

2011 Texas “Probate and Trust” Legislative Preview

**Proposed Statutory Changes Affecting Probate,
Guardianships, Trusts, Powers of Attorney, and Other
Areas of Interest to Estate and Probate Practitioners**

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While this version was last updated **October 6, 2010**, the paper will be updated frequently through the end of the 2011 legislative session. You may check for a more recent version of the paper at:

www.brownmccarroll.com/public/documents/2011_REPTL_Update.pdf



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Legal Experience

Bill Pargaman has been certified by the Texas Board of Legal Specialization as a specialist in Estate Planning and Probate Law. He is also a Fellow in the American College of Trust and Estate Counsel. Bill's practice involves the preparation of wills, trusts and other estate planning documents, charitable planning, and estate administration and alternatives to administration. Additionally, he represents clients in contested litigation involving estates, trusts and beneficiaries, and tax issues. His practice also includes the organization and maintenance of business entities such as corporations, partnerships, and limited liability entities.

Education

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

Professional Licenses

- i Attorney at Law, Texas, 1981

Court Admissions

- i United States Tax Court

Speeches and Publications

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

- i State Bar of Texas, Advanced Estate Planning and Probate Course, Estate Planning and Probate Drafting Course, and Advanced Guardianship Law Course
- i Real Estate, Probate and Trust Law Section Annual Meeting
- i University of Houston Law Foundation, General Practice Institute, and Wills and Probate Institute
- i South Texas College of Law, Wills and Probate Institute
- i Austin Bar Association, Estate Planning and Probate Section Annual Probate and Estate Planning Seminar
- i Austin Bar Association and Austin Young Lawyers Association Legal Malpractice Seminar
- i Houston Bar Association Probate, Trusts & Estate Section
- i Austin Chapter, Texas Society of Certified Public Accountants, Annual Tax Update
- i Texas Bankers Association, Advanced Trust Forum
- i Estate Planning Council of Central Texas, Amarillo Area Estate Planning Council, Corpus Christi Estate Planning Council, East Texas Estate Planning Council, and South Plains Trust & Estate Council
- i Austin Association of Life Underwriters
- i Austin Chapter, University of Texas Medical Branch (Galveston) Alumni Association
- i SAGE Group, University of Texas

Professional Memberships and Activities

- i American College of Trust and Estate Counsel, Fellow
- i State Bar of Texas
 - i Real Estate, Probate and Trust Law Section, Member
 - i Real Estate, Probate, and Trust Law Council, Member, 2004–2008
 - i Legislative – Probate Committee, Member, 2000–Present (Co-Chair, 2008–Present)
 - i Trust Code Committee, Member, 2000–Present (Chair, 2004–2008)
 - i Uniform Trust Code Study Project, Articles 7–9 & UPIA, Subcommittee Member, 2000–2003
- i Texas Board of Legal Specialization (Estate Planning and Probate Law), Examiner, 1995-1997

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- i Estate Planning Council of Central Texas, Member (President, 1991-1992)
- i Austin Bar Association, Member
 - i Estate Planning and Probate Section, Member (Chair, 1992-1993, Board Member, 1997-1999)

Honors

- i Listed in *The Best Lawyers in America*®
- i Listed in *Texas Super Lawyers* (Texas Monthly)
- i Listed in *The Best Lawyers in Austin* (Austin Monthly)

Community Involvement

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

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1. Preliminary Stuff .

1.1. Introduction and Scope. The 82nd Regular Session of the Texas Legislature will begin on January 11, 2011, and will end on May 30, 2011. This paper presents a summary of the bills the author expects will be filed relating to probate (*i.e.*, decedents’ estates), guardianships, trusts, powers of attorney, and several other areas of interest to estate and probate practitioners. However, those issues are relegated to the subtitle of this paper due to their length, and the main title is limited to “probate and trust,” as in the “Real Estate, *Probate and Trust Law Section*” of the State Bar of Texas. Issues of interest to elder law practitioners are touched upon, but are not a focus of this paper.

1.2. Acknowledgments. A lot of the effort in the 2011 session, as in past sessions, will come from the Real Estate, Probate and Trust Law Section of the State Bar of Texas (“REPTL”). REPTL, with its approximately 7,000 members, has been active in proposing legislation in this area for more than 25 years. During the past two years, its Council worked hard to come up with a package which addresses the needs of its members and the public, and continues to work hard to get the package enacted into law. Thanks go to:

- i Harry Wolff of San Antonio, Immediate Past Section Chair
- i Craig Adams of Tyler, Section Chair-Elect and Chair – Power of Attorney Committee
- i Bill Pargaman of Austin, Chair, Legislative – Probate Committee¹
- i Glenn Karisch of Austin, Past Section Chair (2007-2008), Co-Chair, Legislative – Probate Committee, and a past author of this article²

- i Jim Woo of San Antonio, Past Chair – Decedents’ Estates Committee
- i Tina Green of Texarkana, Current Chair – Decedents’ Estates Committee
- i Deborah Green of Austin, Chair – Guardianship Committee and Co-Chair, Guardianship Recodification Committee
- i Linda Goehrs of Houston, Co-Chair, Guardianship Recodification Committee
- i Shannon Guthrie of Dallas, Chair – Trust Code Committee
- i Clint Hackney of Austin, Lobbyist
- i Barbara Klitch of Austin, who provides invaluable service tracking legislation for REPTL

REPTL is helped along the way by the State Bar, its Board of Directors, and its excellent staff (in particular, KaLyn Laney, the Bar’s Director of Governmental Relations).

REPTL works closely with the Texas Academy of Probate and Trust Lawyers (Al Golden of Austin, Chair, Charles Giraud of Houston, Treasurer, and Clint Hackney). The Academy is a group of attorneys who are Board Certified in Estate Planning and Probate Law or Fellows of the American College of Trust and Estate Counsel (ACTEC) (or both) who go the extra mile and help support quality legislation in this area. Attorneys who are eligible for membership but who are not yet members should consider supporting this fine organization. **You’ll find a membership application for the Academy at the end of this paper.**

Other groups have an interest in legislation in this area, and REPTL tries to work with them to mutual advantage. These include the statutory probate

¹ The chutzpah of an author who thanks himself!

² Preparation of this article is an evolutionary process, and thanks also go to Glenn Karisch, Jerry Frank Jones, and

Al Golden, all of Austin and prior Legislative Chairs, who are authors of previous incarnations of this article.

judges (Judge Guy Herman of Austin, Presiding Statutory Probate Judge) and the Wealth Management and Trust Division of the Texas Bankers Association (Leslie Amann of Houston, Chair, Deborah Cox of Dallas, Governmental Relations Chair, and John Brigance, Executive Director).

Last, and of course not least, are the legislators and their capable staffs. In the 2009 session, Rep. Will Hartnett of Dallas, and Senator Kirk Watson of Austin, together with their staffs, were particularly helpful. Currently, the Chairs of the two committees that most of REPTL’s legislation must pass through are Rep. Todd Hunter of Corpus Christi, Chair of the House Committee on Judiciary & Civil Jurisprudence, and Senator Chris Harris of Arlington, the new (as of July, 2010) Chair of the Senate Committee on Jurisprudence.

Thanks go to all of these persons and the many others who have helped in the past and will continue to do so in the future.

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

2. The Players.

The *dramatis personae* in our legislative drama are many and varied:

2.1. REPTL. The Real Estate, Probate and Trust Law Section of the State Bar of Texas, acting through its Council. Many volunteer Section members who are not on the Council give much of their time, energy and intellect in formulating REPTL-carried legislation. REPTL is not allowed to sponsor legislation or oppose legislation without the approval of the Board of Directors of the State Bar. There is no provision to support legislation offered by someone other than REPTL, and the ability of REPTL to react during the legislative session is hampered by the necessity for Bar approval. REPTL is seeking or has received permission to carry the proposals discussed in this paper that are identified as 2011 REPTL proposals. REPTL has hired Clint Hackney to assist the Section obtain passage of its legislative proposals.

2.2. The Academy. As noted above, the Texas Academy of Probate and Trust Lawyers, a non-profit § 501(c)(6) organization composed of dues-paying members who are either Board Certified in Estate Planning and Probate Law or Fellows of the American College of Trust and Estate Counsel (or both). Unfettered by Bar control, the Academy can react to legislation, negotiate compromises, or oppose or support legislation. One of its primary missions is to support REPTL legislation and legislation approved by the REPTL Council which does not have State Bar approval for one reason or another. The Academy has hired Clint Hackney for many sessions. Clint has worked very hard, and has been a major contributor to the Academy’s success. The author and Glenn Karisch wear hats representing both REPTL and the Academy and are the principal volunteers in the legislative process. **As noted above, an Academy membership application is attached at the end of this paper for those eligible and interested.**

2.3. The Statutory Probate Judges. The Texas Statutory Probate Judges hear the vast majority of probate and guardianship cases. Judge Guy Herman of the Probate Court No. 1 of Travis County (Austin) is the Presiding Statutory Probate Judge and has been very active in promoting legislative solutions to problems in our area for many years.

2.4. The Texas Bankers Association. The Wealth Management and Trust Division of the Texas Bankers Association (“TBA”) represents the interests of corporate fiduciaries in Texas. While the interests of REPTL and TBA do not always coincide, the two groups have had an excellent working relationship during the past several sessions.

2.5. The Texas Legislative Council. Among other duties, the Texas Legislative Council provides bill drafting and research services to the Texas Legislature and legislative agencies. All proposed legislation must be reviewed (and usually revised) by the Legislative Council before a Representative or Senator may introduce it. In addition, as part of its continuing statutory revision program, the Legislative Council has embarked on, and is the primary drafter of, a nonsubstantive revision of the Texas Probate Code (discussed below). The guardianship and power of attorney portions of the Probate Code proposed for nonsubstantive revision

by the 82nd Legislature are under the direction of Anne Peters of the Legislative Council's legal staff. Questions, comments, or suggestions relating to the project may be directed to Ms. Peters at P.O. Box 12128, Austin, Texas 78711, at 512-463-1155, or at anne.peters@tlc.state.tx.us.

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

3. The Process.

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

3.2. Preliminary Approval by the REPTL Council. The full "PTL" or probate, guardianship, and trust law side of the REPTL Council reviews each committee's suggestions and gives preliminary approval (or rejection) to those proposals at its Fall

meeting (usually in September or October) in odd-numbered years. Draft language may or may not be available for review at this stage – this step really involves a review of concepts, not language.

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

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

3.5. Legislative Policy Committee Review. Following a comment period (and sometimes revisions in response to comments received), REPTL representatives appear before the State Bar's Legislative Policy Committee in August to explain and seek approval for REPTL's legislative package.

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

3.7. REPTL is Ready to Go. After REPTL receives approval from the State Bar's Board of Directors to carry its package, it then meets with appropriate Representatives and Senators to obtain

³ Note that the "RE" or real estate side of REPTL usually does not have a legislative package, but is very active in monitoring legislation filed in its areas of interest. In 2011, it will propose an act relating to assignment of rents.

sponsors, who submit the legislation to the Legislative Council for review, revision, and drafting in bill form. REPTL’s legislation is usually filed (in several different bills) in the early days of the sessions that begin in January of odd-numbered years. In order to avoid the logjam that doomed some of REPTL’s 2009 legislation, REPTL hopes that most, if not all, of its proposals will be prefiled before the 2011 session begins.

3.8. This Year’s REPTL Package. The 2011 REPTL package will include a Decedents’ Estates bill, a Guardianship bill, a Trust Code bill, and a Statutory Power of Attorney bill. REPTL also will support the bill prepared by the Legislative Council containing the nonsubstantive recodification of the guardianship provisions of the Probate Code for inclusion in the new Estates Code. REPTL members may review the drafts of these proposals approved for the 2011 session on the REPTL website.⁴

3.9. The Academy Steps In. While there are procedures for expedited consideration of additional proposals that do not meet the State Bar’s deadlines described above, REPTL rarely, if ever, uses those procedures. For items that may come up relatively late in the game, or for items that may be considered inappropriate for the REPTL package, the Academy may step in and work for approval of legislation.

3.10. During the Session. During the legislative session, the work of REPTL and the Academy is not merely limited to working for passage of their respective bills. An equally important part of their roles is monitoring bills introduced by others and working with their sponsors to improve those bills, or, where appropriate, to oppose them.

3.11. Where You Can Find Information About Filed Bills. You can find information about any of the bills mentioned in this paper (whether or not they passed), including text, lists of witnesses and analyses (if available), and actions on the bill, at the Texas Legislature Online website: www.legis.state.tx.us. You can even perform your own searches for legislation based on your selected search criteria.

⁴ The drafts are posted under the Legislative Update link under Probate & Trust found on the left side of your screen after logging in. A direct link (that may or may not work) is:

www.reptl.org/Private/DrawOnePage.aspx?PageID=66

3.12. Summary of the Legislative Process. Watching the process is like being on a roller coaster; one minute a bill is sailing along, and the next it is in dire trouble. The real work is done in committees, and the same legislation must ultimately pass both houses. Thus, even if an identical bill is passed by the Senate as a Senate bill and by the House as a House bill, it cannot be sent to the Governor until either the House has passed the Senate bill or vice-versa. At any point in the process, members can and often do put on amendments which require additional steps and additional shuttling. It is always a race against time, and it is **much** easier to kill legislation than to pass it.

4. Key Dates.

Key dates for the enactment of bills in the 2011 legislative session included:

- i **Monday, November 8, 2010** – Prefiling of legislation for the 82nd Legislature begins
- i **Tuesday, January 11, 2011** (1st day) – 82nd Legislature convenes at noon
- i **Friday, March 11, 2011** (60th day) – Deadline for filing most bills and joint resolutions
- i **Monday, May 9, 2011** (119th day) – Last day for House committees to report House bills and joint resolutions
- i **Thursday, May 12, 2011** (122nd day) – Last day for House to consider nonlocal House bills and joint resolutions on **second** reading
- i **Friday, May 13, 2011** (123rd day) – Last day for House to consider nonlocal House bills and joint resolutions on **third** reading
- i **Saturday, May 21, 2011** (131st day) – Last day for House committees to report Senate bills and joint resolutions
- i **Tuesday, May 26, 2011** (134th day) – Last day for House to consider most Senate bills and joint resolutions on **second** reading
- i **Wednesday, May 25, 2011** (135th day) – Last day for House to consider most Senate bills or joint resolutions on **third** reading

Last day for Senate to consider any bills or joint resolutions on third reading

- i **Friday, May 27, 2011** (137th day) – Last day for House to consider Senate amendments

Last day for Senate committees to report all bills

- i **Sunday, May 29, 2011** (139th day) – Last day for House to adopt conference committee reports

Last day for Senate to concur in House amendments or adopt conference committee reports

- i **Monday, May 30, 2011** (140th day) – Last day of 82nd Regular Session; corrections only in House and Senate

- i **Sunday, June 19, 2011** (20th day following final adjournment) – Last day governor can sign or veto bills passed during the previous legislative session

- i **Monday, August 29, 2011** (91st day following final adjournment) – Date that bills without specific effective dates (that could not be effective immediately) become law

5. The New Estates Code.

5.1. A New Beginning. January 1, 2014.

That’s a date you’ll need to remember if you’re still practicing in our area. It is the effective date of our new Estates Code, which will replace our current Probate Code. Here’s the background

5.2. Our Current Probate Code is Not a “Code”. Texas has had a number of statutory compilations during its history. In 1925, the 39th Legislature adopted its fourth bulk revision of Texas laws, the Revised Statutes of Texas, 1925.⁵ In 1936, The Vernon Law Book Company published an unannotated compilation of the 1925 Revised Civil and Criminal Statutes, updated with changes through January 1, 1936. Between 1936 and 1948, this was updated with non-cumulative biennial supplements. In 1948, a new compilation was published, and biennial updates continued. The “Texas Probate Code” was first enacted in 1955, effective January 1, 1956. However, Texas had not yet adopted any organized system of statutory codification at the

time, so the Texas Probate Code was incorporated into Vernon’s Revised Civil Statutes, known as the “Black Statutes” for those of us old enough to have practiced with the hard copies of these volumes.

5.3. The “Codification” Process Began in 1963, After Our Probate Code Was Enacted. In the 38 years since the 1925 general revision of Texas laws, the statutes had become confusing and difficult to use. In 1963, the 58th Legislature passed S.B. 367, which ordered the creation of a permanent, ongoing statutory revision program. The Texas Legislative Council was charged with making a complete, **non-substantive** revision of Texas statutes. Legislation enacting new code sections is generally based on a Revisor’s Report which contains the proposed language of the new code, the language of the old statutes, and brief notes. When the program is complete, all general and permanent statutes will be included in one of 27 codes. The Probate Code is not a “code” for purposes of the Code Construction Act and the Legislative Council codification initiative since (1) it was enacted before the codification effort began, and (2) it does not comply with the organizational and stylistic principles of modern Texas codes. (The Criminal Procedure Code is the only other remaining “uncodified” code. The Probate Code just happened to draw the short straw in 2006.)

5.4. The Legislative Council’s Procedure. The Texas Legislative Council’s **nonsubstantive** revision process involves reclassifying and rearranging the statutes in a more logical order, employing a numbering system and format that will accommodate future expansion of the law, eliminating repealed, invalid, duplicative, and other ineffective provisions, and improving the draftsmanship of the law if practicable—all toward promoting the stated purpose of making the statutes “more accessible, understandable, and usable” without altering the sense, meaning, or effect of the law. The Legislative Council staff encourages examination and review of all proposed code chapters by any interested person. The staff attempts to include in the proposed code all source law assigned to the code and to ensure that no substantive change has been made in the law. A complete and adequate outside review is necessary, however.

5.5. REPTL’s Probate Codification Committee. When REPTL learned in the summer

⁵ The source of this “timeline” is:
www.lrl.state.tx.us/research/texasLawTimeline.html.

of 2006 that the Legislative Council was going to codify the Probate Code, it began to work actively with the Legislative Council staff on the codification project. It established a Probate Code Codification Committee, which is co-chaired by Professor Thomas M. Featherston, Jr., the Mills Cox Professor of Law at Baylor Law School, and by Barbara McComas Anderson, a Dallas attorney, both of whom are former REPTL chairs. Through a series of meetings with Legislative Council staff, it was ultimately decided that:

1. REPTL and the Legislative Council would cooperate in determining how the new code would be organized.
2. The Legislative Council would take the lead in drafting the new code, although REPTL’s committee would work on some of the thorniest provisions, like jurisdiction, venue, and independent administration, where it was considered difficult or impossible to codify the current statutes without some tweaking.
3. The chapters of the code governing decedents’ estates would be drafted first, to be submitted to the Legislature for adoption in 2009.
4. The remaining chapters of the code, including those provisions governing guardianships and powers of attorney, would be drafted after the 2009 session, with a goal of submitting these chapters to the Legislature for adoption in 2011.
5. The new code would become effective after the 2013 session in order to make that session available to correct any errors identified after the 2009 and 2011 enactments but prior to their effective date.
6. REPTL would assist the Legislative Council during the entire legislative process, including providing expert review of chapters as they are drafted and expert testimony about legislation before the Legislature.

5.6. The Nonsubstantive Estates Code Passed. Legislative Council chose the “Estates and Guardianship Code” as the new name for the recodified Probate Code. It was filed in the as **H.B. 2502** by Rep. Hartnett and **S.B. 2071** by Senator Duncan. However, Rep. Hartnett felt that the new name was a mouthful, so the name of the new Code was shortened to just the “Estates Code”

when **H.B. 2502** passed on the floor of the House. It passed the Senate without further amendment and will go into effect on January 1, 2014.

5.7. Revisor’s Report for the Estates Code. Legislative Council has prepared and posted online an **882-page** Revisor’s Report indicating the derivation of each section of the new Estates Code. The last 20 pages consist of a handy disposition table. We have taken the liberty of copying this information to a separate document that has been posted to the REPTL website (www.reptl.org) and is available to REPTL members. You can find it under the Legislative Update link under Probate & Trust on the left side of your screen after logging in. If you’re not a member of REPTL, you can still access the full Revisor’s Report on the Legislative Council website at:

www.tlc.state.tx.us/legal/estatescode/81st_revisors_report.pdf.

5.8. The Substantive Independent Administration Recodification Bill Did Not Pass. The substantive recodification bill relating to independent administration did not pass in 2009, falling victim to the last-minute logjam of bills in the Senate that had a multitude of causes, an explanation of which would substantially lengthen this paper. However, they are being included in REPTL’s proposed 2011 Decedents’ Estates bill.

5.9. Recodification of the Guardianship and Power of Attorney Portions of the Probate Code. As noted above, the guardianship and power of attorney portions of the Probate Code are currently undergoing a nonsubstantive revision by the Legislative Council’s legal staff for introduction in the 2011 session. REPTL has appointed Deborah Green of Austin and Linda Goehrs of Houston as the co-chairs of its Probate Code Codification Committee dealing with this aspect of the recodification process. They are the current and immediate past chairs of REPTL’s Guardianship Committee. A link to the Legislative Council’s initial draft of these provisions can be found at:

www.tlc.state.tx.us/code_current_estates.htm

6. Changes Affecting Decedents' Estates.

6.1. The REPTL Decedents' Estates Bill.

The REPTL 2011 Decedents' Estates bill contains a number of proposals.⁶

(a) Determination of Heirship Sought by Trustees (Sections 48 and 49). Sections 48 and 49 are amended to add **trustees** to the list of persons who may bring a determination of heirship action where necessary to determine the beneficiaries of the trust (*i.e.*, "if no descendant of settlor is then surviving, the trust estate shall be distributed to settlor's then surviving heirs.")

(b) "One-Step" Procedure for Will Execution (Section 59). Ever find yourself trying to explain to your clients why it's necessary for them and the witnesses to sign the will twice? Ever consider the procedure archaic? Well REPTL has something just for you – a handy, dandy revision to Section 59 that allows an **optional** method of simultaneously executing, attesting, and making a will self-proved, so that everyone signs just once. For those of you who think this is just too radical a departure from current law, rest assured that the Uniform Probate Code has contained an optional one-step method for years. Further, if that still doesn't make you feel better, the tried-and-true two-step method will remain available. (This provision was included in the ill-fated 2009 decedents' estates bill, but a similar provision relating to self-proving affidavits in guardianship designations went into effect September 1, 2009, thanks to REPTL's 2009 guardianship bill.)

(c) No Contest Provisions in Wills (Section 64). A 2009 amendment expressly made no contest provisions unenforceable if probable cause exists for commencing the contest and the contest was brought and maintained in good faith. REPTL proposes to revise this provision to conform the language with Probate Code Section 243, relating to allowances for defending wills and to extend protection to the descendants of the contestant. (A similar change is proposed for Trust Code Section 112.038 relating to trust contests, also added in 2009).

(d) Pretermitted Children (Section 67). This change revises the provisions relating to

pretermitted children (children born after the execution of a will who are not otherwise provide for) so that the pretermitted child takes only portion not given to either testator's surviving spouse or the other parent of pretermitted child. Since the rationale for this change isn't as self-evident as some of the other changes, here's some background.

Professor Stanley Johanson brought the following hypothetical to REPTL's attention, taken from one of his law school exams (edited for brevity):

Harvey and Lucille were married, lived in Dallas, and had no children. In 2000, Harvey executed a will that gave all of his property to Lucille. In 2002, Harvey had an affair with Blaze Starr, resulting in a son: Curly. While threatening divorce, Lucille decided to stick with Harvey. Harvey died in 2005 without changing his will. Harvey separate personal property of \$300,000 and an interest in a community estate of \$600,000. What are Curly's rights, if any?

Under current Probate Code §67(a)(2), because Harvey had no children when he executed his will, Curly succeeds to an amount equal to what he would inherit if Harvey had died intestate and unmarried, "owning only that portion of his estate not devised or bequeathed to the **parent** of the pretermitted child." Since the other parent of the child was Blaze and Harvey had understandably given nothing to her in his will, Curly gets Harvey's entire estate, leaving Lucille with only her half of the community property. Prof. Johanson questioned whether this was the appropriate result when Curly would have taken nothing had he been born to Lucille.

The REPTL Council agreed, proposing an amendment that would exclude from consideration the portion of the estate passing to **either** the other parent of the pretermitted child **or the surviving spouse** of the testator.

(e) Repeal of Testamentary Provision for Management of Separate Property (Section 70). Section 70 allows a testator to include a provision in his or her will giving the surviving spouse the power to keep testator's separate property together until each of the beneficiaries becomes an adult, using the same provisions applicable to the management of community property. Since this provision is rarely (if ever) used, REPTL proposed repealing it in 2009, and proposes repeal again in 2011.

⁶ Section references are to the Texas Probate Code unless otherwise noted.

(f) Foreign Self-Proving Affidavit (Section 84). Ever find yourself with a will executed in another state that appears to have a perfectly good self-proving affidavit, only to determine it doesn't comply with Section 59? This change provides that if a will is properly executed with a self-proving affidavit that complies with the laws of the testator's domicile (at the time of execution), the will should be considered self-proved for purposes of probating it here in Texas even if the affidavit does not conform to our normal Texas form of self-proving affidavit.

(g) Independent Administration. A number of independent administration revisions were proposed in 2009 designed to bring some clarification to three areas of independent administration:

1. Specifying the authority of an independent executor or administrator to sell assets in the absence of an express grant in the will;
2. Detailing the procedures for presenting and dealing with creditors' claims; and
3. Providing a simpler procedure for filing a notice that an independent administration has “closed” without the need for a full accounting of all receipts and disbursements.

They are being proposed again in 2011. Here are the highlights:

(i) Determination of Heirships (Section 145). While not originally a REPTL proposal in 2009, the 2011 proposal requires a judicial determination of heirship in the event of an independent administration by agreement in an intestate situation. (This is already the case by local rule in most statutory probate courts.)

(ii) Independent Administration by Agreement (Section 145). Provisions are added allowing parents of minor children and trustees to consent to independent administration by agreement where no conflict exists.

(iii) Power of Sale by Consent (Sections 145A, 145B, and 145C). The revisions confirm that an independent representative may sell without a court order under the same circumstances that a dependent representative could sell with a court order. In administrations without a will, or where a will fails to expressly grant a power of sale,

an independent administrator may be granted a power of sale over real property in the order of appointment if the beneficiaries who would receive the real property consent to the power (avoiding a later need to obtain their consent). Perhaps more importantly from a practical standpoint, the revisions include a new concept (borrowed from the Trust Code) providing statutory protection for third parties who rely on the apparent authority of an independent representative where a power of sale is granted in the will or the representative provides an affidavit that the sale is necessary under the circumstances described in current Probate Code Section 341(1).

Drafting Tip

When you are drafting a will, make sure you give your executor a power of sale, or, better yet, “all of the powers granted trustees under the Texas Trust Code.”

(iv) Secured Claims (Section 146). Over twenty years ago, the Texas Supreme Court ruled that Probate Code Section 306 applies to independent administrations. *See Geary v. Texas Commerce Bank*, 967 S.W.2d 836 (Tex. 1998). However, the Probate Code has never been amended to recognize this. Therefore, the revisions pay special attention to providing guidance regarding the handling of secured claims. Secured creditors electing matured, secured status must file a notice in the official records of the county in which the real property securing the indebtedness is located. Those creditors must obtain court approval or the administrator's consent to exercise any foreclosure rights. Secured creditors electing preferred debt and lien status may not exercise any nonjudicial foreclosure rights during the first six months of the administration.

(v) Method of Presenting Claims and Notices (Section 146). Creditors must present their claims or respond to notices (i) in a written instrument that is hand-delivered or sent by certified mail, in either case with proof of receipt, to the administrator or the administrator's attorney; (ii) in a pleading filed in a lawsuit with respect to the claim; or (iii) in a written instrument or pleading filed in the court in which the administration is pending.

(vi) Statute of Limitations (Section 146). The running of the statute of limitations is tolled **only** by (i) a written approval of

a claim signed by the administrator, (ii) a pleading filed in a suit pending at the time of the decedent's death, or (iii) a suit brought by the creditor against the administrator. The mere presentment of a claim or notice **does not** toll the running of the statute of limitations.

(vii) Other Claims Procedures (Section 146). Other claims procedures generally **do not** apply. Specifically, a claim is not barred merely because a creditor fails to file suit within ninety days following the rejection of a claim.

(viii) Time for Petition for Accounting and Distribution (Section 149B). The Probate Code currently allows an interested person to seek an accounting and distribution of an estate from an independent executor or administrator after the expiration of two years from the grant of letters testamentary or administration. This change clarifies that in the case of successor administrators or executors, the two-year waiting period runs from the **initial** grant of letters to the first representative, and does not restart when the successor is appointed.

(ix) Notice of Closing Estate (Section 151). In addition to existing procedures for closing independent administrations, an administrator may elect to close an independent administration by filing an affidavit stating that all known debts have been paid, or have been paid to the extent the assets of the estate will permit; that all remaining assets have been distributed; and the names and addresses of the distributees. Once the administration is closed, third parties may deal directly with the distributees.

(x) Closing Not Required (Section 151). A new provision explicitly recognizes that independent administrations are not **required** to be closed.

(h) Compensation of Representatives (Section 241). In a significant departure from current Texas law, REPTL proposes to change standard compensation of an executor or administrator from the historical 5%-of-receipts-plus-5%-of-disbursements-up-to-5%-of-the-estate formula to a "reasonable compensation" standard, which is in accordance with the rule in the vast majority of states.

(i) Affidavit in Lieu of Inventories (Section 250). If no debts remain by the inventory

due date, this change allows the executor or administrator to file an affidavit in lieu of the inventory stating those fact. The executor or administrator must still **prepare** a sworn inventory and provide a copy to all all beneficiaries other than those receiving specific gifts.

(j) No More Listing of Co-Owners on Inventories (Section 250). The Probate Code currently requires a listing of the co-owners of property on an inventory. REPTL proposes deleting this requirement.

7. Changes Affecting Guardianships.

7.1. The REPTL Guardianship Bill. The REPTL Guardianship bill deals with a variety of issues, the most significant of which may be the proposed change in guardian compensation described below.

(a) Term of Attorney Ad Litem in Temporary Guardianship (Section 646). Current law provides that the appointment of an attorney ad litem in response to the filing of an application for the appointment of a guardian expires upon the appointment of the guardian. The proposed change provides that the attorney ad litem's appointment **does not** expire upon appointment of **temporary** guardian; only upon the appointment of a permanent guardian.

(b) "Reasonable Compensation" for Guardians (Section 665). REPTL proposes to change standard compensation of guardians and trustees of Section 867 management trusts from the current 5%-of-income-receipts-plus-5%-of-disbursements formula to a "reasonable compensation" standard as determined by the court, which is in accordance with the rule in the vast majority of states.

(c) Assessment of Costs of Guardianship (Section 665A). A court, in appropriate circumstances, would be expressly allowed to assess attorneys fees, including attorney ad litem and guardian ad litem fees, against a party in a guardianship proceeding (and not just against the ward's estate).

(d) Physician's Certificate (Section 687). This change further clarifies the necessary requirements of a physician's or psychologist's

report in a guardianship proceeding. (These requirements were modified in 2009.)

(e) No More Listing of Co-Owners on Inventories (Section 729(c)). The Probate Code currently requires a listing of the co-owners of property on an inventory. REPTL proposes deleting this requirement.

(f) Termination of Guardianship by Transfer to Pooled Interest Trust (Sections 745(6) and 867). This change allows the complete termination of a guardianship proceeding if all of the assets of the guardianship estate have been transferred to a pooled interest trust sub-account for the ward.

(g) Admission of Ward to Psychiatric Facility (Section 770(c)(3)). This change increases the age of wards whom a guardian may admit to an inpatient to psychiatric facility from 16 to 18 or younger.

(h) Gifts for Non-Tax Purposes (Section 865). The Probate Code currently allows court-approved gifts motivated by tax considerations. This change also allow gifts or transfers in order to make the ward eligible for government benefits.

(i) Asset Report Within 30 Days of Management Trust Funding (Section 867). A court could require the trustee of a management trust to file a report showing the current value and descriptions of trust assets within 30 days of trust funding.

(j) Management Trusts for Persons With Physical Disability Only (Sections 867, 871, and 873). Another change would expand the list of persons eligible to apply for establishment of a management trust to include a person with a physical disability only. In that case, there would be no requirement for annual accounts.

(k) Person Eligible to Apply for Establishment of Pooled Interest Sub-Account (Section 911). The final change would expand the list of persons eligible to apply for establishment of pooled interest trust sub-account.

8. Changes Affecting Trusts.

8.1. The REPTL Trust Code Bill. The REPTL Trust Code package is relatively modest.

(a) No Contest Provisions in Trusts (Trust Code Section 112.038). This section of the Trust Code, relating to the enforceability of forfeiture clauses in trust contests, was added in 2009, and is similar to Probate Code Section 64 relating to will contests, also added in 2009. REPTL proposes to revise Probate Code Section 64 to conform the language with Probate Code Section 243, related to allowances for defending wills, and believes it appropriate to make the same change applicable to trusts so the same standard will apply to both wills and trusts. As with the Probate Code change, this change also extends protection to the descendants of the contestant.

(b) Waiver of Notice of Combination of Trusts (Trust Code Section 112.057). This section of the Trust Code allows trustees to divide and combine trusts when appropriate (usually to achieve beneficial tax results) upon 30-days notice to the beneficiaries. New subsections (e) and (f) allow waiver by the beneficiaries of the 30-day notice provision for combination of trusts, and allow waiver of the notice by guardians, parents, etc., of incapacitated beneficiaries.

(c) Trust Jurisdiction of Statutory County Courts (Trust Code Section 115.001). Recent changes to the Probate Code extend jurisdiction over trusts created by a decedent to statutory county courts (as opposed to just statutory probate courts) while administration of the decedent’s estate is pending (*e.g.*, Section 4B(b)(2) and (3)). However, the Trust Code still provides that jurisdiction is exclusively in the district court in these cases. This change expands jurisdiction over trusts created by a decedent to statutory county courts while administration of the decedent’s estate is pending.

(d) Permissive Venue of Trust Proceedings While Estate is Pending (Trust Code Section 115.002). Generally, venue for a trust proceeding is in the county of the trustee’s residence. However, since courts in which the administration of a deceased settlor’s estate is pending have jurisdiction over such proceedings, this change adds permissive venue in those counties.

(e) Necessary Parties to Trust Proceedings (Trust Code Section 115.011(b)). Necessary parties to a trust proceeding include any beneficiary designated by name in the instrument

creating a trust. Technically, this includes anyone named as a beneficiary in a will creating a testamentary trust, even if the person is not a beneficiary of the trust. It also includes persons whose interest in the trust may have previously terminated. This change limits necessary parties to persons designated by name as a beneficiary of the trust, and whose interests have not been previously extinguished.

8.2. Effect of Divorce on Revocable Trusts .

Changes to Probate Code Section 69 in 2007 revoked provisions in a will in favor of the relatives of an ex-spouse when the will was executed prior to the divorce. The changes also included references to a declaration that a marriage is void (in addition to divorce and annulment). REPTL's 2009 Decedents' Estates bill included 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. However, as noted previously, above, the 2009 proposal did not pass. Therefore, they are included in the 2011 package.

Drafting Tip

Until this change to the Probate Code passes (and maybe even after it passes), consider incorporating the substance of Probate Code Section 69 in your revocable management trusts by including a provision such as:

“If settlor’s marriage to settlor’s spouse is dissolved, whether by divorce, annulment, or a declaration that the marriage is void, all provisions in this agreement, including all fiduciary appointments, shall be read as if settlor’s spouse and each relative of settlor’s spouse who is not a relative of settlor failed to survive settlor.”

9. Changes to Jurisdiction and Venue.

9.1. The REPTL Decedents’ Estates Bill.

The REPTL 2011 Decedents’ Estates bill contains several changes to both jurisdiction and venue.

(a) Transfer of Entire Proceeding from Constitutional County Court (Section 4D). The jurisdictional proposed change allows a constitutional county court in a contested matter to transfer the entire proceeding (not just the contested part) to a statutory probate judge or district court

(this is consistent with similar proposed changes to guardianship jurisdiction).

(b) Consolidation of Venue Provisions (Sections 6, 7, 8, and 48). The proposed change consolidates venue provisions, including venue for heirship proceedings previously located in the heirship provisions.

9.2. The REPTL Guardianship Bill. The REPTL 2011 Guardianship bill also contains several similar changes to jurisdiction in guardianship proceedings.

(a) Transfer of Entire Proceeding from Constitutional County Court (Sections 601, 605, 606, 606A, 607, 607A, 607B, 607C, 607D, 607E, 608, and 609). The proposed changes allow a constitutional county court in a contested matter to transfer the entire proceeding (not just the contested part) to a statutory probate judge or district court (this is consistent with similar proposed changes to decedents’ estates jurisdiction). In addition, the changes make the guardianship provisions more consistent with those applicable to decedents’ estates.

10.Changes Affecting Charitable Trusts or Organizations.

10.1. [Reserved for Future Developments].
[Reserved.]

11.Court Administration.

11.1. [Reserved for Future Developments].
[Reserved.]

12.Nontestamentary Transfers.

12.1. Charities as Beneficiaries of POD Accounts (Section 436). The REPTL Decedents’ Estates bill clarifies that a charitable organization may be made the beneficiary of a pay-on-death (P.O.D.) account at a financial institution upon the death of the accountholder.

12.2. Community Property Survivorship Agreements (Sections 439 and 452). 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 nonspouses. REPTL’s Decedents’ Estates 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.

13. Disability Documents.

13.1. Uniform Power of Attorney Act. Our current Durable Power of Attorney Act was enacted in 1993 and is based, in large part, on the Uniform Durable Power of Attorney Act last amended by the National Conference of Commissioners on Uniform State Laws in 1987, over 20 years ago. A national survey conducted by NCCUSL concluded that a durable power of attorney should:

- i provide for confirmation that contingent powers are activated;
- i revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
- i include a portability provision;
- i require gift-making authority to be expressly stated in the grant of authority;
- i provide a default standard for fiduciary duties;
- i permit the principal to alter the default fiduciary standard;
- i require notice by an agent when the agent is no longer willing or able to act;
- i include safeguards against abuse by the agent;
- i include remedies and sanctions for abuse by the agent;
- i protect the reliance of other persons on a power of attorney; and
- i include remedies and sanctions for refusal of other persons to honor a power of attorney.

In 2006, NCCUSL promulgated a new Uniform Power of Attorney Act responding to these concerns. REPTL has been studying this act since then and is now ready to propose replacement of our current act with a “Texified” version of the newer uniform act. Highlights of REPTL’s proposal include the following:

- i The default rule will now be that a power of attorney is durable unless provided otherwise.

- i The agent is expressly allowed reasonable compensation and reimbursement of expenses.
- i An agent’s duties only arise following acceptance by exercising authority or performing duties under the power.
- i The act includes a list of statutory duties owed by the agent to the principal, including preservation of the principal’s estate plan.
- i The act expands the class of individuals with standing to intervene on the principal’s behalf.
- i The act imposes liability on third parties for refusal to accept the power of attorney.
- i The statutory form will change (significantly, but not drastically).
- i The act expressly provides for successor agents and co-agents.
- i Each power listed in the statutory form (such as a power to make gifts) has a corresponding definitional section in the act.

14. Exempt Property.

14.1. [Reserved for Future Developments].
[Reserved.]

15. Changes Affecting Marital Property.

15.1. [Reserved for Future Developments].
[Reserved.]

16. Conclusion.

It’s a bit early for any “conclusions.” Without diminishing the significance of some of REPTL’s proposals, most of what we’re seeing right now consists of “tinkering” while waiting for 2014 when our new Estates Code will go into effect.

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