) account.

Community Property Survivorship Agreements

The recent case of *Holmes v. Beatty*, 290 S.W.3d 852 (Tex. 2009), held that community property survivorship agreements need not meet the same requirements of survivorship agreements between non-spouses. REPTL's bill adds language intended to reverse the result of that case by providing that an account designation as "JT TEN" alone is insufficient to create a community property right of survivorship.

The REPTL Guardianship Bill

The REPTL guardianship package (S.B. 1196) contains a number of mostly "miscellaneous" changes:

- The appointment of an attorney ad litem in a guardianship proceeding will no longer expire upon the appointment of a *temporary* guardian;
- In most cases, hearings on guardianship matters may be held at any suitable location within a county, not just at the courthouse;
- The required elements of a physician's or psychologist's report are further clarified;
- Guardianships may be terminated if all assets have been transferred to a pooled interest trust sub-account for the ward;
- The maximum age of a ward whom a guardian may admit to an inpatient psychiatric facility is increased from 16 to 18 years or younger;
- A probate court may approve gifts or transfers in order to make the ward eligible for government benefits and is not limited to those motivated by tax considerations;
- The trustee of a management trust may be required to file a report of trust assets within 30 days of trust funding;
- A person with physical disabilities only may now apply for establishment of a management trust, in which case annual accounts may not be required; and
- The final change expands the list of persons eligible to apply for establishment of pooled interest trust sub-account.

Other Guardianship Changes

S.B. 220 includes, among other things, the following guardianship changes:



LEGISLATIVE UPDATE

- The initial citation to interested persons must contain a “clear and conspicuous statement” informing them of their right to be notified of future motions, applications, or pleadings;
- Relatives within the third degree of consanguinity must be notified if the proposed ward has no living spouse, parents, adult siblings, or adult children;
- A proposed or existing ward with capacity to contract may retain his or her own attorney of choice, so long as the attorney has the certification required of attorneys ad litem;
- Abuse, neglect, or exploitation of an elderly or disabled person is added as a specific ground for removal of a guardian;
- A court must appoint both a guardian ad litem and an attorney ad litem in a proceeding to remove a guardian on grounds of (i) misapplication, embezzlement, etc.; (ii) conduct constituting abuse, neglect, or exploitation; or (iii) neglect. However, the two ad litem positions may be filled by the same person if no conflict exists in the interests to be represented; and
- Appointment of a successor guardian following removal does not preclude an interested person from filing an application to be appointed in lieu of the successor.

S.B. 481 requires the clerk to notify a guardian of the guardian’s removal under Section 761 and extends from 10 to 30 days the permissible time period under Section 762 for filing a motion for reinstatement of the guardian.

Certain guardianship-related provisions originally included in H.B. 2900 (which failed to pass during the regular session) were added to S.B. 1, the “fiscal matters” bill that passed in the special session. Here is a summary of these provisions:

- Following transfer of a guardianship to another county, the guardian must post a new or modified bond payable to the new judge. The new court must hold a hearing within 90 days to determine whether any of the terms of the guardianship should be modified; and
- An application by a foreign guardian of a ward to transfer the guardianship to a Texas court must include certified copies of all papers filed in the foreign proceeding. The Texas court must consider whether any of the terms of the guardianship should be modified to comply with our laws. A court may delay further action in any pending guardianship if a subsequent proceeding is filed in another jurisdiction where venue is proper. The expressed preference of a proposed ward who is 12 years of age or older is added as a factor in making this decision. But, if at any time a Texas court determines that it has acquired jurisdiction because of unjustifiable conduct, the court may:
 1. decline to exercise jurisdiction;
 2. exercise jurisdiction just to impose an appropriate remedy for the health, safety, and welfare of the incapacitated person’s property or prevent a repetition of the unjustifiable conduct; or

3. continue to exercise jurisdiction after considering the extent to which all necessary parties have acquiesced to the court’s jurisdiction, whether the Texas court is a more appropriate forum, and whether the other court would have jurisdiction under the facts.

If the Texas court determines that it has jurisdiction because a party engaged in unjustifiable conduct, the court may assess costs against that party.

The REPTL Trust Code Bill

The REPTL Trust Code package (S.B. 1197) is relatively modest. In addition to the disclaimer deadline extension mentioned previously, the bill allows beneficiaries to waive the required 30-days’ notice for combination of one or more trusts and allows waiver of the notice by guardians, parents, etc., of incapacitated beneficiaries. A possible conflict between the jurisdiction granted in the Probate Code to statutory county courts over trusts created by a decedent with the exclusive district court jurisdiction provisions of the Trust Code is eliminated. Further, permissive venue for trust proceedings is expanded to include the county in which the administration of a deceased settlor’s estate is currently pending. The bill also includes a change relating to tax allocations to trusts from pass-through entities, such as partnerships or S corporations, incorporating a 2008 amendment by the National Conference of Commissioners on Uniform State Laws to the Uniform Principal and Income Act. Changes made in 2007 to Probate Code Section 69 revoked provisions in a *will* in favor of the relatives of an ex-spouse when the will was executed prior to the divorce. The new provisions make conforming amendments to Probate Code Sections 471, 472, and 473 relating to provisions in a *revocable trust* in favor of an ex-spouse or the ex-spouse’s relatives.

The “Loser Pays” Bill

The “Loser Pays” bill — H.B. 274 — may have an impact on probate practitioners. The Supreme Court must adopt rules that “apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy does not exceed \$100,000.” The rules “shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system.” While the Court is not permitted to adopt rules that conflict with the Family or Property Codes (the latter should exempt Trust Code cases), there is no carve-out for conflicts with the Probate Code. Hopefully the Court will consider some of the unique aspects of probate and guardianship actions when drafting the new rules, but there still may be potential conflicts with current probate practice.

Use of Unsworn Declarations

H.B. 3674 transformed a little-known provision of the Civil Practice and Remedies Code dealing solely with the use of unsworn declarations by inmates into a broad provision allow-



ing the use of an unsworn written declaration made under penalty of perjury in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or a rule, order, or requirement adopted as provided by law. Could this be used on a self-proving affidavit to a will? An inventory?

Anti-Jarboe Bill

An early 2007 bankruptcy decision interpreting Texas law (the *Jarboe* case) held that the Texas exemption from creditors' claims did not extend to inherited IRAs (other than spousal IRAs). S.B. 1810 amends the Texas exemption to clarify that it does apply, not only to all inherited traditional IRAs, but also to Roth IRAs and health savings accounts.

Exemptions for Adult Incapacitated Children

H.B. 2492 amends numerous Probate Code statutes relating to the family allowance, exempt property, and the allowance in lieu of exempt property to extend the benefits of the provisions to a decedent's adult *incapacitated* children (in addition to the surviving spouse, minor children, and adult children residing with the decedent).

Encumbrance of Homestead by Co-Owner

S.B. 1368 allows a co-owner of residential property of 10 acres or less with improvements primarily designed for not more than four families claimed as the co-owner's homestead to place a lien on the property without the joinder of the other co-owners, but only under certain limited conditions (found in new Chapter 64 of the Property Code).

Fraud on the Community

H.B. 908 adds a new remedy for fraud on the community. Currently, a court is limited to dividing the existing community estate, which may be completely exhausted due to the fraud, leaving the wronged spouse without any effective remedy. New Family Code Section 7.009 allows a court to divide the "reconstituted estate," including the property that would have been part of the community estate absent the fraud. After dividing this reconstituted estate, if there were insufficient actual assets to allocate to the wronged spouse, the court could award a money judgment in favor of the wronged spouse against the spouse who committed the fraud.

LLC Interests and Marital Property Laws

S.B. 748 provides that while a member's interest in an LLC may be community property, the member's right to participate in the management of the LLC is not. The bill also added a default rule that on the divorce or death of a member, any interest of the member's spouse or successors becomes an assignee interest. Similarly, on the death of the member's spouse, any interest of the spouse's successors (other than the member) becomes an assignee interest. These changes do not affect any buy-sell provisions.

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STATE BAR PRESIDENT-ELECT NOMINEE PROCESS UNDERWAY

The State Bar Board of Directors is soliciting candidates for the 2012 president-elect race. State Bar Rules stipulate that the 2012 president-elect nominees shall come from **metropolitan counties of the state (Bexar, Dallas, Harris, Tarrant, and Travis).**

The Board of Directors Policy Manual describes the criteria for selecting nominees. The Board will consider potential nominees' involvement in State Bar committee work, knowledge of State Bar operations, participation in local and specialty bar associations and other activities demonstrating leadership ability. Although prior membership on the State Bar Board of Directors is not a prerequisite for nomination, it is important in determining whether a lawyer is a qualified nominee. Nominees should submit a resume and a statement of views of the key issues facing the Bar, the role they would play in dealing with those issues, and what they would seek to accomplish during their tenure as president, all within the overall strategic plan of the State Bar.

Over a period of years, the office of State Bar president should include men and women, ethnic and racial minorities, lawyers from large and small firms and sole practitioners, and those from urban and rural areas of the state. The Board is working toward that end in the selection process.

The Board's Nominations and Elections Subcommittee is accepting names and background information of potential candidates. Please write the subcommittee to recommend potential candidates, c/o Terry Tottenham and Pablo Almaguer, Nominations & Elections Subcommittee Co-Chairs, P.O. Box 12487, Austin 78711-2487. Anyone submitting a name for consideration should first obtain that person's consent to have his/her name submitted.