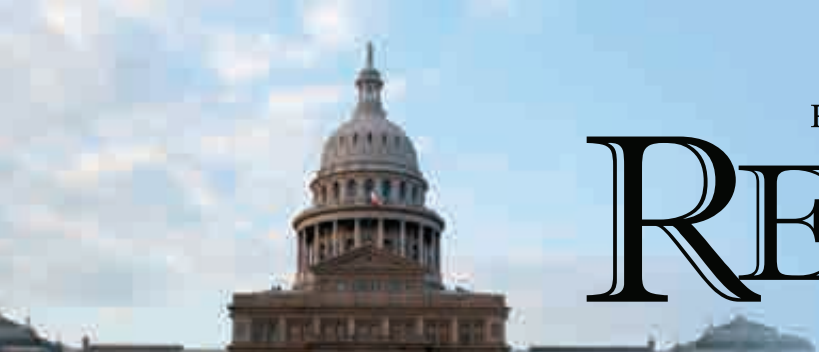

Real Estate, Probate and Trust Law

REPORTER

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ABOUT

The REPTL Reporter is the official journal of the Real Estate, Probate and Trust Law Section of the State Bar of Texas (REPTL). It is published by REPTL to provide education and information for REPTL members in the areas of real estate, probate, trust, guardianship, tax and water law. A copy of each issue is furnished to the members of REPTL as part of their section dues.

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Should We Have a Heavy Metal Estate Planning Law Firm Commercial?

As many of you know, Savannah, Georgia attorney Jamie Casino's epic heavy metal commercial went viral after being shown during the Super Bowl. Regardless of what you think of an attorney advertising in this manner, the commercial is IMHO awesome. I guess I have always wanted to be a rock musician but since I cannot sing, play a guitar, or dance, I am going to stick with my day job. Perhaps you can channel Led Zeppelin or Metallica to create a masterpiece. Or, you could go "cute" like my former students, Charlie Malolo and Taylor Willingham of The Willingham Law Firm in McKinney, Texas, did when they created *The Will Song*.

"Where Have All the [Rockers] Gone, Long Time Passing?"

We recently lost the great folk singer, Pete Seeger, famous for, among other things, the flower-based song quoted above. We know where he has gone—Beacon, New York. But where are all other great artists? If you are a road-trip type, you can purchase a guide to the rockers of yesterday—*Stairway to Heaven: The Final Resting Places of Rock's Legends*. Unlike our clients, as Neil Young exclaims, "Rock and roll can never die."

Will the Reverend Who Disobeyed the Pope's Testamentary Orders be Heading to the Eternal Toaster?

Public opinion is split between praise and criticism of John Paul II's secretary for allowing the late Pope's personal notes to be published despite the fact that his will indicated he did not want that to happen. The Pope wanted his notes burned post-mortem. However, Reverend Stanislaw Dziwisz, the person entrusted with this responsibility, claims he "did not have the courage" to burn the documents. Condemnation seems to have outpaced any positive reactions to the Reverend's actions. Dziwisz published a 640-page hardcover book containing the notes and claims that the book is supposed to help those lost get back on a spiritual path. *See* Associated Press, *Hero or Traitor? Pope's Aide in Polish Controversy*, KUWAIT TIMES (Feb. 4, 2014).

Estates and Future Interests—Not Just for Law School Anymore.

It is not often that a television series delves into the intricacies of property and inheritance rights, but that is exactly what the fourth season of *Downton Abbey* has begun to do. The PBS series has millions of viewers, which have recently been introduced to medieval property concepts like the fee tail. A "Recent Developments" session at the Heckerling Institute on Estate Planning gave the television drama a shout out. *See* Wendy S. Geoff & Deborah L. Jacobs, *Downton Abbey's Plot Twists Spur Lawyers' Debates*, FORBES (Jan. 23, 2014).

INTESTACY, WILLS, AND ESTATE ADMINISTRATION CASE UPDATE

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Inheritance Rights of Descendants of Adopted-Out Heir

In re Estate of Forister, No. 04-00046-CV, 2013 WL 6086934 (Tex. App.—San Antonio Nov. 20, 2013, no pet. h.).

Intestate died without a surviving spouse, descendants, parents, siblings, nieces, or nephews. Thus, her sole heir appeared to be her great-nephew, who claimed her entire estate. A complication arose, however, because her nephew had been adopted by her sister-in-law's second husband. An assignee claimed that an alleged half-cousin of the intestate assigned to him 25% of whatever interest the half-cousin would have in the intestate's estate. The trial court dismissed the assignee's request for a bill of review determining that the great-nephew was the intestate's sole heir.

On appeal, the court affirmed. The court carefully examined the assignee's argument that Probate Code § 40 (now Estates Code § 201.054(b)) provides that only an adopted-out person retains the right to inherit from the biological relatives and that the right to inherit from the biological side of the family does not pass down to the descendants of the adopted-out person. The court rejected the assignee's claim that this results from the omission of "and his descendants" in the mandate that the adopted person "inherits from and through the [person's] natural parent or parents." The court explained that the statutory section must be construed as a whole and in doing so, it is clear that adoption does not cut off the inheritance rights of the adopted person as well as those of the adopted person's descendants.

Moral: The descendants of an adopted-out person retain the right to inherit from the biological relatives unless the adopted-out person was adopted as an adult.

Title of Devisee

Meekins v. Wisnoski, 404 S.W.3d 690 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.).

A beneficiary claimed that a receiver appointed to sell property of the testator's estate could not sell his interest because of the well-established principle that the interest of a beneficiary vests immediately upon the testator's death. Estates Code § 101.001. The appellate court rejected this argument, explaining that once an executor is appointed, the executor holds legal title along with a superior right to possess the property to pay the decedent's debts. Estates Code § 101.051(a). Thus, when the probate court appointed a receiver to partition and sell estate property to pay a tax debt and the sale properly took place, the purchaser received the testator's interest in the property.

Moral: A beneficiary's vested interest in the estate remains subject to the testator's creditors and thus a beneficiary may lose his or her entire bequest or devise.

Tortious Interference With Inheritance Rights

In re Estate of Valdez, 406 S.W.3d 228 (Tex. App.—San Antonio 2013, pet. denied).

After Proponent filed applications to probate the testatrix's will, Contestant filed a will contest. Proponent then attempted to hold Contestant liable for tortious interference with inheritance rights. The trial court granted Contestant a summary judgment.

The appellate court affirmed. Citing Probate Code § 10C (now Estates Code § 54.001), the court explained that Contestant could not be held liable "because his lawful act of filing a will contest was not tortious conduct." *Id.* at 234.

Moral: A will contestant cannot be held liable for tortious interference with inheritance rights.

Discharged Independent Executor as Proper Party to Contest

In re Estate of Whittington, 409 S.W.3d 666 (Tex. App.—Eastland 2013, no pet.).

The court admitted the testator's will to probate and appointed Independent Executor. After completing his duties, Independent Executor obtained a judicial discharge under Probate Code § 149E (now Estates Code § 405.003). Approximately six months later, Contestant filed a will contest and had citation served upon Independent Executor. The trial court granted Independent Executor's motion to be dismissed from the action on the ground that he was not a proper party due to the judicial discharge. Although the trial court originally imposed sanctions on the ground that there was no existing law supporting why Independent Executor would be a proper party and that the argument to establish a new rule was frivolous, the court later reconsidered and denied sanctions.

The appellate court agreed that Independent Executor was not a proper party due to the judicial discharge. A judicial discharge is designed for the executor to "obtain a shield from any liability involving matters related to the past administration of the estate that have been fully and fairly disclosed." *Id.* at 670. In addition, it would be absurd to force the executor to defend the will with his or her own money as all of the estate assets have already been distributed and there is no guarantee that the beneficiaries have retained any of those assets for reimbursement purposes.

The court also agreed that sanctions were not appropriate because this issue was a matter of first impression.

Moral: An independent executor who obtains a judicial discharge is not a proper party to a subsequent contest of the will.

Appeal: *Authority of Trial Court in Gap Between Opinion and Mandate*

Pine v. deBlieux, 405 S.W.3d 140 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

In a prior opinion, the appellate court determined that the administratrix was unsuitable as a matter of law. The executrix sought review by the Supreme Court of Texas which denied her petition. The appellate court then issued its mandate. However, in the interim, the trial court rendered a final judgment disposing of some of the decedent's assets.

When the trial court's action was brought to the attention of the appellate court, the court held that the trial court should not have rendered a final judgment while the unsuitable administratrix was still in office. Accordingly, the court reversed the trial court's determination of the proper recipient of certain of the decedent's assets.

The court recognized that Probate Code § 28 (now Estates Code § 351.053) allows the administratrix to continue to act and that Texas Rule of Appellate Procedure 18.6 provides that an

interlocutory order takes effect when the mandate is issued. However, the court explained that the administratrix acted at her own peril when she continued to make claims to estate property hoping that the Supreme Court of Texas would grant her petition and then find in her favor.

Moral: In the gap period between the appellate court's opinion and the court's issuance of its mandate, a final judgment of a trial court is likely to be set aside if it is in conflict with the opinion and mandate.

TRUST LAW CASE NOTE

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A Binding Arbitration Clause in a Trust Instrument is Enforceable

Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013).

Settlor established an inter vivos revocable trust (the trust) naming his sons as sole beneficiaries and himself as trustee. Upon Settlor's death, the trust became irrevocable and the drafting attorney (Attorney) became trustee.

A beneficiary of the trust sued Attorney individually and as successor trustee for various allegations of breaches of trust and fiduciary duty. Attorney generally denied the allegations and moved to compel arbitration. The trust contained a provision requiring all disputes regarding the trust and trustee to proceed to arbitration. The trial court denied the Attorney's motion and he filed an interlocutory appeal. A divided court of appeals affirmed the trial court's order, holding that to be binding, an arbitration provision must be the product of an enforceable contract between parties, and a trust agreement does not meet this requirement because there is no consideration and the beneficiaries have not consented to such a provision.

Attorney filed a petition for review and the Texas Supreme Court granted the petition to decide whether an arbitration provision under the Texas Arbitration Act (TAA) in an inter vivos trust is enforceable against the beneficiaries.

The court reasoned that generally courts enforce the settlor's intent over the objections of beneficiaries when that intent is unambiguous. Here, Settlor unequivocally stated his intent that all disputes be arbitrated; accordingly, a court must enforce that intent and compel arbitration if such arbitration provision is valid.

The court determined that the language of the TAA indicated legislative intent to enforce arbitration provisions in *agreements* rather than only in contracts, and therefore, the arbitration provision would be upheld and enforced if it was supported by "mutual assent" of the parties involved. The court went on to expressly adopt the doctrine of "direct benefits estoppel" which prevents a nonsignatory party who is seeking the benefits of a contract or seeking to enforce it from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes. In this instance, because a beneficiary is not forced to accept benefits under the trust (such beneficiary could have disclaimed his interest or brought suit to challenge the validity of the trust agreement in general) and has done so by filing suit to enforce the terms of the trust rather than challenge them, the doctrine of "direct benefits estoppel" applies to provide the deemed "assent" necessary for an enforceable agreement.

The court reversed the judgment of the court of appeals and remanded to the trial court.

Moral: A beneficiary who accepts benefits under a trust agreement will be bound by all of the terms of the trust agreement, including mandatory arbitration provisions.

ELDER LAW CASE NOTES

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Medicaid Annuity Okay to Keep Spouse from Being Impoverished

Hughes v. McCarthy, 734 F.3d 473 (6th Cir. 2013), and Geston v. Anderson, 729 F.3d 1077 (8th Cir. 2013).

In these Ohio and North Dakota cases, the Sixth and Eighth Circuit Courts of Appeals validated a common financial planning technique used to preserve assets in an immediate annuity for a community spouse and establish Medicaid eligibility for a nursing home resident spouse under the federal "spousal impoverishment" protections. The federal Medicaid statute governing such annuities (42 U.S.C. 1396p(c)) applies to Texas applicants for benefits as well.

In the Ohio case involving Mrs. Hughes's application for Medicaid nursing home benefits, the state agency and the trial court treated the purchase of the annuity by Mr. Hughes as a penalized transfer of assets because the annuity balance exceeded Mr. Hughes's maximum resource allowance. The appellate court found the annuity to constitute a permissible (nonpenalized) transfer of assets as expressly permitted by the federal statute "to another" (i.e., the insurance company that issued the annuity) "for the sole benefit of the individual's spouse." The annuity did not "count" against Mr. Hughes's maximum resources because it conformed to the various annuity provisions mandated by the federal statute; the monthly annuity distributions are treated as "income" to the community spouse under the Medicaid rules.

In the North Dakota case, the Medicaid applicant challenged the validity of a state statute that "counted" the balance in an immediate annuity where the income derived from the annuity contract (paid to the community spouse of the applicant for Medicaid-funded nursing home benefits) exceeded an income limit for the combined incomes of both spouses. Federal law does not permit the state to consider a community spouse's income in determining an institutionalized spouse's Medicaid eligibility, as affirmed by the Eighth Circuit U.S. Court of Appeals, and the annuity cannot count as a resource because Mrs. Geston (the community spouse) has no right to liquidate the annuity under the terms of the irrevocable contract.

Both the Sixth and Eighth Circuit Courts' rulings are consistent with the prior federal appeals court decision regarding spousal Medicaid annuities, *Morris v. Okla. Dep't of Human Servs.*, 685 F.3d 925 (10th Cir. 2012), and with a series of letters from the federal Center for Medicare & Medicaid Services to several states on these immediate annuities in the context of spousal long-term care Medicaid eligibility.

Moral: Federal regulation of Medicaid eligibility in the spousal impoverishment rules permits unlimited income for the community spouse and allows conversion of assets to income in a strictly regulated type of immediate annuity paying to the community spouse.

Documentation Required to Overcome Presumption of Medicaid Motivation for Transfers

Donvito v. Shah, 108 A.D.3d 1196 (N.Y. App. Div. 2013).

This New York appellate court affirmed the state Medicaid agency's decision to impose a penalty

period for amounts a father (Medicaid applicant) transferred to his son, where the son and family members received $54,162.05 from the Medicaid applicant in the two years before he entered a nursing home following a stroke. The son claimed the last $6,500 transferred to him was a reimbursement for purchases he made for his father, and asserted that prior gifts were made consistent with his father's "history of giving money" and without a motivation to reduce assets for Medicaid eligibility purposes. The court found these assertions unconvincing due to a lack of proof, such as receipts or credit card bills, regarding the reimbursements and lack of evidence establishing that the father "was not motivated, at least in part, by a desire to qualify for Medicaid."

Moral: Documentation is essential to support a claim that funds transferred by a Medicaid applicant (within five years prior to a Medicaid application) are not a transfer properly penalized in an application for benefits. The applicant has the burden of proof to overcome a presumption of Medicaid motivation for transfers, and agency representative are reluctant to find that sworn testimony alone is sufficient evidence.

Classification of Patient Important for Continuous Medicare Eligibility

Bagnall v. Sebelius, No. 3:11cv1703 MPS, 2013 WL 5346659 (D. Conn. Sept. 23, 2013).

A group of Medicare patients sued the U.S. Secretary of Health and Human Services to eliminate or allow appeal of hospitals' reporting them as staying in the hospital on "observation status" rather than as admitted hospital patients, seeking relief for the consequent denial of Medicare coverage of a nursing home stay that would otherwise qualify for Medicare reimbursement.

Moral: A Medicare-insured person (or his or her agent, guardian, family, or other advocate) should be formally admitted to the hospital rather than placed on "observation status"—a decision in the discretion of the treating physician—to ensure that a later discharge to a nursing facility will be eligible for Medicare covered benefits.

ESTATE AND GIFT TAX DEVELOPMENTS

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Inflation Adjusted Amounts for 2014

Rev. Proc. 2013-35, 2013-47 I.R.B. 537.

The basic exclusion amount is $5,340,000 in 2014 for determining the amount of the unified credit against estate tax under § 2010 of the Internal Revenue Code of 1986, as amended (to which all section references are within this summary unless otherwise stated). The annual exclusion from gift taxes under § 2503 remains $14,000 for gifts in 2014. For calendar year 2014, the first $145,000 of gifts to a spouse who is not a citizen of the United States (other than gifts of future interests in property) are not included in the total amount of taxable gifts under §§ 2503 and 2523(i)(2). In 2014, the maximum federal income tax rate of 39.6% applies to taxable income over $12,150 for estates and trusts.

Use of "Net, Net Gifts" Upheld by Tax Court

Steinberg v. Comm'r, 141 T.C. No. 8 (2013).

The Tax Court held that the fair market value of a gift may be reduced by the donees' assumption of the donor's potential estate tax liability for the estate tax imposed on gift taxes paid under § 2035(b) if the donor were to die within three years of making the gifts. In *Steinberg*, the donees agreed to pay two separate liabilities of the donor: i) the federal gift tax imposed as a result of the gifts, as well as ii) any federal or state estate tax liability imposed under § 2035(b) if the donor were to die within three years of making the gifts. Such gifts are sometimes referred to as "net, net gifts." The court refused to grant the IRS's motion for summary judgment to deny as a matter of law a reduction in the amount of a net gift for the § 2035(b) estate tax liability if the donor dies within three years of making the gift. The court declined to follow its prior ruling to the contrary in *McCord v. Comm'r*, 120 T.C. 358 (2003), in which it held that the assumption of potential estate tax liability was too speculative to be consideration under § 2512(b) to reduce the size of the net gift.

Exclusion of Same-Sex Couples from Definition of Marriage is Unconstitutional; Supreme Court Strikes Down Section 3 of DOMA

U.S. v. Windsor, 133 S. Ct. 2675 (2013).

The United States Supreme Court struck down as unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which required same-sex spouses to be treated as unmarried for purposes of federal law. In *Windsor*, the Court upheld the opinion of the Second Court of Appeals that held that a decedent's estate was entitled to an estate tax refund for estate taxes paid on property that passed from the decedent to her same-sex spouse and for which a marital deduction should be allowed. In *Windsor*, two women, residents of New York, were married in Ontario, Canada, in a lawful ceremony. Decedent died two years later, leaving her entire estate to her surviving same-sex spouse, Edith Windsor. Windsor sought to claim the estate tax exemption for surviving spouses but she was barred from doing so by Section 3 of DOMA, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor paid the estate taxes but filed suit to challenge the

constitutionality of this provision. The United States district court and the court of appeals ruled that Section 3 of DOMA was unconstitutional and ordered the United States to pay Windsor a refund. The United States Supreme Court affirmed the judgment in Windsor's favor.

IRS Adopts State of Celebration Rule for Same-Sex Marriages

Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

In light of the Supreme Court's decision in *Windsor*, the IRS released Rev. Rul. 2013-17, in which it adopted a "state of celebration" rule for determining the federal tax implications of same-sex marriages. The IRS held that the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term "marriage" includes such a marriage between individuals of the same sex. The IRS also adopted a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages. Finally, the IRS also ruled that domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under the laws of that state will not be recognized for federal tax purposes as a marriage.

No Refund of Estate Tax Because Remittance was a Payment, Not a Deposit

Syring v. U.S., 2013 WL 4040445 (W.D. Wis. Aug. 8, 2013), modified, 2013 WL 4197143 (W.D. Wis. Aug. 15, 2013).

The United States district court held, in summary judgment, that an estate's remittance to the IRS was a payment of estate tax and not a deposit. The IRS denied the estate's request for refund because the remittance was an estate tax payment and fell outside the three-year tax refund period under § 6511(a). Had the remittance been designated as a deposit, the estate would have been entitled to a refund.

Transfer of Last to Die Life Insurance Policy to Grantor Trust Wholly Owned by One Spouse Will Not Cause Proceeds to be Taxed to Beneficiaries Where Spouses were Also Partners in Partnership

I.R.S. Priv. Ltr. Rul. 201332001 (Aug. 9, 2013).

The IRS privately ruled that a trust's transfer of a life insurance policy insuring the joint lives of husband and wife to a trust would be a transfer for valuable consideration under § 101(a)(2) but also fell within the exception to the general rule under § 101(a)(2)(B) for when the life insurance contract is transferred to the insured, to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer. The trust was a grantor trust wholly owned by the husband alone. Therefore, to the extent the policy insured the life of the husband, the transfer was a transfer to the insured under § 101(a)(2)(B). The IRS further ruled that, to the extent the policy insured the life of the wife, that portion of the policy which insured the life of the wife was being transferred to the husband as a partner of the insured under § 101(a)(2)(B) because the husband is a partner in a partnership in which the wife was a partner. Therefore, the proposed transfer was excepted in its entirety by § 101(a)(2)(B) from the application of the transfer for value rule of § 101(a)(2).

Ten-Year Statute of Limitations Applies to Collecting Estate Taxes from Transferees

U.S. v. Mangiardi, 2013 WL 3810658 (S.D. Fla. July 22, 2013).

The United States district court held the ten-year statute of limitations applied to the collection of unpaid estate taxes from the transferee of a decedent's estate under § 6324, rather than the four-year statute of limitations for transferee liability under § 6901. Section 6324 automatically creates a lien for ten years in favor of the United States on the decedent's gross estate immediately upon death. The court cited § 6324(a)(2), which provides that if the estate transfers property, the lien remains with the transferred property and the transferee takes the estate's assets subject to the special lien. The court also stated that, in addition to the lien, § 6324(a)(2) creates personal liability on any transferee of property included in the decedent's gross estate to the extent of the value, at the time of decedent's death, of such property. The court rejected the taxpayer's argument that § 6901 limited the period of transferee liability under § 6324.

Gift and Estate Tax Treatment of Self-cancelling Installment Notes (SCINs)

I.R.S. Chief Couns. Mem. 201330033 (July 26, 2013).

Before planners get too excited about the outcome in *Kite v. Comm'r*, discussed below, they should keep in mind that the IRS takes a hostile view of self-cancelling installment notes (SCINs), as detailed in CCA 201330033. Though all of the personal information was redacted from the CCA, a recent Tax Court petition reveals that this CCA is the IRS's litigation position that it will take in an estate and gift tax case for nearly $1 billion in tax involving William M. Davidson, a successful businessman and owner of the Detroit Pistons.

In this CCA, the taxpayer entered into a series of estate planning transactions in the year before his death, including the sale of assets to grantor trusts in exchange for promissory notes. The promissory notes were structured to last for the taxpayer's life expectancy as determined in the § 7520 tables. All of the notes required annual interest rate payments during the term of the notes. Some of the promissory notes included a provision under which the makers of the notes were relieved of any obligation to pay the principal or accrued interest in the event that the payee/taxpayer died before the maturity of the notes (i.e., the notes were SCINs). To account for the risk that the taxpayer would die before the repayment of the SCINs, some of the SCINs had a face value that was approximately double the value of the property transferred in exchange for the notes while some of the SCINs had a stated rate of interest that was apparently intended to compensate for the mortality risk. Though it was not clear from the CCA whether the taxpayer had any adverse medical history at the time of the transactions, the taxpayer died less than six months after the transactions took place.

The IRS took the position that the § 7520 tables should not apply to the valuation of the SCINs and that SCINs should be valued based on a method that takes into account the willing-buyer willing-seller standard in Treas. Reg. § 25.2512-8. In valuing the SCINs, the taxpayer's life expectancy, taking into consideration taxpayer's medical history on the date of the gift, should be taken into account. Because of the decedent's health, it was unlikely that the full amount of the note would ever be paid and therefore, the SCINs were worth significantly less than the stated amounts and the difference between the SCINs' actual fair market value and their stated amounts constituted taxable gifts. Finally, the IRS took the position that the cancellation feature of the SCINs did not affect their inclusion in the gross estate of the taxpayer.

Sale of Assets in Exchange for a Deferred Private Annuity was a Valid Transfer for Full and Adequate Consideration; Taxable Gifts Occurred to the Extent That the Annuitant Sold Assets from her QTIP Marital Deduction Trusts

Estate of Kite v. Comm'r, T.C.M. 2013-43 (Feb. 7, 2013).

In *Kite*, the decedent was the beneficiary of three QTIP marital deduction trusts that owned substantial assets. The trustees of the trusts contributed the trust assets to a limited partnership in exchange for limited partnership interests. Approximately five years later, the trustees of the trusts terminated the trusts and transferred the limited partnership interests to the decedent's revocable trust. Two days later, the revocable trust sold the limited partnership interests to the decedent's children in exchange for unsecured private annuities with the first annuity payments due in ten years and continuing every year thereafter until the decedent's death. At the time of the annuity sales, the decedent was seventy-four years old and, according to a statement signed by her physician, was not terminally ill and there was at least a 50% probability that she would live for another eighteen months or longer.

The IRS issued two notices of deficiency taking alternative positions: one for $6,053,752 of gift tax and one for $5,100,493 of estate tax. With respect to the gift tax on the annuity sales, the IRS argued that the annuity agreements did not constitute adequate consideration because they were structured to ensure that no annuity payments would actually have to be made. The IRS also argued that the annuities were illusory. The court rejected these contentions and ruled that the annuity agreements were enforceable and that the parties demonstrated their intention to comply with the terms of the annuities. The court also ruled that the decedent was a sophisticated businesswoman with a profit motive and expectation of payment. Therefore, the court held that the annuity transaction was a bona fide sale for adequate and full consideration.

However, the court also held that the portions of the annuity value that were originally traceable to the property of the QTIP marital deduction trusts, less the decedent's qualifying income interests in the trusts, were subject to gift tax as a result of the termination of the marital trusts.

Ten Percent Marketability Discount Allowed for Tenancy-in-Common Interest in Artwork; Agreement Prohibiting Partition Ignored

Estate of Elkins, Jr. v. Comm'r, 140 T.C. No. 5 (2013).

In *Elkins*, the IRS issued a notice of deficiency for estate tax related to the fair market value of the decedent's undivided fractional interest in sixty-four works of art. The decedent owned a 73.055% undivided interest in sixty-one works of art and his three children each owned an 8.98167% interest. The decedent owned a 50% undivided interest in three other works of art.

Approximately six years before his death, the decedent and his children entered into a co-tenancy agreement with respect to the art in which the parties agreed, *inter alia*, that the property could not be sold without the unanimous consent of all of the co-tenants. The parties stipulated to the undivided values of the art and the only issue for trial was the fair market value of the decedent's undivided interest in the art. The estate presented three expert witnesses regarding the undivided interest discounts that should apply. The IRS presented two experts who testified that no discount should apply.

The IRS held that, under § 2703(a)(2), the transfer restrictions in the co-tenancy agreement were not to be considered in determining the value of the art. The court then held that the estate was entitled to a 10% discount to value the estate's fractional interest in the art.

Marketability Discount of 7.5% Applied to Controlling Interest in LLC with Liquid Assets; No Interest Deduction Allowed for Loan from LLC

Estate of Koons v. Comm'r, T.C.M. 2013-94 (Apr. 8, 2013).

In *Koons*, the court held that the decedent's estate was not entitled to a $71,419,497 claimed interest expense on a $10,750,000 loan from a limited liability company controlled by the decedent's revocable trust. The court ruled that it was not necessary for the decedent's revocable trust to borrow the money to pay the estate tax because, at the time the trust borrowed the money, the trust owned a 70.42% interest in the LLC and had the power to force the LLC to make a pro rata distribution to its members; as a consequence, the court held that the trust was not entitled to the claimed interest deduction. The court also rejected the 31.7% marketability discount claimed by the petitioners and held that a 7.5% marketability discount should apply to the trust's 50.5% interest in the LLC that was owned at the date of death.

Accountant's Incorrect Due Date Advice did Not Excuse Executor's Late Filing

Knappe v. U.S., 713 F.3d 1164 (9th Cir. 2013).

The Ninth Circuit, affirming the district court, held that the IRS properly refused to abate an estate's late filing penalty when the estate tax return was filed within the extended due date supplied by an accountant.

The accountant filed an automatic extension but told the executor it was for one year rather than the correct period of six months. The estate filed after the actual extended due date but within the erroneous one. The court found that this was not reasonable cause to excuse the late filing penalty.

Estate's Late Filing was Not Justified Beyond Time Surviving Spouse Became a Citizen

Estate of Liftin v. U.S., 111 Fed. Cl. 13 (Fed. Cl. 2013).

The Court of Federal Claims upheld the penalty on an estate for late filing of the estate tax return. The court ruled that a difficult question of law regarding the marital deduction for transfers to the decedent's spouse, who was not a U.S. citizen, but who was becoming one after his death, initially provided reasonable cause for the late filing. However, it was unreasonable for the estate to further delay filing after the spouse became a naturalized citizen.

Service Allowing Late 706 to Elect Portability

Rev. Proc. 2014-18 (Jan. 28, 2014).

Rev. Proc. 2014-18 applies if a married person died between January 1, 2011, and December 31, 2013, had a gross estate less than the basic exclusion amount, did not use all of his or her basic exclusion amount, and did not file a 706 to elect portability. This Rev. Proc. allows a late 706 to be filed by December 31, 2014, to elect portability. And, it applies if the married persons were same-sex spouses. Under the Rev. Proc., the 706 must be filed no later than December 31, 2014.

Great. When did the Service become so taxpayer friendly? This is going to help a lot of taxpayers out who previously declined (or never considered) filing a 706 because of the cost of preparing and filing a return. With the simplified return requirements to make the DSUE election, they might change their minds. Which means that we probably have to go back to all of those clients, let them know that there is still time to file, and ask if they want to file a return in view of the simplified (and cheaper!) filing requirements.

REAL ESTATE AND OIL & GAS TAX DEVELOPMENTS

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Characterization of Lease Bonus Proceeds

In *Dudek v. Commissioner*, 106 T.C.M. (CCH) 621 (2013), the court was examining the characterization of lease bonus proceeds and whether these proceeds were eligible for depletion.

Dudek is a CPA and a lawyer licensed in Pennsylvania. He and his wife owned three tracts of land comprising approximately 353 acres. Taxpayers entered into an oil and gas lease covering the property and received a 16% royalty and a bonus that totaled over $883,000. Taxpayers reported the lease bonus as a long-term capital gain.

The court cited a Supreme Court case from 1932 which held that the receipt of a bonus payment under an oil and gas lease is taxable as ordinary income, not as gain from the sale of a capital asset. A lessor in an oil and gas lease retains an economic interest in the property as he has a right to share in the oil and gas produced. When one retains an economic interest in the oil and gas, it is difficult to presume that one has sold the property, hence no capital gain.

The taxpayers then argued that if the lease bonus was taxable as ordinary income, then they were entitled to either percentage or cost depletion. Section 613A(d)(5) clearly states that one is not entitled to percentage depletion on lease bonus, advance royalty, or other amount payable without regard to production from the property. Lease bonuses can be eligible for cost depletion. To compute cost depletion, one must compute the basis for depletion, the amount of the bonus payment, and the royalties the taxpayer expects to receive. Since no evidence was presented as to the amount of royalties taxpayer expected to receive, it was not possible to compute cost depletion.

Evidently, the practice of tax law with respect to oil and gas properties is not as well known in Pennsylvania as it is in Texas. With the new shale discoveries in the area, it is plausible to assume that the knowledge will be quickly assimilated. However, in this case, apparently a lack of knowledge about the tax laws was not deemed to be reasonable cause for the underpayment of tax and thus taxpayers were assessed an accuracy-related penalty based on their tax understatement.

Real Estate Investment Trusts

In Letter Ruling 201320002 (Feb. 6, 2013), the Service was evaluating a company that had elected to be classified as a real estate investment trust. The company, through subsidiary partnerships, owned real estate and mineral interests under the real estate. Taxpayer was to receive a royalty from the minerals produced and rental payments for a lease of the surface for a drill site.

A real estate investment trust (REIT) (among other qualifications) must derive 95% of its gross income from certain types of income (including rents from real property) and at least 75% of its income from more limited sources (including rents from real property). The main question here was whether the income from the oil and gas lease would disqualify the taxpayer from qualifying as a REIT. Taxpayer in this instance intended to classify the mineral royalty income as nonqualifying income. However, the income for the surface lease of the drill site was not disqualifying income as it was based on a set amount per month and not dependent upon the net profits of the lessee. Since the amount of the

disqualifying income was less than 5% of the REIT's gross income, it continued to qualify.

Several years ago, I attended a seminar where a New York investment banking house was attempting to market a REIT that acquired "net profits interests" in certain oil and gas leases. The potential participants were tax exempt institutions and private investors. A REIT is expected to generate passive income, and tax exempt institutions want to earn passive income to avoid tax on active business income. Since a "net profits interest" in an oil and gas property is classified as a royalty, it would have been eligible income for a tax exemption, but according to this ruling, the underlying entity would not have qualified as a REIT.

Qualified Losses

In *Fitch v. Commissioner*, 104 T.C.M. (CCH) 828 (2012), a married couple owned rental properties. Wife was an independent real estate agent and husband was a CPA. Taxpayers incurred losses on virtually all of their eight real estate properties during 2005, 2006, and 2007. Although their losses exceeded $25,000 in each of the years in question, taxpayers limited their losses to $25,000 in each year.

It was determined that the taxpayers' qualified losses were valid as they satisfied the material participation rules contained in § 469. Section 469 disallows losses from passive activities including real estate rental activities. The Treasury Regulations provide if one spouse meets the "active" requirements, then they both qualify. Since the wife was a real estate professional and she provided virtually all the participation in the activity, the couple was deemed to have materially participated in the real estate activity.

The most inventive expense deduction claimed by the taxpayers was one for spousal meals. Taxpayers claimed deductions for hundreds of spousal meals where they supposedly discussed their real estate activities. The court held that daily meals are an inherently personal expense and a taxpayer bears a heavy burden in showing they are deductible. Here, the test was not met and an accuracy-related penalty was assessed.

Horse-related Activities

In *Craig v. Commissioner*, TC Summary Opinion 2013-58 (July, 2013), the court reviewed a taxpayer's argument that her horse raising, horse training, and horse breeding activity was conducted with an expectation of a profit. Section 183 of the Code provides that if a taxpayer can show a profit in three of five years from an activity (two of seven for horse-related activities), then it is presumed that the taxpayer was conducting the activity with a profit objective.

Section 183, often referred to as the "hobby loss" section, seeks to disallow deductions claimed by taxpayers for activities that are inherently recreational or are otherwise engaged in primarily for personal pleasure. Section 183 applies only to individuals and S Corporations. If the profit presumption is not present, taxpayers can show that they were conducting the activity in a businesslike manner. Taxpayers do not have to show that their profit expectation is reasonable, they only need to show that they engaged in the activity with an actual and honest objective of making a profit.

The Service has nine tests in the regulations that it uses to determine whether a profit objective exists. The regulations state that the list is not exclusive and other factors may be considered and that no one factor is determinative.

In this case, Craig failed all nine of the objective tests contained in the regulations, including not

having a written business plan, separate bank accounts, and elements of personal pleasure. Through the years, I have represented many individuals who conduct profitable businesses but would fail many of the objective tests. One rarely finds a sole proprietor who consults a written business plan before making a business decision. However, certain rudimentary considerations accompany business activity and this case clearly demonstrates what § 183 is designed to eliminate. Taxpayer was also assessed the accuracy-related penalty.

Estate Tax Returns and Property Valuation

In *Estate of Young v. U.S.*, 2012-2 USTC ¶60,658 (D. Mass. Dec. 17, 2012), the district court was addressing a rather novel situation. Here, the estate of Nancy Young requested a six month extension of time for filing the estate tax return and a one year extension of time to pay the tax. As the time came for the filing of the return (November 2009), the executor determined that the appraised values for the estate's real estate seemed high. The country was in the midst of a financial crisis and it was difficult to determine an accurate value for the estate's real estate.

The estate had paid a total of $2,960,000 before the extended due date of the return (which actually exceeded the total estate tax liability). However, on the extended due date, the estate had an option to file the return using the original appraised values and amend the return to reflect the correct values when the properties were sold or to just file a single (late, but accurate) return. Normally, filing a late return would result in a penalty, but here the estate's advisors accurately believed that the amount paid in would exceed the eventual estate tax liability.

The estate made two estimated tax payments toward its estate tax liability. The first of $760,000 was made before the original due date of the return. The second of $2,200,000 was made before the extended due date of the return. The Service assessed a late filing penalty and the estate protested, claiming reasonable cause.

The government cited the Supreme Court case of *United States v. Boyle*, 469 U.S. 249 (1985). In this case, the Supreme Court stated that a taxpayer has a nondelegable duty to comply with the filing deadlines and cannot rely on advisors to comply. Here, the advisors were not delegated the duty of filing the return, they just advised that no penalty would be assessed because the tax had been fully paid.

The anomaly here is if the tax had been fully paid before the initial payment deadline instead of the extended payment deadline, no penalty would be due. The court disregarded this apparent unfairness by noting that the government has millions of taxpayers to monitor and the administration of a self assessment tax system cannot work without adherence to strict filing standards.

WET CEMENT! E-FILING AND PROBATE

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Introduction

The materials referenced below give the general structure of the mandatory system for electronic filing of documents in Texas courts (as initially implemented in the ten largest counties) as of January 1, 2014.

In the interest of full disclosure, I have been a member of the Judicial Committee on Information Technology since 1997 and so must bear my share of any cavils or brickbats regarding the system.

As is common in viewing probate and guardianship within the larger framework of civil law, the more unique facets of our area of practice have posed challenges for the structure of an electronic filing system that are sometimes difficult to reconcile. Until the e-filing process becomes routine, we are all (courts, clerks, and counsel) somewhat feeling our way forward in this thing. Lest our perception of e-filing be like the blind men and the elephant in John Godfrey Saxe's poem, some attention to the overall process must be given.

There is no substitute for reading and comprehending the rules as promulgated. However, because there are many areas in which the rules are silent, this note is an attempt to try to give some guidance in those areas which the rules do not address and which have already caused considerable consternation to Texas attorneys.

The Mandate and the Rules

On December 11, 2012, the Texas Supreme Court issued its mandate that filing of all court documents would be required to be by electronic means, to be implemented in six month phases, beginning January 1, 2014. Order Requiring Electronic Filing in Certain Courts, Misc. Docket No. 12-9206 (2012).

On December 13, 2013, the supreme court issued final rules for electronically filed civil court documents, effective January 1, 2014. Order Adopting Texas Rule of Civil Procedure 21c and Amendments to the Texas Rules of Civil Procedure 4, 21, 21a, 45, 57, and 502; Texas Rules of Appellate Procedure 6, 9, and 48; and the Supreme Court Order Directing the Form of the Appellate Record, Misc. Docket No. 13-9165 (2013). These rules supersede all other local civil rules governing electronic document filing in Texas courts.

The court also approved technology standards established by the Judicial Committee on Information Technology.

Rules, Local Rules, and Standing Orders

The supreme court promulgates the Rules of Civil Procedure, while local rules are adopted by individual counties, but must be approved by the Texas Supreme Court. Tex. R. Civ. P. 3a. Most local rules for e-filing were adopted six or seven years ago and will need some fine tuning.

Standing orders are policy statements issued by a particular court for a county to apply to the local

courts, but do not require supreme court approval.

The e-filing rules adopted by the supreme court are "bare bones" rules, leaving most of the details of the filing process to be worked out by the county and district clerks in conjunction with the trial courts. Until a common standard emerges, expect to see the courts (and possibly administrative judges) adopting standing orders to better regulate the e-filing process as it reaches equilibrium.

E-Filing Overview

An overview of the e-filing system can be best gleaned from the supreme court's web site or in a January 2014 article in the Texas Bar Journal, *Paperless Courts: Are You Ready for the E-Filing Mandate?* Much reference material is accessible on the e-filing home page of the Texas Supreme Court's web site.

An earlier attempt to interpret the e-filing rules can be found in a paper I wrote for an e-filing seminar last December for the Tarrant County Probate Bar Association.

Caveat: Since the seminar, the Texas Supreme Court revised the e-filing rules, so some of the information has been superseded.

A video of the seminar is accessible online.

Caveat: Running time is 2:46:20.

Original Wills

Original wills are addressed in two places in the e-filing rules: Rule 21(f)(4)(A) under "Exceptions" provides wills are not required to be filed electronically. Rule 21(f)(12) provides, "When a party electronically files an application to probate a document as an original will, the original will must be filed with the clerk within three business days after the application is filed."

Comment: It is important that the court has the original will in hand well before the probate hearing to determine if the document is, in fact, the original. Microscopic examination of copies will reveal whether the ink is xerographic or hand-applied by pen. If the court has only a copy of the will, then obviously different considerations come into play.

Suggestions:

1. If it is necessary to disassemble the will for photocopying or scanning, reassemble the will with a staple placed well away from the existing staple holes, preferably on the left side about two inches from the top of the page. The person responsible for disassembling and reassembling the original will should also place the person's initials in colored ink beside the vertical staple. This creates a chain of custody and is the protocol many clerks follow in unstapling and restapling original wills for photocopying. The location of existing staple holes may later be forensic evidence in the event of a will contest, so care should be taken to restaple where existing staple holes will not be obscured.

2. Go ahead and mail in or hand-file the original will as in the past. It is probably prudent to request a file-marked copy.

Documents Not To Be E-Filed

Other exceptions to e-filing under Rule 21(f)(4) include the following: (i) documents filed under seal or presented to the court in camera; and (ii) documents to which access is otherwise restricted by law or court order (see below).

Rule 21(f)(4)(C) also provides, "For good cause, a court may permit a party to file other documents in paper form in a particular case." This would include documents such as surety bonds, subpoenas and trial exhibits (since trial exhibits are actually "lodged" with the court reporter and not filed with the clerk).

Sensitive Data and Sensitive Information

Sensitive Data Prohibited: E-filed documents must not contain sensitive data unless required by a statute, court rule, or administrative regulation. Tex. R. Civ. P. 21c(a).

Sensitive Data Defined:

1. Financial: Social Security numbers, taxpayer-identification numbers, bank and other financial account numbers (credit cards, etc.).

2. Government ID: identification numbers on government-issued personal identification (driver's licenses, passports, etc.).

3. Minors: birth date, home address, and name of any person who was a minor when the underlying suit was filed. Tex. R. Civ. P. 21c(a).

Comment: Do not dwell too much on the use of "and" in the rule on minors. It is my belief that the intent of the rule is that any *information regarding a minor is sensitive data.*

Redaction Required:

The *burden of redaction* of the sensitive data is on the filer (not the clerk). Redaction is accomplished by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating redaction.

Retention Requirement: The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed. Tex. R. Civ. P. 21c(c).

Notice to Clerk of Required Unredacted Sensitive Data: If a document is required by statute or court rule to contain unredacted sensitive data, the filing party must notify the clerk by doing one of the following:

1. designating the document as containing sensitive data when the document is electronically filed; or

2. if the document is not e-filed, by including, on the upper left-hand side of the first page, the phrase "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." Tex. R. Civ. P. 21c(d).

Non-Conforming Documents: The court may strike any document containing sensitive data in violation of this rule and require a redacted substitute document to be filed. The substitute document must be deemed filed on the same day as the document that was struck**.** Tex. R. Civ. P. 21c(e).

Comment: My expectation is that the courts will take the position that the document containing sensitive data is to then be treated as a "non-public document," viewable only by the court and the attorneys involved in the case. For counties using the Odyssey program, this is called a "non-docketable event." (The document may be viewable in the court's jacket or a public data terminal at the clerk's office. Check your local listings.)

Sensitive Information: *"[D]ocuments to which access is otherwise restricted by law or court order."*

Rule 21(f)(4) refers to documents which are exceptions to mandatory electronic filing. Besides original wills (see above), sealed documents (under a sealing order), and documents submitted in camera, the rule excepts "*documents to which access is otherwise restricted by law or court order.*"

This area is the most problematic for probate lawyers. Many of the documents with which we have to deal are subject to restrictions on access by statute. However, these documents do not just contain sensitive data as defined by the supreme court rule; they are full of "sensitive information"—beyond the rule definition—which is restricted by other statutes.

Examples:

1. *Protected Health Information* made confidential by HIPAA (45 CFR 164.512(e)(1)(i)) and made applicable to Texas by Tex. Health & Safety Code Chap. 181. This most often comes up in guardianships:

   a. The "Certificate of Medical Examination" or "Determination of Intellectual Disability," Tex. Estates Code §§ 1101.103, 1101.104, 1202.152;

   b. Court visitor reports pursuant to Tex. Estates Code § 1054.104;

   c. Guardian ad litem reports pursuant to Tex. Estates Code § 1202.054;

   d. Guardian of the person reports pursuant to Tex. Estates Code § 1163.101;

   e. Documents filed in conjunction with a court's determination of whether a guardianship should be continued, modified, or terminated. Tex. Estates Code § 1201.052.

2. *Criminal History Record Information* on potential guardians. Tex. Estates Code § 1104.103.

3. *Adult Protective Services Records*—made confidential by Tex. Hum. Res. Code § 48.101—filed as a part of an Application for Emergency Protective Services pursuant to § 48.208 or as a part of an investigation of suspected abuse, neglect, or exploitation.

4. *Chemical Dependency, Mental Health or Intellectual Disability Records*, Tex. Health & Safety Code Chapters 462, 571, & 574 used in civil commitment proceedings.

Dealing with the Entire Document: Because it is the entire document to which access is restricted, the procedure set forth in Rule 21c(d) must be followed: the clerk must given a "heads-up" that the document being filed contains sensitive information, not susceptible to redaction.

Retention Requirement: As with redacted documents, the filing party should retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.

Nonconforming Documents: Also as under Rule 21(c)(e), the court must have the discretion to strike any document containing sensitive information and direct the filer to file a properly designated substitute document.

Comment: Retention Requirement. Although some early commentary suggested there would be a requirement to retain original documents that had been e-filed, the only retention requirement in the final e-filing rules is for unredacted documents containing sensitive data. Rule 21(f)(13) allows the clerk to designate either an electronically filed document or a scanned paper document as the official court record. However, the clerk does have a retention requirement to retain an original will filed for probate in a numbered file folder.

Other Landmines in the Filing Process

Document Formats: Rule 21(f)(7) sets forth the parameters of the format to be used.

Caveat: Currently, some counties are imposing additional requirements such as font sizes and sequential page numbering. Check with the clerk's office in which you plan to file.

Document Attachment: Determining how the various "papers" get to the clerk is unquestionably the most confusing area of e-filing thus far.

Best explanation: Like filing hard copies, the envelope is the big brown thing you put all the documents in. Similarly, you have to have all the documents together in one filing for your probate. You put your documents in separately, with the caveat on different treatments for the copy of the will (as either its own document or an attachment to the application).

The following explanation (with some editing) was provided by eFileTexas.gov:

1. Main (Lead) Documents vs. Supporting Documents

a. A document to be file-stamped and docketed is a *main* or *lead* document. Attachments to a main document are *supporting* documents. Supporting documents include orders to be signed and exhibits.

b. Supporting documents will NOT receive a file stamp and will not generate a separate entry in the court's docket.

c. Only one main document is permitted per filing transaction.

d. The first document in each filing is considered the main document, and, if accepted, will receive a file-stamp. This will determine how the document will be recorded on the court's docket.

2. Supporting Documents: Exhibits and Proposed Orders

a. Proposed orders should be submitted as a supporting document with the same filing transaction as the respective motion whenever possible. (There is a document type specified as "Proposed Order.")

b. A proposed order should not be submitted integrally with a main document. This restricts the judge's ability to electronically sign and process the proposed order.

c. Documents scanned together as one document cannot be separated by the e-filing system. Incorrectly filing a proposed order may result in the filing being rejected and require resubmission of the proposed order.

d. The system will only allow one proposed order to be submitted within each filing transaction. If you are submitting more than one proposed order, submit one in the same transaction as its respective motion. Each additional proposed order will need to be submitted in a separate transaction.

e. If only a proposed order is e-filed, a cover letter should be submitted as the main document with the proposed order attached.

Comment: Beyond that, the requirements vary from county to county. Dallas, Collin, and Harris Counties specify that the Case Information Sheet is to be a separate lead document and the Application (with its supporting documents attached as a single PDF with electronic bookmarks) to be another lead

document within one envelope, while Travis County prefers the application to be the lead document with the supplemental documents (scan of the will, the civil information sheet, and the supplemental information sheet) all attached as supporting documents.

Rejection

Rule 21(f)(11) provides that the clerk may not refuse to file a document that fails to conform with this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format.

Comment: Even though the clerk cannot refuse to accept the e-filed document, it can be rejected numerous *times. Reasons for potential rejection might include the following: duplicate filings, documents not separated, missing information, no attorney signature, no e-mail address, incorrect filing code, incorrect jurisdiction—county vs. district courts or wrong county, insufficient payment, document unreadable/illegible, incorrect case number, rejection requested by filing party, or file sealed pursuant to TRCP 76a.*

Filing Codes

Select the "filing code" which most closely fits the document title (clerk can make corrections). Order Adopting Texas Rule of Civil Procedure 78a, Misc. Docket 10-9062 (2010).

Comment: The filing codes for each type of filing are determined by the appropriate clerk in each county. As a result, they vary widely from county to county. Until a common statewide matrix of event codes can be developed, it is vital that you determine the proper codes for the county in which you intend to file.

Electronic Signatures

An e-filed document is considered signed if the document includes the following:

A. "/S/" and the signer's name typed in the space where the signature would otherwise appear

e.g., */S/ John Henry Doe*, unless the document is notarized (see below), or

B. an electronic image or scanned image of the signature. Rule 21(f)(7).

Acknowledgments, Notarization, and Verification

E-filed documents which must be acknowledged, verified, affirmed, or sworn involve a combination of different statues and rules.

As authorized by the Texas Uniform Electronic Transactions Act (Tex. Bus. & Com. Code § 322.011), an e-acknowledgment or e-notarization must otherwise conform to the requirements of a standard notarization (per Tex. Civ. Prac. & Rem. Code § 121.004) and the seal attached must include all of the required elements of a Texas Notary Seal (per Tex. Gov't. Code § 406.013). Thus, like an e-signature, an electronic notarization may be one of the following:

1. a *scanned* image of a manually-signed acknowledgment, or
2. a purely electronic notarization:

/S/ Richard Roe

Acknowledged before me by Richard Roe on January 1, 2014.

/S/ John Q. Public
Notary Public, State of Texas

The following steps create an electronic seal (PDF):

1. Print the ink seal on a clean sheet of paper.
2. Take a digital photo of the seal impression.
3. E-mail the photo to yourself.
4. Open the photo, crop it down, and save it as a PDF image.

It can then be cut and pasted into the acknowledged document.

Good-Bye to the Mailbox Rule

E-Service is complete on transmission of the document to the serving party's EFSP; therefore, the "Mailbox Rule" (adding three days to the notice period) does not apply with E-Service. Rule 21a(b)(3)

Transition to Paperless: Practical Strategies on Courtroom Proofs and Proposed Orders

Until we have acquired and embraced the technology to e-sign the courtroom proofs and the court's orders, it makes the most sense in the short run to bring your paper proofs, order, and oath (including copies to be conformed) for uncontested prove-ups.

Practice Tip: BYOP (Bring Your Own Paper). If you want conformed copies, print them yourself rather than asking the clerk to make you free copies.

If you think there is a possibility of your order being marked up, the simplest thing to do is to think ahead and e-mail an editable word processing copy of the order to the proper contact person in the court so the order can be "fixed" without additional follow-up.

However, if you have been advised there are documents which are lacking (waivers, appointment of resident agent, etc.), those should be e-filed or scanned into the system at a public kiosk (if your county makes one available). This should be done far enough in advance for the documents to make it into the court's system for the hearing. This will sometimes make the difference (as in the case of an Appointment of Resident Agent) of whether the applicant is statutorily disqualified or not.

There is a high probability that approved fillable PDF forms for uncontested hearings will appear on at least some probate court web sites.

Practice Tip: If you are in court and the court cannot find your document, to prove to the judge that you have a file-marked copy, load it onto your tablet to display rather than printing it out and creating more paper to eventually throw away.

A Redemptive Standard will Emerge

While the current state of e-filing is still somewhat chaotic, I think the intent of the courts regarding compliance with the rules is demonstrated by the Houston 1st Court's recent decision of *Texas Department of Aging and Disability Services v. Mersch*, No. 01-13-0021-CV, 2013 Tex. App. LEXIS 14817 (Tex. App.—Houston [1st Dist.], December 10, 2013, no pet h.):

"Finally, the Texas Supreme Court's overarching policy in approaching the unintentional errors of counsel is that cases should be decided on the merits rather than on a procedural default, when possible." "[P]rocedural rules should be 'liberally construed so that the decisions of the courts of appeals turn on substance rather than procedural technicality.'" "The electronic filing and service rules should not become a trap for the unwary when no harm is done."

Final Suggestions

Call the clerk before you e-file to make sure you have a handle on the local practices.

Call the clerk or court, as applicable, to check the status of your filings until you (and the clerks) reach a comfort level.

Allow plenty of time for e-filing your first time in each county.

[Editor's note: Steve M. King has been the judge of Tarrant County Probate Court One since 1994.]

THE STORY OF THE TEXAS ESTATES CODE

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Introduction

By the time you are reading this, our new Estates Code has already gone into effect—on January 1, 2014—and our beloved Probate Code that has been with us for almost six decades has faded away. These changes were enacted into law in 2009, 2011, and 2013. All of those changes went into effect at the same time—January 1, 2014. But the story of the Texas Estates Code goes back more than half a century.

Here is what this article will attempt to discuss:

- Texas's fifty-year-old continuing statutory revision program;
- A bit of the back story behind our Probate Code;
- The reasons why it was necessary to replace the Probate Code with the Estates Code;
- The process of drafting the Estates Code;
- The organization of the Estates Code;
- Construction issues related to its replacement of the Probate Code;
- Some of the substantive changes that were included in connection with the enactment of the Estates Code; and
- A few (free) resources the reader may find helpful.

Portions of this article have been adapted from this author's own legislative updates for the 2009 through 2013 legislative sessions.[1,2] In addition, while not cited directly, the author has been led to a number of the authorities cited in this paper by being aided in preparation of this article by T. Aaron Dobbs, *It's Going to Be Okay: Transition to the New Estates Code*, South Texas College of Law 28th Annual Wills and Probate Institute (2013). The author has attempted to cite all other authorities relied upon in the footnotes. Apologies in advance for any inadvertent omissions.

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[1] Copies of which can be downloaded from www.snpalaw.com/resources. Scroll down to the section titled "For Professional Advisors."

[2] While this paper was originally prepared as a standalone paper, it has now been incorporated as an attachment to the author's 2013 legislative update.

When (and Why) Did All This Begin?

Texas became the twenty-eighth state when President James K. Polk signed a Joint Resolution to admit Texas as a state on December 29, 1845. This really is not the beginning, for Texas already had laws enacted during its ten years as the independent Republic of Texas. But we will treat it as the beginning. The first unofficial "compilation" of Texas laws appears to have been *Paschal's Digest*, published by George Paschal in 1866. But a compilation was a publication of existing statutes in a rearranged and renumbered form. It involved no legislative action—it was merely a publisher's attempt to present statutes in their last-amended versions and omit expressly repealed statutes. On the other hand, a "revision" involved redrafting statutes, repealing the existing ones, and enacting the new ones. A revision could be substantive, but if it was not substantive, it was characterized as a "formal" revision. A formal revision involved everything involved in a compilation, plus the elimination of unconstitutional, impliedly repealed, and duplicated provisions.[3] A revision was initiated by legislative act, and the drafting was performed by a commission of three to five members appointed by the governor. Texas's first formal revision was enacted in 1879. There were three more—at approximately sixteen-year intervals—in 1895, 1911, and 1925.[4]

The 1925 revision adopted by the 39th Legislature—the Revised Statutes of Texas, 1925—began with "accountants" and ended with "wrecks," and spanned from Article 1 to Article 8324.[5] Laws enacted after 1925 that did not amend existing Articles were arranged unofficially and assigned an article number by the private publisher (now the West Publishing division of Thomson Reuters). The publisher was forced to add a letter or number suffix to a whole number because the 1925 revision left no room for expansion. For example, the editors added Articles 5159a-5159c between Articles 5159 and 5160.

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 (known as the "Black Statutes" for those of us old enough to have practiced with the hard copies of these volumes). Between 1936 and 1948, this was updated with noncumulative biennial supplements. In 1948, a new compilation was published and biennial updates continued. According to the *Drafting Manual*:

> As the result of this history, the user of Vernon's Texas Civil Statutes must wade through numerous printed statutes that are legally ineffective, must sort out surplus from substance, must adapt to confusing inconsistency of expression, capitalization, spelling, and punctuation, and must try to comprehend an alphabetical arrangement and often bizarre numbering scheme.

When the 1925 Revised Statutes were enacted, the last section of Title 125, "Trial of Right of Property," was Article 7425, "Levy on other property." The first section of Title 126, "Trusts–Conspiracies Against Trade," was Article 7426, "Trusts" (in the antitrust sense). In that same session, the legislature enacted H.B. 143. Sections 1 and 2 of that act added provisions the substance of which are now found in Texas

[3] Freeman, R., *The Texas Legislative Council's Statutory Revision Program*, 29 TEX. B.J. 1021 (1966) (cited in this paper as *Freeman*).

[4] *Id*. at 1022.

[5] The material in this section is generally drawn from the Texas Legislative Council Drafting Manual (September 2012) (cited as *Drafting Manual* in this paper), p. 147, *et seq.*, and the Texas law timeline provided by the Legislative Reference Library of Texas at:

www.lrl.state.tx.us/research/texasLawTimeline.html.

Property Code §§ 101.001 and 101.002 (just before the beginning of our current Texas Trust Code). These laws protected persons dealing with trustees. Since there was no designated place for these sections in the 1925 Revised Statutes, the publisher assigned the articles enacted by H.B. 143 the numbers 7425a and 7425b, so they would appear before Title 126. Again, these numbers were assigned by the publisher, not the legislature.

After a multiyear effort (which will not be discussed here), the laws relating to trusts were assembled into a somewhat coherent format prepared by private practitioners. The Texas Trust Act (S.B. 251) was signed into law on April 19, 1943, effective immediately. By that time, Articles 7425a and 7425b had made their way into Title 125A, "Trusts and Trustees." Sections 1 through 47 of the Texas Trust Act were published as Articles 7425b-1 through 7425b-47 of Vernon's Revised Statutes.

The 1955 Enactment of the Texas Probate Code

> "In the natural order of things, property must, in a generation, pass through the chute symbolized by our probate courts."[6]

By 1955, "[m]ost of our present statutes of decedents' estates and wills, descent and distribution, and guardianship [had been] enacted by the Texas Legislature in 1848 and . . . [had] survived to [that] day."[7,8] Numerous amendments and additions had caused conflicts, uncertainties, and inconsistencies. The first evidence of an initiative to revise and codify these statutes arose out of the State Bar's Standing Committee on Real Estate, Probate, and Trust Law (now the State Bar's Real Estate, Probate, and Trust

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[6] W. S. Simkins, Professor of Law, University of Texas, 1908, quoted in Grant, B, and Whitehill, R., *The Revision of the Texas Probate Code*, 43 TEX. B.J. 892 (1980) (cited as *Grant & Whitehill* in this paper). "Colonel" Simkins is also credited with writing the first comprehensive treatise on Texas probate law, *Administration of Estates in Texas*, in 1908. PROBATE AND DECEDENTS' ESTATES 17, (Woodward & Smith) at v (West 1971). Fellow graduates of the University of Texas School of Law will, of course, recall that Professor Simkins's equity class around 1900 was credited with the birth of the law school's mascot, the Peregrinus, and that Russell Savage, class of 1902, first drew the "beast":

Simkins achieved the rank of colonel as a member of the Confederate Army in the Civil War. In fact, prior to his move to Texas in 1873, Simkins may have been among the first to fire on Union forces at Fort Sumter in April of 1861 as a cadet at the Citadel. *See Simkins, William Stewart*, THE HANDBOOK OF TEXAS ONLINE, (http://www.tshaonline.org/handbook).

Until 2010, Simkins Hall, a University of Texas dormitory along Waller Creek near the law school, was named for Professor Simkins. However, the dormitory was renamed Creekside Residence Hall when Simkins's role in founding the Florida Ku Klux Klan resurfaced.

[7] Anthony, John, *The Story of the Texas Probate* Code, 2 S. TEX. L.J. 1, at 2 (1955) (now S. TEX. L. R.) (cited as *Anthony* in this paper). Most of the material in this section is drawn from *Anthony*. Mr. Anthony attempted to mention every contributor to the codification effort throughout its ten-year history, a task this author will not undertake.

[8] *See also* Interim Report of the Judiciary Committee: Proposed Revision of the Texas Probate Code, 66th Legislative Session, at 1 (cited as *Interim Report* in this paper).

Law Section, or REPTL) in 1944.[9] Actual work on the proposed revisions appears to have begun in 1946. The Committee on Probate Reform of the Trust Section of the Texas Bankers Association joined in the effort by 1949,[10] a probate reform committee of the Texas Civil Judicial Council joined later,[11] and individual attorneys throughout the state working outside the structure of any of these organizations joined in the effort.

At times taking what appeared to be two steps forward and one step back, through several legislative sessions, what eventually became the Texas Probate Code was introduced as S.B. 97 in January of 1955, accompanied by a 103-page "Summary of the Proposed Texas Probate Code" prepared by the Honorable R. Dean Moorhead of Austin, who had been hired in 1952 as "codifier and reporter" for the project,[12] probably because of his previous experience with the enactment of the Texas Trust Act ten years earlier. After passing the senate by unanimous vote, the bill was considered by a subcommittee of the House Judiciary Committee over five hearings and was overwhelmingly passed by the house with twenty-one minor amendments. The senate quickly passed the amended bill by unanimous vote and it was signed into law on April 4, 1955.[13] The Probate Code went into effect on January 1, 1956.

Because of the lack of expansion room in the Black Statutes noted previously, the Probate Code was inserted by the publisher between Title 110, "Principal and Surety" (which ended with Article 6252), and Title 110A, "Public Offices" (which began with Article 6252-1).[14] At the time, Volume 17 of the 1948 version of Vernon's Texas Statutes included Title 94, "Militia," through Title 111, "Quo Warranto." Therefore, the Probate Code was published as Volumes 17A, 17B, and 17C. (Volume 18 began with Title 112, "Railroads.")

The provisions of the new Probate Code were gathered from eleven volumes of the Revised Statutes, the Model Probate Code, and the Uniform Probate of Foreign Wills Act.[15] Some of the changes were a result of combining provisions, such as definitions that were scattered through the Revised Statutes that were consolidated in Probate Code § 3. There had previously been sixty-nine places where citation or notice was required, but thirty-nine of those places contained no indication of what kind of citation or notice was to be used.[16] The Probate Code consolidated all of the general rules relating to citations and notices in Probate Code § 33. Rules governing the sale of real estate in dependent administrations and guardianships were clarified and consolidated. The statutes relating to oil, gas, and mineral leases were totally revised and consolidated.[17] Many of the provisions applicable to both

[9] *Id*. at 3.

[10] *Id*. at 11.

[11] *Governor Signs Bar's Bills*, 18 TEX. B.J. 208 (1955).

[12] *Id.* at 208.

[13] *Anthony* at 19.

[14] Vernon's Texas Statutes, 1956 Supplement, at xli.

[15] *Anthony* at 22.

[16] *Id*. at 26. *See also* Irving, G, *Texas Probate Code*, 19 TEX. B.J. 11 (1956) (cited as *Irving* in this paper); and *Probate Code Institute*, 18 TEX. B.J. 373 (1955) (cited as *Institute* in this paper).

[17] *Anthony* at 31. This was a pet project of Mr. Anthony, who complained of the "evil burdens and discriminations" of existing mineral statutes.

estates of decedents and guardianships, such as bonds and venue, were combined.[18]

In addition to revisions of existing laws through combination and elimination of needless duplication, a number of new provisions were added, including the small estates provisions found in §§ 137 through 144,[19] procedures for closing independent administrations,[20] the various procedures relating to recognition of foreign wills,[21] and § 69 making provisions in favor of a spouse void upon divorce.[22] But probably the new provision we should be most grateful for is the self-proving affidavit found in § 59.[23] Thank you, John Anthony![24] At the time, it was believed that Texas was the first state to have enacted this type of alternative method of proving due execution of a will. However, prior laws in New York and West Virginia were later discovered.

"A standing-room-only crowd of 1,700 lawyers flocked to Dallas the day before the convention began [June 29, 1955] to attend a daylong institute on the new Texas Probate Code."[25] Can you imagine that many lawyers gathering today to learn about the Estates Code? According to Dean Moorhead, "Primarily, the Texas Probate Code is a codification, rather than a measure designed to make any sweeping changes in our present probate law."[26] Other speakers included W. O. Huie of Austin,[27] former Judge Atwood McDonald of Fort Worth, and Frank J. Scurlock of Dallas.

Subsequent Significant Probate Code Revisions

While the revisions and additions listed below are by no means an exhaustive list of significant changes to the Probate Code following its passage in 1955, they do include a number of changes that we now take for granted.

- **1961**. On January 25, 1961, the Texas Supreme Court held that § 46, which authorized rights of survivorship, could not extend to survivorship rights between spouses in community property. *Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1961). At the time, spouses could not change the marital property characterization of property by mere agreement. By looking at this issue as solely a matter of contract, the court concluded that since the consideration furnished by each spouse was community property, the "fruits" of the contract would be community, and when the first spouse died, he or she still owned a community interest in the property. The court felt that changing the passage of title that would otherwise apply in

[18] An effort that was "undone" thirty-eight years later when the guardianship provisions were extracted and moved to new Chapter XIII of the Probate Code.

[19] *Anthony* at 39; *Irving* at 43. Section 144 was subsequently repealed in 1993, when its substance was moved to § 887 as part of the enactment of Chapter XIII.

[20] *Anthony* at 40; *Irving* at 44.

[21] *Anthony* at 41; *Irving* at 43.

[22] *Anthony* at 43; *Irving* at 42.

[23] *Anthony* at 42.

[24] George Irving notes that a self-proved will was sometimes referred to as "A John Anthony Will." *Irving* at 42.

[25] *Institute* at 373. And yes, it was a "convention" back then, not the Annual Meeting.

[26] *Id*. at 373.

[27] Whom this author remembers as his Marital Property Law professor at the University of Texas School of Law in 1979.

the event of intestacy would somehow constitute such a change. The legislature attempted to respond to the *Hilley* case by adding a sentence making § 46 specifically applicable to community property.[28] Section 58a was added, allowing a testator to devise property to a revocable trust created before or concurrently with the execution of the will and have the property be governed by the terms of the trust, including amendments after the execution of the will. The muniment of title procedure was also added.

- **1969**. The 1961 legislative attempt to get around the *Hilley* decision was subsequently ruled unconstitutional in *Williams v. McKnight*, 402 S.W.2d 505 (Tex. 1966), and in 1969, the legislature gave up its quest to provide for community property survivorship agreements (at least for the time being). The reference to spouses in § 46 was eliminated.[29] And a number of other changes were made to reflect the state's lowering of the age of majority to eighteen (e.g., an eighteen-year-old could now execute a will).

- **1971**. After a six-year study by REPTL, in 1971, the legislature adopted § 36A, providing for **durable** powers of attorney, and § 149A, allowing an interested person to demand an accounting from an otherwise independent executor.[30] A number of other miscellaneous revisions were included in that REPTL bill. That same year, the legislature enacted § 37A, a proposal of the Taxation Section of the State Bar, a provision that for the first time codified a provision allowing beneficiaries to disclaim a testamentary gift.[31]

- **1973**. Until 1973, original probate jurisdiction rested with county courts and district courts had appellate jurisdiction.[32] That year, the legislature submitted a constitutional amendment authorizing statutory redistribution of probate jurisdiction, and a statutory redefinition of the district court revising its probate jurisdiction in probate matters contingent on passage of the constitutional amendment.[33] While the district court's appellate jurisdiction under Article V, Section 8 of the Constitution and § 5 of the Probate Code was eliminated, due to what was described as a "reform effort . . . marred either by careless draftsmanship or by the legislature's unwillingness to place adequate restrictions on politically powerful county court judges," the legislature failed to eliminate the district court's probate review by appeal, certiorari, bill of review, and mandamus.[34] Nevertheless, as a result of the 1973 legislation, district courts for the first time had concurrent **original** probate jurisdiction with the county courts in those counties where there was no statutory court exercising probate jurisdiction, eliminating the need for the district court's appellate trial de novo.[35] In addition, new § 5 expanded the county court's probate jurisdiction to permit the court to hear all matters "incident to an estate" (including a nonexclusive list of

[28] Hudspeth, C. M., and Nance, James K., *A Synopsis of Recent Texas Legislation*, 24 TEX. B.J. 817 (1961).

[29] Saunders, C., *Legislation 1969 - Real Estate, Probate and Trust Law*, 32 TEX. B.J. 584 (1969).

[30] Remy, W., *Effective Dates of AMENDMENTS to the PROBATE CODE and a Brief Summary of the CHANGES Made*, 34 TEX. B.J. 885 (1971).

[31] *Id.* at 886.

[32] Schwartzel, Boone, and Wilshusen, Doug, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEX. L. REV. 323 (1975) (cited as *Schwartzel & Wilshusen I* in this paper).

[33] *Id.*

[34] *Id.* at 323.

[35] *Id.* at 324-326.

matters considered incidental).[36]

- **1975**. Many of the deficiencies of the 1973 legislation identified in *Schwartzel & Wilshusen I* were addressed in the 1975 legislation.[37] The bill promoted "the legislative goal of destroying de novo review" and introduced mandatory transfers of contested matters in constitutional county courts to the district court upon the motion of any party.[38] The nonexclusive list of matters "incident to an estate" was lengthened.[39]

- **1978 Interim Report**. Following the 1977 legislative session, the following interim charge was issued to the House Judiciary Committee, chaired by the Honorable Ben Z. Grant: "A review of the probate laws of Texas, including a study of the advantages and disadvantages of enacting, in whole or in part, the Uniform Probate Code. This study should also include recommendations as to the need for further recodification of the existing probate laws."[40]

- **Changed Society**. The 1955 codification had not been intended to make radical changes in the former law, but rather to eliminate conflicts, resolve ambiguities, and modernize archaic language. Therefore, at least 95% of the 1955 Probate Code consisted of a rearrangement and reenactment of the prior statutes.[41] In 1848, when many of those statutes were first adopted, Texas had a population of 200,000 and remained primarily a rural and agrarian state until after World War II.[42] But the years following that war were marked by rapid urbanization and population growth so that by 1978, Texas was the third most populous state in the nation, after California and New York.[43] Only 3% of the population continued to live on farms (and presumably ranches). A complete review of the probate statutes, originally designed for an agrarian society, was thought wise for what was now a relatively urban state.[44]

- **Uniform Probate Code Rejected**. Following one full committee hearing in Austin in 1977 and three subcommittee hearings in Dallas, San Antonio, and Levelland in 1978, the Judiciary Committee concluded that overall, the Texas Probate Code was superior to the Uniform Probate Code. Texas had introduced independent administration in 1845, and for over a century, it remained the only state with that type of simplified administration.[45] While the Uniform Probate Code offered two methods of administration—supervised and unsupervised (the latter being based largely on Texas's independent administration procedures)—the Texas Probate Code, in combination with common law, offered at least

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[36] *Id.* at 335-336.

[37] Schwartzel, Boone, and Wilshusen, Doug, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEX. L. REV. 372 (1976) (cited as *Schwartzel & Wilshusen II* in this paper).

[38] *Id.* at 377-380.

[39] *Id.* at 382-383.

[40] Letter to the Honorable Bill Clayton, Speaker of the House, transmitting the *Interim Report* (Sept. 23, 1978).

[41] *Interim Report* at 1.

[42] *Id.*

[43] Texas's population did not surpass New York's until 1994. *A Rank That Rankles: New York Slips to No. 3; Now Texas Is 2d Most Populous State*, N.Y. TIMES (May 19, 1994).

[44] *Interim Report* at 2.

[45] *Id.*

seventeen possible methods of administration, depending on the needs of a particular estate.[46]

- **Thirty-six Recommendations**. The *Interim Report* made thirty-six separate recommendations, but only four involved adoption of Uniform Probate Code provisions. Those related to inheritance rights of children born out of wedlock, simultaneous death, children believed dead at the time of writing of a will, and contractual wills. A fifth recommendation involved codifying existing Texas law relating to nontestamentary transfers along the structural lines of the corresponding Uniform Probate Code provisions, without enacting any of the uniform code's provisions that clashed with existing Texas law.[47]

- **1979**. As a result of the *Interim Report*, in 1979, the legislature adopted what was described as the only comprehensive revision of the Probate Code since its 1955 enactment except for the 1971 changes.[48] Among the numerous changes were amendments to the 1971 disclaimer statute to add the nine-month requirement found in Internal Revenue Code § 2518 and the simultaneous death provisions, requiring a beneficiary to survive the decedent by 120 hours. Several new provisions were added, including § 59A (providing that contracts to make (or not revoke) a will could only be established by a will provision stating its material terms), §§ 149B (providing a method for a court-ordered accounting and distribution by an independent executor) and 149C (providing for removal of an independent executor under certain circumstances), and Chapter XI (containing a codification of existing Texas case law relating to nontestamentary transfers).[49]

- **1981**. In 1981, the legislature provided that a written agreement among spouses and a financial institution could provide that funds deposited to an account, plus future interest, would be partitioned into separate property by that agreement, thus allowing the spouses to hold the property as joint tenants with rights of survivorship.[50] This procedure was required by the "*Hilley* rule" set forth in the *Hilley* case.

- **1983**. In 1983, the most significant legislation affecting estate planning and probate practitioners was the enactment of the Texas Trust Code as part of the codification of the Property Code.[51] While there were a number of minor amendments to the Probate Code, there were no significant changes.[52]

- **1985**. One little phrase added in 1985 provided a significant clarification and expansion of statutory probate court jurisdiction. Actions "by or against a personal representative" were added to the list of causes of actions that were appertaining to or incident to an estate in statutory probate courts, giving them concurrent jurisdiction with district courts in a wide

[46] *Id.* at 3-4.

[47] *Id.*

[48] *Grant & Whitehill* at 892.

[49] *Id.* at 894-900.

[50] Saunders, C., *1981 Legislation Real Estate, Probate and Trust Law*, 44 TEX. B.J. 1199 (1981).

[51] McMahan, K., *Recent Legislative Developments*, State Bar of Texas's Advanced Estate Planning and Probate Course (1983).

[52] *See also* Saunders, C., *1983 Legislation Real Estate, Probate and Trust Law*, 46 TEX. B.J. 1215 (1983).

variety of cases.[53]

- **1987**. In 1987, voters approved an amendment to Article XVI, Section 15 of the Texas Constitution that authorized spouses to hold community property with rights of survivorship, eliminating the procedure required by the *Hilley* rule.[54] New § 46(b) was added as the enabling legislation.

- **1989**. In 1989, the jurisdiction of statutory probate courts was further expanded.[55] The durable power of attorney statute (then § 36A) was redrafted (temporarily adding a witness requirement), and a non-Probate Code change for the first time authorized statutory durable powers of attorney for health care decisions. And the language of § 46(b) was further refined and moved to new Part 3 of Chapter XI (§§ 451-462).

- **1991**. Perhaps the most significant changes affecting probate practice in 1991 were not Probate Code amendments. Amendments to the Government Code removed statutory probate courts from the definition of statutory county courts, eliminated the probate jurisdiction of the latter in counties that contained the former, and added a provision listing the powers and duties of a statutory probate court or its judge. In the Probate Code itself, a notable change was the enactment of the "anti-*Boren*" portion of § 59. In *Boren v. Boren*, 402 S.W.2d 725 (Tex. 1966), the Texas Supreme Court invalidated a will if the testator or witnesses inadvertently failed to sign the will itself, even though they had signed the self-proving affidavit. After the 1991 amendment, the will could be upheld by treating the signatures in the self-proving affidavit as signatures to the will (but it was no longer considered self-proved). Also, an initial version of the Guardianship Code was also introduced and withdrawn in 1991.[56]

- **1993**. In 1993, three significant changes were enacted. New Chapter XII included a Texas version of the 1987 Uniform Durable Power of Attorney Act (after having failed to pass in 1991), prepared by a REPTL committee headed by Houston attorney Charles W. Giraud, a past chair of the section.[57] The guardianship provisions that had been combined with decedents' estates provisions when the Probate Code was originally enacted in 1955 were extracted from Title 1 and placed in new Chapter XIII.[58] This was the culmination of a ten-year REPTL project led by Professor Thomas M. Featherston, Jr., the Mills Cox Professor of Law at Baylor Law School, as the chief scrivener and reporter.[59] And the intestacy rules applicable to community property were changed so that for the first time, it was possible for the surviving spouse to inherit the deceased spouse's half of the community estate (if the

[53] Saunders, C., *1985 Legislation Real Estate, Probate and Trust Law*, 48 TEX. B.J. 1322 (1985).

[54] Cenatiempo, M. and Rogers, M., *Legislative Developments*, State Bar of Texas's Advanced Estate Planning and Probate Course (1989).

[55] *Id*.

[56] Flores, M., *Overview of State Bar and State Bar Section Sponsored Legislation – Final Disposition by the 72nd Legislature*, 54 TEX. B.J. 706 (1991).

[57] Golden, A., *1993 Legislative Update*, State Bar of Texas's Advanced Estate Planning and Probate Course (1993) (cited in this paper as *Golden 1993*).

[58] *See* Saunders, C., *1993 Update - Real Estate, Probate and Trust Law Legislation*, 56 TEX. B.J. 896, at 899 (1993).

[59] *Golden 1993*.

survivor was the other parent of all of the deceased spouse's children).[60] The legislature also added a new Chapter XII providing for a new type of estate administration called "informal probate." (With the addition of the Durable Power of Attorney Act, this meant that we had two Chapter XII's.)

- **1995**. In 1995, the legislature enacted the product of a REPTL joint committee of real estate and probate lawyers (with input from judges and bankers) headed again by Professor Featherston. The proposal provided some needed clarification of the creditors' claims procedures to be followed in independent administrations and the handling of secured claims in any administration. The legislature also tried to fix problems with the informal probate procedures it had first enacted two years earlier.

- **1997**. In 1997, S.B. 504 added the Uniform Transfer on Death Security Registration Act as Part 4 of Chapter XI of the Probate Code. It was signed by the governor on April 17, with a September 1 effective date. This uniform act's enactment apparently motivated some people to actually read it, and in response to perceived problems with the uniform act, a month later the house amended S.B. 506 on the floor to repeal the uniform act before it ever went into effect, and merely add securities and accounts with financial institutions to the list of property covered by the provisions for payment or transfer at death covered by existing § 450.[61] Two important changes were made to the Durable Power of Attorney Act. First, any power granted to a spouse would terminate upon divorce. Second, the original initialing method of opting in to listed powers was changed to a strikeout method of opting out, a change that remained with us until switched back by a non-REPTL bill in 2013, effective January 1, 2014.[62] The legislature also gave up on its attempt to clean up the informal probate provisions enacted four years earlier and just repealed them in their entirety.

- **1999**. In 1999, the legislature continued its expansion of statutory probate court jurisdiction by expanding its transfer powers under §§ 5B and 608 to include any cause of action in which a personal representative was a party, whether or not otherwise appertaining to or incident to the estate pending in the court.[63] The legislature also introduced the requirement that court-appointed attorneys (e.g., attorneys ad litem) in guardianship proceedings be certified as having successfully completed a three-hour course of study.

While the previous paragraphs by no means constitute an exhaustive discussion of all significant amendments to the Probate Code, we will use the turn of the millennium as a milestone that ends our discussion of post-1955 amendments. Let us trace our steps backward about fifty years.

The Need for Statutory Revision

As noted above, the four revisions of Texas law between 1879 and 1925 were separated by intervals of about sixteen years. However, by 1963, it had been thirty-eight years since the last general

[60] *Id*.

[61] Jones, J., *Texas Legislative Report 1997: Next to Last Stop Before the Millennium (The End is Near Report)*, State Bar of Texas's Advanced Estate Planning and Probate Course (1997).

[62] *Id*.

[63] Jones, J., *Texas Legislative Report 1999, Laws for the Millennium*, State Bar of Texas's Advanced Estate Planning and Probate Course (1999).

revision of Texas laws in 1925. Meanwhile, the Probate Code was not the only topical revision that was enacted outside the framework of the 1925 revision. At least ten other topics were covered by codes or acts outside that numbering system.[64] Without the privately-published "Black Statutes," finding statutory law would be almost impossible for the average lawyer.[65] Even the private compilations had developed problems. The 131 alphabetically-arranged "titles" covering "subjects" could not accommodate growth of the statutory law rationally. The compilations still retained impliedly repealed legislation replaced by a new law. Many laws regulating business and occupations were located in the penal code. Not the first place one would think to look. Parts of many legislative acts were assigned to the civil statutes, while penalty provisions in the same acts were assigned to the penal codes. And when the legislature created a new state agency with the powers and duties of an old agency, it often failed to amend other statutes that referred to the old agency. For example, the statutes contained references to the Game, Fish, and Oyster Commissioner; the Game, Fish, and Oyster Commission; the Game and Fish Commission; and the State Parks Board even after their powers and duties had been transferred to the Parks and Wildlife Department.[66]

And none of these problems touched upon the language used in many of the statutes—described as "archaic, verbose, obscure, or unnecessarily legalistic."[67]

In 1961, confusion and difficulty of using the Black Statutes were reflected in H.S.R. 650, passed by the house. It requested that the Legislative Council study the matter and report to the 58th Legislature. The Legislative Council did so, and recommended that the legislature direct a state agency (such as the Legislative Council) to prepare a formal revision without substantive changes on a topical basis. The chair of the Legislative Council would appoint seven members to an advisory committee (including representatives of the State Bar, the judiciary, and leading law schools) to work and consult with the Council on the classification, arrangement, and numbering system of the statutes.[68]

The Legislative Council report led the 58th Legislature to pass S.B. 367,[69] which ordered the creation of a permanent, ongoing statutory revision program, including the creation of a "statutory revision advisory committee." The Legislative Council was charged with making a complete, non-substantive revision of Texas statutes.

The initial members of the advisory committee were Ruel C. Walker (an associate justice of the Supreme Court of Texas), Spurgeon E. Bell (Chief Justice of the First Court of Civil Appeals in Houston), Austin attorney R. Dean Moorhead (you will read about him again later), Dallas attorney Angus Wynne, Sr., and three law professors, Margaret Amsler (Baylor), Carlos C. Cadena (St. Mary's), and Millard H. Ruud (Texas).[70]

With the assistance of the Legislative Council staff, the committee prepared a classification plan for Texas statutes, along with a consistent numbering and format system. The original plan adopted in 1965 contemplated compiling all general and permanent statutes into twenty-six codes arranged by topic.

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[64] *Freeman* at 1022.

[65] *Id.* at 1071.

[66] *Id.* at 1072.

[67] *Id*.

[68] *Id.* at 1074-75.

[69] Now codified at Tex. Gov't Code Sec. 323.007.

[70] *Freeman* at 1075.

Later, that would be expanded to twenty-seven codes.[71] The committee recommended that code sections be numbered decimally in a manner designed to accommodate future expansion.[72] Each code would be divided into "titles," "subtitles," "chapters," "subchapters," "sections," "subsections," and "subdivisions."[73]

In November of 1965, the Legislative Council staff began work on the first two codes selected for revision to be enacted by the legislature in 1967: the Business and Commerce Code and the Water Code. The latter turned out to be a much larger task than anticipated, so it was not ready for enactment in 1967.[74] The Legislative Council anticipated the complete program to take between ten to fifteen years. (It has been a bit longer.)

Why did the Legislative Council need to revise the Probate Code when it had already been organized and codified in 1955? Here is why.

- 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. The Probate Code was not a "code" for purposes of the Code Construction Act[75] and the Legislative Council codification initiative since (1) it was enacted before the codification effort began, and (2) it did not comply with the organizational and stylistic principles of modern Texas codes.
- The preparation of a new "Code" is not a mere compilation of existing statutes. It involves a time-consuming complete redrafting of statutory language. The director of the Legislative Council's legal division appoints a senior staff attorney as chief revisor, who is then responsible for collecting the source law, proposing an arrangement, and assigning work among other Legislative Council attorneys.

To assure a completely nonsubstantive revision, the attorneys must review the source law in detail; analyze case law interpreting those statutes; identify invalid, duplicative, or ineffective provisions; and then redraft all of the statutes into a single Code that is well-organized, well-written, and in a consistent format. After extensive internal review, the drafts are circulated among other interested persons outside the Legislative Council. At the current time, the Criminal Procedure Code stands as the only proposed code that has not yet been enacted,[76] and the Special District Local Laws Code may not be completed yet.[77]

According to the chairs of the Probate Code Codification Committee (discussed below), because of the anticipated disruption to our practice that would be caused by a codification project, many years ago, the leadership of the Real Estate, Probate and Trust Law Section of the State Bar of Texas, acting through its council (REPTL), convinced the Legislative Council to delay the project as long as possible by

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[71] *See* Bill Analyses for H.B. 2502 - Engrossed Version (81st R.S.) and H.B. 2759 - Engrossed Version (82nd R.S.).

[72] *Freeman* at 1075.

[73] *Id*.

[74] *Id.* at 1076.

[75] Tex. Gov't Code Ch. 311.

[76] Miscellaneous criminal procedures statutes omitted from the 1965 Code of Criminal Procedure were codified as Title 2 of that code in 1985.

[77] *Special District Local Laws Code,* TEX. LEGISLATIVE COUNCIL, http://www.tlc.state.tx.us/code_current_sddl.htm (last visited Jan. 28, 2014).

placing the Probate Code at the end of the project list.[78] This "convincing" was likely made easier by the fact that the probate laws, unlike the rest of the Revised Statutes, had already been somewhat organized through the 1955 enactment of the Probate Code. But by 2006, the Legislative Council ran out of other codification projects and turned its attention to the Probate Code.

Legislative Council's Codification Process

The 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."[79] 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.

The two members of the Legislative Council legal staff primarily responsible for the production of the nonsubstantive revision of the Probate Code were Maria Breitschopf and Anne Peters. Ms. Breitschopf was responsible for the decedents' estates revisions passed by the 81st (2009) Legislature, while Ms. Peters was responsible for the guardianship and power of attorney revisions passed by the 82nd (2011) Legislature. Questions, comments, or suggestions relating to the project may be directed to either of them at:

Texas Legislative Council
P. O. Box 12128
Austin, Texas 78711
512-463-1155
or
maria.breitschopf@tlc.state.tx.us or
anne.peters@tlc.state.tx.us.

REPTL's Probate Code Codification Committee

When REPTL learned in the summer 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.[80] REPTL established a Probate Code Codification Committee, which was co-chaired by Professor Featherston and Barbara McComas Anderson, a Dallas attorney, both of whom are former REPTL chairs. Through a series of meetings with Legislative Council staff, the following was ultimately decided:

- REPTL and the Legislative Council would cooperate in determining how the new code would be organized.

[78] Anderson, B., and Featherston, T., *Probate Code Recodification Project Overview*, State Bar of Texas 32nd Annual Advanced Estate Planning and Probate Course (2008).

[79] *Drafting Manual* at 147. *See also* www.tlc.state.tx.us/code_overview.htm.

[80] Letter from Glenn Karisch to Maria Breitschopf (Mar. 8, 2007).

- The Legislative Council would take the lead in drafting the new code, although REPTL's committee would work on substantive changes to 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.
- The chapters of the code governing decedents' estates would be drafted first, to be submitted to the legislature for adoption in 2009.
- 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.
- 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.

The Probate Code Codification Committee consisted of the Probate Division of the REPTL Council, including then-current council members and past chairs.[81] From time to time, judges, professors, and other private practitioners were invited to participate in the meetings. Lisa Jamieson, a Fort Worth attorney (and REPTL chair for the 2013-2014 Bar year), agreed to be chair of the Jurisdiction and Venue Drafting Committee. Later, Stephanie Donaho, a Houston attorney, took over the role of chair of the Independent Administration Drafting Committee. And Jerry Frank Jones, an Austin attorney (and a REPTL past chair), headed the Legislative Council Coordination Committee.

An organizational meeting of the Probate Code Codification Committee was held April 13, 2007, at Baylor Law School in Waco.[82] Topics for discussion included whether any of the similar rules for decedents' estates and guardianship should be combined or kept separate,[83] appropriate jurisdiction and venue provisions for counties without a statutory probate court, and clarification of independent administration provisions, such as claims procedures and powers of sale.

Professor Featherston took a first crack at drafting an outline of the structure for the new code in 2007.[84] When the Legislative Council prepared its initial drafts of what it originally called the "Estates and Guardianships Code"[85] that fall, its structure was remarkably similar to the one proposed by Professor Featherston. By November, the Estates Code had been organized into the following Titles:

Title 1: General Provisions (§§ 22.001-.034)

Title 2: Estates of Decedents (§§ 31.001-551.103); Durable Powers of Attorney (§§ 751.001-I.5C)

Title 3: Guardianship and Related Provisions (§§ 1001.001-1356.056, 604-665B)

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[81] Memorandum from the co-chairs (Mar. 28, 2007).

[82] Agenda of the Probate Code Codification Organizational Meeting (Apr. 12, 2007).

[83] The rules were only separated twenty years ago, when the guardianship provisions were "extracted" from the decedents' estates provisions and moved to new Chapter XIII.

[84] REPTL Recodification Project Probate Code Structure Discussion Outline (Aug. 24, 2007), reproduced as *Probate Code Recodification Project Overview* at the State Bar's 2008 Advanced Estate Planning and Probate Course.

[85] The Legislative Council had researched other states' names for what we call the Probate Code in a document titled *How the 50 States Group & Label their Probate and Related Provisions* (June 15, 2007).

Legislative Council's First Drafts

The Legislative Council provided REPTL with preliminary drafts of Titles 1 and 2 at that time, but since it had not yet drafted the new power of attorney provisions, these initial drafts merely transferred the existing power of attorney provisions found in Chapter XII of the Probate Code to Title 2 of the Estates Code and renumbered them without revision.[86] These drafts also transferred the independent administration, jurisdiction, and venue provisions of the Probate Code to a portion of Title 2 and transferred the guardianship provisions of the Probate Code (Chapter XIII) to Title 3 of the Estates Code, all without any revision.

Here is an example of the kind of esoteric issues that the Legislative Council had to deal with.

- **Internal References to "This Code."** In drafting these provisions, the Legislative Council struggled with what most of us would consider an extremely minor matter—references in the general procedural provisions of the Probate Code to "this Code." As an example, they pointed to Probate Code § 22, which provides that the rules relating to witnesses and evidence that govern in district courts should apply to the extent practicable in proceedings arising under the provisions of "this Code." As described above, when the original Probate Code was enacted in 1955, the provisions relating to decedents' estates and guardianships were combined, so many general provisions applied to both.

- **Separate Guardianship Provisions**. But as noted above, in 1993, the legislature separated the guardianship provisions from the decedents' estates provision. New Chapter XIII, which contained the guardianship provisions, replicated many of those general procedural provisions. The applicability of those provisions was clearly limited to guardianship matters. Further, § 603 provided that the laws and rules applicable to decedents' estates would continue to apply to guardianships to the extent they were not inconsistent with the guardianship provision. However, while replicating many of these provisions to be applicable just to guardianship matters, the legislature failed to amend the original provisions to state that they applied only to decedents' estates. They still referred to proceedings under "this Code." This was not really necessary, since if any of the existing general provisions applicable to the entire Probate Code conflicted with a more specific provision applicable to guardianship matters only, the general rules of statutory construction would make the more specific provisions control the general provisions. So the older provisions purporting to apply to the entire Probate Code actually only applied to the nonguardianship portions, which at that time consisted only of the decedents' estates provisions, except to the extent those older provisions were made applicable to guardianship matters by virtue of § 603. Got that? Unfortunately, we are not done.

- **Separate Power of Attorney Provisions**. During the same 1993 legislative session in which the guardianship provisions were moved to new Chapter XIII, the legislature enacted the Durable Power of Attorney Act as new Chapter XII of the Probate Code. While the Legislative Council recognized that the general procedural provisions referencing "this Code" seemed to have little practical applicability to the power of attorney provisions, its staff was unable to conclude based on legislative history that limiting those general procedural provisions to decedents' estates would be a nonsubstantive revision of existing law.

[86] Memorandum from Maria Breitschopf to REPTL (Oct. 31, 2007).

- **Conclusion**. Therefore, the Legislative Council combined the power of attorney provisions with the decedents' estates provisions in Title 2 and changed references to "this Code" found in those general procedural provisions to "this title."

Originally, the Legislative Council anticipated introducing a bill including Titles 1 and 2 in 2009, with an effective date of April of 2011, while a bill including Title 3 plus revision of the power of attorney provisions would be prepared for introduction in 2011, with an effective date of April of 2013.

The preliminary drafts were prepared to facilitate their review. Each chapter included both the text of the proposed Estates Code provisions and the text of the current Probate Code provisions from which they were drawn. If needed, a Revisor's Note was included to provide further explanation.

Review of Proposed Chapters

In early 2008, Professor Featherston and Ms. Anderson distributed these general drafts to the Probate Code Codification Committee for preliminary review. By July 1, REPTL initiated the process of obtaining approval from the State Bar Board of Directors to "carry" both the nonsubstantive codification provisions and the substantive provisions dealing with independent administration, jurisdiction, and venue as "Bar bills."

In July, Alvin J. Golden, an Austin attorney (also a REPTL past chair), e-mailed members of the Texas Academy of Probate and Trust Lawyers, seeking volunteers to review the drafts and compare them to current law, paying particular attention to whether any of the language in the drafts might make an inadvertent substantive change to existing law.[87]

Beginning in August of 2008, Professor Featherston and Ms. Anderson parceled out chapters of the proposed code to volunteer reviewers. But while this review was going on, Hurricane Ike hit the Gulf Coast and caused significant delays in the reviews by volunteers from that area of Texas (e.g., Houston). Remember all of the flooded basements of office buildings and courthouses? That hurricane also led to the cancellation of the REPTL Fall Council meeting, at which these proposed chapters were going to be discussed.

During this review process, REPTL became concerned about the confusion that would be caused by the two-year difference in effective dates for the two parts of the Estates Code. Eventually, it was agreed that both the 2009 and 2011 enactments would have the same effective date, and that date would be after the end of the 2013 session to make that session available to correct any errors identified after the 2009 and 2011 enactments but prior to their effective date. And since it was such a major change, January 1, 2014, was selected as the effective date, rather than the more common September 1 effective date for most legislation.

2009 Nonsubstantive Legislation

The review was eventually completed prior to the beginning of the 2009 legislative session, and the proposed nonsubstantive revision of the decedents' estates portion of the Probate Code was filed in the 2009 legislative session as H.B. 2502 by Representative Will Hartnett of Dallas and S.B. 2071 by Senator Robert Duncan of Lubbock. The house version passed both chambers with an effective date of January 1, 2014.

[87] E-mail from Al Golden to members of the Texas Academy of Probate and Trust Lawyers (July 21, 2008)

But prior to passage of the bill in the house, Representative Hartnett raised concerns about the title "Estates and Guardianship Code" being a mouthful. This author provided Representative Hartnett with a number of the alternate titles that had been considered by the Legislative Council and REPTL.[88] He chose to shorten the name of the new Code to just the "Estates Code" when H.B. 2502 passed on the floor of the house.

2009 Substantive Legislation

As noted above, the Legislative Council did not attempt to make a nonsubstantive codification of the independent administration, jurisdiction, or venue provisions, leaving it up to REPTL to come up with substantive revisions for these provisions. The REPTL substantive independent administration proposals were introduced as H.B. 3085, and the jurisdiction and venue proposals were introduced as H.B. 3086. Unfortunately, neither of these bills passed both chambers of the legislature. They fell victim to a last-minute logjam of bills in the senate that had a multitude of causes, an explanation of which would substantially lengthen this paper. But due to the hard work of Representative Will Hartnett and the cooperation of Senator John Carona of Dallas, the language of the jurisdiction portions of H.B. 3086 was engrafted at the last minute onto the conference committee report for S.B. 408, a bill otherwise dealing with judicial administration, and passed on the last day of the session.

The jurisdiction and venue provisions were originally revised with the goal of making them more streamlined and easier to understand. However, because of the different courts in Texas that have original probate jurisdiction based on which county you find yourself in, there is a limit to how much streamlining can be achieved. A version of these revisions was included in the introduced version of H.B. 3086, but due to opposition from Texans for Lawsuit Reform and the Texas Civil Justice League to some of the proposed venue changes, all of the venue provisions were stripped from the bill prior to its approval in the house. And as noted, the stripped down language was eventually added to S.B. 408 before it was passed. These jurisdiction provisions were "double-billed," meaning that the substantive changes were made to the appropriate provisions of the Probate Code, effective September 1, 2009, and the same substantive changes were made to the corresponding provisions of the Estates Code, effective January 1, 2014. What follows is a description of those substantive changes that have been in effect for over four years that were prepared as a part of the Estates Code project.

- **"Probate Proceedings."** The term "probate proceedings" was used to define the matters that must be brought in a court exercising original probate jurisdiction. In addition to the jurisdiction of a court to exercise original probate jurisdiction over "probate proceedings," the provisions set out each court's power to hear matters "related to a probate proceeding." (Say good-bye to the old "appertaining to or incident to an estate.") If a matter was merely "related to a probate proceeding," then it did not have to be brought in the court exercising original probate jurisdiction unless that court was a statutory probate court. All matters "related to a probate proceeding" had to be brought in a statutory probate court unless the statutory probate court had concurrent jurisdiction with the district court on a matter related to a probate proceeding.**Statutory County Courts**. The types of courts exercising original probate jurisdiction did not change. However, the probate jurisdiction of statutory county courts was expanded to include the interpretation and administration of

[88] This author's preference expressed to Rep. Hartnett at the time was the "New Probate Code," since that is what many people are going to call it. Obviously, my powers of persuasion are not my strong suit.

testamentary trusts if the will creating the trust was admitted to probate in that court.

- **Transfer of Contested Matters**. The provisions outlining the transfer of contested matters from a court with original probate jurisdiction were modified slightly with the hope of alleviating some of the jurisdictional traps that had been associated with these transfer statutes.
    - If a contested matter was transferred from a county court to a district court, any matter related to the probate proceeding could be brought in the district court proceeding. The district court, on its own motion or the motion of any party, could determine that the new matter was not contested and transfer the new matter back to the county court that had original jurisdiction of the probate proceeding. In addition, jurisdiction for any other contested matters filed after the transfer of a contested matter to district court would be in the same district court.
    - If a contested matter was assigned to a statutory probate judge, then any other contested matters filed after the assignment must be assigned to a statutory probate judge.
    - In those counties where there was a statutory county court exercising original probate jurisdiction, a contested matter must be transferred to that court on motion of any party. In addition, the judge of the constitutional county court, on his or her own motion or on the motion of any party, could transfer the entire proceeding to the statutory county court. If only the contested portion of the proceeding was transferred to the statutory county court, it could be returned to the county court for further proceedings once resolved.
- **Statutory Probate Courts**. A new provision granted statutory probate courts concurrent jurisdiction with district courts over certain matters involving trusts and powers of attorney, and certain matters involving a personal representative in personal injury lawsuits.

2011 Nonsubstantive Legislation

After the 2009 legislative session, the Legislative Council turned its attention to the guardianship and power of attorney portions of the Probate Code. REPTL appointed Deborah Green of Austin and Linda Goehrs of Houston (both of whom had served terms as past chairs of REPTL's Guardianship Committee) as the co-chairs of its Probate Code Codification Committee dealing with this aspect of the codification process, and it underwent a similar review under their direction (no hurricane this time!). This portion of the nonsubstantive recodification was introduced as H.B. 2759 (Hartnett) and S.B. 1299 (Duncan). The house version passed, was signed by the governor, and goes into effect with the rest of the Estates Code on January 1, 2014.

2011 Substantive Legislation

The substantive independent administration changes that REPTL had tried and failed to pass in 2009 were incorporated into REPTL's main decedents' estates bill in 2011. Those bills were introduced as H.B. 2046 (Hartnett) and S.B. 1198 (Rodriguez). The 2009 independent administration revisions were 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.

Here are the highlights of those provisions:

- **Consent to Independent Administration**. Provisions were added allowing parents of minor children and trustees to consent to independent administration by agreement where no conflict exists.
- **Power of Sale**. The revisions confirmed 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 failed to expressly grant a power of sale, an independent administrator could be granted a power of sale over real property in the order of appointment if the beneficiaries who would receive the real property consented to the power (avoiding a later need to obtain their consent). Perhaps more importantly, from a practical standpoint, the revisions included 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 Probate Code § 341(1)/Estates Code § 356.251(1).
- **Secured Claims**. Over twenty-five years ago, the Texas Supreme Court ruled that secured creditor elections found in Probate Code § 306 applied to independent administrations.[89] However, the Probate Code was never amended to recognize this. Therefore, the revisions paid 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.
- **Presentment of Claims**. Creditors must present their claims or respond to notices (i) in a written instrument[90] 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.
- **Limitations**. 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.
- **Other Procedures Inapplicable**. 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

[89] *See* Geary v. Tex. Commerce Bank, 967 S.W.2d 836 (Tex. 1998).

[90] The REPTL 2013 Decedents' Estates bill, H.B. 2912 (Thompson), further modified this provision to require that the written instrument meet the requirements of an authenticated claim in a dependent administration.

the rejection of a claim.

- **Closing Administration**. 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. However, a new provision explicitly recognizes that independent representatives are not required to close an estate.

Finally, the 2011 substantive legislation included provisions consolidating venue statutes, including venue for heirship proceedings previously located in the heirship provisions, in one place. At the request of certain probate judges, the then-current provision allowing an heirship proceeding to be brought in a guardianship proceeding following the death of an intestate ward was modified to continue to allow venue in that county, but require that the heirship proceeding be brought as a separate cause. The bill also added clarification that Probate/Estates Code venue provisions are subordinate to the Travis County venue provided by Property Code § 123.005 for suits by the Attorney General's office related to breach of fiduciary duties by charitable organizations or their agents.

General Code Update Bills

While both nonsubstantive codification bills have passed and will go into effect on January 1 without further action, that does not mean the codification process is finished. Substantive amendments to the Probate Code were made in both the 2009 and 2011 sessions that were not included in the nonsubstantive portions of the Estates Code that were enacted those years. Since the Estates Code is intended to be a nonsubstantive codification of the Probate Code as it exists immediately prior to 2014 (i.e., on December 31, 2013), there is a continuing need to make additional nonsubstantive revisions to incorporate changes to the Probate Code made prior to that time that were not incorporated into the Estates Code. In addition, one reason for the delayed effective date of the Estates Code mentioned above was to provide time for "errors" to be discovered and corrected prior to that effective date. These same issues apply not just to the Estates Code, but to other codes enacted as part of the nonsubstantive codification process. The Legislative Council regularly prepares what it refers to as a "general code update bill." In 2011, that bill was S.B. 1303 (West), a very lengthy bill that made "nonsubstantive" revisions to a number of codes, including the Estate Code and the Trust Code (see Article 8 and Secs. 21.002 and 21.003 of the bill).

The stated purposes of the general code update bill were:

- codifying without substantive change or providing for other appropriate disposition of various statutes that were omitted from enacted codes;
- conforming codifications enacted by the 81st Legislature to other acts of that legislature that amended the laws codified or added new law to subject matter codified;
- making necessary corrections to enacted codifications; and
- renumbering or otherwise redesignating titles, chapters, and sections of codes that duplicate title, chapter, or section designations.

The 2011 general code update bill passed, and the portions relating to the Estates Code were effective January 1, 2014. In 2013, the general code update bill was S.B. 1093 (West). It also contained

numerous Estates Code provisions that were effective January 1, 2014.

Any revisions to the Probate Code in the 2013 session would go into effect on September 1, only to be superseded by the Estates Code four months later. REPTL did not think any of its decedents' estates or guardianship proposals were important enough to warrant that extra four months of effect. Therefore, REPTL opted to keep its 2013 proposals simpler by only proposing changes to the Estates Code that were effective January 1, 2014.

Only two 2013 bills that passed made changes to the Probate Code. Both went into effect September 1, 2013. H.B. 2380 (Davis, S.) amended the forfeiture clause enforceability provisions that were enacted in 2009 (Probate Code § 64). And H.B. 789 (King) increased the allowances in lieu of homestead and other exempt property (Probate Code § 273). But since both of these bills made the same changes to the corresponding provisions of the Estates Code (§§ 254.005 and 353.053, respectively), effective January 1, 2014,[91] there may be little, if any, need for any Estates Code provisions in the 2015 general code update bill.

But it appears that there may be a few minor matters to clean up. As noted below, a number of Probate Code provisions were transferred to the Estates Code in 2009 "as is and with all faults." By the end of the 2013 session, these had all been repealed or moved and redesignated as different parts of the revised Estates Code. But even though the actual statutes were no longer there, some of the structural provisions remained—subtitles, chapters, parts, and subparts. While "empty," here is what remains to be cleaned up by repeal in 2015:

Title 2. Estates of Decedents; Durable Powers of Attorney
Subtitle X. Texas Probate Code: Scope, Jurisdiction, and Courts
Chapter I. General Provisions
[Empty]
Title 3. Guardianship and Related Procedures
Subtitle Y. Texas Probate Code: Scope, Jurisdiction, and Venue
Part 1. General Provisions
Subpart A. Proceedings In Rem
[Empty]
Part 2. Guardianship Proceedings
Subpart C. Duties and Records of Clerk
[Empty]
Subtitle Z. Texas Probate Code: Additional Guardianship Provisions
Part 2. Guardianship Proceedings
Subpart H. Compensation, Expenses, and Court Costs
[Empty]

General Organization of the Estates Code

As noted previously, the organization of the Estates Code generally follows Professor Featherston's suggestions.

- **Title 1** includes general provisions such as the purpose and construction of the code and definitions.**Title 2** includes provisions dealing with both decedents' estates and powers of

[91] The tactic described earlier as "double-billing."

attorney, beginning with jurisdiction and venue (Subtitle A), procedural matters (Subtitle B), passage of title and distribution of property in general (Subtitle C), proceedings before administration (Subtitle D), intestacy (Subtitle E), wills (Subtitle F), initial appointment and opening of administration (Subtitle G), continuation of administration (Subtitle H), independent administration (Subtitle I), miscellaneous administration matters (Subtitle J), foreign wills (Subtitle K), escheat (Subtitle L), and durable powers of attorney (Subtitle P).[92] **Title 3** contains the guardianship provisions previously found in Chapter XIII of the Probate Code. Because those provisions were essentially "recodified" when they were moved to the new Chapter XIII in 1993, they required less revision and reorganization on the part of the Legislative Council than the decedents' estates provisions.

Intentional Ambiguities

An interesting aspect (at least to this author) of the nonsubstantive nature of the statutory revision program is that if the Legislative Council determines that an existing statute contains an ambiguity, the revised law attempts to preserve that ambiguity.

For example, Probate Code § 248, dealing with the appointment of appraisers in decedents' estates, was revised by two different bills in 2005. The two versions were essentially identical except that one authorized an "interested person" to move for the appointment of appraisers while the other referred to an "interested party." The Legislative Council determined that the legislative intent was ambiguous, so the revised law (§ 309.001) preserves the ambiguity by including virtually identical subsections (a) and (b), the former referring to an "interested party" and the latter referring to an "interested person."[93]

Probate Code § 243, dealing with an allowance for defending a will, provides in its first sentence that an administrator with the will or alleged will annexed "shall be allowed" out of the estate the administrator's necessary expenses and disbursements in proceedings defending the will. But the second sentence provides that the same representative "may be allowed" those expenses in the same type of proceedings. That ambiguity is preserved in Estates Code § 352.052(a) and (b).[94]

Probate Code § 763, dealing with successor guardians, allows the successor to settle with the predecessor and provide a receipt for the portion of the estate remaining in the hands of the **successor** guardian. It is probable that that reference to the successor is erroneous and instead should have referred to the predecessor guardian. Nevertheless, the ambiguity is preserved in Estates Code § 1203.202.[95]

And, if one is interested, Estates Code § 1052.001, dealing with guardianship dockets, preserves an ambiguity with respect to the use of the word "estate" in its source law, Probate Code § 623.[96] However, the explanation of the nature of the ambiguity is a bit too convoluted to be included here.

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[92] There are no Subtitles M, N, or O. Presumably, they have been reserved for expansion.

[93] Revisor's Report submitted by Legislative Council to the 81st Legislature (2009) following Estates Code § 309.001.

[94] *Id*. following Estates Code § 352.052.

[95] Revisor's Report submitted by Legislative Council to the 82nd Legislature (2011) following Estates Code § 1203.202.

[96] *Id*. following Estates Code § 1052.001.

But You Haven't Explained Why the Estates Code Begins With Chapter 21!

Section 21.001, "Purpose of Code" is the very first section in our new Estates Code. Why is it not § 1.001? This is a very good question that this author has been asked numerous times while delivering legislative updates that include discussions of the Estates Code. And one for which this author, until recently, had no answer. But now there appears to be an answer.[97]

As noted previously, as the Estates Code was enacted in H.B. 2502 (2009) and H.B. 2759 (2011), certain portions of the Probate Code were transferred to the Estates Code without revision as part of the continuing statutory revision program. In some cases, this was due to anticipated substantive revisions to be undertaken by REPTL. For example, in 2009:

- The general provisions, including jurisdiction and venue, found in §§ 2, 4, 5, 5A, 5B, 5C, 6, and 8 found in Chapter I of the Probate Code were transferred to Chapter I, Subtitle X, Title 2, of the Estates Code (with the same section numbers),[98] in anticipation of future substantive revision by REPTL.
- The independent administration provisions found in §§ 145 through 154A were transferred without renumbering to Part 4, Chapter VI, Subtitle Y, Title 2, of the Estates Code,[99] in anticipation of the unsuccessful 2009 substantive revision by REPTL that passed in 2011.
- The Durable Power of Attorney Act found in Chapter XII was transferred without renumbering to Subtitle Z, Title 2, of the Estates Code,[100,101] in anticipation of the anticipated 2011 substantive revision by REPTL based on the 2006 Uniform Power of Attorney Act.
- And all of the guardianship provisions found in Chapter XIII were transferred without renumbering to Chapter XIII of the Estates Code,[102,103] in anticipation of the 2011 nonsubstantive revision by the Legislative Council.

Because of the transfer of certain portions of the Probate Code to new chapters of the Estates Code, up to and including Chapter XIII, the Legislative Council chose to begin the portions of the Estates Code codified pursuant to the continuing statutory revision program with something that would follow "Chapter 13." And why, you ask, did they not start with Chapter 14? Because the Legislative Council prefers to begin with chapter numbers that have the numeral "1" in the one's column. The first unused

[97] The answers were provided by Anne Peters, the Legislative Council's aforementioned Chief Revisor for the guardianship and power of attorney portions of the Estates Code, in e-mails to this author on December 10, 2013. Whether or not they are actually THE answers is irrelevant to this author. It is my story and I am sticking to it.

[98] H.B. 2502, Section 2.

[99] H.B. 2502, Section 3.

[100] H.B. 2502, Section 4.

[101] REPTL was unsuccessful in its 2011 attempt to make substantive revisions to the power of attorney statutes, so the Durable Power of Attorney Act was codified pursuant to the continuing statutory revision program in 2011's H.B. 2759 and is now found in Chapters 751 and 752 of the Estates Code.

[102] H.B. 2502, Section 5.

[103] While it was anticipated that the guardianship provisions would be codified pursuant to the continuing statutory revision program in 2011, they were moved "as is" in 2009 to the Estates Code so that even if the anticipated codification failed to take place, all of the old Probate Code could be repealed effective January 1, 2014.

chapter number that fit this description was Chapter 21. End of story.

What About Issues "Overlapping" January 1?

The Probate Code is repealed, effective January 1, 2014. Period. Let us say you have got an estate administration pending at the end of 2013. Does that mean that on January 1, the Probate Code no longer applies? As a general rule, the answer is "yes." To the author's knowledge, all of the bills relating to the Probate Code in the last three sessions, taken together, repeal every section of the Probate Code effective January 1, 2014. And all of the bills relating to the Estates Code in the last three sessions go into effect on January 1, 2014. As noted above, even the only two bills passed in 2013 that made revisions to the Probate Code effective September 1, 2013 (H.B. 2380 relating to forfeiture clauses in wills and H.B. 789 increasing allowances in lieu of homestead and exempt property) provide that those revised sections of the Probate Code are repealed effective January 1. Both bills make identical changes to the corresponding Estates Code provisions that go into effect on January 1.

The Estates Code will apply to pending estates. There is nothing in the **nonsubstantive** Estates Code bills that makes them inapplicable to estates pending on January 1. There really was no need to deal with pending estates separately in the nonsubstantive bills—while the code name and section numbers may have changed, the rules did not—that is why they are called "nonsubstantive" revisions.

But the Probate Code will (sort of) remain relevant. Even though the Probate Code is repealed in its entirety on January 1, that does not mean that it will be completely irrelevant after 2013. For example, this year's REPTL decedents' estates bill (H.B. 2912) makes a number of substantive changes that go into effect January 1. There are **some** changes that apply to estate administrations pending or commenced on or after January 1. But you have to check. Section 62 of the bill contains special transitional rules applicable to some of the changes made by the bill:

- A change prohibiting the use of unsworn declarations in self-proving affidavits applies only to wills executed **on or after** January 1. (A will executed **before** January 1 "is governed by the law in effect on the date the will was executed, and the former law is continued in effect for that purpose.")
- Changes relating to genetic testing and gestational agreements apply only to heirships commenced **on or after** January 1. (But an heirship commenced **before** January 1 "is governed by the law in effect on the date the proceeding was commenced, and the former law is continued in effect for that purpose.")
- A change relating to competing applications for letters filed by persons equally entitled to them applies only to applications filed **on or after** January 1. (A competing application filed **before** January 1 "is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.")
- A number of changes apply only to actions filed or proceedings commenced **on or after** January 1. (But an action filed or proceeding commenced **before** January 1 "is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.")
- And a number of other changes apply only to the estates of decedents dying **on or after** January 1. (But for purposes of those specific changes, the estate of a decedent dying **before** January 1 "is governed by the law in effect on the date of the decedent's death, and the former law is continued in effect for that purpose.")

For these listed categories, the law "in effect" before January 1 and "continued in effect for that purpose" is the corresponding Probate Code provision that had been repealed, since the corresponding unamended Estates Code provision had not gone into effect yet.

Should live pleadings be "repleaded" with updated references to the Estates Code after January 1? Hopefully not,[104] but then as a practical matter, that depends on the judge you are before. Certainly, Probate Code references should be converted to the corresponding Estates Code provisions in any amended or new pleadings filed after January 1. And statutory references in any orders should definitely refer to the Estates Code.

Construction Issues

One of the purposes of the Legislative Council's general code update bills is to revise other statutes that refer to repealed sections of the Probate Code so that they now refer to the corresponding Estates Code provision. But just in case they miss anything, Estates Code § 21.003(a) provides a catch-all solution:

> (a) A reference in a law other than in this code to a statute or a part of a statute revised by, or redesignated as part of, this code is considered to be a reference to the part of this code that revises that statute or part of that statute or contains the redesignated statute or part of the statute, as applicable.

And in addition to this specific provision in the Estates Code, the Code Construction Act (Chapter 311 of the Government Code), which applies to all of the codifications made pursuant to 1963's S.B. 367, covers this same situation:

> Sec. 311.027. **STATUTORY REFERENCES.** Unless expressly provided otherwise, a reference to any portion of a statute or rule applies to all reenactments, revisions, or amendments of the statute or rule.

It is not clear whether § 311.027 applies only to references in other statutes or to any reference, whether in a statute, agreement, or other instrument (it probably does not). It would have been nice had the Estates Code included a provision similar to Trust Code § 111.002:

> Sec. 111.002. **CONSTRUCTION OF SUBTITLE.** This subtitle and the Texas Trust Act, as amended (Articles 7425b-1 through 7425b-48, Vernon's Texas Civil Statutes), shall be considered one continuous statute, and *for the purposes* of any statute or *of any instrument creating a trust that refers to the Texas Trust Act*, this subtitle shall be considered an amendment to the Texas Trust Act. [emphasis added]

But the Estates Code does not include this provision. Part of the reason may be that for the most part, the Estates Code truly is a nonsubstantive codification of the Probate Code. The Trust Code, on the other hand, while enacted as part of the nonsubstantive codification of the Property Code, was drafted as part of a ten year REPTL project that began in 1973. While much of the Texas Trust Code is a nonsubstantive codification of the Texas Trust Act, REPTL intentionally also included new provisions relating to contemporary trust practice that were left unaddressed by the Trust Act, along with provisions relating to trusts that were not a part of the Trust Act but could be logically integrated into the Trust Code.

[104] Every judge with probate jurisdiction with whom this author has consulted agrees with this conclusion.

REPTL is considering proposing the addition of language similar to that found in Trust Code § 111.002 to the Estates Code in 2015.

Legislative Council's Bills are Intended as Nonsubstantive Revisions, But…

Pursuant to its mandate to craft a purely nonsubstantive revision, Section 11 of H.B. 2502 and Section 4.01 of H.B. 2759 both provide that the respective acts are "intended as a recodification only, and no substantive change in law is intended by" either bill. However, that does not mean that the actual language of the Estates Code will be treated as a nonsubstantive revision if the actual language used by the Legislative Council inadvertently introduces a substantive change.

The 1999 Texas Supreme Court case of *Fleming Foods of Texas, Inc., v. Rylander*[105] addressed the issue of whether a taxpayer (Fleming) who paid sales tax to a vendor could seek a refund from the State without receiving an assignment of refund rights from the vendor. Texas Tax Code § 111.104(b) provided that a "tax refund claim may be filed with the comptroller by the person who directly paid the tax." There was no question that Fleming was the "person who paid the tax." However, the source law for this provision when the Tax Code was enacted in 1981 pursuant to the continuing statutory revision program (former Article 1.11A) provided that a refund claim could be filed by any person who paid the tax "directly to the state." The bill enacting the Tax Code contained the same provision stating that no substantive change was intended, and based upon that intent (and notwithstanding the clear language of Tax Code § 111.104(b)), the court of appeals held that Fleming lacked standing to seek a refund because it did not pay taxes "directly to the state."[106]

But the supreme court overturned the court of appeals decision, rejecting the notion that prior law and legislative history can be used to alter or disregard the express terms of a code provision when its meaning is clear and unambiguous when considered in its entirety.[107] Therefore, all we can conclude is that while no substantive change was intended by Legislative Council in drafting the nonsubstantive bills, should someone discover a substantive change in the clear, unambiguous language of a new Estates Code provision, that change will likely carry the day.

Inadvertently Revised Applicability Dates

Certain substantive changes made to the Probate Code over the past few sessions may have had a different "applicability date" from their corresponding Estates Code provisions. These differences were inadvertent, but under the line of cases noted above, are probably real. Here is an example.

S.B. 1198 was REPTL's 2011 Decedents' Estates bill. Section 1.17 of that bill amended Probate Code § 84 to treat a will as self-proved if it was executed in accordance with the laws of the testator's domicile at the time of execution, or in accordance with the self-proving affidavit requirements of the Uniform Probate Code. Section 1.43(c) of the bill limited the application of the change to § 84 to the estates of decedents dying on or after September 1, 2011. And Section 2.54(b)(1) of the bill repealed § 84 effective January 1, 2014.

In an example of "double-billing," Section 2.32 of the bill made the same changes to the corresponding provisions of the Estates Code—§ 256.152. Those changes were made effective

[105] Fleming Foods of Texas, Inc., v. Rylander, 6 S.W.3d 278 (Tex. 1999).

[106] *Id.* at 281.

[107] *Id.* at 284.

January 1, 2014, by Section 2.55 of the bill. But S.B. 1198 contains **no** language limiting the application of the change to Estates Code § 256.152 to decedents dying on or after September 1, 2011.

So since the September 1, 2011 applicability limitation only applied to a statute that is no longer the law (Probate Code § 84), the current law (Estates Code § 256.152) should allow the foreign will of a 2010 decedent to be treated as self-proved, as long as it meets the requirements of that statute as revised in 2011.

Other (Free!) Resources

The Legislative Council has prepared and posted online two Revisor's Reports—the first an 822-page report indicating the derivation of each section of the nonsubstantive Estates Code passed in 2009, and the second a 715-page report indicating the derivation of each section of the nonsubstantive Estates Code passed in 2011. You can find a link to both Revisor's Reports on the Legislative Council web site.

Professor Gerry W. Beyer of the Texas Tech University School of Law has prepared and posted online a very helpful compilation of the entire Estates Code through the 2013 session. Professor Beyer has also posted derivation and disposition tables to help you find where a Probate Code section went (or where an Estates Code section came from).

The versions of the Texas Constitution and statutes available online from the state now include the Estates Code.

Postscript on Estates Code § 352.003.

Was it inadvertently repealed? **No!** But you may have a publication indicating that it **was** repealed. If so, that publication is incorrect, and you should make a note of that fact. You can stop reading here if you do not care to know why. If you do care, then sit back. This will take a while.

Estates Code § 352.003 was enacted in 2009 as part of the Legislative Council nonsubstantive Estates Code bill enacting decedents' estates provisions (effective January 1, 2014), and incorporates the portion of Probate Code § 241(a) that allows a court to award additional compensation to a personal representative if the representative manages a farm, ranch, factory, or other business, or if the compensation produced by the five-plus-five formula is unreasonably low.

The possibility that it was repealed came to this author's attention when a private practitioner emailed him on January 9 asking why the additional compensation portion of Probate Code § 241(a) had not been carried forward into the Estates Code. It had not? That was odd. Here is what the investigation, conducted by several people, turned up.

In 2011, REPTL proposed changing a representative's standard compensation from the five-plus-five formula to "reasonable compensation." In the bill REPTL introduced (S.B. 1198), these changes were to §§ 352.001 and 352.002, found in Section 2.36 on page 81 of a 124-page bill. In addition, § 352.003 was repealed because it would no longer be needed if the standard compensation was "reasonable." This repeal was included at the end of the bill, where repealers always are found. In the introduced version, the repealer was located in Section 2.51(a) on page 123 of the 124-page bill.

But that is not the final version that passed. Opposition to the compensation change arose, so REPTL agreed to drop the proposed changes to §§ 352.001 and 352.002. Therefore, we would still need § 352.003 and would not want to repeal it. In Section 2.54(a) of the **enrolled** version (i.e., the one that

passed), which was the successor to Section 2.51(a), two sections of the Estates Code, neither of which are § 352.003, are repealed. (This is on page 138 of a 140-page bill.)

Here is where the problem arises: Section 2.54(a) of S.B. 1198, as reflected in Chapter 1338 of the 2011 session laws (but which is not the bill itself), **INCORRECTLY** states that § 352.003 is one of the two sections that are repealed. This would have been correct had the **introduced** version passed, but it was not in the **enrolled** version that actually passed.

Thomson Reuters (i.e., West) publishes the session laws. This accounts for them carrying forward this mistake on page 1400 of the 2013 edition of Johanson's Texas Probate Code. This author has been told that West's other printed versions of the Estates Code leave it "blank," rather than repealed, because it was repealed in 2011 before its effective date of 2014.

The 2013-2014 edition of O'Connor's Estates Code plus (Jones-McClure) **DOES NOT** contain this mistake. This author has also been told that Lexis has it correct.

West was promptly notified of the error, and by Monday, January 13, had corrected § 352.003 on Westlaw. They are planning to send corrections to those who purchased hard copies of the Estates Code.

If you do not have the text of the unrepealed § 352.003 handy, here is the original (and current) version:

§ 352.003. Alternate Compensation

(a) The court may allow an executor, administrator, or temporary administrator reasonable compensation for the executor's or administrator's services, including unusual efforts to collect funds or life insurance, if:

(1) the executor or administrator manages a farm, ranch, factory, or other business of the estate; or

(2) the compensation calculated under Section 352.002 is unreasonably low.

(b) The county court has jurisdiction to receive, consider, and act on applications from independent executors for purposes of this section.

ESTATE PLANNING DECISIONS

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Flowchart, Questionnaire, and Acknowledgment of Decisions

Prior to TARA 2012, the lines were much clearer as to which estate planning structure to use. While there has always been collateral damage, so to speak, depending on which route the clients chose (e.g., no step-up in basis for a bypass trust), the pros would typically outweigh the cons such that the decisions were easier. Now with a higher exemption, lower estate tax rates, and portability, choices have multiplied, the lines have blurred, and the decisions are not as clear cut as in the past. In a post-ATRA 2012 world, it will be critical for the professional to ascertain and prioritize the clients' major concerns and objectives in order to navigate the choices.

The Questionnaire and the Flow Chart are to be used in conjunction to help the client make an educated decision as to which technique best fits his or her situation. The Acknowledgment is to document that the client considered the major pros and cons so that if the spouse or beneficiaries years later have concerns about the plan that was ultimately implemented, there is documentation that the client made an informed decision based on the facts and knowledge the client had at the time.

Flow Chart to Assist ❶ Attorney as to type of Document As It Relates to Surviving Spouse ❷

(Post American Taxpayer Relief Act 2012)

Is the couple worth less than 5 million with little appreciation potential?

YES

Does either client have non-tax reasons for creating a testamentary trust for spouse-
1. Concerns about surviving spouse's remarriage or changing disposition
2. Asset protection
3. Children by a prior marriage of either spouse

NO

Simple Will/ RMT with possibility of electing portability at first spouse's death depending on facts at that time.

YES

Create Will/RMT with "QTIPable" Testamentary Trust so if executor decides it wants to elect QTIP status to obtain a step-up in basis, it can do so or keep it as a normal bypass. May elect portability.

NO

No (means greater than 5 million now or in the future due to appreciation)

Is the couple worth between 5-10 million with little appreciation potential?

NO

No (means greater than 10 million now or in the future due to appreciation)

Traditional bypass most likely because accumulation and appreciation more likely to be significant with spouse in higher income tax bracket so no pressure to distribute to spouse or could spray to descendants.
Alternative - QTIPable Trust with Clayton feature via a partial QTIP Election. ❺

YES

Is simplicity more important than non-tax reasons for a trust or maximizing GST exemptions for dynasty trusts?

No - non-tax reasons or GST outweighs simplicity

Is the client more concerned about the possibility of step-up or excluding assets from spouse's estate due to significant potential appreciation?

Exclusion

Traditional Bypass ❹
Could "Spray" income among Spouse & descendants

Option- Give independent party power to grant surviving spouse power to appoint to the spouse's creditors (GP of A). It could be exercisable only with consent of a non adverse party if settlor wanted more protection OR intentionally trigger Delaware Tax Trap. This would result in assets being included in surviving spouse's estate and step- up.

Step-up

QTIPable Bypass ❹

Option - could consider adding a Clayton provision via a partial QTIP Election. ❺

YES

OUTRIGHT
Simple Will/RMT and Elect Portability at First Death ❸

OR

Disclaimer Will ❻

For a client that wants a "wait & see" plan. The spouse can either take assets outright or channel all or part into a bypass trust via a disclaimer. Client could consider a disclaimer if an asset could explode in value (e.g., mineral interest)-they could exclude such asset out of surviving spouse's estate OR if the surviving spouse decided to maximize GST planning OR if the surviving spouse thought they may remarry someone that they could survive & if that 2nd spouse uses all of their exemption, DSUE could be lost by relying on portability.
Remember not to give surviving spouse a limited power of appointment in bypass trust in Disclaimer Will context.

❶ Assist is the key - this flow chart is not absolute and an estate plan must be prepared and customized to the clients' individual facts and desires which could deviate from this chart. Also, state estate tax issues could impact the decision.

❷ Note - This flow chart focuses on the document structure as it relates to the spouse. Note even with a simple Will, client may decide to implement GST "downstream".

❸ Unless there are significant business entity interests that could be discounted at 1st death with little audit risk. In such a case, client may want to move asset out of surviving spouse's estate via disclaimer option or merely design bypass from the outset. Otherwise, surviving spouse could end up with a majority of business with no (or modest) discounts.

❹ If QTIP is elected, most likely portability will be as well. Be aware that abuse could occur if surviving spouse elects QTIP and portability, and he or she does not waive right of reimbursement from QTIP. No such potential abuse exists with a traditional bypass trust. Portability may make sense even with traditional bypass depending on how much exemption is left over after funding bypass trust.

❺ Warning: Best for surviving spouse not be the Executor making the QTIP election if there is a Clayton provision; otherwise, there could be gift implications.

❻ There are other variations of the disclaimer approach that are beyond the scope of this flow chart.

Estate Planning Questionnaire for

_____

(each spouse should fill out a separate questionnaire)

Dated _____

In order for us to better assist you, we need to know what your major concerns are vs. minor concerns. The answers may not give us a definitive direction to your plan, but could give us a good start to work from. Please take a moment to answer these few questions. Your attorney will help you address any unanswered questions in your conference:

	NO or Not Concerned									YES or Very Concerned
1. Do you think the value of your estate will significantly increase in the future (including future inheritances)?	1	2	3	4	5	6	7	8	9	10
2. Are you concerned about your spouse remarrying and changing the estate plan?	1	2	3	4	5	6	7	8	9	10
3. Factoring in family dynamics, are you concerned with beneficiaries at the second spouse's death pestering or harassing (or even suing) the surviving spouse about their future inheritance?	1	2	3	4	5	6	7	8	9	10
4. Are you concerned about your assets ultimately going down to grandchildren once your children die?	1	2	3	4	5	6	7	8	9	10
5. How concerned are you about your assets obtaining a "step-up" in basis at the surviving spouse's death?	1	2	3	4	5	6	7	8	9	10
6. Factoring in the assets your spouse will own and have access to at your passing, are you more concerned about your spouse having access to your assets even if that results in the reduction in assets available to the remainder beneficiaries or is preservation of the core assets for children and/or other relatives a bigger concern?	_____Spouse					_____Children				
						_____Balance				

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7. Is it more important to you to keep things simple for the surviving spouse or is it more important to protect the assets from the surviving spouse's potential liability or remarriage?	____Simplicity for spouse	_____Asset Protection
8. If you were to use a trust, are you more concerned about your assets <u>not</u> being included in your spouse's estate (i.e., concern that the joint estate will exceed $5,340,000 indexed for inflation or Congress may lower the estate tax exemption) or are you more concerned that the assets are included in surviving spouse's estate in order to receive a step-up in basis for capital gain tax purposes?	_____Estate tax exclusion	_____ "Step-up"* In basis

QUESTIONS 9-11 SHOULD BE ANSWERED IN CONFERENCE AFTER ATTORNEY EXPLANATION

9. If Portability is elected by your Executor, do you want your estate to pay for the preparation of the Form 706 to make such election or would you prefer your spouse to pay the cost out of his or her own funds?	_____Estate will pay	_____ Spouse will pay
10. Do you want to give full discretion to your Executor whether or not to make a QTIP election and/or a portability election?	_____Yes	_____No
11. Do you wish to exculpate your Executor from liability in connection with such discretion?	_____Yes	_____No

* If you choose "step-up" and have concerns about your joint estate exceeding your estate exemption, portability should be elected to increase exemptions.

Signed:_____ Dated: _____

This questionnaire is to be used stand alone for estates less than roughly 5 million or in conjunction with Acknowledgment of Estate Planning Decisions for estates greater than 5 million.

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Acknowledgment of Questionnaire Planning Decisions
(For couples with a net worth exceeding 5 million)

While in January of 2013 Congress passed American Taxpayer Relief Act 2012 (an extremely favorable estate tax law), the amount of options and their pros and cons can be a bit overwhelming. Without the proverbial "crystal ball," it will be impossible for you or us to design the perfect plan. Hindsight as they say is always 20/20. Nevertheless, by diligent "engineering" on the front end, your plan will have a much greater chance of success. Our responsibility is not to dictate what you should do, but instead make logical recommendations based on your facts and desires so that you can make an educated decision. We have prepared an Estate Planning Questionnaire for you to answer (or one of our attorneys will discuss and record your answers in your conference) so we are aware of your major concerns.

For couples with a net worth exceeding approximately 5 million dollars (or those who feel future growth will approximate that) who desire to utilize both spouses' estate tax exemption amounts (in 2014 $5,340,000 per taxpayer increased for inflation for future years) to minimize estate taxes, there are two primary vehicles to accomplish this and a "hybrid":

1. Elect Spousal Portability on the IRS Form 706 Estate Tax Return of the first spouse to die (allows the surviving spouse to carryover first spouse's unused exemption).

2. Create a testamentary trust at the first spouse's death (allows first spouse to die to "park" their assets in trust for the benefit of the surviving spouse with such assets plus appreciation passing estate tax free to remainder beneficiaries at the surviving spouse's subsequent death; the testamentary trust can be designed to permit a "QTIP" election, which provides additional flexibility following the first spouse's death).

3. Disclaimer Will (hybrid) , whereby the surviving spouse can EITHER a) take the assets outright or b) disclaim them into a bypass trust for the surviving spouse's benefit.

Unfortunately, each vehicle has distinct advantages and disadvantages; therefore, your facts and desires will most likely dictate your selection.

Are you most concerned about:	Advantage Portability	Advantage Testamentary Trust	Advantage Trust with QTIP Election
1. Simplicity - as to flow of assets.	✓		
2. Expect significant appreciation in the Estate.		✓	
3. Cost of Electing Portability at the death of the first spouse to die.		✓*	
4. Less maintenance going forward after estate is settled.	✓		
5. Obtaining a second step-up in basis for income tax purposes.	✓		✓

* Note in some cases, even if a testamentary trust is used, it may be advisable to elect portability in which case the cost of the election would be incurred in any event.

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	Advantage Portability	Advantage Testamentary Trust	Advantage Trust with QTIP Election
6. The ability to protect the assets for multiple generations (GST considerations).		✓	✓
7.Concern that the surviving spouse could remarry and change the testamentary plan at the second death.		✓	✓
8. Concern that children or stepchildren will badger, harass (or even sue) the surviving spouse about their remainder interest if a trust is created.	✓		
9. If the surviving spouse remarries and survives their new spouse and their new spouse utilizes his or her exemption, the surviving spouse could lose the DSUE of the first deceased spouse.		✓	

Many clients will have concerns about many or all 9 items, but neither technique satisfies all the concerns. After a thorough explanation of the advantages and disadvantages, we have chosen:

Date Signature

____ _____ Simple testamentary plan (i.e., everything to each other) via Will or revocable management trust "RMT" and will elect portability. We understand that the preparation of the Estate Tax Return by my CPA or tax lawyer is a one time cost that could take 40-80 hours to prepare.

____ _____

____ _____ Create a testamentary trust at first spouse's death (electing portability could still be an option depending on how much goes into the bypass trust or if a QTIP election is made).*

____ _____

____ _____ Hybrid-Disclaimer Will/RMT-Simple on front end (i.e., all to each other) with the ability for surviving spouse to disclaim if he or she feels the testamentary trust is a better fit at that time. This option would only make sense if remarriage is not a concern. A disadvantage of this approach is that if the spouse disclaims, the spouse could not have a testamentary "limited power of appointment" to redirect how the assets would pass among specified beneficiaries at the spouse's subsequent death.

*In some estates that have non-tax reasons for creating a testamentary trust, such trust could be "QTIPable" at first spouse's death so that the surviving spouse could decide the format of the trust - 1) either elect QTIP Trust status which would include assets in surviving spouse's estate and receive a step-up or 2) not elect QTIP status (i.e., nonqualified trust often referred to as a bypass trust) and would not be included in surviving spouse's estate, but would not receive a step-up. In order to elect QTIP status, an IRS Form 706 will need to be prepared and filed and portability most likely would be elected.

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CFPB REVISES HELOC BROCHURE, CHARM BOOKLET, AND SETTLEMENT COST BOOKLET/SPECIAL INFORMATION BOOKLET

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In the January 10, 2014 *Federal Register* (79 FR 1836), the Bureau of Consumer Financial Protection (CFPB) published a Notice of Availability of the following revised consumer publications related to mortgage loans and home equity lines of credit transactions that are required under the Real Estate Settlement Procedures Act (RESPA), Regulation X, the Truth in Lending Act (TILA), and Regulation Z:

(1) What You Should Know About Home Equity Lines of Credit (HELOC Brochure);

(2) Consumer Handbook on Adjustable-Rate Mortgages (CHARM Booklet); and

(3) Shopping for Your Home Loan: Settlement Cost Booklet (Settlement Cost Booklet).

The following is a redaction of the CFPB's notice published in the *Federal Register*:

These revised consumer publications are available for download on the CFPB's web site and can also be found in the Catalog of U.S. Government Publications.

Those who provide these publications may, at their option, immediately begin using the revised HELOC Brochure, CHARM Booklet, or Settlement Cost Booklet, or suitable substitutes to comply with the requirements in Regulations X and Z. The CFPB understands, however, that some may wish to use their existing stock of publications. Therefore, those who provide these publications may use earlier versions of these publications until existing supplies are exhausted. When reprinting these publications, the most recent version should be used.

HELOC Brochure

The revised HELOC Brochure adds a reference to the requirement that lenders must provide borrowers with a list of housing counselors in their area, CFPB contact information, and updates to other federal agency contact information. It also adds CFPB resources for consumers including information about how consumers can submit a complaint to the CFPB, a link to the CFPB's online "Ask CFPB" tool to find answers to questions about mortgages and other financial topics, and a link to an online tool to find local HUD-approved housing counseling agencies.

CHARM Booklet

The key revisions to the CHARM booklet include: (1) removing references to certain fees and product types that are no longer permitted, such as prepayment penalties on adjustable-rate mortgages; (2) adding information about the lender's obligation to consider the borrower's ability to repay the loan, provide disclosure of interest rate adjustments, and ensure a borrower has received homeownership counseling before making a negative amortization loan; and (3) adding CFPB contact information and resources for consumers and updates to other federal agency contact information.

The CFPB resources added include: information about how consumers can submit a complaint to the CFPB, a link to the CFPB's online "Ask CFPB" tool to find answers to questions about mortgages and other financial topics, and a link to an online tool to find local HUD-approved housing counseling agencies.

Settlement Cost Booklet/Special Information Booklet

The CFPB has revised the Settlement Cost Booklet to add information about new servicing protections for consumers, including servicer obligations to (1) respond promptly to consumer requests for information and notices of errors, (2) provide mortgage payoff statements and monthly billing information, and (3) contact delinquent consumers regarding options to avoid foreclosure. As with the HELOC Brochure and CHARM Booklet, the revised Settlement Cost Booklet also adds CFPB contact information and resources for consumers, and updates other federal agency contact information. The CFPB resources added include: information about how consumers can submit a complaint to the CFPB; a link to the CFPB's online "Ask CFPB" tool to find answers to questions about mortgages and other financial topics; and a link to an online tool to find local HUD-approved housing counseling agencies. These changes make unnecessary the relevance of the permissible changes stated in § 1024.6(d)(1)(ii) and the last sentence of § 1024.6(d)(2) of Regulation X for those using the revised Settlement Cost Booklet.

CFPB Requires Lenders to Provide a List of Homeownership Counseling Organizations to Loan Applicants

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In the January 31, 2013 issue of the *Federal Register* (78 FR 6856), the Bureau of Consumer Financial Protection (CFPB) published a final rule that adds § 1024.20 to Regulation X to require lenders to provide a loan applicant for a federally related mortgage loan (with certain exceptions) with a written list of homeownership counseling organizations not later than three business days after the lender or mortgage broker receives an application or information sufficient to complete an application. The final rule is effective on January 10, 2014, and applies to transactions for which an application is received on or after that date. The text of the final rule is located on pages 6961-6962 of the above Federal Register and also is reprinted in the attached Exhibit A.

The final rule requires lenders to obtain the homeownership counseling organizations list from either of the following sources:

(i) a CFPB-maintained web site; or

(ii) data made available by the CFPB or HUD.

For lenders who wish to use the first alternative to obtain the list, the CFPB has established a web site that will automatically generate the required list when the loan applicant's zip code is entered.

For lenders who wish to use the second alternative to independently create lists from the data made available by the CFPB or HUD, that data must be used in accordance with instructions provided with the data. On November 8, 2013, the CFPB issued an interpretative rule that provides the data instructions, clarifies how lenders may generate their own lists, and gives a web site where HUD's data may be obtained. The interpretative rule is published in the November 14, 2013 issue of the Federal Register (78 FR 68343). On November 8, 2013, the CFPB also issued Bulletin 2013-13 to provide guidance to lenders regarding these homeownership counseling list requirements.

The final rule provides that the list must be obtained within thirty days of the time it is provided to the loan applicant and contain only those homeownership counseling organizations that provide relevant counseling services in the location of the loan applicant. The final rule permits the list to be combined and provided with other mortgage loan disclosures required by Regulation X or Regulation Z, unless prohibited by either Regulation.

The final rule allows a mortgage broker to provide the list to the loan applicant. If the mortgage broker provides the list, the lender is not required to provide an additional list but remains responsible for ensuring that the list is provided and satisfies the final rule requirements.

The list must be provided to the loan applicant in person, by mail, or by other delivery means. It also may be provided in electronic form, but only if the loan applicant consents and this method of delivery complies with the applicable provisions of the E-Sign Act (15 U.S.C. §§ 7001-7006).

The lender is not required to provide the list if, before the end of the three business day period, the loan applicant withdraws the application or the lender denies the loan. If there is more than one loan applicant, the list may be provided to any loan applicant who would be a primary obligor on the loan.

For HELOCs subject to Regulation X and Regulation Z, the final rule provides that the list may be provided in accordance with the timing and delivery requirements of either the final rule or § 1026.40(b) of Regulation Z.

The final rule exempts reverse mortgages and timeshare plans from its requirements.

Exhibit A

Regulation X § 1024.20. List of homeownership counseling organizations.

(a) Provision of list.

(1) Except as otherwise provided in this section, not later than three business days after a lender, mortgage broker, or dealer receives an application, or information sufficient to complete an application, the lender must provide the loan applicant with a clear and conspicuous written list of homeownership counseling organizations that provide relevant counseling services in the loan applicant's location. The list of homeownership counseling organizations distributed to each loan applicant under this section shall be obtained no earlier than 30 days prior to the time when the list is provided to the loan applicant from either:

(i) The website maintained by the Bureau for lenders to use in complying with the requirements of this section; or

(ii) Data made available by the Bureau or HUD for lenders to use in complying with the requirements of this section, provided that the data is used in accordance with instructions provided with the data.

(2) The list of homeownership counseling organizations provided under this section may be combined and provided with other mortgage loan disclosures required pursuant to Regulation Z, 12 CFR part 1026, or this part unless prohibited by Regulation Z or this part.

(3) A mortgage broker or dealer may provide the list of homeownership counseling organizations required under this section to any loan applicant from whom it receives or for whom it prepares an application. If the mortgage broker or dealer has provided the required list of homeownership counseling organizations, the lender is not required to provide an additional list. The lender is responsible for ensuring that the list of homeownership counseling organizations is provided to a loan applicant in accordance with this section.

(4) If the lender, mortgage broker, or dealer does not provide the list of homeownership counseling organizations required under this section to the loan applicant in person, the lender must mail or deliver the list to the loan applicant by other means. The list may be provided in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. 7001 et seq.

(5) The lender is not required to provide the list of homeownership counseling organizations required under this section if, before the end of the three-business-day period provided in paragraph (a)(1) of this section, the lender denies the application or the loan

applicant withdraws the application.

(6) If a mortgage loan transaction involves more than one lender, only one list of homeownership counseling organizations required under this section shall be given to the loan applicant and the lenders shall agree among themselves which lender will comply with the requirements that this section imposes on any or all of them. If there is more than one loan applicant, the required list of homeownership counseling organizations may be provided to any loan applicant with primary liability on the mortgage loan obligation.

(b) Open-end lines of credit (home-equity plans) under Regulation Z. For a federally related mortgage loan that is a home-equity line of credit subject to Regulation Z, 12 CFR 1026.40, a lender or mortgage broker that provides the loan applicant with the list of homeownership organizations required under this section may comply with the timing and delivery requirements set out in either paragraph (a) of this section or 12 CFR 1026.40(b).

(c) Exemptions.

(1) Reverse mortgage transactions. A lender is not required to provide an applicant for a reverse mortgage transaction subject to 12 CFR 1026.33(a) the list of homeownership counseling organizations required under this section.

(2) Timeshare plans. A lender is not required to provide an applicant for a mortgage loan secured by a timeshare, as described under 11 U.S.C. 101(53D), the list of homeownership counseling organizations required under this section.

EFFECT OF DIVORCE ON A CLIENT'S ESTATE PLAN

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Approximately one-half of all marriages in the United States end in divorce. Accordingly, divorce is one of the realities of a client's life that you must keep in mind during all stages of estate planning. Whenever a married client seeks estate planning advice, you should inquire as to the condition of the marriage. If divorce is looming on the horizon, you must take action to protect as much of the client's property as is legally possible from attacks by the soon-to-be ex-spouse. For example, beneficiary designations in wills, trusts, insurance policies, retirement plans, bank accounts, and like arrangements need to be changed immediately. Likewise, the client must revise fiduciary designations in wills, trusts, durable powers of attorney, and guardian self-declarations. Even if divorce does not appear imminent, you need to keep a watchful eye on the marriage just in case circumstances change.

Unfortunately, from the perspective of an estate planner, a person with marital problems is typically more concerned with child custody and the property settlement than with the disposition of property upon death and the naming of fiduciaries. Even after divorce, many people do not seek prompt assistance to revise their estate plans to reflect the tremendous change in circumstances. Thus, you will be frequently faced with administering the estate of a divorced person that was prepared while that person was married and which was based on the assumption that the marriage would still be intact.

I. Intestate Distribution

Immediately upon the entering of a final decree of divorce, a person is no longer considered as having a spouse. *Hamilton v. Calvert*, 235 S.W.2d 453, 455 (Tex. Civ. App.—Austin 1950, writ ref'd). Thus, all of that person's property is individual (non-marital) property and passes by intestacy to heirs, none of whom is the ex-spouse. Estates Code § 201.001.

II. Wills

A. Ex-Spouse as Beneficiary

1. Will Executed Before Divorce

"If, after the testator makes a will, the testator's marriage is dissolved by divorce . . . all provisions in the will . . . shall be read as if the former spouse . . . failed to survive the testator, unless the will expressly provides otherwise." Estates Code § 123.001(b). Thus, if the testator failed to change the will to remove the ex-spouse as a beneficiary, the statute provides a significant degree of protection because the ex-spouse is no longer able to take unless the will specifically provides that a divorce does not prevent the ex-spouse from being a beneficiary. Instead, the testator's property will pass under the will as if the ex-spouse had predeceased.

If a divorce action has merely been filed and is currently pending, however, the will remains effective as written, permitting the spouse to receive the property although it is unlikely that the testator still intended the spouse to take.

2. Will Executed After Divorce

If the testator executed the will *after* the divorce, leaving property to the person who is now the testator's ex-spouse, the ex-spouse would still be able to take. Although it is unlikely that a person would intentionally leave property to an ex-spouse, it may be done inadvertently. For example, assume that the testator executed his will in 2000 and was divorced in 2010. Then in 2013, the testator made a valid codicil to the 2000 will which merely added his alma mater as the beneficiary of a small charitable gift. "It is well settled . . . that a properly executed and valid codicil which contains a sufficient reference to a prior will, operates as a republication of the will in so far as it is not altered or revoked by the codicil; the will and codicil are then to be regarded as one instrument speaking from the date of the codicil." *Hinson v. Hinson*, 280 S.W.2d 731, 735 (Tex. 1955). Because the testator was already divorced when the codicil was executed, the statutory revocation would not apply, and the ex-spouse may be able to take unless, perhaps, the court could be convinced that the testator lacked the intent to republish.

B. Ex-Spouse as Fiduciary

The same rules apply to provisions of the will that appoint the ex-spouse as independent executor, dependent executor, trustee of a testamentary trust, or as any fiduciary under the will. Estates Code § 123.001(b). The alternatives or successors named in the will would then be eligible to serve, assuming they are otherwise qualified. If none were named or if those named refused or were unable to serve, the court may appoint a personal representative and a trustee. *See* Estates Code § 404.005 (independent administrations), Estates Code § 361.102 (dependent administrations), and Prop. Code § 112.009(c) (trusts).

C. Ex-Spouse as Guardian of Minor Children

1. If Ex-spouse is the Parent of Testator's Children

Upon the death of one parent, "the surviving parent is the natural guardian of the person of the minor children and is entitled to be appointed guardian of the minor children's estates." Estates Code § 1104.051(c). Thus, if the ex-spouse is also the parent of the testator's children, the ex-spouse is entitled to be appointed guardian unless the ex-spouse is otherwise disqualified. Estates Code §§ 1104.351-1104.358.

2. If Ex-spouse is Not Parent of Testator's Children

Under normal circumstances, "the surviving parent of a minor may by will or written declaration appoint any eligible person to be guardian of the person of the parent's minor children after the parent dies or in the event of the parent's incapacity." Estates Code § 1104.053(a). Unless the court finds that the person the testator designated in the will or declaration to serve as the guardian is disqualified, is dead, refuses to serve, or would not serve the best interests of the minor children, the court will appoint the person as guardian in preference to those otherwise entitled to serve. Estates Code § 1104.053(b). If the testator is the surviving parent and has named the ex-spouse (step-parent) as the guardian of the children, however, all such provisions with respect to the estate or person of the testator's children are ineffective. Estates Code § 123.001(b). The alternative guardians would then, if otherwise qualified, be eligible for appointment as guardian. If none were named or if those named refused or were unable to serve, the court would appoint appropriate guardians as if the last surviving parent had made no appointment. Estates Code § 1104.052.

D. Gifts to Other Ex-relatives

Assume that Harry's will contains the following provision: "I leave $100,000 to Wanda, my wife. I leave another $100,000 to her son, my step-son, Sammy. I leave the remainder of my estate to the American Red Cross." Harry and Wanda are then divorced and Harry dies without changing his will. Not only is the gift to Wanda ineffective but so too is the gift to Sammy because "each relative of the former spouse who is not a relative of the testator" is also treated as if he or she failed to survive the testator. Estates Code § 123.001(b).

E. Pour-Over Provision

Assume that the testator's will leaves the entire estate to a valid irrevocable trust the testator created prior to executing the will. The testator's spouse is named as a beneficiary of the trust. After executing the will, the testator divorced and then died without changing the will. There appears to be no clear Texas authority to determine whether the testator's ex-spouse is able to benefit from this pour-over situation. Although the ex-spouse is ultimately benefited, it is unclear whether the pour-over provision would trigger the application of Estates Code § 123.001 which would void the gift.

F. Exception to General Rules

The rules discussed above would not apply if, after the divorce, the ex-spouses validly remarried each other and the death occurred while the new marriage was still in effect. The will would then operate as if the divorce had not taken place. Thus, the former ex-spouse who returned to spousal status by virtue of the remarriage would be able to take and serve as a fiduciary. Estates Code § 123.002. It is unclear, however, whether the other ex-relatives who were named as beneficiaries are returned to their prior status by the remarriage.

III. Inter Vivos Trusts

A. Ex-spouse and Other Ex-relatives as Beneficiary or Trustee

If the settlor of a written revocable trust divorces a beneficiary of that trust to whom the settlor was married before or at the time of trust creation, the following provisions of the trust in favor of the ex-spouse and the ex-spouse's relatives who are not also relatives of the settlor are automatically revoked under Estates Code § 123.052(a):

Beneficiary of a revocable disposition or appointment,

Donee of a general or special power of appointment, and

Designation as a fiduciary (e.g., trustee, personal representative, agent, or guardian).

Any property interest which is automatically revoked passes as if the ex-spouse executed a valid disclaimer of that interest under Texas law. Estates Code § 123.053(a). If a fiduciary designation is automatically revoked, the trust instrument is read as if the ex-spouse died immediately before the dissolution of the marriage. Estates Code § 123.053(b).

Note that the ex-spouse remains as the beneficiary of an irrevocable trust and of a revocable oral trust.

B. Exceptions

The automatic revocation of provisions in favor of the ex-spouse discussed above does *not* occur if one or more of the following instruments provides otherwise under Estates Code § 123.052(b):

A trust executed after the divorce,

A court order,

Express language in the trust, or

Express language of a contract relating to the division of the marital estate entered into before, during, or after the marriage.

C. Bona Fide Purchaser Protection

A bona fide purchaser from the ex-spouse or other ex-relative of trust property or a person who receives a payment from the ex-spouse which is traceable to the trust does not have to return the property or payment and is not liable for that property or payment. Estates Code § 123.054.

IV. Property Held With Survivorship Rights

A. Community Property

The effect of divorce on an existing community property survivorship agreement is not discussed in the Estates Code. Estates Code Chapter 112. "While it is arguable that [a divorce] decree would terminate the survivorship arrangement, this result does not necessarily follow." W. Reed Quilliam, Jr., *A Requiem for Hilley: Is Survivorship Community Property Worse Than the Problem?*, 21 TEX. TECH. L. REV. 1153, 1182 (1990). Community property survivorship agreements should contain an express provision which revokes the agreement upon divorce. Estates Code § 112.054(a).

B. Separate Property

If a joint owner has separate property in survivorship form with an ex-spouse, the ex-spouse will receive the joint owner's interest in that property upon the joint owner's death. The Estates Code does not contain a provision which automatically partitions the property upon divorce. Estates Code § 111.001.

V. Multiple-Party Bank Accounts

During marriage, it is very common for spouses to have bank accounts in joint and survivorship form. In addition, one spouse may name the other spouse as the beneficiary of a trust account or as the P.O.D. payee on a P.O.D. account. Unless the form of these accounts is changed after divorce or the accounts were covered by the divorce decree, it seems that an ex-spouse would still be able to receive and retain the amounts in these accounts upon the death of the spouse who created them. Neither the Estates Code nor Family Code contains provisions that automatically invalidates the contractual transfer to the ex-spouse.

VI. Insurance

A. Life Insurance

1. General Rule

If the insured is divorced after designating the ex-spouse as a beneficiary of a life insurance policy, the ex-spouse will not receive the proceeds even if the insured neglected to change the beneficiary designation on the policy. Fam. Code § 9.301(a). The proceeds are then payable to the named alternative beneficiary or, if none, to the insured's estate. Fam. Code § 9.301(b).

An insurer who inappropriately pays the proceeds to the ex-spouse is liable only if (1) prior to payment of the proceeds to the ex-spouse, the insurer received written notice at the home office of the

insurer from an interested person that the designation of the ex-spouse as the beneficiary is no longer effective, and (2) the insurer did not interplead the proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure. Fam. Code § 9.301(c).

2. Exceptions

The ex-spouse is still entitled to receive the life insurance proceeds under the following circumstances:

- The divorce decree designates the ex-spouse as the beneficiary (Fam. Code § 9.301(a)(1)),
- The insured redesignates the ex-spouse as the beneficiary after the divorce, (Fam. Code § 9.301(a)(2)),
- The ex-spouse receives the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either the insured or the ex-spouse (Fam. Code § 9.301(a)(3)), or
- The policy is governed by federal law such as the Employee Retirement Income Security Act (ERISA) or the Federal Employees' Group Life Insurance Act of 1954. The United States Supreme Court in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), held that a Washington statute altering the specified beneficiary upon divorce was preempted by ERISA. Likewise, in *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), the United States Supreme Court held that Virginia's statute voiding the designation of an ex-spouse did not apply to a life insurance policy covered by the Federal Employees' Group Life Insurance Act of 1954. *See also Heggy v. American Trading Employee Retirement Account Plan*, 56 S.W.3d 280 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding that Family Code § 9.302 did not apply to a retirement account governed by ERISA and thus permitting the ex-spouse to receive the proceeds).

B. Other Insurance

If the divorce decree does not determine the rights of the spouses in an insurance policy other than life insurance, the policy remains in effect until it expires according to its terms. Fam. Code § 7.005(a).

The proceeds of a valid claim under the policy are payable as follows:

- If the interest in the property insured was awarded solely to one ex-spouse by the decree, to that ex-spouse (Fam. Code § 7.005(b)(1));
- If an interest in the property insured was awarded to each ex-spouse, to those ex-spouses in proportion to the interests awarded (Fam. Code § 7.005(b)(2)); or
- If the insurance coverage is directly related to the person of one of the ex-spouses, to that ex-spouse. Fam. Code § 7.005(b)(3).

The failure of either ex-spouse to change the insurance policies to reflect the above distribution arrangements does not relieve the insurer of liability to pay the proceeds or any other obligation on the policy. Fam. Code § 7.005(c).

VII. Retirement Benefits And Other Financial Plans

A. General Rule

If a participant, annuitant, or account holder is divorced after designating the ex-spouse as a beneficiary under an individual retirement account, employee stock option plan, stock option, or other

form of savings, bonus, profit-sharing, or other employer plan or financial plan of an employee or a participant, the ex-spouse will not receive the benefits or proceeds even if the participant, annuitant, or account holder neglected to change the beneficiary designation. Fam. Code § 9.302(a). The benefits or proceeds are then payable to the named alternative beneficiary or, if none, to the participant, annuitant, or account holder. Fam. Code § 9.302(b).

A business entity, employer, pension trust, insurer, financial institution, or other person who inappropriately pays the proceeds to the ex-spouse is liable only if (1) prior to payment of the benefits or proceeds to the ex-spouse, the payor received written notice at the home office of the payor from an interested person that the designation of the ex-spouse as the beneficiary or fiduciary is no longer effective, and (2) the payor did not interplead the proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure. Fam. Code § 9.302(c).

B. Exceptions

The ex-spouse is still entitled to receive the benefits or proceeds under the following circumstances:

- The divorce decree designates the ex-spouse as the beneficiary (Fam. Code § 9.302(a)(1));
- The participant, annuitant, or account holder redesignates the ex-spouse as the beneficiary after the divorce (Fam. Code § 9.302(a)(2)); or
- The ex-spouse receives the benefits or proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either the insured or the ex-spouse. Fam. Code § 9.301(a)(3).

The designated ex-spouse will also receive the benefits from a retirement benefit or other financial plan of a public retirement system as defined by Texas Government Code § 802.001. Fam. Code § 9.302(e).

VIII. Disability Planning Techniques

A. Declaration of Guardian

Texas law permits a competent adult to designate a guardian before the need arises. Estates Code § 1104.202. A properly executed and witnessed declaration along with the accompanying self-proving affidavit are normally prima facie evidence that the guardian named in the declaration would serve the best interests of the ward. Estates Code § 1104.209. However, "[i]f a declarant designates the declarant's spouse to serve as guardian . . . and the declarant is subsequently divorced from that spouse before a guardian is appointed, the provision of the declaration designating the spouse has no effect." Estates Code § 1104.211.

B. Durable Power of Attorney for Property Management

"[I]f, after execution of a durable power of attorney, the principal is divorced from a person who has been appointed the principal's . . . agent . . . , the powers of the . . . agent granted to the principal's former spouse terminate on the date the divorce or annulment of marriage is granted by a court." Estates Code § 751.053. Note, however, that the principal may state in the durable power of attorney that it is to remain effective even if a divorce subsequently occurs. *Id*.

C. Medical Power of Attorney

If the agent is the principal's spouse, the principal's divorce from the agent automatically revokes

the designation of the ex-spouse as the health care agent unless the medical power of attorney provides otherwise. Health & Safety Code § 166.155(a)(3).

D. Directive to Physicians

The Advance Directives Act permits a person to execute a Directive to Physicians, which states the person's desire that the person's life not be prolonged with the use of artificial life-sustaining procedures when death is inevitable due to a terminal or irreversible condition. Health & Safety Code Ch. 166, Subchapter B. It is also possible for a person to designate in the Directive another person to make the decision to withhold or withdraw life-sustaining procedures. Health & Safety Code § 166.032(c). Although this designation is effective only if the declarant is comatose, incompetent, or otherwise mentally or physically incapable of communication, there is no provision that the designation of a spouse to make that decision is ineffective if a divorce subsequently occurs. Unless the Directive contained such a limitation, it appears that an ex-spouse would still be authorized to make such life and death decisions for the declarant. Hopefully, the fact of the divorce would be made known to the attending physician so that extra care may be taken to be certain that the withholding or removal of life-sustaining procedures is still in accord with the desires of the declarant.

E. Agent to Control Disposition of Remains

An individual may have appointed an ex-spouse as the agent to control the disposition of the individual's remains. Health & Safety Code § 711.002. This statute does not provide for the automatic revocation of this designation upon divorce. Accordingly, the ex-spouse may have priority to make these decisions over children, a new spouse, parents, etc. To prevent this scenario, the appointment document should condition a spouse's appointment on the continuity of the marriage.

THE CONDEMNATION CONUNDRUM: HOW THE TEXAS SUPREME COURT REDEFINED THE CONSTITUTIONALITY OF ADMINISTRATIVE CONDEMNATION PROCEEDINGS AND CREATED A MESS FOR MUNICIPAL ABATEMENT OF NUISANCE PROPERTIES

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REPTL
REAL ESTATE, PROBATE & TRUST LAW
SECTION OF THE STATE BAR OF TEXAS

STUDENT WRITING CONTEST

Honorable Mention

I. Introduction

Whether Hill Country bluffs or Panhandle Plains, East Texas woods or Trans-Pecos wilderness, one thing is clear: Texas is a state with plenty of real estate. Virtually any Texan will proudly boast of the immense and hallowed earth lying within more than 2,800 miles of Texas border. This pride grows exponentially, however, when considering a Texan's personal land. Think beyond just land to consider the rights inherent to owning real property, and you have something Texans consider sacred. Consequently, few things draw the ire of Texas real property owners more than violation of their property rights.

The summer of 2011 saw the Texas Supreme Court decide a number of cases evoking the emotions of interference with real property rights.[108] However, no case proved more volatile than *City of Dallas v. Stewart*.[109] The court determined—in a 5-4 split decision—that homeowner Heather Stewart was entitled to payment for a government takings after the City of Dallas condemned and demolished her

[108] *See* Lesley v. Veterans Land Bd. of Tex., 352 S.W. 3d 479 (Tex. 2011) (finding in favor of non-executive right mineral interest owners of subdivided lots that were limited by the executive right owner through restrictive covenants forbidding future oil and gas leases); Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, No. 09-0901, 2011 WL 3796574 (Tex. Aug. 26, 2011) (holding that registration as a common carrier does not automatically give an entity the power of eminent domain, nor does it preclude a challenge of eminent domain power in court).

[109] City of Dallas v. Stewart, No. 09-0257, 2011 WL 2586882, at *1 (Tex. July 1, 2011).

house.[110] At first blush, the decision appeared a righteous victory for helpless real property owners suffering under big government's heavy hand. Heather Stewart's neighbors, however, surely did not share any sense of victory.

The truth was that Stewart's property was in such disrepair that it represented a danger to the public.[111] A tree fell from Stewart's lot onto her neighbor's house, and vagrants routinely took refuge within the dilapidated walls of the vacant house.[112] The City only condemned and abated the nuisance property after an administrative board carefully reviewed the case—on two separate occasions—and determined it was a public nuisance.[113] The administrative board properly followed legislative procedure to exercise Dallas's municipal police power, yet the court ruled for Stewart and upheld a takings judgment in her favor.[114]

The decision hinged on the court's ruling that an agency's nuisance determination cannot preclude de novo review in a trial court.[115] Not only did the decision violate Dallas's statutory police power,[116] it caused a chilling effect that halted municipal abatement of nuisance properties across the state.[117] With municipalities no longer certain of their ability to abate nuisance property by administrative determination and concern of collateral takings claims growing, cities feared any action that could subject them to liability for takings.[118] The City of Dallas filed a motion for a rehearing[119] and amicus briefs from cities all across the state flooded in.[120]

In January of 2012, the court denied the rehearing and substituted the ruling with a new—although substantially similar—opinion aimed at addressing the growing concerns of municipalities.[121] The new opinion was a partial win for concerned cities because it eliminated the possibility of collateral takings claims,[122] yet it still allowed for de novo court review of an agency's nuisance determination. In a well-reasoned dissent, Justice Guzman stated the ruling's problem plainly: "the Court's decision essentially strips municipalities of their legislatively provided tool to combat public nuisance."[123] Without the ability to make preclusive determinations of nuisance, municipalities remain vulnerable to costly litigation, with taxpayers ultimately footing the bill. In the end, the hypersensitive ruling put property rights on a pedestal at the expense of reason and public well-being.

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[110] *See id.*

[111] *See infra* note 23.

[112] *See infra* note 22.

[113] *See infra* notes 20 and 25.

[114] *See* discussion *infra* Part I.C.

[115] City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *6 (Tex. Jan. 27, 2012).

[116] *See* TEX. LOC. GOV'T CODE ANN. § 214.001(a) (West 2007).

[117] "Abatement" means the act of "eliminating or nullifying" a nuisance. BLACK'S LAW DICTIONARY 3 (9th ed. 2009).

[118] *See* discussion *infra* part II.A.

[119] *See infra* note 61.

[120] *See infra* note 70.

[121] *See* City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012).

[122] *Id*. at *12-13.

[123] *Id*. at *28 (Guzman, J., dissenting from denial of rehearing).

Part I of this paper explains the background, facts, and procedure of the case. Part II explores the ruling's chilling effect that brought municipal abatement of nuisance properties to a standstill. Part III criticizes the majority decision and suggests why proper agency determinations should be afforded preclusive effect. Finally, Part IV proposes changes that could restore the preclusive effect of a municipal agency's nuisance determination and give bite back to municipal police power.

II. Case Background

A. Facts

In 1991, Heather Stewart boarded up the windows of her Dallas property, terminated all utilities, and moved out of her house.[124] As the house slowly deteriorated without attention, the property became "a regular stop for Dallas Code Enforcement Officials."[125] Stewart consistently ignored notifications from the City to take care of code violations as the house sat vacant for a decade.[126] The house became a magnet for vandalism and vagrants, and pictures of the house told a tale of neglect and degeneration. Finally, the Dallas Urban Rehabilitation Standards Board (URSB), an administrative board tasked with enforcement of the City's zoning codes, considered the property for condemnation in September of 2001.[127]

At the September 2001 URSB meeting, the board looked at complaints of neighbors bemoaning the property's state of disrepair.[128] One of Stewart's neighbors even testified that she sustained thousands of dollars in damages to her home after a tree fell from Stewart's property due to neglect.[129] The board finally determined, given the evidence of neglect and public concern, that the house was an urban nuisance and should be abated.[130] Unsatisfied with the result, Stewart appealed the ruling and petitioned a rehearing.[131] On September 22, 2002, the URSB convened again to consider Stewart's appeal.[132] After hearing testimony, the URSB decided to deny the request for rehearing and move forward with demolition under the September 24, 2001 order.[133]

More than a year later, on October 17, 2002, a city inspector visited and took pictures of the property that verified Stewart made no effort to bring the property into compliance.[134] Additionally, a special project manager visited the property for inspection again on October 23, 2002, and also verified that the house showed no sign of improvement.[135] After affidavits from the code inspector and special

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[124] *Id.* at *1.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at *14 (Guzman, J., dissenting).

[132] *Id.*

[133] *Id.*

[134] Petitioner's Brief on the Merits at 3, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Sept. 21, 2012).

[135] *Id.*

project manager were submitted with a magistrate, probable cause was established to believe that no curative measures occurred since the URSB's nuisance determination.[136] The magistrate issued a warrant to demolish the property in the interest of public health, safety, and welfare.[137] Four days later, the property was demolished.[138]

Stewart appealed the URSB's decision before the property was demolished.[139] The appeal was insufficient, however, to stay the demolition order.[140] After demolition, Stewart filed an amended complaint that added two claims: denial of due process and government taking.[141] On April 15, 2005, the trial court upheld the URSB's nuisance determination, but severed the constitutional claims for a trial by jury.[142] Stewart never appealed the court's affirmation of the nuisance finding.[143] After the constitutional claim was severed, Stewart instead sought damages for the demolition.[144] Stewart argued that the nuisance determination had no preclusive effect on the takings claim, while the City countered that the nuisance finding was res judicata.[145]

B. Trial Court and Court of Appeals

The trial of the constitutional claims commenced on May 2, 2007.[146] Stewart never objected to the URSB's nuisance determination, and she never argued that the subsequent demolition was not pursuant to the nuisance finding.[147] Instead, Stewart relied solely on her constitutional claims.[148] The City moved for a directed verdict based on its res judicata argument, but the court rejected the motion.[149] Eventually, the jury decided that Stewart's house was not a nuisance and awarded her $75,707.67 as damages for the taking.[150] The jury rejected Stewart's due process claim, however, because it found the City adequately notified Stewart.[151]

After the trial court denied the City's motion for a new trial, the City appealed the decision.[152] The appellate court upheld the trial court's order, holding that the City had no defense because it could not prove the property was a nuisance on the day of demolition.[153] In other words, the nine-day delay

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[136] *Id.*

[137] *Id.*

[138] *Stewart*, 2012 WL 247966, at *1.

[139] *Id.*

[140] *Id.* (citing TEX. LOC. GOV'T CODE ANN. § 54.039(e) (West 2007)).

[141] *Id.*

[142] *Id.*

[143] Petitioner's Brief on the Merits, *supra* note 27, at 3.

[144] *Id.* at 4.

[145] *Stewart*, 2012 WL 247966, at *1.

[146] Petitioner's Brief on the Merits, *supra* note 27, at 4.

[147] *Id.*

[148] *Stewart*, 2012 WL 247966, at *15 (Guzman, J., dissenting).

[149] *Id.* at *1 (majority opinion).

[150] *Id.*

[151] Petitioner's Brief on the Merits, *supra* note 27, at 4-5.

[152] *Id.* at 5.

between final inspection and demolition stripped the nuisance determination of its preclusive effect.

C. Initial Supreme Court Decision

The City then petitioned the Texas Supreme Court for review, continuing to argue that the board's nuisance determination was res judicata and thus barred the takings claim.[154] On November 29, 2009, the court granted the City's petition for review.[155] On July 1, 2011, the court held in a 5-4 decision that an agency's substantial evidence review of a nuisance finding "does not sufficiently protect a person's rights under Article I, Section 17 of the Texas Constitution," and cannot provide preclusive effect.[156] Further, the court characterized all takings claims as "fundamentally constitutional."[157] The opinion compared an agency's nuisance finding to an agency's eminent domain decision, which are reviewable de novo at trial court.[158] Thus, the court determined that an agency comprised of citizens cannot make a nuisance finding that bars a trial court's constitutional review.[159] In ruling that nuisance determinations were subject to de novo review, the court also looked to case law. Particularly, the court pointed to *City of Houston v. Lurie*, in which the court stated "[it] has been repeatedly held that the question whether property is a public nuisance and may be condemned as such is a justiciable question to be determined by a court."[160]

The opinion clearly displayed the court's lack of faith in municipal agencies to uphold the constitutional rights of citizens.[161] For instance, the court relied on the Texas Constitution's Separation of Powers Clause to argue that because a municipal agency shows a low level of government separation, it does not possess the requisite accountability to make preclusive determinations of constitutional issues.[162] The court remarked that the opinion "emphasizes the importance of an individual property owner's rights when aligned against an agency appointed by a City to represent the City's interests."[163] The decision implied that a municipal agency lacks the sophistication that mixed questions of fact and constitutionality require.[164] The majority clearly articulated this view when it said, "while state and lower federal courts are presumed competent to handle constitutional issues, administrative agencies, for all the deference they are typically given, occupy a subordinate status in our system of government."[165] While "initial questions of historical fact" are within an agency's competence, the court

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[153] *See* City of Dallas v. Stewart, No. 05-07-01244-CV, 2008 WL 5177168, at *2 (Tex. App.—Dallas Dec. 11, 2008, pet. granted) (mem. op., not designated for publication), *affirmed, reh'g denied*, No. 09-0257, 2012 WL 247966 (Tex. Jan. 27, 2012).

[154] *Stewart*, 2012 WL 247966, at *2.

[155] *Id.*

[156] *Id.*

[157] *Id.* at *4.

[158] *Id.*

[159] *Id.*

[160] *Id.* at *6 (citing City of Houston v. Lurie, 224 S.W.2d 871 (Tex. 1949)).

[161] The court expressed this belief when it said, "[a]ccountability is especially weak with regard to municipal-level agencies such as the URSB." *Id.* at *8

[162] *Id.* at *8 (citing Tex. Const. art. II, § 1).

[163] *Id.* at *9.

[164] *Id.* at *10.

[165] *Id.*

determined that mixed questions of fact and law "are outside the competence of administrative agencies."[166] Ultimately, the court said, "an agency's adjudicative power is strongest where it decides purely statutory claims and weakest where it decides claims derived from the common law."[167]

D. Final Supreme Court Decision

After losing its appeal to the court, the City of Dallas filed a motion for rehearing.[168] The motion was accompanied by amicus briefs from cities all over Texas concerned with the ruling's sweeping effect. On January 27, 2012, the motion for rehearing was denied by the Texas Supreme Court.[169] The court did, however, withdraw the original opinion and substitute it with a final opinion.[170] There was very little substantive difference between the opinions, but the one notable addition was a section aimed at addressing the fears of the City and its municipal brethren statewide.[171]

First, the court tempered the original decision by clarifying that municipalities are not subject to collateral attack.[172] In other words, the court required that future claimants exercise all their procedural remedies before availing themselves of the court.[173] Second, the court discussed how cities should not worry because "property owners rarely invoke the right to appeal" due to the time and money commitments of going to court.[174] Finally, the court dismissed amicus brief arguments lamenting that the opinion effectively forced all new nuisance claims to be filed in court.[175] Instead, the court noted that cities are still free to allow nuisance findings by agency determination because cities are only required to defend the decision in court after a property owner's appeal.[176]

III. The Ruling's Chilling Effect on Municipal Abatement of Nuisance Properties

Widespread panic and outcry from Texas cities ensued following the original opinion.[177] The opinion left municipalities with a difficult decision: continue abatement of nuisance properties based on agency determination—potentially suffering the City of Dallas's costly fate—or cease all nuisance abatement.[178] Many cities opted for the latter as careful consideration of the opinion raised more startling issues.[179] Uncertainty regarding these issues initiated a chilling effect that stopped municipal

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[166] *Id.* at *11.

[167] *Id.* at *12.

[168] *See generally* Petitioner's Motion for Rehearing, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Aug. 18, 2011).

[169] *See Stewart*, 2012 WL 247966, at *1.

[170] *Id.*

[171] *See id.* at 12-13.

[172] *Id.*

[173] *Id*.

[174] *Id*. at 13.

[175] *Id.*

[176] *Id.*

[177] *Id.* at *28 (Guzman, J., dissenting).

[178] *Id.* at *28 (Guzman, J., dissenting from denial of rehearing).

[179] The City of Abilene, for instance, self-imposed a moratorium on nuisance abatement until further clarification came from the court. Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene at ii, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012).

abatement across the state.[180] Fear of costly litigation forced public safety and well-being to the side until clarity was reached. One amicus brief noted, "if not tailored, [the] ruling will create significant obstacles to municipal regulation of health and safety, leaving the public exposed to serious health and other safety risks."[181] Amicus briefs raised many issues that warranted possible reversal or, at the least, explanation from the court.

A. Confusion and Questions Regarding the Supreme Court Decision's Effect

General confusion with the supreme court ruling made it difficult for municipalities determining how to proceed with nuisance abatement in the future.[182] The opinion left readers with the odd conclusion that administrative boards—no matter how carefully created under legislative authorization and guidelines—were no longer granted preclusive effect when making nuisance determinations.[183] The cities of San Antonio and Houston concluded that this effectively "render[ed] [the legislative authorizations] meaningless."[184] If a board's substantial evidence review no longer had any bite, one city reasoned that its only viable action was filing a lawsuit to adjudicate the issue.[185] The confusion did not end with the issue of res judicata, however, as more questions arose that the decision did not seem to resolve.

Another point of confusion was whether the ruling extended beyond real property to personal property.[186] The decision seemed to imply that even abatement of personal property requires de novo review in court.[187] Similar to real property, the Texas statute allows administrative determination for abatement of junk cars or removal of improper signs.[188] Cities were naturally left with the question of whether these determinations held preclusive effect against subsequent appeals in court. The City of Fort Worth pondered whether "removing a pile of garbage that contains metal [could] subject the City to an inverse-condemnation claim[.]"[189] Although the question took the point to the extreme, the opinion did nothing to provide any clarity on the matter. Considering the wide array of agency authority granted to municipalities by the statute, cities faced considerably more liability for takings claims if the

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[180] *Stewart*, 2012 WL 247966, at *28 (Guzman, J., dissenting from denial of rehearing).

[181] Brief of Amici Curiae Tex. Mun. League and Tex. City Attorneys Ass'n in Support of Petitioner City of Dallas's Motion for Rehearing at 3, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012).

[182] One municipal official noted that it was important to "step back" and evaluate the ruling to avoid citizen exposure to "unnecessary litigation." Chris Moran, *Ruling May Slow Houston's Tearing Down of Nuisance Properties*, HOUS. CHRONICLE (Aug. 11, 2011), http://www.chron.com/news/houston-texas/article/Ruling-may-slow-Houston-s-tearing-down-of-2081673.php.

[183] Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at 6.

[184] Brief of Amici Curiae Cities of San Antonio and Houston in Support of Petitioner City of Dallas' Motion for Rehearing at 10, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012).

[185] Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at 6.

[186] Brief of Amici Curiae Tex. Mun. League and Tex. City Attorneys Ass'n in Support of Petitioner City of Dallas's Motion for Rehearing, *supra* note 74, at 6-8.

[187] *Id.* at 4.

[188] *Id.* at 6-7 (citing TEX. TRANSP. CODE ANN. § 683 (West 2011); TEX. LOC. GOV'T CODE ANN. § 216 (West 2003)).

[189] Amicus Curiae Brief of the City of Forth Worth in Support of Motion for Rehearing at 8, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012).

opinion included takings of personal property.

Finally, cities were concerned with the question of litigation for past nuisance abatement. As cities started to count up the number of past condemnations, concern grew over possible takings claims that property owners could now file in court.[190] Because the opinion afforded agency determinations no preclusive effect, municipalities feared they would be overwhelmed with claims from disgruntled owners whose properties the municipality condemned over a ten year limitations period.[191] One amicus brief voiced this concern, saying, "[e]ven if the takings claims prove[] to be unsuccessful, the cost associated with defending the lawsuits is unpredictable and would create severe financial hardship for cities and taxpayers."[192] This impracticality meant wasting millions of taxpayer dollars to protect the public from nuisance, a task that the legislature had already authorized cities to perform as part of their duty to citizens.[193]

B. Unrealistic Burden on Municipalities to Adjudicate Nuisance Abatement Cases in Court

The court's conclusion that an administrative board's substantial evidence review was not res judicata meant that a city's only remaining option was adjudication in court.[194] Amici, however, felt that adjudication is "an exercise in futility," because of the impractical burdens it raises.[195] The apparent impracticalities were twofold: (1) cities lacked the money and resources to take all nuisance claims to court, and (2) litigation often takes considerable time. San Antonio and Houston stated that they face more than 5,000 nuisances.[196] Abilene, a relatively small city, cited over thirty instances of nuisance abatement per year over a five year period.[197] If nuisance abatement continued at rates necessary to ensure public health and safety, the extraordinary amount of money required to litigate such cases would sap a city's resources dry and place a tremendous burden on taxpayers.[198] Moreover, the proposition meant placing public health, safety, and well-being in jeopardy while litigation runs its course.[199] No city wanted to subject its citizens to the hazards of nuisance properties while nuisance claims were heard in an already crowded and inefficient court system.

C. The Chilling Effect Sets In

Once cities determined that nuisance abatement based on administrative determination could lead to devastating results, they were forced to weigh the cost of public exposure to the nuisance with the

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[190] Brief of Amici Curiae Cities of San Antonio and Houston in Support of Petitioner City of Dallas' Motion for Rehearing, *supra* note 77, at 12.

[191] Brief of Amici Curiae Tex. Mun. League and Tex. City Attorneys Ass'n in Support of Petitioner City of Dallas's Motion for Rehearing, *supra* note 74, at 11 (citing Grunwald v. City of Castle Hills, 100 S.W.3d 350, 353-54 (Tex. App.—San Antonio 2002, no pet.)).

[192] *Id*.

[193] Brief of Amici Curiae Cities of San Antonio and Houston in Support of Petitioner City of Dallas' Motion for Rehearing, *supra* note 77, at 13.

[194] *Id.* at 12.

[195] *Id.*

[196] *Id.* at 13.

[197] Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at 9.

[198] *Id*. at 8.

[199] Amicus Curiae Brief of the City of Forth Worth in Support of Motion for Rehearing, *supra* note 82, at 7-8.

cost of moving forward with abatement despite possible liability.[200] For example, during the moratorium, a City of Houston review panel spokeswoman said, "only when public health and safety concerns outweigh the risk of lawsuit" would the panel issue permits for demolition.[201] Alternatively, the City of Midland made the decision not to demolish any of the fifteen nuisance properties it had scheduled for abatement until after the court's determination of the motion for rehearing.[202] The City of Abilene made a similar decision to cease all demolition until the court gave greater clarity.[203] Ultimately, Justice Guzman's warning that "the consequences of the Court's decision will not be limited to the courtroom" indeed proved prophetic.

IV. Criticism of the Majority Opinion

Both Justices Johnson and Guzman, along with amici curiae across the state, raised a host of criticisms and arguments regarding the court's decision. Specifically, the criticisms stem from two places: the substantive reasoning of the decision and the decision's impractical effects on municipal abatement. On one hand, the majority overlooked existing procedural safeguards and took an entirely novel approach in reaching its decision.[204] On the other hand, the decision's effect "essentially decimated summary nuisance abatement—a city's crucial, front-line tool to combat the detrimental effects of nuisance on the health, safety, and welfare of its citizens."[205] Either way, the majority opinion raises serious and legitimate concern for both municipalities and their citizens.

A. Disregard for Legislative Authorization of Municipal Nuisance Abatement

One of the most serious criticisms of the decision hinges on the majority's indifference to the legislature's comprehensive statutory authorization allowing for cities to abate nuisance.[206] This is particularly significant given that the court's history of accepting legislative authorization of municipal nuisance abatement dates back to 1859.[207] History aside, the decision overlooks modern Texas statutes allowing for nuisance abatement.[208] Although the majority opinion did not declare the legislation unconstitutional, it "effectively invalidat[ed] the express intent of the Texas Legislature to create a

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[200] Amicus Curiae Brief of the City of Irving in Support of Motion for Rehearing at 11, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012).

[201] Patricia K. Hart, *Whose Property Rights are Being Protected?*, HOUS. CHRONICLE (Jan. 7, 2012), http://www.chron.com/news/kilday-hart/article/Whose-property-rights-are-being-protected-2448385.php.

[202] Kathleen Thurber, *Dilapidated Structure Demolition Put on Hold*, MIDLAND REP.-TELEGRAM (July 27, 2011), http://www.mywesttexas.com/top_stories/article_6acfe5ca-7865-5b8b-9fc6-64fca75c18b7.html.

[203] Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at ii.

[204] City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *26 (Tex. Jan. 27, 2012) (Guzman, J., dissenting).

[205] *Id.*

[206] *Id.* at *25.

[207] One amicus brief specifically noted that the court "allowed a city's 'board of aldermen' to '"as far as practicable, prevent any nuisances within the limits of the corporation, and cause such as exist to be removed, at the expense of the persons by whom they were occasioned[.]"'" Brief of Amici Curiae Tex. Mun. League and Tex. City Attorneys Ass'n in Support of Petitioner City of Dallas' Motion for Rehearing, *supra* note 74, at 3 (quoting City of Waco v. Powell, 32 Tex. 258, 268 (1869)).

[208] City of Dallas v. Stewart, No. 09-0257, 2011 WL 2586882, at *25 (Tex. July 1, 2011).(Guzman, J., dissenting).

statutory method wherein municipalities may expeditiously and without threat of litigation abate dangerous structures."[209]

1. Statutory Authorization

The Texas Legislature clearly authorized municipal abatement of specifically defined nuisance.[210] The statute provides:

> (a) A municipality may, by ordinance, require the vacation, relocation of occupants, securing, repair, removal, or demolition of a building that is:
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> (1) dilapidated, substandard, or unfit for human habitation and a hazard to the public health, safety, and welfare;
>
> (2) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children; or
>
> (3) boarded up, fenced, or otherwise secured in any manner if:
>
> (A) the building constitutes a danger to the public even though secured from entry; or
>
> (B) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described by Subdivision (2).[211]

Essentially, the statute describes a "nuisance in fact."[212] That is, the legislature only allowed for municipal abatement of a particular kind of nuisance by carefully limiting the definition to those properties that threaten the surrounding public.[213] The legislature even specified that if appealed, a court is limited to substantial evidence review.[214] In conjunction with granting municipalities the ability to abate nuisance, the legislature also authorized municipal governments to appoint boards tasked with determining nuisance abatement matters.[215] Again, the legislature limited judicial review of a board's decision to the substantial evidence standard.[216] Thus, the intent of the legislation was to allow for quick resolution of quasi-judicial administrative determinations without the unnecessary delay of de novo

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[209] Brief of Amici Curiae Cities of San Antonio and Houston in Support of Petitioner City of Dallas' Motion for Rehearing, *supra* note 77, at 8.

[210] *See* TEX. LOC. GOV'T CODE ANN. § 214.001(a)(1)(3) (West 2009).

[211] *Id.*

[212] "[N]uisance in fact" describes a condition that "endangers the public health, public safety, public welfare, or offends the public morals." City of Dallas v. Stewart, 2011 WL 2586882, at *25 (Guzman, J., dissenting) (quoting State v. Spartan's Indus., Inc., 447 S.W.2d 407, 413 (Tex. 1969)).

[213] *Id.*

[214] TEX. LOC. GOV'T CODE ANN. § 214.0012(f) (West 2007).

[215] *Id.* § 54.033(a) (West 2011).

[216] *Id.* § 54.039(f) (West 2007).

court review.[217]

2. The Court's Rejection of Legislative Authorization Based on *Lurie*

Despite the Dallas URSB's full compliance with the applicable legislation, the court still concluded that "nuisance determinations must ultimately be made by a court," and that a property owner has a right to "full judicial review."[218] The court based its reasoning on *Lurie*, one in a line of cases dealing with nuisance determinations that were determined to be takings.[219] There, the court stated that "[i]t has been repeatedly held that the question whether property is a public nuisance and may be condemned as such is a justiciable question to be determined by a court."[220]

The majority opinion, however, overlooked key elements of *Lurie* that stand in contradiction to *Stewart*. The nuisance ordinance at the heart of *Lurie* failed to provide court review should the city council conclude that the property in question was a nuisance.[221] Further, the court granted a judgment notwithstanding verdict that the buildings in question were nuisances requiring abatement, despite the jury's finding that only one of the two buildings was a nuisance.[222] Ultimately, the petitioner City argued that, because it introduced substantial evidence supporting the nuisance finding, it was entitled to an instructed verdict.[223] Yet, in ruling against application of the substantial evidence rule, the court said: "Certainly we would not be justified in applying the substantial evidence rule to this case when there is nothing in the statutes, including the home rule enabling act, or in the city's charter or in the city's ordinance, expressing an intention that the suit be tried under that rule."[224] In other words, as Justice Johnson astutely observes, "the Court's refusal to afford preclusive effect to the council's determination that a property was a nuisance, or to afford substantial evidence review of the council's determination, occurred in the absence of a statute or ordinance providing for substantial evidence review."[225]

Unlike *Lurie* and its precedents, the *Stewart* decision came after the legislature statutorily authorized judicial review of a municipal agency's nuisance determination.[226] Moreover, the *Stewart* case dealt with much more robust guidelines, including a definition of nuisance, detailed notice procedures, and specific provisions related to judicial review.[227] The *Stewart* majority admitted that *Lurie* lacked statutorily authorized substantial evidence review, but continued to rely on its holding by pointing out that the focus was on the "special nature of the right in question" rather than the presence of the authorizing statute.[228] Regardless, the facts of *Stewart* align better with *Cedar Crest #10, Inc. v.*

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[217] Brief of Amici Curiae Cities of San Antonio and Houston in Support of Petitioner City of Dallas' Motion for Rehearing, *supra* note 77, at 9 (quoting HOUSE RESEARCH ORG., DAILY FLOOR REPORT, BILL ANALYSIS, Tex. H.B. 333, 73d Leg., R.S. at 885-89 (Apr. 19, 1993)).

[218] *Stewart*, 2011 WL 2586882, at *5-6.

[219] *Id.* at *5 (citing City of Houston v. Lurie, 224 S.W.2d 871 (Tex. 1949)).

[220] *Id*. at *6 (quoting *Lurie*, 224 S.W.2d at 873)).

[221] *Id.* at *16 (Johnson, J., dissenting) (citing *Lurie*, 224 S.W.2d at 873).

[222] *Id.*

[223] *Id.*

[224] *Lurie*, 224 S.W.2d at 876.

[225] *Stewart*, 2011 WL 2586882, at *16 (Johnson, J., dissenting).

[226] *Id.* at *17.

[227] *Id.*

[228] *Id.* at 6 n.15 (majority opinion).

City of Dallas.[229] There, the court distinguished *Lurie* and upheld a municipal nuisance determination and subsequent abatement.[230] The *Cedar Crest* court noted that the *Lurie* decision was predicated on ordinances "with no provision for judicial review[,]" while the statute under its review *only* authorized substantial evidence review.[231]

3. Judicial Substantial Evidence Review in *Brazosport* and *Blackbird*

The *Stewart* majority reasoning also stands in stark contrast to the reasoning of both *City of Houston v. Blackbird* and *Brazosport Savings and Loan Association v. American Savings and Loan Association*.[232] In *Blackbird*, property owners sued in district court for de novo review after the City of Houston enacted ordinances that charged assessments to property owners for improvements to their abutting streets.[233] The court rejected the property owner's argument for de novo review, stating that although "the right to judicial review of acts of legislative and administrative bodies affecting constitutional or property rights is axiomatic[,]" the right is not necessarily to de novo review.[234] In other words, the court's decision gave deference to the legislative provision for substantial evidence review, even though the challenge was predicated on the takings clause.[235] *Brazosport* also upheld legislation limiting judicial review to the substantial evidence standard.[236]

Nonetheless, the *Stewart* majority rejected *Blackbird* and *Brazosport* by arguing that neither involve nuisance determinations—which the court said necessarily implicates constitutional takings questions—but rather they are "due process cases alleging improper agency actions implicating property interests."[237] The *Blackbird* court, however, "squarely addressed the issue as one involving the takings clause of the Texas Constitution."[238] The *Stewart* majority also cited *Steele v. City of Houston* to undermine *Blackbird* and *Brazosport*.[239] In *Steele*, Houston police destroyed a fugitive citizen's property in an attempt to apprehend him.[240] The owner then sued the City, arguing that the police action was a takings in violation of the Texas Constitution.[241] The court reversed a decision for the City, saying, "the Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use."[242] Thus, the court argued that takings suits are fundamentally constitutional suits requiring court review rather

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[229] *Id.* (citing Cedar Crest #10, Inc. v. City of Dallas, 754 S.W2d 351, 353 (Tex. App.—Eastland 1988, writ denied)).

[230] *Cedar Crest*, 754 S.W.2d at 353.

[231] *Id.*

[232] City of Houston v. Blackbird, 294 S.W.2d 159 (Tex. 1965); Brazosport Sav. & Loan Ass'n v. Am. Sav. & Loan Ass'n, 342 S.W.2d 747 (Tex. 1961).

[233] *Stewart*, No. 09-0257, 2011 WL 2586882, at *17 (Johnson, J., dissenting).

[234] *Blackbird*, 294 S.W.2d at 162, 63 (Tex. 1965).

[235] *Stewart*, 2011 WL 2586882, at *18 (Johnson, J., dissenting).

[236] *Brazosport*, 342 S.W.2d at 752 (Tex. 1961).

[237] *Stewart*, 2011 WL 2586882, at *7.

[238] *Id.* at *18 (Johnson, J., dissenting) (citing *Blackbird* 294 S.W.2d at 163).

[239] *Id.* at *4 (citing Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980)).

[240] *Steele*, 603 S.W.2d at 789.

[241] *Id.* at 788.

[242] *Stewart*, 2011 WL 2586882, at *4.

than agency determination.[243] Given the *Steele* decision came after *Blackbird* and *Brazosport*, the court reasoned that *Steele* represented a fundamental change in whether legislative authorization of judicial substantial evidence review precludes an owner's appeal for de novo review.[244]

Yet again, Justice Johnson noted the inapplicability of *Steele*. The *Steele* decision never looks at a quasi-judicial process that the legislature authorized to deal with public nuisance.[245] Rather, the case dealt with police destruction of property in the interest of great public necessity.[246] Thus, the ultimate question in *Steele* was not whether legislatively authorized nuisance determination procedures were followed before destruction of property, but whether there was a "public emergency" requiring destruction to aid in apprehension of a fugitive.[247] In applying *Steele*, Justice Johnson noted, "the Court simply displaces a permissible Legislative decision to prescribe a particular type of judicial review and oversight of the determination that property was a nuisance and the administrative remedy."[248] Justice Guzman agreed, saying, "*Steele* in no way modified or curtailed the State's police power; instead, it merely removed the shield of sovereign immunity from the exercise of that power."[249]

B. Substantial Evidence Review Afforded Stewart Procedural Due Process

In providing detailed legislative framework that allows agency nuisance determination, abatement, and judicial substantial evidence review, the Texas statute effectively ensures that property owners are afforded procedural due process.[250] In fact, the City of Aledo noted, "[w]hile the Court views substantial evidence review as being ultimately repugnant to the constitution, in actuality the standard has constitutional origins."[251] Along with case law and historical background, several other arguments bolster the proposition that substantial evidence review adequately affords due process.

1. Stewart Failed to Litigate Her Available Claims

Stewart's favorable ruling seems particularly incongruous to her circumstances considering her failure to litigate all issues prior to her district court appeal.[252] For instance, Stewart argued that she was entitled to de novo court review, yet she never bothered to attack the statutes authorizing agency

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[243] *Id.*

[244] *Id.*

[245] *Id.* at *19 (Johnson, J., dissenting).

[246] *Steele*, 603 S.W.2d at 792.

[247] *Id.* at 792.

[248] *Stewart*, 2011 WL 2586882, at *19 (Johnson, J., dissenting) (citing TEX. LOC. GOV'T CODE §§ 54.039(f), 214.0012(f); *Blackbird*, 394 S.W.2d at 162, 63).

[249] *Id.* at *26 (Guzman, J., dissenting).

[250] Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at 4.

[251] The City of Aledo explained the history of substantial evidence review saying, "the very reason that substantial evidence review was developed was to provide an evidentiary threshold that had to be satisfied for a decision to be within an agency's constitutional authority." Brief of Amici Curiae the Cities of Aledo Et Al. in Support of Petitioner's Motion for Rehearing at 5, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012) (citing Gerst v. Nixon, 411 S.W.2d 350, 354 (Tex. 1966); County of Dallas v. Wiland, 216 S.W.3d 344, 361 (Tex. 2007)).

[252] Brief of Amicus Curiae Int'l Mun. Laws. Assoc. in Support of Petitioner's Motion for Rehearing at 12, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012).

nuisance determination and judicial substantial evidence review.[253] Despite failing to attack the statutes, she continues to maintain their invalidity.[254] The result is a glaring impracticality: Stewart argued that she was denied due process after she failed to afford herself of available claims.

Similarly, Stewart never challenged the trial judge's ruling affirming the URSB's nuisance determination on substantial evidence review.[255] When Stewart appeared before the URSB for her second hearing, she never argued that she had made improvements or that the URSB failed to provide adequate notice.[256] Instead of taking her case seriously by arguing her claims before the administrative board, Stewart chose to circumvent the agency's authority after her inaction resulted in the destruction of her property. Considering her failure to raise a number of possible claims, the facts of Stewart's case simply fail to "support the statements by the Court that 'unelected municipal agencies cannot be effective bulwarks against constitutional violations.'"[257]

2. Judicial Substantial Review Still Adequately Protects Constitutional Rights

The legislative scheme authorizing agency nuisance determination appears especially valid considering a property owner's statutorily guaranteed opportunity for judicial review.[258] Even if an agency's determination was improper, substantial evidence review in a district court protects an appellant by determining "whether the decision was arbitrary, capricious, unlawful, or not reasonably supported by substantial evidence."[259] In other words, due process guarantees that a court will review the determination, but does not necessarily guarantee a de novo standard of review.[260] *Brazosport* similarly holds that due process is guaranteed by the opportunity for an appellant to prove that an agency's action was improper or inadequate considering substantial evidence.[261] Thus, Justice Guzman argued, "even under substantial evidence review, it is still possible to prove that an agency's or municipality's action is illegal . . . which might well be relevant if an agency or municipality acts outside of its authority."[262]

C. Improper Comparison between Nuisance and Condemnation

The majority opinion was also criticized for its comparison of nuisance abatement proceedings to condemnation proceedings.[263] Citing *Steele*, the court concluded that agency nuisance determinations

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[253] *Stewart*, 2011 WL 2586882, at *15 (Johnson, J., dissenting).

[254] *Id.*

[255] *Id.* at *15.

[256] *Id.* at *21.

[257] Brief of Amicus Curiae Int'l Mun. Laws. Assoc. in Support of Petitioner's Motion for Rehearing, *supra* note 145, at 12-13.

[258] *See* TEX. LOC. GOV'T CODE ANN. § 54.039(f) (West 2007).

[259] Petitioner's Motion for Rehearing, *supra* note 61, at 12 (citing Rector v. Tex. Alcoholic Beverage Comm'n, 599 S.W.2d 800 (Tex. 1980)).

[260] *Stewart*, 2011 WL 2586882, at *25 (Guzman, J., dissenting) (citing City of Houston v. Blackbird, 294 S.W.2d 159, 160-61 (Tex. 1961)).

[261] Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n, 342 S.W.2d 746, 752 (Tex. 1961).

[262] *Stewart*, 2011 WL 2586882, at *26 (Guzman, J., dissenting).

[263] Brief of Amicus Curiae The City of Sulphur Springs in Support of Petitioner City of Dallas' Motion for Rehearing at 7, City of Dallas v. Stewart, No. 09-0257, 2012 WL 247966, at *1 (Tex. Jan. 27, 2012).

are not adequate to protect against constitutional takings because the Takings Clause of the Texas Constitution is self-executing.[264] That is, a claim regarding violation of the protection afforded property owners against government takings is based on and triggered by the constitutional provision itself. This does not mean, however, that nuisance determinations are so interrelated with takings questions that they fundamentally become constitutional questions requiring de novo review. Notably, the United States Supreme Court stated:

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[265]

More recently, the United States Supreme Court reiterated its holding that abatement of nuisance is an exception to takings.[266] Given the United States Supreme Court's obvious distinction between the concepts, it seems odd that the majority opinion pairs nuisance and takings subsequent to inverse condemnation without reservation.

Another significant difference between the two concepts is that condemnation proceedings typically do not deal with the public danger that nuisance abatement presents.[267] This fundamental difference means that nuisance abatement requires a more delicate balance between property rights and public well-being.[268] On the one hand, condemnation proceedings typically balance property rights against potential public benefit. On the other hand, nuisance abatement proceedings balance property rights against potential harm to a city's citizens affected by the nuisance property. It seems natural, then, that the legislature used substantial evidence review to offer adequate police power to municipalities.[269] Given the choice between de novo review and substantial evidence review, the legislature made the decision to strike a fairer balance between public well-being and property rights by limiting review of a municipal agency's determination to substantial evidence review.[270]

Finally, the City of Abilene raised a unique question that follows the improper comparison between nuisance and condemnation: must nuisance properties be void of all value for proper abatement?[271] This question derived from the court's statement that "nuisance findings are 'determination[s]—in constitutional terms—that the structure has no value at all."[272] In other words, the court said that nuisance findings are effectively value determinations, based on the idea that nuisance is simply a

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[264] *Stewart*, 2011 WL 2586882, at *4 (citing Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980)).

[265] Samuels v. McCurdy, 267 U.S. 188, 196 (1925) (quoting Mugler v. Kansas, 123 U.S. 623, 8 (1887)).

[266] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029-30 (1992).

[267] Amicus Curiae Brief of the City of Irving in Support of Motion for Rehearing, *supra* note 93, at 12.

[268] *Id*.

[269] *Id* at 5-6.

[270] *Id.* at 6 (suggesting that it is fair for the court to presume the legislature made a deliberate, informed choice to limit judicial review to the substantial evidence standard).

[271] Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at 6.

[272] *Stewart*, 2011 WL 2586882, at *9 (quoting D.R. Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers over Slum Housing*, 67 MICH. L. REV. 635, 39 (1969)).

takings that does not require just compensation.[273] If the determination does not require compensation, the court reasoned, then the nuisance determination is essentially a determination that the property is without any value requiring compensation.[274] In practicality, however, nuisance properties often maintain nominal monetary value, regardless of the nuisance they present.[275] Moreover, the court never declared in prior case law that nuisance determinations are essentially determinations that a property is without any value. The characterization of nuisance as a value determination stands in direct contrast to the definition of nuisance the legislature provides.[276] Thus, the majority opinion proposes a novel definition of nuisance that disqualifies abatement of many properties that might maintain marginal value, yet constitute a nuisance subject to abatement under the statutory definition.

D. Improper Reliance on the Constitutional Fact Doctrine

Another shortcoming of the majority opinion was found in the court's application of the constitutional fact doctrine. The doctrine is defined as "the rule that federal courts are not bound by an administrative agency's findings of fact when the facts involve whether the agency has exceeded its constitutional limitations on its power."[277] Although the court cites cases that apply the constitutional fact doctrine to the review of state and federal decisions, the court argued that the reasoning of the cases was even more applicable to an administrative agency's decision.[278] The court reasoned that because a lower court is not granted deference when making a determination on a question of mixed fact and law, neither should deference be granted to an administrative agency's determination in a mixed question of fact and law.[279] The obvious problem—which the majority admits—is that the principle is used "primarily in the context of the First and Fourth Amendments."[280]

1. Inapplicability of the Constitutional Fact Doctrine

Justice Guzman stated the most glaring problem with the majority's application of the constitutional fact doctrine: the doctrine is used primarily when dealing with First and Fourth Amendment issues.[281] Cases implicating the First and Fourth Amendments involve questions wholly unrelated to those regarding nuisance and takings.[282] Moreover, the Supreme Court of the United States

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[273] *Id.*

[274] *Id.*

[275] The City of Abilene specifically noted that "[i]n 2010 the average value of a structure demolished within Abilene was $13,999.30." Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at 6 fn. 2.

[276] *See* TEX. LOC. GOV'T CODE ANN. § 214.001(a) (West 2009).

[277] Not surprisingly, the definition also notes that "although it has not been overruled or wholly discredited, this rule has fallen out of favor." BLACK'S LAW DICTIONARY 354 (9th ed. 2009).

[278] The majority opinion justifies this conclusion by arguing that "because while state and lower federal courts are presumed competent to handle constitutional matters, administrative agencies, for all the deference they are typically given, occupy a subordinate status in our system of government." *Stewart*, 2011 WL 2586882, at *10 (citing Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 239 (1985)).

[279] *Id.* at *11.

[280] *Id.*

[281] *Id.* at *27 (Guzman, J., dissenting) (citing Ornelas v. United States, 517 U.S. 690, 697 (1996); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984)).

[282] *Id.*

has never leaned on the constitutional fact doctrine when deciding a question involving conventional takings.[283] The majority cited cases involving complicated, evolving legal standards in which "the 'fact' in question is of highly subjective intent—such as whether an alleged defamer acted with actual malice, or whether the police had probable cause."[284] Alternatively, the URSB's nuisance determination did not require subjective determinations or application of developing legal theories because the board simply applied an unambiguous and longstanding statutory definition to reach its determination.[285]

2. Misplaced Reliance on *Ben Avon* for Application in Takings Context

Additionally, the court erroneously used *Ohio Valley Water Company v. Ben Avon Borough* as the basis for its application of the constitutional fact doctrine to the takings context.[286] The majority argued that the case was on point because it implicated the Takings Clause.[287] *Ben Avon* deals with a governmental commission's decision to lower a public utility's rates when they were determined to be unreasonable.[288] The Superior Court of Pennsylvania overturned the decision after the utility company argued that the Commission's appraisal of the company's value was too low and that the order "would deprive it of a reasonable return and thereby confiscate its property."[289] After the state supreme court overturned the appellate court's decision, the United States Supreme Court then reversed the state's high court based on the determination that an agency acting in a legislative capacity "must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because [it is] in conflict with the due process clause, Fourteenth Amendment."[290] That is, the ultimate issue in the case was due process under the Fourteenth Amendment. The United States Supreme Court did not apply the constitutional fact doctrine to a takings determination, but rather the review due process violation. Neither did the state supreme court's decision implicate the Takings Clause, because "the state supreme court did not allow the company to raise a takings challenge, as it was not provided in state statute."[291] Amazingly, the majority opinion even admits that *Ben Avon* has never been cited for its original ruling.[292] Nonetheless, the court used the case to make an unsubstantiated leap from the constitutional fact

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[283] Brief of Amicus Curiae Int'l Mun. Laws. Assoc. in Support of Petitioner's Motion for Rehearing, *supra* note 145, at 10. Although the majority cites the *Ben Avon* case as proof the United States Supreme Court has applied the constitutional fact doctrine in a takings context, it is not applicable because the appellant argued the case as a regulatory takings and it was ultimately decided on Fourteenth Amendment grounds. *See* discussion *supra* Part III.A.4.b.

[284] *Stewart*, 2011 WL 2586882, at *27 (Guzman, J., dissenting) (citing *Bose Corp.*, 466 U.S. at 515 (Rehnquist, J., dissenting) (1984)).

[285] *Id.*

[286] *See id.* at *10 n.22 (citing Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 288 (1920)).

[287] *Id.*

[288] *Ben Avon*, 253 U.S. at 288.

[289] *Id.*

[290] "The order," of course, refers to the governmental commission's determination of a set utility rate schedule. *Id.*

[291] Brief of Amicus Curiae Int'l Mun. Laws. Assoc. in Support of Petitioner's Motion for Rehearing, *supra* note 145, at 4.

[292] *Stewart*, 2011 WL 2586882, at *10 n.22.

doctrine's traditional application.[293]

3. Mixed Questions of Fact and Law are not Necessarily Constitutional Questions

The court also applied the constitutional fact doctrine based on the premise that, similar to First and Fourth Amendment issues, "[t]akings claims also typically involve mixed questions of fact and law."[294] The majority's point essentially implies that if a question looks at both fact and law then the constitutional fact doctrine should be applied.[295] The reality, however, is that mixed questions of fact and law that concern constitutional issues are not always granted judicial de novo review.[296] For instance, Justice Guzman noted that the majority's reasoning violates the court's earlier rule that "[w]e review a trial court's decision on a mixed question of law and fact for an abuse of discretion."[297] The court stated the rule when deciding a consent to search case that looked at both the facts of the consent and the law of "voluntariness under the totality of the circumstances," which concerns the Fourth Amendment.[298] The fear, then, is that the court opens up all mixed questions of fact and law to de novo review because of its failure to apply the doctrine correctly,[299] notwithstanding the court's assurance that the ruling is "restricted to judicial review of agency decisions of substantive constitutional rights."[300]

E. Unnecessary Concern Regarding Ability and Autonomy of Administrative Boards

The majority's characterization of an administrative board's inability to make impartial, informed decisions is among the most disappointing aspects of the opinion. Despite the legislature's apparent faith in an agency's ability, the court made clear that it thought agencies are unqualified to make presumptive determinations of nuisance.[301] Citing the separation of powers doctrine, the court reasoned that administrative agencies lack sufficient separation from municipal interests to render their decisions impartial.[302] The majority's argument not only ignored the sophistication of most administrative agencies, but it also implied agency impartiality where the record reflected none.

1. Administrative Boards are Often Comprised of Highly Sophisticated Professionals

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[293] Brief of Amicus Curiae Int'l Mun. Laws. Assoc. in Support of Petitioner's Motion for Rehearing, *supra* note 145, at 5.

[294] *Stewart*, 2011 WL 2586882, at *11.

[295] *Id.* at *27 (Guzman, J., dissenting).

[296] Justice Guzman argued, "our precedents do not require de novo judicial determination in every case of this nature in order to satisfy due process[,]" and further noted, "[a] survey of our precedents in this area instead demonstrates that de novo review is *not* required if the Legislature has *both* (1) properly defined the nuisance and authorized its abatement, and (2) provided for a different standard for review of such an abatement." *Id.* at *23 (Guzman, J., dissenting).

[297] *Id.* (quoting State v. $217,590.00 in U.S. Currency, 18 S.W.3d 631, 633 (Tex. 2000)).

[298] *$217,590.00 in U.S. Currency*, 18 S.W.3d at 633 (Tex. 2000).

[299] *Stewart*, 2011 WL 2586882, at *27 n.9 (Guzman, J., dissenting) (arguing that despite the court's attempt to limit its ruling, it fails to properly distinguish the ruling from the general rule because the cases cited by the majority "are disparate examples of heightened review in various contexts, and generally do not address the proper framework for review of mixed questions of law and fact").

[300] *Id.* at *11 n.25.

[301] *Id.* at *8.

[302] *Id.*

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Although the court portrayed administrative boards as less than trustworthy,[303] these agencies typically have competent, knowledgeable members sensitive to the issues they decide.[304] The state statutes authorizing formation of a buildings and standards commission do not contain any provisions requiring members have a certain level of education or expertise, however, it is common practice for cities to set rules that do contain such requirements. The City of Dallas pointed out that its own code requires that board members represent a wide spectrum of professionals with years of experience in various fields related to real property and nuisance abatement.[305] Abilene, a much smaller city, appoints a board that similarly requires highly educated professionals with a high standard of experience.[306] The implication that municipalities haphazardly organize boards that have little sophistication in matters pertaining to nuisance abatement is, in most instances, simply untrue.

2. Deference to an Administrative Board's Decision is Warranted

Further, the legislature's authorization of substantial evidence review clearly intended to offer deference to boards with sufficient experience and education to determine matters within their scope of expertise.[307] However, the court concluded—with no supporting evidence on the record—that the URSB was incapable of making a dispassionate and independent decision.[308] As one amicus brief noted, "[t]he Court's presumption of improper motives on the part of these board members is . . . befuddling given the lack of any allegation or evidence of impropriety."[309] The court's lack of confidence in the URSB also ignores that many municipal codes contain important procedural safeguards that protect property owners from biased decisions.[310] Proof that such procedural safeguards sufficiently protect owners is found in the extremely low number of demolitions relative to the high number of properties that go before a board.[311] Thus, the court should have given deference to the URSB's determination,

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[303] Specifically, the court expressed its belief that "[a]ccountability is especially weak with regard to municipal-level agencies such as the URSB, which are created by cities that 'typically lack the separation of powers of the state and federal governments.'" *Id*. (quoting Harold H. Bruff, *Separation of Power under the Texas Constitution*, TEX. L. REV. 1337, 1355 (1990)).

[304] Notably, one Texas appellate court recognized a presumption that "[a]gency members are persons of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." Amicus Curiae Brief of the City of Irving in Support of Motion for Rehearing, *supra* note 93, at 6 (quoting Tex. Util. Elec. Co. v. Public Util. Comm'n, 881 S.W.2d 387, 391 (Tex. App.—Austin 1994, writ granted)).

[305] Specifically, the code requires the following professionals, each with at least ten years experience, be represented on the board: a registered architect, mortgage loan banker, real estate appraiser, home builder, real estate broker, social or welfare worker, and structural engineer. DALLAS, TEX. CODE § 27-9(e) (repealed 2012).

[306] Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at 5.

[307] Amicus Curiae Brief of the City of Irving in Support of Motion for Rehearing, *supra* note 93, at 6 (citing R.R. Comm'n of Tex. v. Torch Operating Co., 912 S.W.2d 790, 792 (Tex. 1995)).

[308] *Id*. (citing *Stewart* at *9 n.18).

[309] *Id.*

[310] Fort Worth, for instance, explains its lengthy procedure to safeguard a property owner's rights, including: detailed owner searches, public and personal notification, city burdens of proof, cross-examination of city personnel, preliminary review opportunities, and opportunities to cure substandard or hazardous conditions. Owners are afforded ample opportunity to avoid condemnation of their property as a last means to abate nuisance. Amicus Curiae Brief of the City of Forth Worth in Support of Motion for Rehearing, *supra* note 82, at 4-6.

[311] Amicus Curiae Brief of the City of Irving in Support of Motion for Rehearing, *supra* note 93, at 8. The City of Abilene also notes its board "works with the owner, monitoring progress made, which often results in properties

barring reference to a clear instance of bias or impropriety that infringed on the property owner's rights.

V. Post-*Stewart* Realities and Proposal to Restore Preclusive Effect

In its January 27, 2012 substituted opinion, the court denied the City's motion for rehearing and reiterated its belief that Stewart should have received protection of her constitutional rights through de novo review of her appeal.[312] The majority did, however, offer concerned cities three points of parting comfort.[313] Although the court recognized that cities are not subject to collateral attack for "long-concluded nuisance abatements,"[314] that property owners must appeal within thirty days of determination, and that cities only have to litigate claims appealed by property owners, the majority did not go far enough to protect citizens exposed to nuisance.[315] Without further action, citizens remain exposed to nuisance properties while cities take much greater time and money to cautiously traverse the abatement mine field post-*Stewart*.

A. Increased Public Exposure to Nuisance Properties

In following the court's limiting guidance, cities must effectively wait an additional thirty days for an appeal after a board's nuisance determination before demolishing a property. Otherwise, a city risks takings liability upon appeal similar to the City of Dallas. Although this gives cities enough confidence to start demolishing properties again subsequent to an agency's nuisance determination,[316] the additional time delay further exposes the public to the exact problems abatement aims to avoid.[317] Thus, a process that often takes years to complete is now extended by thirty more days to wait out potential appeals, meaning citizens must endure the "vagrants, criminal activity and potential hazards" that nuisance properties often present.[318] Why needlessly delay a city's ability to protect the health, welfare, and safety of the public when the legislature already authorized cities by statute "to swiftly and expeditiously address dangerous structures"?[319]

B. Potential Rise in Number of Appeals

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being brought out of condemnation." Brief in Support of Petitioner's Motion for Rehearing for Amicus Curiae City of Abilene, *supra* note 72, at 5.

[312] City of Dallas v. Stewart, No. 09-0257, 2011 WL 2586882, at *12-13 (Tex. Jan. 27, 2012).

[313] *See supra* Part I.D.

[314] This limiting principle was applied to a takings claim stemming from nuisance abatement in an opinion released on the same day as *Stewart*. *See* Patel v. City of Everman, No. 09-0506, 2012 WL 247983 at *1 (Tex. Jan. 27, 2012).

[315] *Stewart*, 2011 WL 2586882, at *13.

[316] *See, e.g.* Kathleen Petty, *Demolition of Run Down Structures Back On Track*, MIDLAND REP.-TELEGRAM (March 27, 2012), http://www.mywesttexas.com/top_stories/article_2c9b1634-d5f5-59a1-8cbe-bb4d549ee80c.html; Brennan K. Peel, *Demolition of Blighted Abilene Buildings Might Not Be On Hold Much Longer*, ABILENE REP. NEWS (Feb. 27, 2012), http://www.reporternews.com/news/2012/feb/27/demolition-of-blighted-abilene-buildings-wont-be/.

[317] Justice Guzman highlights the worry that "this new requirement will delay an already agonizingly slow process." *Stewart*, 2011 WL 2586882, at *28 (Guzman, J., dissenting from denial of rehearing).

[318] *Id.*

[319] Brief of Amici Curiae Cities of San Antonio and Houston in Support of Petitioner City of Dallas' Motion for Rehearing, *supra* note 77, at 10.

Another problem with the court's ruling is that property owners, encouraged by Heather Stewart's success, will file appeals of an agency's nuisance determination with greater regularity. Although waiting to demolish properties until after an appeal has run its course avoids city liability, a rise in appeals still slows abatement of nuisance properties that should be demolished for public safety. It should not come as a surprise that disgruntled owners will appeal nuisance determinations with greater regularity, either out of spite or to stave off the inevitable demolition of their property. Though an appeal might offer the owner an opportunity to cure the nuisance and avoid demolition altogether, why offer the possibility of more for a defiant property owner that has already been granted numerous opportunities to bring the property into compliance? A greater number of appeals also means that cities must litigate those appeals. This unnecessarily wastes more time and taxpayer dollars.

C. Proposed Changes to Restore Preclusive Effect of Agency Nuisance Determinations

To reverse the negative effects of the *Stewart* decision and restore legislative intent, Texans should vote for a constitutional amendment that restores preclusive effect to an agency's nuisance determination and limits appeals to a substantial evidence standard of review. The Texas Constitution provides that the legislature "may propose amendments revising the Constitution, to be voted upon by the qualified voters."[320] A spot on the ballot requires that a two-third majority of all members in each house vote for the proposal.[321] Following a statewide notice period, the proposal may go to a vote in a statewide election.[322] Should the election result in a majority vote that favors the amendment, the proposal then officially becomes part of the Texas Constitution.[323]

A constitutional amendment could easily borrow language from existing statute to frame a constitutional definition of nuisance, explicitly exclude nuisance abatement from the scope of the Takings Clause, and limit judicial review of nuisance determinations to the substantial evidence standard. The proposed amendment should simply carry on at the end of the Texas Constitution's Takings Clause.[324] The proposed amendment should read:

> (e) In this section, "taken, damaged, or destroyed for or applied to public use" under Subsection (a) of this section does not include the vacation, relocation of occupants, securing repair, removal, or demolition of a building pursuant to a statutorily authorized municipal ordinance that provides for the abatement of a nuisance property.
>
> (1) A nuisance property is described as a building that is:
>
> (A) dilapidated, substandard, or unfit for human habitation and a hazard to public health, safety, and welfare;
>
> (B) regardless of its structural condition, unoccupied by its owners, lessees, or other invitees and is unsecured from unauthorized entry to the extent that it could be entered or used by vagrants or other uninvited persons as a place of harborage or could be entered or used by children; or

[320] Tex. Const. art. XVII, § 1 (amended Nov. 2, 1999).

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] Thus, the constitutional amendment should add a subsection (e) to Art. 17. *See id.*

> (C) boarded up, fenced, or otherwise secured in any manner if:
>
> (i) the building constitutes a danger to the public even though secured from entry; or
>
> (ii) the means used to secure the building are inadequate to prevent unauthorized entry or use of the building in the manner described by Subdivision (2).
>
> (2) Appellate review of a municipal nuisance determination, made pursuant to a statutorily authorized municipal ordinance that provides for the abatement of a nuisance property, is limited to the substantial evidence standard. Subject to substantial evidence review, a municipal nuisance determination is afforded preclusive effect against a claim under Subsection (a) of this section. The court may reverse or affirm, in whole or in part, or may modify the decision brought up for review. If the determination is affirmed upon review, the determination is granted preclusive effect against a claim under Subsection (a) of this section.[325]

Read in conjunction with existing statutes that authorize municipal ordinances that allow for agency nuisance determination, the proposed constitutional amendment would ensure that the legislature's original intent to limit review of an agency's determinations to the substantial evidence standard is honored. Further, the constitutional amendment would afford property owners due process and continue to protect their constitutional rights against an abuse of municipal power that might appear upon substantial evidence review. Most importantly, the constitutional amendment would restore common sense by allowing cities to abate nuisance properties efficiently and fairly while protecting citizen health, safety, and welfare.[326]

VI. Conclusion

Cities are, once again, moving forward with nuisance abatement based on determinations from administrative boards.[327] Nonetheless, the *Stewart* decision replaces the legislature's clear intent with an unnecessary and cumbersome process that continues to waste the public's time and tax money by subjecting cities to unnecessary de novo appellate review. The conservative-leaning court's decision represents a pendulum swing to the far right in Texas property rights jurisprudence. Despite the well-reasoned warnings from dissenting justices, the *Stewart* decision handcuffs municipalities from protecting their citizens through quick, yet fair, nuisance abatement procedures. The irony is that conservative property owners cheering the court's hypersensitive ruling for personal property rights

[325] The proposed constitutional amendment borrows existing language from both the Texas Constitution and state statute. *See* Tex. Const. art. XVII, § 1 (amended Nov. 2, 1999); TEX. LOC. GOV'T CODE ANN. § 214.001(a) (West 2009).

[326] Critics may argue that the proposed constitutional amendment is still subject to attack under the Due Process Clause and the Takings Clause of the United States Constitution. The suggested amendment will likely overcome constitutional scrutiny, however, because the amendment does not violate due process or takings. Due process is upheld because the amendment does guarantee the right to judicial review ensuring due process, just not de novo review. *See supra* Part IV.B.2. Neither does the amendment violate the Takings Clause because, per *Lucas v. South Carolina Coastal Council,* it explicitly defines nuisance in a manner consistent with past nuisance jurisprudence and property law in Texas. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).

[327] *See supra* note 164.

today could tomorrow become victims to the serious effects of a nearby nuisance property. Texans can, however, reestablish the former level of protection stripped from the municipalities they rely on by voting for a constitutional amendment that restores the preclusive effect of municipal agency nuisance determination.