2005 Texas Legislative Update

Changes in Trust, Probate and Guardianship Law

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"UPIA Handbook," The Texas Probate Web Site [www.texasprobate.com] (2003 - 4).

"The Two UPIAs – How They Will Change the World," State Bar of Texas Advanced Estate Planning and Probate Law Course (2003).

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"Protecting the Surviving Spouse," Southwestern Legal Foundation Wills and Probate Institute (1999).

"Court-Created Trusts in Texas," State Bar of Texas Advanced Drafting: Estate Planning and Probate Law Course (1995), updated on The Texas Probate Web Site [www.texasprobate.com].

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2005 Texas Legislative Update

Every two years, the Texas Legislature makes significant changes to the laws affecting probate, guardianships and trust. The 79th Legislature, meeting in 2005, was no exception. This paper summarizes those changes.[1] The most significant changes in 2005 affected trust law.

1. Introduction and Acknowledgments.

A lot of effort goes into the legislative process. In the best of circumstances, this effort is manifested by passing quality legislation and defeating poor legislation. Of course, each session some shoddy things slip through and other deserving things fail to pass. The reader can judge if this year's batch was worth the effort.

A lot of the effort this session, as in past sessions, came from the Real Estate, Probate and Trust Law Section of the State Bar of Texas ("REPTL"). REPTL, with its 6,800+ members, has been active in proposing legislation in this area for more than 20 years. During the past two years, its Council, headed by Barbara Anderson of Dallas (Immediate Past Chair) and Judge Nikki DeShazo of Dallas (Chair-Elect), and its legislative committees and their respective chairs (Harry Wolff of San Antonio – Probate, Lisa Jamieson of Fort Worth – Guardianships, and Bill Pargaman of Austin – Trusts), worked hard to come up with a package which addressed the needs of its members and the public and then worked hard to get the package enacted into law. Austin lawyer Barbara Klitch provides invaluable service tracking legislation for REPTL.

REPTL is helped along the way by the State Bar and its Board of Directors (Bill Elliott of Dallas, Chair) and its excellent staff (in particular, KaLyn Laney, the head of the Bar's Legislation Department).

REPTL works closely with the Texas Academy of Probate Lawyers (the "Academy") (David Tracy of Fort Worth, Chair, and Clint Hackney, Lobbyist). The Academy is a group of attorneys who are board certified in Estate Planning and Probate Law and/or are members of the American College of Trust and Estate Counsel (ACTEC) who go the extra mile and help support quality legislation in this area. Attorneys who are eligible for membership but who are not yet members should consider supporting this fine organization.

Other groups have an interest in legislation in this area, and REPTL tries to work with them to mutual advantage. These include the statutory probate judges (Judge Steve King of Fort Worth, Presiding Statutory Probate Judge) and the Texas Bankers Association Trust/Financial Services Division (the "TBA") (Dave Folz of Dallas, Governmental Relations Chair, and John Brigance, Executive Director).

Last, and of course not least, are the Legislators and their capable staffs. This session, Rep. Will Hartnett of Dallas, Senator Jeff Wentworth of San Antonio, Senator Chris Harris of Arlington and Senator Royce West of Dallas, together with their staffs and the staffs of the House Judiciary Committee and the Senate Jurisprudence Committee, were particularly helpful and worked particularly hard on legislation in

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[1] At the time of the latest update to this paper (June 20, 2005), the Governor had called a special session of the Legislature beginning June 21, 2005. This paper does not report on any legislation from this or any subsequent special session.

this area.

Heartfelt thanks go to all of these persons and the many others who helped.

2. Changes Affecting Trusts.

The last two legislative sessions (2003 and 2005) have brought the most significant changes in trust law in Texas in 20 years. In 2003, the Uniform Prudent Investor Act and the Uniform Principal and Income Act were enacted. This year, several Uniform Trust Code concepts were incorporated in the 20-year-old Texas Trust Code. Most of these changes were made by HB 1190, which is REPTL legislation which has been signed by the Governor and becomes effective January 1, 2006. While legislation usually becomes effective September 1, TBA asked that this bill be made effective January 1 so that its members would have longer to adjust to its impact and so that trust rules would change on a calendar year basis and not in the middle of a calendar year.

2.1. ***UTC Concepts into Texas Trust Code.*** REPTL conducted a multiyear study of the new Uniform Trust Code ("UTC"), adopted by the National Council of Commissioners on Uniform State Laws ("NCCUSL") in 2000, and concluded that the Texas Trust Code is familiar to Texans, is superior to the UTC in many ways and should be retained. However, REPTL concluded that Texas should: (1) adopt the two UPIAs -- the Uniform Prudent Investor Act and the Uniform Principal and Income Act -- which were enacted in 2003; and (2) pick up some of the better UTC provisions and incorporate them into the Texas Trust Code. HB 1190 picks up many UTC provisions and incorporates them in the Texas Trust Code.

2.1.1. ***Default and Mandatory Rules.*** It is hornbook trust law that there are limits on what a settlor can do in a trust instrument and still have a trust. For example, in order for a trust to be a trust, the trustee must have some duty to account to someone. The UTC recognizes this principle and contains a section listing default and mandatory rules -- mandatory rules being rules which apply notwithstanding contrary terms in the trust instrument. The Texas Supreme Court decision in *Texas Commerce Bank, N. A. v. Grizzle*, 96 S. W. 3d 240 (Tex. 2002), was a wakeup call on this point in Texas. Under prior law, Section 111.002 of the Trust Code provided that the terms of the trust control over the Trust Code except for two corporate self-dealing rules (Sections 113.052 and 113.053). In *Grizzle*, the Supreme Court cited this section and stated, or at least implied, that those two sections were the only limits in Texas on a settlor's ability to alter the terms of a trust. *Grizzle* was an exculpatory clause case, and in 2003 the Texas Legislature responded with HB 3503, which made it clear that, notwithstanding *Grizzle*, a settlor can't exculpate the trustee from liability for breaches of trust committed in bad faith, intentionally or with reckless indifference to the interest of the beneficiary. However, HB 3503 did not address the other "mandatory" rules of a trust. HB 1190 does that. It amends Section 111.002 and adds Section 111.0035 to the Trust Code, which contains this laundry list of things which cannot be overridden in the trust instrument:

- the requirement that trusts cannot be created for an illegal purpose or require the trustee to commit an illegal or tortious act or an act that is contrary to public policy.
- the duties and liabilities of and restrictions placed on a corporate trustee under Trust Code Sections 113.052 or 113.053.
- the limitations on the effectiveness of exculpatory provisions enacted in 2003's HB 3503.
- the limitations period regarding commencing a judicial proceeding regarding a trust.

- the trustee's duty to respond to an accounting demand from a "first tier" beneficiary – a beneficiary who either is entitled or permitted to receive current distributions or who would receive a distribution if the trust terminated at that time. This, then, becomes the limit that the settlor can set for denying a beneficiary's right to demand an accounting – he or she can cut off the right of a remote beneficiary to demand an accounting, but he or she cannot cut off the rights of a current income beneficiary or a first-tier contingent remainderman.

- the trustee's duty under new Trust Code Section 113.060 to keep "first tier" beneficiaries age 25 and over reasonably informed about the trust. Note that these "first tier" beneficiaries are the same as those whose right to demand an accounting cannot be infringed. However, in addition to being able to relieve the trustee from the duty to keep remote beneficiaries reasonably informed about the trust, Section 111.0035 permits the settlor to relieve the trustee from the duty to keep beneficiaries *under age 25* informed about the trust, even if they are "first tier" beneficiaries. While the trustee may be relieved from the duty to keep non-remote beneficiaries under age 25 informed about the trust, note that such beneficiaries have the right to demand an accounting.

- the trustee's duty to act in good faith and in accordance with the purposes of the trust.

- the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:

    - modify or terminate a trust under Trust Code Section 112.054.

    - remove a trustee.

    - exercise jurisdiction under Section 115.001.

    - require, dispense with, modify or terminate a trustee's bond.

    - adjust or deny a trustee's compensation if the trustee commits a breach of trust.

As practitioners discovered when the first anti-*Grizzle* bill passed in 2003 regarding exculpatory provisions, by specifying the limits of the settlor's power to vary a Trust Code duty or other provision, the Legislature in effect tells settlors just how far they can go in modifying Trust Code standards. For example, under current law it is unclear to what extent, if any, a settlor may relieve the trustee of the duty to account. Once HB 1190 becomes effective on January 1, 2006, Texans will know those limits and can draft just up to the line and not over if they wish. Thus, the following provision regarding the trustee's disclosure duties would appear to be permitted:

> I relieve the trustee from the duty imposed by Section 113.060 of the Texas Trust Code to keep any of the following beneficiaries reasonably informed concerning the administration of the trust and the material facts necessary for the beneficiaries to protect the beneficiaries' interests:
>
> 1. Beneficiaries who are neither entitled nor permitted to receive current distributions from the trust and who would receive no distribution from the trust if it then terminated; and
>
> 2. Beneficiaries under age twenty-five (25) years.

> To the extent permitted by law, I direct that beneficiaries under age twenty-five (25) years be given no information about the trust. Also, no beneficiary who is neither entitled nor permitted to receive current distributions from the trust and who would receive no distribution from the trust if it then terminated may demand an accounting from the trustee under Section 113.151 of the Texas Trust Code.

Hopefully, these types of provisions will be inserted only in appropriate cases and will not become boilerplate, since in most cases it is not in the beneficiary's best interest to be kept in the dark about a trust for his or her benefit.

Also, note that the statute of limitations probably will not start running on a beneficiary kept in the dark until age 25 until the beneficiary knew or, through the exercise of reasonable diligence, should have known about a breach of trust. *See Slay v. Burnett Trust,* 143 Tex. 621, 187 S.W.2d 377, 394 (Tex. 1945). As a practical matter, this should give the beneficiary until age 29 to sue for trustee actions occurring during the first 25 years of his or her life.

2.1.2. ***Duty to Keep Beneficiaries Informed.*** Texas common law has long imposed a "duty of full disclosure" on trustees. *See Huie v. DeShazo,* 922 S. W. 2d 920, 923 (Tex. 1996), and *Montgomery v. Kennedy,* 669 S. W. 2d 309, 313 (Tex. 1984 -- trustees owed "a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiary's] rights"). However, the Trust Code has no provision addressing this general duty. (It has Section 113.151, requiring a trustee to respond to an accounting demand, but it does not address the affirmative duty of a trustee to keep beneficiaries reasonably informed.) HB 1190 adds new Section 113.060, which is taken from the UTC and provides that a trustee has a duty to keep beneficiaries reasonably informed concerning the administration of the trust and the material facts necessary for the beneficiaries to protect their interests. This is a mandatory (non-waivable) duty for trustees with respect to beneficiaries 25 years of age and over who are either (a) entitled or permitted to receive current distributions or (b) "first tier" remaindermen. In a compromise with TBA, the settlor is permitted to waive this duty with respect to beneficiaries under age 25. However, an income beneficiary or "first tier" remainderman under age 25 still can demand an accounting under Section 113.151, assuming he or she finds out about the existence of the trust.

2.1.3. ***Judicial Modification and Termination of Trusts.*** HB 1190 follows the UTC's lead in expanding the bases for modifying or terminating an irrevocable trust by court action. Changes to Section 112.054 should make it easier to modify or terminate a trust in appropriate cases. Under prior law, it was necessary to prove either (1) that the purposes of the trust had been fulfilled or become impossible or illegal to fulfill or (2) that, because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the purposes of the trust. The 2005 changes preserve the first of the two bases for modifying or terminating a trust – that the purposes have been fulfilled or become impossible or illegal to fulfill – but it liberalizes the second basis and adds three new bases for modifying or terminating a trust:

- In cases of circumstances not anticipated by the settlor, rather than having to prove that compliance with the terms would defeat or substantially impair the accomplishment of the purposes of the trust, Subsection (a)(2) now provides that one must prove merely that the modification or termination "will further the purposes of the trust." This is a much easier standard to meet and is much more logical.

- "Administrative, nondispositive" provisions of the trust may be modified if "necessary or appropriate to prevent waste or avoid impairment of the trust's administration." No inquiry into the settlor's knowledge or intent is required.

- Modification or termination necessary to achieve the settlor's tax objectives are permitted, so long as the action is "not contrary to" the settlor's intentions. These changes may be given retroactive effect.

- If all the beneficiaries agree (using virtual representation concepts), a trust may be terminated if its continued existence is not necessary to achieve any material purpose of the trust or modified in any manner which is "not inconsistent with a material purpose of the trust."

2.1.4. ***Division and Combination of Trusts.*** Most well-drafted trusts permit division of one trust into two or more trusts or the combination of two or more trusts into one trust in various circumstances. Currently, Section 112.057 of the Trust Code permits division or combination in cases where the trust instrument is silent only for tax reasons. HB 1190 amends this section to permit division or combination of trusts for any reason, so long as the rights of beneficiaries are not impaired and the achievement of the purposes of the trust is not adversely affected.

2.1.5. ***Trust for Care of Animal.*** HB 1190 follows the UTC's lead by adding Section 112.037 to the Trust Code, which permits trusts for the care of animals. The statute permits such trusts only for animals that are alive during the settlor's lifetime. The statute addresses issues such as who may enforce the trust and what happens to the trust property when the animal or animals die.

2.1.6. ***Another Option for Distributions to Minor and Incapacitated Beneficiaries.*** Most well-drafted trusts contain a "facility of payment" provision giving the trustee various options in making distributions to or for the benefit of a beneficiary. Section 113.021 of the Trust Code is a default provision for trusts with no specific facility of payment provision. Under prior law the trustee had various options when making distributions to or for the benefit of a minor or incapacitated beneficiary, including making the distribution to a Uniform Transfers for Minors Act (UTMA) account. HB 1190 adds one more distribution option -- it permits the trustee to manage the distribution as a separate fund for the beneficiary, subject to the beneficiary's continuing right to withdraw the distribution. This will permit the trustee in the appropriate case to hold onto the money until the beneficiary obtains majority or regains capacity.

2.1.7. ***Non Pro Rata Trust Distributions.*** HB 1190 adds Section 113.027 to the Trust Code, which permits a trustee to make non pro rata distributions and divisions of trust property. Most well-drafted trusts contain such a provision. Now this becomes the default rule in Texas.

2.1.8. ***Updating Co-Trustee Rules.*** HB 1190 amends Sections 113.085 and 114.006 regarding co-trustees. Under Section 113.085, three or more trustees who are unable to act reach a unanimous decision may act by majority and co-trustees are permitted to delegate various functions among themselves. Under Section 114.006, a co-trustee who does not join in an action may avoid liability for actions taken by a co-trustee if he or she either has properly delegated the responsibility for making the action or properly notes his or her dissent to the action. However, each co-trustee must exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress a serious breach of trust.

2.1.9. ***Other UTC-Inspired Changes.*** HB 1190 also makes the following changes based on similar UTC provisions:

- ***Section 111.004*** **--** Definition of "settlor" revised to reflect multiple settlors and to provide that one who contributes property to a trust is a "settlor" in proportion to the property contributed; "breach of trust" defined.

- ***Section 112.009*** **--** Permits a person named as trustee to take limited actions to preserve or investigate trust property without accepting the trust.

- ***Section 113.003*** **--** Authorizes granting, acquiring and exercising options.

- ***Section 113.051*** **--** Adds "good faith" to the trustee's general duty.

- ***Section 113.058*** **--** Makes it clear that a court may order a trustee to post a bond in an appropriate case even if the trust instrument waives the bond.

- ***Section 114.003*** **--** Clarifies rules when someone other than the trustee is given power to modify or terminate a trust (such as so-called "trust protectors"), and makes it clear that someone in that capacity owes fiduciary duties to the beneficiaries.

- ***Section 114.008*** **--** Lists the remedies for breach of trust.

- ***Section 115.014*** **--** Permits a guardian ad litem to consider the general benefit accruing to the living members of his client's family.

2.2. ***Clarifying Spendthrift Rules.*** HB 1190 amends Section 112.035 to clarify how spendthrift trusts work in Texas in light of the publication in 2003 of Volumes 1 and 2 of the Restatement, Third, of Trusts, by the American Law Institute. HB 1190 clarifies, for example, that spendthrift protection is not lost if the surviving spouse is made the trustee of a bypass trust, so long as his or her power as trustee to make distributions to himself or herself is limited by an ascertainable standard such as health, education, maintenance and support.

2.3. ***Uniform Principal and Income Act Fixes.*** HB 1190 fixes two provisions of the Uniform Principal and Income Act enacted in 2003. First, it fixes the garbled language in Section 116.172 regarding deferred compensation plans that made that section almost impossible to administer. The change clarifies what was intended in 2003. Second, it eliminates Section 116.005(c)(1). When it was enacted, Section 116.005(c)(1) was necessary because a power to adjust that could reduce income jeopardized the qualified terminable interest property (QTIP) status of a marital trust for federal estate tax purposes. Since enactment, Treasury Regulation 1.643(b)-1 (effective January 2, 2004) makes it clear that an adjustment meeting the regulation's requirements that reduces income in a QTIP trust does not disqualify the trust. Repeal of subsection (c)(1) gives the trustee greater flexibility in administering QTIP trusts.

2.4. ***Authority of Court in Trust Cases.*** HB 1190 amends Section 115.001 of the Trust Code to clarify that a court may intervene in the administration of a trust to the extent its jurisdiction is properly invoked, but that a trust is not subject to continuing judicial supervision unless the court orders such supervision.

2.5. ***Right of Beneficiaries to Bar Trustee Lawsuits.*** HB 3434 adds new Section 113.028 to the Texas Trust Code, permitting the beneficiaries of a trust to bar a trustee's prosecution or assertion of a claim for damages against a party who is not a beneficiary of the trust. This provision should apply only rarely for the following reasons:

- "Each beneficiary" of the trust must give written notice to the trustee, but there is no provision for virtual representation or guardians ad litem to act for minor or unascertained beneficiaries. Therefore, it will be impossible to get written notice from "each beneficiary" of most trusts.

- It applies only to damage claims against nonbeneficiaries. Thus, it may apply in cases of suits against strangers to the trust (such as suits to collect a promissory note owed to the trust) and to damage suits against former trustees who are not also beneficiaries of the trust, but it should not bar the trustee from accessing the courts on trust administrative issues.

2.6. ***Necessary Parties to Trust Litigation.*** Prior to being amended by HB 1190, Section 115.011 made any person designated by name in the instrument creating the trust a necessary party to an action involving the trust. This resulted in persons with no interest in the trust arguably being necessary parties to an action involving the trust. For example, if a will makes a specific cash gift to A and then created a trust for the benefit of B, A may have been a necessary party to a trust action even though he or she has no interest in the trust. Also, if an instrument named someone as initial trustee and that person previously resigned as trustee or declined to serve as trustee, he or she may nevertheless have been a necessary party to an action involving the trust. HB 1190 amends Section 115.001 to provide that *beneficiaries* designated by name in the instrument and *the trustee actually serving* are necessary parties.

2.7. ***Notice Required to be Given to the Attorney General in Charitable Trust Litigation.*** Under Tex. Prop. Code §123.003 prior to amendment, the attorney general had to be given notice of a proceeding involving a charitable trust within 30 days of filing and at least 10 days prior to a hearing in the proceeding. HB 934 increases the 10 days to 25 days, but makes clear that no notice of an uncontested probate proceeding is required.

2.8. ***867 Trusts Without a Guardianship.*** Guardianship management trusts, also known as "867 trusts" since they are created under Section 867 of the Probate Code, have been around since 1993. Originally only guardians could apply for creation of a trust. Prior amendments have permitted attorneys ad litem and guardians ad litem to apply for creation of a trust. HB 1472 provides that any interested person to apply for creation of an 867 trust, but only if no guardian is then serving. If a guardian has already been appointed when the application for the trust is filed, only the guardian or an ad litem may file it. HB 1472 also makes it clear that a court may create an 867 trust without first creating a guardianship.

2.9. ***Court-Created Trusts Can Qualify for Residence Homestead Exemption.*** Texas Tax Code §11.13 permits a residence homestead to enjoy a partial exemption from ad valorem taxation in some cases. The section permits property held in a "qualifying trust" – in general, property transferred to the trust either by the person occupying the property or by that person's spouse – to qualify for the residence homestead exemption. This is how residential property in revocable living trusts, bypass trusts and marital trusts can qualify for the exemption. HB 3240 amends Section 11.13 to permit court-created trusts to be "qualifying trusts" as well. Although the bill does not mention trusts created under Section 867 of the Probate Code or Section 142.005 of the Property Code by name, this bill clearly is intended to permit trusts created under those sections to qualify for the residence homestead exemption if the beneficiary of the trust is a resident of the property.

2.10. ***Cleaning Up the Code.*** Each year there are bills which clean up mistaken cross-references, change outdated terminology or correct similar minor problems in the statutes. HB 1190 cleans up references to the Uniform Transfers to Minors Act in Sections 113.021 and 113.171 of the Trust Code, cleans up language regarding trustee removal in Section 113.082, moves the statute on exculpation provisions from the "Duties of Trustee" part of the Code (Section 113.059) to the "Liability of Trustee"

part (Section 114.007), and fixes a reference to the Texas Trust Code in Property Code Section 121.003.

3. Changes Affecting Decedents' Estates.

3.1. ***Effect of Divorce on Living Trusts.*** HB 1186 is REPTL legislation that creates a new Chapter XI-A of the Probate Code (new Sections 471 through 475) addressing the effect of a divorce on a living trust which makes a gift to an ex-spouse or names an ex-spouse as trustee or successor trustee. While Texas has a statute on this subject regarding wills (Probate Code §69), no such statute covers living trusts. HB 1186 provides that trusts which are revocable by the decedent spouse and that benefit the former spouse or name the former spouse in a fiduciary capacity are treated as if the former spouse disclaimed or predeceased the decedent spouse, unless the instrument is re-executed or unless a court order or contract provides otherwise.

3.2. ***Nonexoneration of Liens.*** HB 1186 reverses the common law exoneration of liens doctrine in Texas. Under new Probate Code Section 71A, unless the will provides to the contrary, a specific devise of property passes to the devisee subject to any liens securing debt. Creditors' rights are protected, and there is a procedure for paying the debt if a creditor elects matured secured status. The bill also makes a corresponding change to Section 306 of the Probate Code.

3.3. ***Good Cause Required for Appointment of Appraisers.*** SB 347 and HB 3434 amend Probate Code Sections 248 and 727 to require a good cause showing before the court is permitted to appoint appraisers for estate property in decedents' estates and guardianships.

3.4. ***Extending the Deadline for Temporary Administrator's Bond.*** HB 3434 gives someone appointed as temporary administrator under Section 131A of the Probate Code three business days to file his or her bond, instead of requiring the bond to be filed on the date of the order appointing the temporary administrator.

3.5. ***Inheritance Rights of Adopted Adults.*** Probate Code §40 now provides that an adopted child retains the right to inherit (as an intestate heir) from his or her natural (birth) parents. HB 204 amends Probate Code §40 and Family Code §162.507 to provide that a person who is adopted when he or she is an adult does not retain the right to inherit from or through his or her birth parents. Note that this only applies when the adoption occurs when the person being adopted is an adult, so it will not apply to most adoptions. Also note that it may have the unintended consequence of cutting off inheritance rights from or through the natural mother when an adult is adopted by a father (or from or through the natural father when an adult is adopted by a mother). Of course, a well-drafted will eliminates the problem.

3.6. ***Post-Inventory Filing Fees.*** In 1999, HB 2822 eliminated the dreaded $3-for-the-first page, $2-for-each-additional-page filing fees for pleadings, etc., filed in decedents' estates and guardianships after the inventory is approved or more than 120 days after the proceeding began. The "deal" in 1999 was that certain specific filing fees would be raised to make up for elimination of the $3 and $2 fees. This session, HB 1404 keeps the 1999 increases in specific filing fees, but requires a $25 filing fee for all other documents which are more than 25 pages long which are filed after the inventory is approved or 120 days after the proceeding begins, whichever is earlier. As originally filed, the bill would have required a fee regardless of the length of the document and would have required all documents to be in type no smaller than 12 points. The 12-point type requirement and the filing fee for documents 25 pages or under was dropped. These changes make the bill much more palatable, given that most filings will be 25 pages or fewer except in big, complicated cases, and in those cases presumably the filing fee won't be that big of a deal.

3.7. ***Cleaning Up the Code.*** Each year there are bills which clean up mistaken cross-references, change outdated terminology or correct similar minor problems in the statutes. HB 1186 clarifies Section 58b of the Probate Code. Currently, a testamentary gift to an "heir or employee" of the attorney who prepared the will is void (with some exceptions). HB 1186 removes the word "heir" and replaces it with a description of the family members of the lawyer who are within the group of prohibited devisees. HB 1186 also cleans up Section 271 and 272 by removing references to the homestead rights of unmarried adult children living at home, since they do not have those rights.

4. Changes Affecting Guardianships.

4.1. ***SB 6 – Protective Services and Guardianship Certification Board.*** One of the main issues addressed by the Legislature in 2005 were perceived problems with child and adult protective services. Cases in El Paso and elsewhere drew media attention and legislative scrutiny. SB 6 focused primarily on child and adult protective services, but the final version contained a few changes which will impact guardianship practice in Texas.

4.1.1. ***DADS as Guardian, But Not DPRS.*** Under SB 6, the Department of Aging and Disability Services (DADS) may serve as a guardian of last resort, but the Department of Protective and Regulatory Services (DPRS) is prohibited from being appointed guardian.

4.1.2. ***Two More Certifications.*** SB 6 adds two new certification requirements:

- Certification of persons wishing to be appointed attorney ad litem for a child in proceedings under Chapter 262 or 263 of the Family Code. To be certified, attorneys must complete a three-hour course. Note that this is *not* the same three-hour course required under Probate Code §647A.

- Certification of private professional guardians, employees and contractors of private professional guardians, guardianship programs and DADS by the Guardianship Certification Board (GCB). The GCB is a new board governed by Chapter 111 of the Government Code. Attorneys are specifically excluded from the definition of "private professional guardian," so attorneys should not have to be certified by GCB unless they are employees or contractors of a private professional guardian, a guardianship program or DADS who provide guardianship services. Even in those cases it is not clear that attorneys must be GCB-certified. Attorneys who represent private professional guardians or guardianship programs as clients (in other words, provide legal services and not guardianship services) do not need the GCB certification. SB 6 leaves it up to the GCB to establish the requirements for certification. There is a national certification available, but there was some resistance to adopting this national certification as the statutory requirement because of its expense.

Note that neither of these certifications affects the certification of attorneys wishing to be eligible for appointment as attorney ad litem or guardian ad litem in guardianship proceedings under Section 647A of the Probate Code. There were no changes to Section 647A in 2005, so the same three-hour course requirement still applies.

4.1.3. ***Liability of Guardianship Programs.*** SB 6 adds Section 674 to the Probate Code, which provides that a guardianship program is not liable for civil damages for simple negligence. Since guardianship programs often are the guardian of last resort, they tend to be appointed in difficult cases where the risk of liability is greater. This section provides greater protection of guardianship programs than other guardians.

4.1.4. ***Changing the Rights and Duties of Guardians of the Person.*** Under prior law, Section 767 of the Probate Code provided that the guardian of the person was entitled to "control" the person of the ward and had the duty of care, "control" and protection of the ward. This change deletes the word "control" and instead speaks in terms of the guardian taking "charge" of the ward's person and having the duty to "provide supervision."

4.2. ***Guardians Ad Litem and Court Investigators in Restoration/Modification Proceedings.*** Section 694A of the Probate Code permits a ward to provide an informal letter to the court supervising the guardianship requesting a modification of the guardianship or full restoration of the ward's capacity. Under prior law, Section 694A(c) provided that, upon receipt of such a letter, the court had to appoint the court investigator or a guardian ad litem, who is then required to file an application for modification or restoration. HB 1191 is REPTL legislation that changes this section so that the court investigator or guardian ad litem is required to investigate the situation and report to the court, but the court investigator or guardian ad litem is required to file an application for restoration or modification only if he or she determines that such filing is in the best interest of the ward. HB 1191 also makes a corresponding change to Section 672.

4.3. ***Buying and Selling Securities Pursuant to Investment Plan.*** Section 855B of the Probate Code was amended in 2003 to require guardians of the estate to submit an investment plan for approval to the court. If the investment plan approved by the court calls for the buying and selling of securities along the guidelines set in the plan, then there is no reason that the guardian should have to follow the sale of personal property provisions (which may require issuing citation) in the guardianship chapter of the Code. HB 1191 amends Section 855B to make it clear that a guardian may sell securities pursuant to a court-approved investment plan without having to meet the citation requirements for sales of personal property. Presumably the court will require the investment plan to include whatever safeguards it desires before approving it.

4.4. ***Paying and Applying the Monthly Allowance.*** Under prior law, Section 776 of the Probate Code states that a guardian of the estate shall pay to the guardian of the person the monthly allowance set by the court. HB 1191 amends Section 776 so that, in those situations in which the guardian of the estate and guardian of the person are different, the court may order that the guardian of the estate may pay all or a portion of the monthly allowance to persons other than the the guardian of the person (permitting direct payments to caregivers, providers, etc.).

4.5. ***Presumption of Incapacity in Temporary Guardianships.*** In 2003, Section 875 of the Probate Code was amended to delete this sentence: "A person for whom a temporary guardian has been appointed may not be presumed to be incapacitated." Deleting this sentence called into question whether the appointment of a temporary guardian, which may occur without all of the safeguards of a full guardianship proceeding, constitutes a finding of incapacity that could have adverse consequences for the ward, even though he or she may later be found not to be incapacitated. HB 1191 in effect replaces the sentence deleted in 2003 by adding new Section 874 to the Probate Code.

4.6. ***Post-Inventory Filing Fees.*** In 1999, HB 2822 eliminated the dreaded $3-for-the-first page, $2-for-each-additional-page filing fees for pleadings, etc., filed in decedents' estates and guardianships after the inventory is approved or more than 120 days after the proceeding began. The "deal" in 1999 was that certain specific filing fees would be raised to make up for elimination of the $3 and $2 fees. This session, HB 1404 keeps the 1999 increases in specific filing fees, but requires a $25 filing fee for all other documents which are more than 25 pages long which are filed after the inventory is approved or 120 days after the proceeding begins, whichever is earlier. As originally filed, the bill would have required a fee regardless of the length of the document and would have required all documents to be

in type no smaller than 12 points. The 12-point type requirement and the filing fee for documents 25 pages or under was dropped. These changes make the bill much more palatable, given that most filings will be 25 pages or fewer except in big, complicated cases, and in those cases presumably the filing fee won't be that big of a deal.

4.7. ***Home Equity Loans In (and Out) of Guardianships.*** HB 637 amends Section 781 and adds Sections 889A and 890A to the Probate Code to permit home equity loans in cases where a ward or minor owns an interest in a residence homestead. The loan is subject to court approval. Under Section 889A, the parent or managing conservator of a minor may apply for the loan without the need for a guardianship. Under Section 890A, the guardian of the person of a ward may apply for the loan without the need for a guardianship of the estate. Under Section 781, the guardian of an estate may apply for the loan. In all cases, the loan proceeds attributable to the minor's interest may only be used to make improvements to the property, pay for education or medical expenses of the minor or pay the outstanding balance on the loan.

4.8. ***867 Trusts Without a Guardianship.*** Guardianship management trusts, also known as "867 trusts" since they are created under Section 867 of the Probate Code, have been around since 1993. Originally only guardians could apply for creation of a trust. Prior amendments have permitted attorneys ad litem and guardians ad litem to apply for creation of a trust. HB 1472 provides that any interested person to apply for creation of an 867 trust, but only if no guardian is then serving. If a guardian has already been appointed when the application for the trust is filed, only the guardian or an ad litem may file it. HB 1472 also makes it clear that a court may create an 867 trust without first creating a guardianship.

4.9. ***Approval of Periodic Tax-Motivated Gifts***. HB 1501 permits the guardian of an estate to obtain approval of a multi-year tax-motivated gifting plan under Section 865 of the Probate Code. Many courts already permitted this under prior law, but some courts read Section 865 as requiring the guardian to apply for authority to make gifts every year.

4.10. ***Neglect of Ward Grounds for Removal Without Notice.*** HB 230 amends Probate Code §761 to authorize the court to remove a guardian without notice who "neglects or cruelly treats" a ward.

4.11. ***Cleaning Up the Code.*** Each year there are bills which clean up mistaken cross-references, change outdated terminology or correct similar minor problems in the statutes. In 2003, the deadline for a guardian of the estate to file his or her inventory, appraisement and list of claims was shortened from 90 days to 30 days. SB 346 and HB 1191 both amend Section 761 of the Probate Code to provide that the court may remove a guardian who fails to file an inventory within 30 days of qualification, rather than 90 days. HB 1191 amends Sections 615 and 616 of the Probate Code to clarify what happens to the file when a guardianship case is transferred. HB 1191 also cleans up a mistaken cross-reference in Section 788 and deletes superfluous references to a decedent's estate in Section 831.

5. Changes to Jurisdiction.

5.1. ***Jurisdiction over Testamentary Trusts.*** Amendments to Probate Code Sections 5 and 5A in 2003 called into question which courts have jurisdiction to hear cases involving testamentary trusts. HB 1186 goes back to the pre-2003 rule that statutory probate courts and district courts have concurrent jurisdiction over charitable, inter vivos and testamentary trusts. HB 1186 also gives statutory probate judges concurrent jurisdiction with the district court in any case "by or against a trustee." This will make it clear that a statutory probate court has jurisdiction to hear a case in which a trustee is a party without having to inquire into whether or not the case "involves" a trust.

5.2. ***Jurisdiction over 142 Trusts.*** The decision of the Texas Supreme Court in *Texas Commerce Bank, N. A. v. Grizzle*, 96 S. W. 3d 240 (Tex. 2002), and the enactment of HB 3503 in 2003 made it clear that the Trust Code applied to trusts created under Section 142.005 of the Property Code. Unfortunately, this cast into doubt the authority of courts other than district courts and statutory probate courts to create, modify and terminate so-called "142 Trusts." This is because Section 115.001(d) of the Trust Code said that district courts have exclusive jurisdiction over trust matters, except for the jurisdiction given to statutory probate courts. HB 1190 amends Section 142.005 of the Property Code and Section 115.001 of the Trust Code to clarify that any court of record with jurisdiction to hear the suit in which the 142 Trust is created may create, modify, terminate and otherwise deal with the 142 Trust so created.

5.3. ***Tweaks to the Procedure for Contested Probate Proceedings in Smaller Counties.*** HB 1186 amends Probate Code Section 5 to assure that a litigant in a contested probate proceeding in a county with no statutory probate court or county court at law has a right to have a statutory probate court judge assigned to hear the case, so long as the county court has not previously transferred the contested proceeding to the district court *pursuant to Section 5* -- in other words, after it was contested. Apparently in at least one county (Wood County -- *see* Tex. Gov. Code §24.547) the county judge routinely transfers uncontested probate proceedings to the district court as soon as they are filed. The change makes it clear that such a transfer does not defeat a litigant's right to have a statutory probate court judge assigned. The change also confirms that a litigant's motion for assignment of a statutory probate court judge may be filed before the proceeding is contested and that a statutory probate court judge assigned to hear a case takes his or her jurisdictional toolbox along -- including the jurisdiction to hear matters involving testamentary trusts given to the judge in Section 5(e).

5.4. ***Trial by Special Judge.*** HB 231 amends Civ. Prac. and Rem. Code §151.001 to make clear that a civil or family matter pending in a district court, statutory probate court or statutory county court may be referred for trial to a special judge with the agreement of the parties. Though the act mentions statutory probate courts, it does not specifically refer to probate matters, just civil and family matters. Nevertheless, it appears likely that probate matters will be considered civil matters for purposes of this statute and that litigants in contested probate proceedings will be able to use the revised statute to choose a special judge to hear their case by agreement, circumventing the assignment of a statutory probate judge process in some cases.

5.5. ***Associate Judges Permitted in Harris County Probate Court No. 3.*** HB 3557 amends Government Code Section 54.602 to permit associate judges in Harris County Probate Court No. 3. Now the three Dallas statutory probate courts and Harris County Probate Court Nos. 2 and 4 will be the only statutory probate courts where associate judges are not permitted.

5.6. ***New Courts with Probate Jurisdiction.*** These bills create additional courts with probate jurisdiction in the counties in question:

- HB 564 creates an additional county court at law in Williamson County.
- HB 597 creates an additional county court at law in Randall County.
- HB 1622 creates a county court at law in Hill County.
- HB 3475 creates the Probate Court No. 2 of El Paso County, Texas, which has primary responsibility for mental illness proceedings.

- HB 3489 creates an additional statutory county court in Brazoria County.

- HB 3547 creates an additional county court at law in Kaufman County.

- SB 524 creates a county court at law in Cass County.

6. Changes Affecting Marital Property.

6.1. ***Effect of Divorce on Living Trusts.*** HB 1186 is REPTL legislation that creates a new Chapter XI-A of the Probate Code (new Sections 471 through 475) addressing the effect of a divorce on a living trust which makes a gift to an ex-spouse or names an ex-spouse as trustee or successor trustee. While Texas has a statute on this subject regarding wills (Probate Code §69), no such statute covers living trusts. HB 1186 provides that trusts which are revocable by the decedent spouse and that benefit the former spouse or name the former spouse in a fiduciary capacity are treated as if the former spouse disclaimed or predeceased the decedent spouse, unless the instrument is re-executed or unless a court order or contract provides otherwise.

6.2. ***Income from Partitioned Property.*** Prior to being amended by HB 202, Family Code §4.102 provided that a spousal partition of community property into separate property included the income from the property "unless the spouses agree in a record that the future earnings and income will be community property after the partition or exchange." HB 202 in effect reverses the presumption, providing that the partition agreement "may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse."

6.3. ***Determining Separate/Community Interests in Retirement Plans, Options and Insurance Proceeds***. HB 410 adds Family Code §§3.007 and 3.008, which specify how to calculate the separate and community property shares of retirement plans, stock options and certain insurance proceeds when a person marries while such plans, options and policies are in effect.

7. Other Legislation.

7.1. ***Making Health Savings Accounts Exempt from Creditors' Claims.*** HB 330 amends Property Code §42.0021 to give health savings accounts established under Section 223 of the Internal Revenue Code the same creditor-exempt status as individual retirement accounts.

7.2. ***Organ Donor Information on Driver's Licenses.*** HB 120 returns to the days when a person's statement of intent to be an organ donor could be included on the person's driver's license. The bill requires the DPS to give persons applying for driver's licenses or renewals the opportunity to indicate their willingness to be organ donors.

7.3. ***Problem With Mandatory Deed Notice Fixed.*** SB 461 fixes the problem caused in 2003 by HB 2930. HB 2930 added Section 11.008 to the Property Code, which required every deed and deed of trust recorded in the real property records to include the following notice:

> NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

SB 461 amends Section 11.008 to provide that the notice is required only when the deed or deed of trust discloses a person's social security number or driver's license number. This will make the notice requirement inapplicable in most probate situations. SB 461 became effective May 13, 2005.

7.4. ***Group Term Life Insurance Changes.*** HB 526 removes the dollar amount caps on group term life insurance policies in Texas. Previously the dollar limit was $250,000. Effective June 17, 2005, the limit is removed. Also, HB 1571 permits group term life insurance paid wholly from amounts contributed by employees. Under prior law such insurance was permitted only if paid wholly or partially with employer funds. This change makes it possible for employers to offer group term life insurance payable wholly from employee funds.

7.5. ***Disposing of Records With Personal Identifying Information.*** HB 698 requires a business (including, presumably a law firm providing estate planning services) disposing of a "business record" that contains personal identifying information (such as a social security number, date of birth, mother's maiden name or financial account number) to shred or erase the information to make it unreadable. "Business record" is defined broadly enough to include most anything a law firm may have in its client's file, so firms should review their disposal policies. HB 698 is effective September 1, 2005.

8. Elder Law/Medicaid/Mental Health Legislation. Attached is a table summarizing legislation in the elder law, Medicaid and mental health areas.

9. Things of Note Which Did *Not* Pass. Follow are matters worth noting which did not pass:

9.1. ***Protecting the Privacy of Information in Probate and Guardianship Filings.*** Two bills (HB 2750 and HB 1309) addressed the privacy of information in probate and guardianship filings. Neither passed, in part because the Texas Supreme Court is considering adopting Rules of Judicial Administration 14 and 15. Rule 14 deals with keeping confidential information out of the public part of court case filings. Rule 15 deals with internet access to public records.

For probate and guardianship lawyers, Rule 14 has the greatest potential impact. The most recent draft of proposed Rule 14 would require the following information to be kept confidential:

- Social security numbers;
- Bank account, credit card or other financial account numbers;
- Driver's license numbers, passport numbers, and similar government-issued personal identification card numbers;
- Date of birth;
- The address and phone number of a person who is a crime victim; and
- The name and address of a minor child.

This so-called "sensitive data" could not be filed in a case file except in a separate pink "sensitive data form." Only "parties" and attorneys of record would be permitted to access the sensitive data forms.

Toward the end of the session, indications were that the Supreme Court may adopt Rules 14 and 15 in summer 2005 to be effective near the end of 2005. REPTL has expressed its concerns over Rule 14

to the court in an effort to narrow its focus and to provide different access rules in probate and guardianship cases. Among the issues to be faced:

- If the will contains the names, addresses and/or dates of birth of minor children, does the will have to be kept from public inspection when it is filed for probate? If so, how is that going to work?

- How can the minor's name, address and birthdate be kept out of the case file in a guardianship proceeding for the minor child?

- How can the court declare heirship if one or more of the heirs is a minor child?

9.2. ***Prohibiting the Sale of Living Trusts By Non-Lawyers.*** HB 2011 came close to passing. It would have added Chapter 48 to the Business and Commerce Code prohibiting any person other than a licensed attorney from engaging "in any act, practice or course of business involving the solicitation of another person to become the settlor of a living trust or to purchase a document or other instrument creating or purporting to create a living trust" or inducing, soliciting, employing or contracting with "another" to engage in such conduct. Civil remedies would have been imposed, and the prohibited actions would have constituted the unauthorized practice of law. Ultimately the bill failed because it was too hard to draw lines between inappropriate living trust "solicitations" and appropriate conduct by trust officers, financial advisors making attorney referrals, etc. This type of legislation is likely to reappear in 2007.

9.3. ***Rule Against Perpetuities.*** HB 2561 and HJR 75 would have made the rule against perpetuities inapplicable to a trust created on or after January 1, 2006. Neither went anywhere.

9.4. ***Sale of Real Estate By Independent Executors.*** HB 3186 would have revised Section 331 of the Probate Code to provide that independent executors have the authority to sell real property for three years after letters testamentary are issued even if the will contains no power of sale. This would change the "default" rule, that independent executors have the power to sell real estate for purposes other than paying debts and administrative expenses only if the will gives the executor that power. This bill didn't go anywhere, but REPTL will be studying if any changes to the default power of an independent executor to sell real estate need to be made in 2007.

9.5. ***Venue Rules and Section 5B/608 Transfer Power.*** In *Gonzalez v. Reliant Energy, Inc.*, decided March 11, 2005, the Texas Supreme Court held that the venue rules in the Civil Practice and Remedies Code "trump" a statutory probate court's authority to transfer a case to itself under Section 5B or Section 608 of the Probate Code in wrongful death, personal injury and property damage cases. This settles several years of uncertainty over this issue, but it leaves a few questions unanswered. For example, if the venue rules applicable to personal injury cases trump the 5B/608 transfer power, might other venue rules also trump it? HB 2875 and SB 1216 would have, in effect, overturned the result in *Reliant Energy* by amending Sections 5B and 608 of the Probate Code to permit statutory probate judges transfer tort and non-tort cases under those sections even if they do not have proper venue. However, neither bill could muster enough support to pass. So, *Reliant Energy* appears to be the law for at least the next two years.

9.6. ***Power of Attorney/Disability Planning Legislation.*** Amazingly, given all the publicity surrounding the Terri Schiavo and her tragic circumstances, there was no significant legislation on durable powers of attorney, medical powers of attorney or directives to physicians and family or surrogates. HB 2765 adds persons entitled to consent to medical treatment under Health and Safety Code

Chapter 313 and a patient's "heirs" to the list of persons who can authorize the release of private health care information by a hospital under Chapter 241 of the Health and Safety Code. This no doubt would make it easier for the hospital to find someone to consent to the release of information, and it may have adverse consequences for patient privacy, but it has no effect on the preparation or use of disability planning documents.

2005 Changes to the Texas Trust Code and to Chapters 42, 121, 123 and 142, Texas Property Code

These sections of the Texas Trust Code (Chapters 111 – 117, Property Code) and of Chapters 42, 121, 123 and 142, Property Code, were amended by Acts of the 79th Legislature, Regular Session. This was compiled quickly by Glenn M. Karisch at the end of the legislative session as an aid to attorneys. While Glenn believes it to be a complete and correct listing of changes to these chapters of the Property Code, it should not be considered authoritative and he does not warrant its accuracy and completeness.

Glenn Karisch's Legislative Comments Appear in Boxes

Sec. 42.0021. ADDITIONAL EXEMPTION FOR CERTAIN SAVINGS PLANS [~~RETIREMENT PLAN~~]. (a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, and under any annuity or similar contract purchased with assets distributed from that type of plan, and under any retirement annuity or account described by Section 403(b) or 408A of the Internal Revenue Code of 1986, and under any individual retirement account or any individual retirement annuity, including a simplified employee pension plan, and under any health savings account described by Section 223 of the Internal Revenue Code of 1986, is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986. A person's right to the assets held in or to receive payments, whether vested or not, under a government or church plan or contract is also exempt unless the plan or contract does not qualify under the definition of a government or church plan under the applicable provisions of the federal Employee Retirement Income Security Act of 1974. If this subsection is held invalid or preempted by federal law in whole or in part or in certain circumstances, the subsection remains in effect in all other respects to the maximum extent permitted by law.

(b) Contributions to an individual retirement account, other than contributions to a Roth IRA described in Section 408A, Internal Revenue Code of 1986, or an annuity that exceed the amounts deductible under the applicable provisions of the Internal Revenue Code of 1986 and any accrued earnings on such contributions are not exempt under this section unless otherwise exempt by law. Amounts qualifying as nontaxable rollover contributions under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986 before January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts treated as qualified rollover contributions under Section 408A, Internal Revenue Code of 1986, are treated as exempt amounts under Subsection (a). In addition, amounts qualifying as nontaxable rollover contributions under Section 402(c), 402(e)(6), 402(f), 403(a)(4), 403(a)(5), 403(b)(8), 403(b)(10), 408(d)(3), or 408A of the Internal Revenue Code of 1986 on or after January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts qualifying as nontaxable rollover contributions under Section 223(f)(5) of the Internal Revenue Code of 1986 on or after January 1, 2004, are treated as exempt amounts under Subsection (a).

(c) through (f) [no change].

Amended by HB 330, effective May 24, 2005. Section 3 of HB 330 provides: "The change in law made by this Act applies to all contributions made under Section 223, Internal Revenue Code of 1986, before, on, or after the effective date of this Act."

This change is intended to give health savings accounts the same creditor protection status that individual retirement accounts enjoy. The effective date provision makes the creditor protection applicable to contributions made before, on or after the bill's effective date.

Sec. 111.002. CONSTRUCTION OF SUBTITLE. [~~(a) If the provisions of this subtitle and the terms of a trust conflict, the terms of the trust control except the settlor may not relieve a corporate trustee from the duties, restrictions, and liabilities under Section 113.052 or 113.053.~~

[~~(b)~~] 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 [~~of~~] the Texas Trust Act.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This is an nonsubstantive change. Subsection (a) of Section 111.002 is deleted here, but the substance of this subsection is moved to new Section 111.0035.

Sec. 111.0035. DEFAULT AND MANDATORY RULES; CONFLICT BETWEEN TERMS AND STATUTE. (a) Except as provided by the terms of a trust and Subsection (b), this subtitle governs:

(1) the duties and powers of a trustee;

(2) relations among trustees; and

(3) the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:

(1) the requirements imposed under Section 112.031;

(2) the duties and liabilities of and restrictions placed on a corporate trustee under Section 113.052 or 113.053;

(3) the applicability of Section 114.007 to an exculpation term of a trust;

(4) the periods of limitation for commencing a judicial proceeding regarding a trust;

(5) a trustee's duty:

(A) with regard to an irrevocable trust, to respond to a demand for accounting

made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:

(i) is entitled or permitted to receive distributions from the trust; or

(ii) would receive a distribution from the trust if the trust terminated at the time of the demand;

(B) to act in good faith and in accordance with the purposes of the trust; and

(C) under Section 113.060 to a beneficiary described by Paragraph (A) that is 25 years of age or older; or

(6) the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:

(A) modify or terminate a trust or take other action under Section 112.054;

(B) remove a trustee under Section 113.082;

(C) exercise jurisdiction under Section 115.001;

(D) require, dispense with, modify, or terminate a trustee's bond; or

(E) adjust or deny a trustee's compensation if the trustee commits a breach of trust.

Added by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 105 of the Uniform Trust Code. The case of *Texas Commerce Bank, N. A. v. Grizzle*, 96 S. W. 3d 240 (Tex. 2002), called into question the limits, if any, placed on a settlor's ability to override statutory and common law trust principles. New Section 111.0035 makes clear that, while the settlor is free to override most provisions of the Texas Trust Code by placing specific provisions to that effect in the trust instrument, certain rights, powers and duties cannot be overridden.

Many of these "mandatory" rules have to do with the court's authority to act with respect to the trust. For example, a provision in a trust instrument which attempts to bar the court's authority to remove a particular trustee is unenforceable.

Perhaps the most significant mandatory rules relate to the disclosure of information by trustees. The trustee's disclosure obligations are twofold: First, the trustee must respond to a beneficiary's demand for accounting under Section 113.151. Second, the trustee has an affirmative duty to keep beneficiaries reasonably informed under new Section 113.060.

This section permits the settlor to place limits on the trustee's disclosure obligations. First, with respect to accounting demands, the settlor may cut off the right of remote beneficiaries to demand an accounting -- remote beneficiaries being those who both (a) are not entitled or permitted to receive current distributions from the trust (in other words, who are not current income beneficiaries) and (b) would not receive a distribution from the trust if the trust then terminated (in other words, who are not first-tier remaindermen).

Second, with respect to the affirmative duty to keep beneficiaries informed, the settlor may relieve the trustee from the duty to make such disclosures to the same remote beneficiaries whose rights to demand accountings may be curtailed. In addition, the settlor may provide that the trustee has no duty to make such affirmative disclosures to a beneficiary under age 25.

Note that the under-25 rule applies to the affirmative duty to disclose but not to the right to demand an accounting. Therefore, if a beneficiary under age 25 demands an accounting under Section 113.151, the trustee must respond to the demand even if the trustee has no affirmative duty to keep him or her reasonably informed. Also note that the settlor must include a provision overriding the statutory requirement in order for the under-25 rule to apply -- it is not a default rule. If the trust instrument is silent, a trustee must keep a beneficiary under age 25 reasonably informed about the trust under Section 113.060.

Example 1. Settlor S creates a trust. The trust instrument is silent about the trustee's duty to disclose information or respond to demands for accountings. Trustee T has a duty to keep all beneficiaries, even remote beneficiaries and beneficiaries under age 25, reasonably informed under Section 113.060 and to respond to a demand for an accounting by any such beneficiary.

Example 2. Settlor S creates a trust. The trust instrument provides: "Distribute all income to Beneficiary B. At B's death, distribute the remaining trust property to B's descendants, per stirpes." The trust instrument also provides: "The trustee is directed not to provide any information to, or to respond to an accounting demand from, any of B's descendants." B is 65 and has two children, C1, who is age 40, and C2, who is age 20. C1 has one child, G, who is 19. Here is the effect on the various beneficiaries:

> ***B.*** Trustee T must keep B reasonably informed pursuant to Section 113.060 and must respond to an accounting demand from B pursuant to Section 113.151 because the terms of the trust do not attempt to override the trustee's disclosure duty with respect to B.
>
> ***C1.*** Trustee T must keep C1 reasonably informed pursuant to Section 113.060 because C1 is over age 25 and would receive a distribution from the trust if the trust then terminated (if B died). T must respond to an accounting demand from C1 pursuant to Section 113.151 since C1 would receive a distribution from the trust if the trust then terminated (if B died).
>
> ***C2.*** Trustee T is relieved from the duty to keep C2 reasonably informed pursuant to Section 113.060 because C2 is under age 25. (Note that this assumes that the phrase "a trust may not limit" in Section 111.0035(b) is interpreted to mean a provision that exceeds these limits is carved back to the limit. A court could disregard the overly broad provision entirely, meaning that the default disclosure rules apply. For this reason, a settlor desiring to limit the trustee's disclosure limits probably should draft up to the statutory limit and not intentionally exceed that limit.) However, if C2 finds out about the trust and makes an accounting demand, T must respond to an accounting demand from C2 pursuant to Section 113.151 since C2 would receive

a distribution from the trust if the trust then terminated (if B died) and since the under-25 provision applies only to the Section 113.060 duty and not to the Section 113.151 right to demand an accounting.

G. Trustee T is relieved from the duty to keep G reasonably informed pursuant to Section 113.060 because G is neither entitled or permitted to receive current distributions, nor would G receive a distribution from the trust if it then terminated, since G's parent, C1, is alive. Similarly, T is not required to respond to an accounting demand from G because G is neither entitled or permitted to receive current distributions, nor would G receive a distribution from the trust if it then terminated, since G's parent, C1, is alive. (Note that this assumes that the phrase "a trust may not limit" in Section 111.0035(b) is interpreted to mean a provision that exceeds these limits is carved back to the limit. A court could disregard the overly broad provision entirely, meaning that the default disclosure rules apply. For this reason, a settlor desiring to limit the trustee's disclosure limits probably should draft up to the statutory limit and not intentionally exceed that limit.)

Example 3. Settlor S creates a trust. The trust instrument provides: "Trustee T may distribute to Beneficiary B or to any of B's descendants so much of the income or principal of the trust as T determines is needed for the health, education, maintenance and support of such beneficiaries. However, B is the primary beneficiary and shall be given priority with respect to trust distributions." The trust instrument also provides: "The trustee is directed not to provide any information to, or to respond to an accounting demand from, any of B's descendants." B is 65 and has two children, C1, who is age 40, and C2, who is age 20. C1 has one child, G, who is 19. Trustee T is obligated to respond to accounting demands from any of B, C1, C2 or G, since all are "permitted" to receive current distributions from the trust. T must keep B and C1 reasonably informed pursuant to Section 113.060 since both are over age 25. T is relieved from the duty to keep C2 and G reasonably informed pursuant to Section 113.060 because each is under age 25. (Note that this assumes that the phrase "a trust may not limit" in Section 111.0035(b) is interpreted to mean a provision that exceeds these limits is carved back to the limit. A court could disregard the overly broad provision entirely, meaning that the default disclosure rules apply. For this reason, a settlor desiring to limit the trustee's disclosure limits probably should draft up to the statutory limit and not intentionally exceed that limit.)

Sec. 111.004. DEFINITIONS. In this subtitle:

(1) through (13) [no change].

(14) "Settlor" means a [~~the~~] person who creates a trust or contributes property to a trustee of a [~~the~~] trust. If more than one person contributes property to a trustee of a trust, each person is a settlor of the portion of the property in the trust attributable to that person's contribution to the trust. The terms "grantor" and "trustor" mean the same as "settlor."

(15) through (24) [no change].

(25) "Breach of trust" means a violation by a trustee of a duty the trustee owes to a beneficiary.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before

January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

The change in the definition of "settlor" is based on Section 103 (14) of the Uniform Trust Code. It clarifies that a person is a settlor if he or she contributes property to the trustee of a trust even if he or she does not create the trust. It also clarifies that one is only a "settlor" of that portion of the trust attributable to that person's contribution to the trust.

Example. A creates a trust and contributes $90 to the trust. On the same day, B contributes $10 to the same trust. A is a settlor with respect to 90% of the trust, and B is a settlor with respect to 10% of the trust.

The definition of "breach of trust" is based on Section 1001(a) of the Uniform Trust Code. It is relevant because of new Section 114.008, which lists remedies for breach of trust.

Sec. 112.009. ACCEPTANCE BY TRUSTEE. (a) The signature of the person named as trustee on the writing evidencing the trust or on a separate written acceptance is conclusive evidence that the person accepted the trust. A person named as trustee who exercises power or performs duties under the trust is presumed to have accepted the trust, except that a person named as trustee may engage in the following conduct without accepting the trust:

(1) acting to preserve the trust property if, within a reasonable time after acting, the person gives notice of the rejection of the trust to:

(A) the settlor; or

(B) if the settlor is deceased or incapacitated, all beneficiaries then entitled to receive trust distributions from the trust; and

(2) inspecting or investigating trust property for any purpose, including determining the potential liability of the trust under environmental or other law.

(b) and (c) [no change]

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 701(c) of the Uniform Trust Code. It permits the trustee take limited actions with respect to a trust without accepting the trusteeship.

Sec. 112.035. SPENDTHRIFT TRUSTS. (a) through (d) [no change].

(e) A beneficiary of the trust may not be considered a settlor merely because of a lapse, waiver, or release of:

(1) a power described by Subsection (f); or

(2) the beneficiary's right to withdraw a part of the trust property to the extent that [~~if~~] the value of the property affected by the lapse, waiver, or release [~~that could have been withdrawn by exercising the right of withdrawal~~] in any calendar year does not exceed [~~at the time of the lapse, waiver, or release~~] the greater of the amount specified in:

(A) [~~(1)~~] Section 2041(b)(2) or 2514(e), Internal Revenue Code of 1986; or

(B) [~~(2)~~] Section 2503(b), Internal Revenue Code of 1986.

(f) A beneficiary of the trust may not be considered to be a settlor, to have made a voluntary or involuntary transfer of the beneficiary's interest in the trust, or to have the power to make a voluntary or involuntary transfer of the beneficiary's interest in the trust, merely because the beneficiary, in any capacity, holds or exercises:

(1) a presently exercisable power to:

(A) consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary, if the power is:

(i) exercisable only on consent of another person holding an interest adverse to the beneficiary's interest; or

(ii) limited by an ascertainable standard, including health, education, support, or maintenance of the beneficiary; or

(B) appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate, or a creditor of the beneficiary's estate;

(2) a testamentary power of appointment; or

(3) a presently exercisable right described by Subsection (e)(2).

Amended by HB 1190, effective January 1, 2006. Section 30(a) of HB 1190 provides that the changes made to Section 112.035 are "intended to clarify existing law, but only as expressly provided by that section. An inference may not be drawn from the amendments made by that section for situations not specifically described by that section."

This change addresses problems resulting from the publication in 2003 of Volumes 1 and 2 of the Restatement, Third, of Trusts, by the American Law Institute (ALI). ALI occasionally publishes restatements of the law on various subjects, and Texas appellate courts often cite the restatements as authority for positions taken. Section 60 of the Restatement, Third, of Trusts and the comments and examples related thereto call into question the protection from creditors of a spendthrift trust in situations where the trustee also is a beneficiary of the trust, even if the trustee's authority to make

distributions is limited to an ascertainable standard such as the health, education, maintenance and support of the beneficiary.

It is common practice in Texas to establish trusts with one of the beneficiaries as trustee. For example, a husband, seeking to avail himself of certain tax benefits permitted under federal tax law, may provide in his will that one or more trusts will be established for the benefit of his wife after his death and name his wife as trustee. If these trusts contain a "spendthrift" clause (a clause barring the premature alienation of the trust property and protecting the trust property from the beneficiary's creditors) and limit the trustee's authority to make distributions to an ascertainable standard – as virtually all such trusts do – then significant tax savings may be achieved on the death of the wife.

Trusts are drafted this way in Texas because it has long been the predominant view in Texas that spendthrift protection is not lost because a beneficiary is a trustee of the trust, so long as there are ascertainable restrictions on the trustee/beneficiary's authority to make distributions to himself or herself. Section 60 of Restatement, Third, of Trusts, calls this into question. If Texas courts followed the Restatement approach and disallow spendthrift protection from these trusts, thousands of existing trusts in Texas and their beneficiaries may suffer devastating tax and non-tax consequences.

This change clarifies existing law to assure that spendthrift trusts do not lose spendthrift protection because the trustee also is a beneficiary of the trust, so long as the authority to make distributions to a beneficiary is limited to an ascertainable standard such as health, education, maintenance and support. It also clarifies existing law regarding spendthrift protection as it relates to certain powers of appointment.

Sec. 112.037. TRUST FOR CARE OF ANIMAL. (a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates on the death of the animal or, if the trust is created to provide for the care of more than one animal alive during the settlor's lifetime, on the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if a person is not appointed in the terms of the trust, by a person appointed by the court. A person having an interest in the welfare of an animal that is the subject of a trust authorized by this section may request the court to appoint a person to enforce the trust or to remove a person appointed to enforce the trust.

(c) Except as provided by Subsections (d) and (e), property of a trust authorized by this section may be applied only to the property's intended use under the trust.

(d) Property of a trust authorized by this section may be applied to a use other than the property's intended use under the trust to the extent the court determines that the value of the trust property exceeds the amount required for the intended use.

(e) Except as otherwise provided by the terms of the trust, property not required for the trust's intended use must be distributed to:

(1) if the settlor is living at the time the trust property is distributed, the settlor; or

(2) if the settlor is not living at the time the trust property is distributed:

(A) if the settlor has a will, beneficiaries under the settlor's will; or

(B) in the absence of an effective provision in a will, the settlor's heirs.

(f) For purposes of Section 112.036, the lives in being used to determine the maximum duration of a trust authorized by this section are:

(1) the individual beneficiaries of the trust;

(2) the individuals named in the instrument creating the trust; and

(3) if the settlor or settlors are living at the time the trust becomes irrevocable, the settlor or settlors of the trust or, if the settlor or settlors are not living at the time the trust becomes irrevocable, the individuals who would inherit the settlor or settlors' property under the law of this state had the settlor or settlors died intestate at the time the trust becomes irrevocable.

Added by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

Section 112.037 is based on Section 408 of the Uniform Trust Code. It provides a means for a settlor to provide care and support for companion animals which are alive at the time of the settlor's death. The offspring of those animals born after the death of the settlor are on their own -- the trust cannot be extended to care for them.

The statute provides a means for enforcing the trust should the settlor fail to provide that means expressly in the trust. Anyone interested in the welfare of the animal may ask the court to appoint someone to enforce the trust.

If a court determines that the property in the trust exceeds the amount necessary to provide for the trust's intended use, it may order the distribution of the property. Subsection (e) provides a means for determining the remaindermen of a trust if the settlor fails to name remaindermen.

These trusts are subject to the rule against perpetuities, and animals cannot be measuring lives for perpetuities purposes. Therefore, it is possible that the Galapagos turtle alive at the death of the settlor will have to fend for itself if it lives beyond the perpetuities period provided in the statute.

Sec. 112.054. JUDICIAL MODIFICATION OR TERMINATION OF TRUSTS. (a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:

(1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; [σr]

(2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust;

(3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration;

(4) the order is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions; or

(5) subject to Subsection (d):

(A) continuance of the trust is not necessary to achieve any material purpose of the trust; or

(B) the order is not inconsistent with a material purpose of the trust [~~compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust~~].

(b) The court shall exercise its discretion to order a modification or termination under Subsection (a) in the manner that conforms as nearly as possible to the probable intention of the settlor. The court shall consider spendthrift provisions as a factor in making its decision whether to modify or terminate, but the court is not precluded from exercising its discretion to modify or terminate solely because the trust is a spendthrift trust.

(c) The court may direct that an order described by Subsection (a)(4) has retroactive effect.

(d) The court may not take the action permitted by Subsection (a)(5) unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order. A minor, incapacitated, unborn, or unascertained beneficiary is deemed to have consented if a person representing the beneficiary's interest under Section 115.013(c) has consented or if a guardian ad litem appointed to represent the beneficiary's interest under Section 115.014 consents on the beneficiary's behalf.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

The changes to Section 112.054 are based on Sections 410, 411, 412 and 416 of the Uniform Trust Code. They represent a significant modernization of the statute regarding judicial modification or termination of irrevocable trusts.

Under prior law, it was necessary to prove either (1) that the purposes of the trust had been fulfilled or become impossible or illegal to fulfill or (2) that, because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the purposes of the trust. This standard was a codification of the pre-Trust Code common law modification standard expressed in *Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Board,* 430 S. W. 2d 107, 117 (Tex. Civ. App. — Dallas 1968, writ ref'd), cert. denied, 396 U. S. 838 (1969).

The 2005 changes preserve the first of the two bases for modifying or terminating a trust – that the purposes have been fulfilled or become impossible or illegal to fulfill – but it liberalizes the second basis and adds three new bases for modifying or terminating a trust:

In cases of circumstances not anticipated by the settlor, rather than having to prove that compliance with the terms would defeat or substantially impair the accomplishment of the purposes of the trust, Subsection (a)(2) now provides that one must prove merely that the modification or termination "will further the purposes of the trust." This is a much easier standard to meet and is much more logical.

Subsection (a)(3) permits "administrative, nondispositive" provisions of the trust to be modified if "necessary or appropriate to prevent waste or avoid impairment of the trust's administration." No inquiry into the settlor's knowledge or intent is required.

Subsection (a)(4) permits modifications or terminations if necessary to achieve the settlor's tax objectives, so long as the action is "not contrary to" the settlor's intentions. These changes may be given retroactive effect. Whether or not these modifications – especially retroactive modifications – will be successful for tax purposes is uncertain. According to the official comments of the National Conference of Commissioners on Uniform State Laws to Section 416 of the Uniform Trust Code:

> Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

Subsection (a)(5) permits the trust to be terminated if its continued existence is not necessary to achieve any material purpose of the trust or for the trust to be modified in any manner which is "not inconsistent with a material purpose of the trust." However, Subsection (a)(5) changes are permitted only if all beneficiaries agree. Virtual representation concepts may be used in obtaining beneficiary consent pursuant to Subsection (d).

Sec. 112.057. DIVISION AND COMBINATION OF TRUSTS. (a) The trustee may, unless expressly prohibited by the terms of the instrument establishing the trust, divide a trust into two or more separate trusts without a judicial proceeding if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the original trust [~~trustee reasonably determines that the division of the trust could result in a significant decrease in current or future federal income, gift, estate, generation-skipping transfer taxes, or any other tax imposed on trust property. If the trustee divides the trust, the terms of the separate trusts must be identical to the terms of the original trust, but differing tax elections may be made for the separate trusts~~]. The trustee may make a division under this subsection by:

(1) giving written notice of the division, not later than the 30th day before the date of a division under this subsection, to each beneficiary who might then be entitled to receive distributions from the trust or may be entitled to receive distributions from the trust once it is funded; and

(2) executing a written instrument, acknowledged before a notary public or other person

authorized to take acknowledgements of conveyances of real estate stating that the trust has been divided pursuant to this section and that the notice requirements of this subsection have been satisfied.

(b) [no change]

(c) The trustee may, unless expressly prohibited by the terms of the instrument establishing a [~~the~~] trust, combine [~~merge~~] two or more trusts into a single trust without a judicial proceeding if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of one of the separate trusts [~~having identical terms into a single trust if the trustee reasonably determines that merging the trusts could result in a significant decrease in current or future federal income, gift, estate, generation-skipping transfer taxes, or any other tax imposed on trust property~~]. The trustee shall complete the trust combination [~~merger~~] by:

(1) giving a written notice of the combination [~~merger~~], not later than the 30th day before the effective date of the combination [~~merger~~], to each beneficiary who might then be entitled to receive distributions from the separate trusts being combined [~~merged~~] or to each beneficiary who might be entitled to receive distributions from the separate trusts once the trusts are funded; and

(2) executing a written instrument, acknowledged before a notary public or other person authorized to take acknowledgments of conveyances of real estate stating that the trust has been combined [~~merged~~] pursuant to this section and that the notice requirements of this subsection have been satisfied.

(d) The trustee may divide or combine [~~merge~~] a testamentary trust after the will establishing the trust has been admitted to probate, even if the trust will not be funded until a later date. The trustee may divide or combine [~~merge~~] any other trust before it is funded [~~if the instrument establishing the trust is not revocable at the time of the division or merger~~].

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 417 of the Uniform Trust Code. Under prior Texas law, the trustee could divide a trust into two or more trusts or combine ("merge" under prior law) two or more trusts into one trust only if the trustee believed the action would result in significant tax savings. As amended, Section 112.057 permits the division or combination of trusts for any reason, so long as the rights of beneficiaries are not impaired or the achievement of the one of the purposes of the trust is not adversely affected.

Sec. 113.003. OPTIONS. A trustee may:

(1) grant an option involving a sale, lease, or other disposition of trust property, including an option exercisable beyond the duration of the trust; or

(2) acquire and exercise an option for the acquisition of property, including an option exercisable beyond the duration of the trust.

Added by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 816(10) of the Uniform Trust Code.

Sec. 113.021. DISTRIBUTION TO MINOR OR INCAPACITATED BENEFICIARY. (a) A trustee may make a distribution required or permitted to be made to any beneficiary in any of the following ways when the beneficiary is a minor or a person who in the judgment of the trustee is incapacitated by reason of legal incapacity or physical or mental illness or infirmity:

(1) to the beneficiary directly;

(2) to the guardian of the beneficiary's person or estate;

(3) by utilizing the distribution, without the interposition of a guardian, for the health, support, maintenance, or education of the beneficiary;

(4) to a custodian for the minor beneficiary under the Texas Uniform Transfers [~~Gifts~~] to Minors Act (Chapter 141) or a uniform gifts or transfers to minors act of another state; [~~or~~]

(5) by reimbursing the person who is actually taking care of the beneficiary, even though the person is not the legal guardian, for expenditures made by the person for the benefit of the beneficiary; or

(6) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.

(b) [no change]

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 816(21)(D) of the Uniform Trust Code. It provides the trustee with another means of dealing with a minor or incapacitated beneficiary when the trust instrument requires or permits a distribution to the person or for the person's benefit. The trustee may maintain a separate fund subject to the beneficiary's continuing right to withdraw the funds. If the beneficiary is incapacitated, then presumably he or she lacks the capacity to withdraw the funds, but his or her guardian could do so. This change may make a guardianship unnecessary in some cases, since the trustee could manage the fund indefinitely on the beneficiary's behalf.

Sec. 113.027. DISTRIBUTIONS GENERALLY. When distributing trust property or dividing or terminating a trust, a trustee may:

(1) make distributions in divided or undivided interests;

(2) allocate particular assets in proportionate or disproportionate shares;

(3) value the trust property for the purposes of acting under Subdivision (1) or (2); and

(4) adjust the distribution, division, or termination for resulting differences in valuation.

Added by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 816(22) of the Uniform Trust Code. Most well-drafted trusts permit the trustee to make non-pro-rata distributions of trust property. This change makes that power a default rule in Texas. Thus, even if the trust instrument is silent, the trustee has the power to distribute certain specific assets to one beneficiary and other specific assets of appropriate value to another beneficiary, rather than distributing undivided interests in each asset to both beneficiaries.

Sec. 113.028. CERTAIN CLAIMS AND CAUSES OF ACTION PROHIBITED. (a) A trustee may not prosecute or assert a claim for damages in a cause of action against a party who is not a beneficiary of the trust if each beneficiary of the trust provides written notice to the trustee of the beneficiary's opposition to the trustee's prosecuting or asserting the claim in the cause of action.

(b) This section does not apply to a cause of action that is prosecuted by a trustee in the trustee's individual capacity.

(c) The trustee is not liable for failing to prosecute or assert a claim in a cause of action if prohibited by the beneficiaries under Subsection (a).

Amended by HB 3434, effective June 17, 2005.

A disgruntled litigant in Houston pressed for and succeeding in causing this change to pass. As originally proposed, the ability of the beneficiaries to bar a trustee from pursuing a legal action was

much broader and could have impeded the trustee's ability to properly administer the trust. As finally passed, the bill is limited as follows:

- It applies only to *claims for damages* against a *person who is not a beneficiary of the trust.* This keeps the bill from applying to most internal trust matters. It may apply to a suit for damages against a former trustee who is not also a beneficiary of the trust.

- It applies only if "each beneficiary of the trust provides written notice" to the trustee. Since most trusts have minor or unascertained beneficiaries, and since the statute makes no provision for obtaining the "written notice" from these beneficiaries through virtual representation or by the appointment of a guardian ad litem, it will be impossible to obtain the necessary written notice in the vast majority of cases.

A late change to HB 3434 made the bill effective immediately upon being signed by the Governor and deleted a provision that said Section 113.028 applied only to litigation filed on or after its effective date. However, legislative history from the floor of the House indicates that the bill is not intended to apply to litigation pending on the effective date.

Sec. 113.051. GENERAL DUTY. The trustee shall administer the trust <u>in good faith</u> according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 801 of the Uniform Trust Code. Prior to its enactment, trustees were probably held to a "good faith" standard at common law, but there was no express requirement of good faith in the Texas Trust Code.

Sec. 113.058. BOND. (a) [no change].

(b) Unless <u>a court orders otherwise or</u> the instrument creating the trust provides otherwise, a noncorporate trustee must give bond:

(1) payable to each person interested in the trust, as their interests may appear; and

(2) conditioned on the faithful performance of the trustee's duties.

(c) through (f) [no change]

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply

to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change makes it clear that, even if the trust instrument waives the requirement that a trustee provide a bond, a court has the authority to require a bond. In this respect, this change is consistent with Section 702 of the Uniform Trust Code.

~~Sec. 113.059. POWER OF SETTLOR TO ALTER TRUSTEE'S RESPONSIBILITIES. (a) Except as provided by this section, the settlor by provision in an instrument creating, modifying, amending, or revoking the trust may relieve the trustee from a duty, liability, or restriction imposed by this subtitle.~~

~~(b) A settlor may not relieve a corporate trustee from the duties, restrictions, or liabilities of Section 113.052 or 113.053 of this Act.~~

~~(c) A settlor may not relieve the trustee of liability for:~~

~~(1) a breach of trust committed:~~

~~(A) in bad faith;~~

~~(B) intentionally; or~~

~~(C) with reckless indifference to the interest of the beneficiary; or~~

~~(2) any profit derived by the trustee from a breach of trust.~~

~~(d) A provision in a trust instrument relieving the trustee of liability for a breach of trust is ineffective to the extent that the provision is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary duty to or confidential relationship with the settlor.~~

Repealed by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

The subject matter of subsections (a) and (b) is addressed in new Section 111.0035. Subsections (c) and (d) are moved to new Section 114.007 because they deal more with the duties of a trustee (Subchapter B of Chapter 113 of the Trust Code) than with the liability of a trustee (Subchapter A of Chapter 114 of the Trust Code).

Sec. 113.060. INFORMING BENEFICIARIES. The trustee shall keep the beneficiaries of the

trust reasonably informed concerning:

(1) the administration of the trust; and

(2) the material facts necessary for the beneficiaries to protect the beneficiaries' interests.

Added by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

Prior to enactment of Section 113.060, a trustee had an affirmative duty to keep the beneficiaries of the trust informed pursuant to common law, but the Texas Trust Code was silent as to this duty. The only Trust Code sections specifically related to a trustee's disclosure duty were Sections 113.151 and 113.152, dealing with the trustee's duty to respond to a beneficiary's demand for an accounting. The common law duty to inform was found in *Huie v. DeShazo,* 922 S. W. 2d 920, 923 (Tex. 1996), and *Montgomery v. Kennedy,* 669 S. W. 2d 309, 313 (Tex. 1984): trustees owed "a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiary's] rights".

With the enactment of new Section 111.0035, which lists those provisions of the Trust Code which cannot be overridden by the terms of the trust instrument, and with the desire of the Texas Bankers Association Trust/Financial Services Division to permit a settlor to relieve the trustee from the duty to keep beneficiaries under age 25 informed about the trust (*see* Trust Code Section 111.0035(b)(5)(C)), it became necessary to codify the affirmative duty of a trustee to keep the beneficiaries informed about the trust. New Section 113.060 is based on Section 813(a) of the Uniform Trust Code.

Sec. 113.082. REMOVAL OF TRUSTEE. (a) A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may, in its discretion, remove a trustee and deny part or all of the trustee's compensation if:

(1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust;

(2) the trustee becomes incapacitated [~~incompetent~~] or insolvent;

(3) the trustee fails to make an accounting that is required by law or by the terms of the trust; or

(4) [~~in the discretion of~~] the court finds[~~, for~~] other cause for removal.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or

omission relating to the trust that occurs on or after January 1, 2006."

This change clarifies the bases for removal of a trustee.

Sec. 113.085. EXERCISE OF POWERS BY MULTIPLE TRUSTEES. (a) Cotrustees that are unable to reach a unanimous decision may act by majority decision.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(c) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee:

(1) is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity; or

(2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other cotrustees, and has filed the delegation in the records of the trust.

(d) If a cotrustee is unavailable to participate in the performance of a trustee's function for a reason described by Subsection (c)(1) and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may delegate to a cotrustee the performance of a trustee's function unless the settlor specifically directs that the function be performed jointly. Unless a cotrustee's delegation under this subsection is irrevocable, the cotrustee making the delegation may revoke the delegation. [~~Except as otherwise provided by the trust instrument or by court order:~~ [~~(1) a power vested in three or more trustees may be exercised by a majority of the trustees; and~~ [~~(2) if two or more trustees are appointed by a trust instrument and one or more of the trustees die, resign, or are removed, the survivor or survivors may administer the trust and exercise the discretionary powers given to the trustees jointly.~~]

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 703 of the Uniform Trust Code. Subsections (a) and (c) appear to require three or more co-trustees to attempt to act unanimously prior to acting by majority, unless the co-trustees have delegated the authority to act to fewer than all of the trustees. This may call into question the practice of having a majority of trustees sign an instrument on behalf of the trust without any showing that (1) the trustees attempted to act unanimously but failed or (2) the nonsigning trustee(s) delegated the authority to the signing trustees. Subsection (d) may provide some relief on this point, but a statement or showing as to the unavailability of a co-trustee and the need for prompt action may be required.

Subsections (c)(2) and (e) make it clear that co-trustees may delegate the authority to act among themselves. A proper delegation may relieve the delegating co-trustee from liability for the acts of acting co-trustees, so long as the delegating co-trustee meets his or her duty under Section 114.006(b).

Sec. 113.171. COMMON TRUST FUNDS. (a) A bank or trust company qualified to act as a fiduciary in this state may establish common trust funds to provide investments to itself as a fiduciary, including as a custodian under the Texas Uniform Transfers [~~Gifts~~] to Minors Act (Chapter 141) or a uniform gifts or transfers to minors act of another state or to itself and others as cofiduciaries.

(b) and (c) [no change].

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This is a nonsubstantive change.

Sec. 114.003. POWERS TO DIRECT. (a) The terms of a trust may give a trustee or other person a power to direct the modification or termination of the trust.

(b) If the terms of a trust give a person the power to direct certain actions of the trustee, the trustee shall act in accordance with the person's direction unless:

(1) the direction is manifestly contrary to the terms of the trust; or

(2) the trustee knows the direction would constitute a serious breach of a fiduciary duty that the person holding the power to direct owes to the beneficiaries of the trust.

(c) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from a breach of the person's fiduciary duty. [~~PERSON OTHER THAN TRUSTEE IN CONTROL. If a trust instrument reserves or vests authority in any person to the exclusion of the trustee, including the settlor, an advisory or investment committee, or one or more cotrustees, to direct the making or retention of an investment or to perform any other act in the management or administration of the trust, the excluded trustee or cotrustee is not liable for a loss resulting from the exercise of the authority in regard to the investments, management, or administration of the trust.~~]

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or

omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 808 of the Uniform Trust Code. It validates the use of trust "protectors" or advisers and makes it clear that they owe fiduciary duties to the beneficiaries.

Sec. 114.006. LIABILITY OF COTRUSTEES FOR ACTS OF OTHER COTRUSTEES. (a) A trustee who does not join in an action of a cotrustee is not liable for the cotrustee's action, unless the trustee does not exercise reasonable care as provided by Subsection (b).

(b) Each trustee shall exercise reasonable care to:

(1) prevent a cotrustee from committing a serious breach of trust; and

(2) compel a cotrustee to redress a serious breach of trust.

(c) Subject to Subsection (b), a dissenting trustee who joins in an action at the direction of the majority of the trustees and who has notified any cotrustee of the dissent in writing at or before the time of the action is not liable for the action. [~~POWER EXERCISED BY MAJORITY. (a) A trustee who does not join in exercising a power held by three or more cotrustees is not liable to a beneficiary of the trust or to others for the consequences of the exercise nor is a dissenting trustee liable for the consequences of an act in which the trustee joins at the direction of the majority trustees if the trustee expressed the dissent in writing to any of the cotrustees at or before the time of joinder.~~ [~~(b) This section does not excuse a cotrustee from liability for failure to discharge the cotrustee's duties as a trustee.~~]

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 703 of the Uniform Trust Code. It deals with the liability (or lack thereof) of a trustee when he or she does not join in the action of one or more of his or her cotrustees, either because he or she has delegated authority to act to the cotrustees, he or she dissents from the action of the cotrustees, or he or she was unavailable to act along with the cotrustees. Prior law contained the somewhat ambiguous Section 114.006(b): "This section does not excuse a cotrustee from liability for failure to discharge the cotrustee's duties as a trustee." As amended, this section makes clear that each cotrustee must exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress a serious breach of trust.

Sec. 114.007. EXCULPATION OF TRUSTEE. (a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee of liability for:

(1) a breach of trust committed:

(A) in bad faith;

(B) intentionally; or

(C) with reckless indifference to the interest of a beneficiary; or

(2) any profit derived by the trustee from a breach of trust.

(b) A term in a trust instrument relieving the trustee of liability for a breach of trust is ineffective to the extent that the term is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary duty to or confidential relationship with the settlor.

(c) This section applies only to a term of a trust that may otherwise relieve a trustee from liability for a breach of trust. Except as provided in Section 111.0035, this section does not prohibit the settlor, by the terms of the trust, from expressly:

(1) relieving the trustee from a duty or restriction imposed by this subtitle or by common law; or

(2) directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.

Added by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This is a nonsubstantive change. This provision was moved from Section 113.059 because it more properly fits in Subchapter A, Chapter 114, of the Trust Code, entitled "Liability of Trustee."

Sec. 114.008. REMEDIES FOR BREACH OF TRUST. (a) To remedy a breach of trust that has occurred or might occur, the court may:

(1) compel the trustee to perform the trustee's duty or duties;

(2) enjoin the trustee from committing a breach of trust;

(3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property;

(4) order a trustee to account;

(5) appoint a receiver to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee as provided under Section 113.082;

(8) reduce or deny compensation to the trustee;

(9) subject to Subsection (b), void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or

(10) order any other appropriate relief.

(b) Notwithstanding Subsection (a)(9), a person other than a beneficiary who, without knowledge that a trustee is exceeding or improperly exercising the trustee's powers, in good faith assists a trustee or in good faith and for value deals with a trustee is protected from liability as if the trustee had or properly exercised the power exercised by the trustee.

Added by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 1001 of the Texas Trust Code. It lists possible remedies for a breach of trust. Most, if not all, of these remedies were available to Texas courts under prior law, but now there is a convenient list of remedies.

Sec. 115.001. JURISDICTION. (a) and (b) [no change].

(c) The court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. A trust is not subject to continuing judicial supervision unless the court orders continuing judicial supervision. [~~Unless specifically directed by a written order of the court, a proceeding does not result in continuing supervision by the court over the administration of the trust.~~]

(d) The jurisdiction of the district court over proceedings concerning trusts is exclusive except for jurisdiction conferred by law on a statutory probate court, [~~or~~] a court that creates a trust under Section 867, Texas Probate Code, or a court that creates a trust under Section 142.005.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

The change to Subsection (c) is intended to clarify that a court may intervene in the administration of a trust if its jurisdiction is properly invoked without making the trust permanently subject to the court's continuing supervision.

The change to Subsection (d) clarifies that a court which creates a trust for an incapacitated person under Section 142.005 of the Property Code has jurisdiction over that trust even if it is not a district court or statutory probate court. This was called into question by *Texas Commerce Bank, N. A. v. Grizzle*, 96 S. W. 3d 240 (Tex. 2002), and by the 2003 amendment to Section 142.005 making the Texas Trust Code apply to so-called "142 Trusts."

Sec. 115.011. PARTIES. (a) [no change].

(b) Contingent beneficiaries designated as a class are not necessary parties to an action under Section 115.001 [~~of this Act~~]. The only necessary parties to such an action are:

(1) a beneficiary on whose act or obligation the action is predicated;

(2) a beneficiary [~~person~~] designated by name in the instrument creating the trust; [~~and~~]

(3) a person who is actually receiving distributions from the trust estate at the time the action is filed; and

(4) the trustee, if a trustee is serving at the time the action is filed.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

Prior law made any person designated by name in the instrument creating the trust a necessary party to an action involving the trust. This resulted in persons with no interest in the trust arguably being necessary parties to an action involving the trust. For example, if a will makes a specific cash gift to A and then created a trust for the benefit of B, A may have been a necessary party to a trust action even though he or she has no interest in the trust. Also, if an instrument named someone as initial trustee and that person previously resigned as trustee or declined to serve as trustee, he or she may nevertheless have been a necessary party to an action involving the trust. This change makes it clear that *beneficiaries* designated by name in the instrument and *the trustee actually serving* are necessary parties.

Sec. 115.014. GUARDIAN AD LITEM. (a) and (b) [no change]

(c) A guardian ad litem may consider general benefit accruing to the living members of a person's family.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January

1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change is based on Section 305 of the Uniform Trust Code. Often a guardian ad litem is appointed to represent the unborn or unascertained beneficiaries of a trust. It often is impossible for the guardian ad litem to ask his or her clients about their wishes. This change makes it clear that the guardian ad litem may consider general benefit accruing to the living members of the clients' family in deciding how to act on behalf of his or her clients.

Sec. 116.005. TRUSTEE'S POWER TO ADJUST. (a) and (b) [no change].

(c) A trustee may not make an adjustment:

(1) [~~that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;~~ [~~(2)~~]] that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(2) [~~(3)~~]] that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(3) [~~(4)~~]] from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(4) [~~(5)~~]] if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(5) [~~(6)~~]] if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(6) [~~(7)~~]] if the trustee is a beneficiary of the trust; or

(7) [~~(8)~~]] if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

When it was enacted, Section 116.005(c)(1) was necessary because a power to adjust that could reduce

income jeopardized the qualified terminable interest property (QTIP) status of a marital trust for federal estate tax purposes. Since enactment, Treasury Regulation 1.643(b)-1 (effective January 2, 2004) makes it clear that an adjustment meeting the regulation's requirements that reduces income in a QTIP trust does not disqualify the trust. Repeal of subsection (c)(1) gives the trustee greater flexibility in administering QTIP trusts.

Sec. 116.172. DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR PAYMENTS. (a) and (b) [no change].

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income the part of the payment that does not exceed an amount equal to:

(1) four percent of the fair market value of the future payment asset on the date specified in [~~as determined under~~] Subsection (d); less

(2) the total amount that the trustee has allocated to income for all [~~a~~] previous payments [~~payment~~] received from the future payment asset during the same accounting period in which the payment is made [~~prescribed by Subsection (d)~~].

(d) For purposes of Subsection (c)(1), the determination of the fair market value of a future payment asset is made on the later of:

(1) the date on which the future payment asset [~~right~~] first becomes subject to the trust; or

(2) the last [~~first~~] day of the [~~trust's~~] accounting period of the trust that immediately precedes the accounting period during which the [~~future~~] payment [~~asset~~] is received.

Amended by HB 1190, effective January 1, 2006. Section 30(b) of HB 1190 provides that the amendment to Section 116.172 "is intended to clarify existing law."

As originally enacted in 2003, Section 116.172 was garbled in a way that it was nearly impossible to administer. This change it fixes the garbled language and clarifies what was intended in 2003.

Sec. 121.003. APPLICATION OF TEXAS TRUST CODE [~~ACT~~]. The Texas Trust Code [~~Act~~] (Chapters 111 through 117 [~~115~~]) applies to a pension trust.

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This fixes a cross-reference to the Texas Trust Code.

Sec. 123.003. NOTICE. (a) Any party initiating a proceeding involving a charitable trust shall

give notice of the proceeding to the attorney general by sending to the attorney general, by registered or certified mail, a true copy of the petition or other instrument initiating the proceeding involving a charitable trust within 30 days of the filing of such petition or other instrument, but no less than 25 [~~10~~] days prior to a hearing in such a proceeding. This subsection does not apply to a proceeding that:

(1) is initiated by an application that exclusively seeks the admission of a will to probate, regardless of whether the application seeks the appointment of a personal representative, if the application is uncontested; or

(2) is not a proceeding under Section 83, Texas Probate Code.

(b) Notice shall be given to the attorney general of any pleading which adds new causes of action or additional parties to a proceeding involving a charitable trust in which the attorney general has previously waived participation or in which the attorney general has otherwise failed to intervene. Notice shall be given by sending to the attorney general by registered or certified mail a true copy of the pleading within 30 days of the filing of the pleading, but no less than 25 [~~10~~] days prior to a hearing in the proceeding.

(c) [no change].

Amended by HB 934, effective September 1, 2005. Section 2 of HB 934 provides: "The change in law made by this Act applies only to a petition, instrument, or pleading that is filed in a proceeding involving a charitable trust on or after the effective date of this Act. A petition, instrument, or pleading that is filed in a proceeding involving a charitable trust before the effective date of this Act is governed by the law in effect at the time the petition, instrument, or pleading is filed, and the former law is continued in effect for that purpose."

This change gives the Attorney General more time to respond to a notice of the filing of a proceeding involving a charitable trust. While it is not clear that an uncontested probate proceeding is a "proceeding involving a charitable trust," the bill makes it clear that the notice requirement does not apply to uncontested probate proceedings.

Sec. 142.005. TRUST FOR PROPERTY. (a) In a suit in which a minor who has no legal guardian or an incapacitated person is represented by a next friend or an appointed guardian ad litem, any [~~the~~] court of record with jurisdiction to hear the suit may, on application by the next friend or the guardian ad litem and on a finding that the creation of a trust would be in the best interests of the minor or incapacitated person, enter a decree in the record directing the clerk to deliver any funds accruing to the minor or incapacitated person under the judgment to a trust company or a state or national bank having trust powers in this state.

(b) and (c) [no change].

(d) A court that creates a trust under this section has continuing jurisdiction and supervisory power over the trust, including the power to construe, amend, revoke, modify, or terminate the trust. A trust created under this section [~~may be amended, modified, or revoked by the court at any time before its termination, but~~] is not subject to revocation by the beneficiary or a guardian of the beneficiary's estate. If the trust is revoked by the court before the beneficiary is 18 years old, the court may provide for the management of the trust principal and any undistributed income as authorized by this chapter. If the trust is revoked by the court after the beneficiary is 18 years old, the trust principal and any undistributed

income shall be delivered to the beneficiary after the payment of all proper and necessary expenses.

(e) through (j) [no change].

Amended by HB 1190, effective January 1, 2006. Section 31 of HB 1190 provides: "(a) Except as otherwise provided by a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after January 1, 2006; (2) the estate of a decedent who dies before January 1, 2006, if the probate or administration of the estate is pending on or after January 1, 2006; and (3) the estate of a decedent who dies on or after January 1, 2006. (b) For a trust existing on January 1, 2006, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after January 1, 2006."

This change clarifies that a court which creates a trust for an incapacitated person under Section 142.005 of the Property Code has jurisdiction over that trust even if it is not a district court or statutory probate court. This was called into question by *Texas Commerce Bank, N. A. v. Grizzle*, 96 S. W. 3d 240 (Tex. 2002), and by the 2003 amendment to Section 142.005 making the Texas Trust Code apply to so-called "142 Trusts."

2005 Changes to the Texas Probate Code

These sections of the Texas Probate Code were amended by Acts of the 79th Legislature, Regular Session. This was compiled quickly by Glenn M. Karisch at the end of the legislative session as an aid to attorneys. While Glenn believes it to be a complete and correct listing of changes to the Texas Probate Code, it should not be considered authoritative and he does not warrant its accuracy and completeness.

Glenn Karisch's Legislative Comments Appear in Boxes

Sec. 5. JURISDICTION WITH RESPECT TO PROBATE PROCEEDINGS. (a) and (b) [no change].

(b-1) If the judge of the county court has not transferred a contested probate matter to the district court under this section by [~~at~~] the time a party files a motion for assignment of a statutory probate court judge, the county judge shall grant the motion and may not transfer the matter to district court unless the party withdraws the motion. A party to a proceeding may file a motion for assignment of a statutory probate court judge under this section before the matter becomes a contested probate matter, and the motion is given effect as a motion for assignment of a statutory probate court judge under Subsection (b) of this section if the matter later becomes contested. A transfer of a contested probate matter to district court under any authority other than the authority provided by this section:

(1) is disregarded for purposes of this section; and

(2) does not defeat the right of a party to the matter to have the matter assigned to a statutory probate court judge in accordance with this section.

(b-2) A statutory probate court judge assigned to a contested probate matter as provided by Subsection (b) of this section has the jurisdiction and authority granted to a statutory probate court by this section and Sections 5A and 5B of this code. On resolution of a contested matter, including an appeal of a matter, to which a statutory probate court judge has been assigned, the statutory probate court judge shall transfer the resolved portion of the case to the county court for further proceedings not inconsistent with the orders of the statutory probate court judge.

(b-3) through (d) [no change].

(e) A statutory probate court has concurrent jurisdiction with the district court in all personal injury, survival, or wrongful death actions by or against a person in the person's capacity as a personal representative, in all actions by or against a trustee, in all actions involving an inter vivos trust, testamentary trust, or [~~in all actions involving a~~] charitable trust, and in all actions involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate.

(f) through (I) [no change].

Amended by HB 1186, effective September 1, 2005. Section 9(a) of HB 1186 provides: "Section 5, Texas Probate Code, as amended by this Act, applies only to an action filed on or after the effective date of this

Act. An action filed before the effective date of this Act is governed by the law in effect on the date the action was filed, and the former law is continued in effect for that purpose."

The change to Subsection (b-1) is intended to assure that a litigant in a contested probate proceeding in a county with no statutory probate court or county court at law has a right to have a statutory probate court judge assigned to hear the case, so long as the county court has not previously transferred the contested proceeding to the district court *pursuant to Section 5* -- in other words, after it was contested. Apparently in at least one county (Wood County -- *see* Tex. Gov. Code §24.547) the county judge routinely transfers uncontested probate proceedings to the district court as soon as they are filed. The change to Subsection (b-1) makes it clear that such a transfer does not defeat a litigant's right to have a statutory probate court judge assigned. The change also confirms that a litigant's motion for assignment of a statutory probate court judge may be filed before the proceeding is contested, solving a "chicken or egg" problem for the litigant -- a proceeding isn't contested and, therefore, subject to having a statutory probate judge assigned until an adverse party files a responsive pleading, but waiting until a responsive pleading is filed before filing the motion for assignment of a statutory probate judge may cause the motion to be filed after the proceeding is transferred to the district court.

The change to Subsection (b-2) makes it clear that a statutory probate court judge assigned to hear a case takes his or her jurisdictional toolbox along -- including the jurisdiction to hear matters involving testamentary trusts given to the judge in Section 5(e).

The change to Subsection (e) corrects a problem caused by legislation in 2003 which removed "action involving a testamentary trust" from the list of actions over which district courts and statutory probate courts have concurrent jurisdiction. Since the 2003 change, it was unclear if statutory probate courts or district courts had jurisdiction to hear matters involving testamentary trusts. The 2005 change makes it clear that both types of courts have concurrent jurisdiction over actions involving any type of trust -- inter vivos, testamentary or charitable -- so the case can be filed in either district court or statutory probate court, assuming venue is proper. (Note that, in cases where the testamentary trust action is appertaining to or incident to an pending estate administration, the statutory probate court may have dominant jurisdiction under Section 5A(b) of the Probate Code.)

The change to Subsection (e) also makes it clear that a statutory probate court has proper jurisdiction to hear any action brought by or against the trustee of a trust. Under prior law, statutory probate courts had jurisdiction in actions "involving" an inter vivos or charitable trust, and an issue could arise as to whether or not an action in which the trustee was a party but which arguably did not involve trust administration issues was in fact an action "involving" the trust sufficient to give the statutory probate court jurisdiction. This change makes it clear that the statutory probate court has jurisdiction to hear any action in which a trustee is a party without having to inquire into the subject matter of the suit.

Sec. 40. INHERITANCE BY AND FROM AN ADOPTED CHILD. For purposes of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural child of such parent or parents by adoption. The natural parent or parents of such child and their kin shall not inherit from or through said child, but, except as provided by Section 162.507(c), Family Code, the [~~said~~] child shall inherit from and through its natural parent or parents. Nothing herein shall prevent any parent by adoption from disposing of his property by will according to law. The presence of this Section specifically relating to the rights of

adopted children shall in no way diminish the rights of such children, under the laws of descent and distribution or otherwise, which they acquire by virtue of their inclusion in the definition of "child" which is contained in this Code.

Amended by HB 204, effective September 1, 2005. Section 3 of HB 204 provides: "The changes in law made by this Act apply only to the estate of a person who dies on or after the effective date of this Act. An estate of a person who dies before the effective date of this Act is covered by the law in effect on the date of the person's death, and the former law is continued in effect for that purpose."

This change affects inheritance rights in cases where a person is adopted when he or she is an adult. It does not affect inheritance rights in cases where the person is adopted when he or she is a minor.

Sec. 58b. DEVISES AND BEQUESTS THAT ARE VOID. (a) A devise or bequest of property in a will is void if the devise or bequest is made to:

(1) an attorney who prepares or supervises the preparation of the will;

(2) a parent, descendant of a parent, or employee of the attorney described by Subdivision (1) of this subsection; or

(3) a spouse of an individual described by Subdivision (1) or (2) of this subsection [~~a devise or bequest of property in a will to an heir or employee of the attorney who prepares or supervises the preparation of the will is void~~].

(b) [no change].

Amended by HB 1186, effective September 1, 2005. Section 9(b) of HB 1186 provides: "Section 58b, Texas Probate Code, as amended by this Act, and Sections 71A and 306(c-1), Texas Probate Code, as added by this Act, apply only to a will executed on or after the effective date of this Act. A will that is executed before the effective date of this Act 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."

As law professors are fond of saying, the living have no heirs. This change gets rid of the pesky reference to "heirs" of the living and clarifies how one must be related to the attorney who prepared a will in order to be affected by this section.

Sec. 71A. NO RIGHT TO EXONERATION OF DEBTS; EXCEPTION. (a) Except as provided by Subsection (b) of this section, a specific devise passes to the devisee subject to each debt secured by the property that exists on the date of the testator's death, and the devisee has no right to exoneration from the testator's estate for payment of the debt.

(b) A specific devise does not pass to the devisee subject to a debt described by Subsection (a) of this section if the will in which the devise is made specifically states that the devise passes without being subject to the debt. A general provision in the will stating that debts are to be paid is not a specific statement for purposes of this subsection.

(c) Subsection (a) of this section does not affect the rights of creditors provided under this code or the rights of other persons or entities provided under Part 3, Chapter VIII, of this code. If a creditor elects

to have a debt described by Subsection (a) of this section allowed and approved as a matured secured claim, the claim shall be paid in accordance with Section 306(c-1) of this code.

Added by HB 1186, effective September 1, 2005. Section 9(b) of HB 1186 provides: "Section 58b, Texas Probate Code, as amended by this Act, and Sections 71A and 306(c-1), Texas Probate Code, as added by this Act, apply only to a will executed on or after the effective date of this Act. A will that is executed before the effective date of this Act 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."

This reverses the common law exoneration of liens doctrine in Texas. Unless the will specifically provides otherwise, a specific devise of property subject to a lien passes to the devisee subject to the debt securing the lien. This change applies only to wills executed on or after September 1, 2005.

Sec. 131A. APPOINTMENT OF TEMPORARY ADMINISTRATORS. (a) through (c) [no change].

(d) Not later than the third business day after [~~On~~] the date of the order, the appointee shall file with the county clerk a bond in the amount ordered by the court. In this subsection, "business day" means a day other than a Saturday, Sunday, or holiday recognized by this state.

(e) through (j) [no change].

Amended by HB 3434, effective June 17, 2005. Section 4(a) of HB 3434 provides: "Sections 131A and 248, Probate Code, as amended by this Act, apply only to the estate of a decedent who dies on or after the effective date of this Act. The estate of a decedent who dies before the effective date of this Act 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."

This change gives a temporary administrator a more realistic deadline for posting his or her bond.

Note: Section 248 was amended by both HB 3434 and SB 347. Both bills make similar changes, but they are not identical.

Sec. 248. APPOINTMENT OF APPRAISERS. [As amended by HB 3434] At any time after the grant of letters testamentary or of administration, [~~upon the application of any interested person or if the court shall deem necessary,~~] the court for good cause on its own motion or on the motion of an interested party shall appoint not less than one nor more than three disinterested persons, citizens of the county in which letters were granted, to appraise the property of the estate. In such event and when part of the estate is situated in a county other than the county in which letters were granted, if the court shall deem necessary it may appoint not less than one nor more than three disinterested persons, citizens of the county where such part of the estate is situated, to appraise the property of the estate situated therein.

Amended by HB 3434, effective June 17, 2005. Section 4(a) of HB 3434 provides: "Sections 131A and 248, Probate Code, as amended by this Act, apply only to the estate of a decedent who dies on or after the effective date of this Act. The estate of a decedent who dies before the effective date of this Act 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."

Sec. 248. APPOINTMENT OF APPRAISERS. [As amended by SB 347] At any time after the grant of letters testamentary or of administration and on its own motion or on the motion of an [~~, upon the application of any~~] interested person [~~or if the court shall deem necessary~~], the court for good cause shown shall appoint not less than one nor more than three disinterested persons, citizens of the county in which letters were granted, to appraise the property of the estate. In such event and when part of the estate is situated in a county other than the county in which letters were granted, if the court shall deem necessary it may appoint not less than one nor more than three disinterested persons, citizens of the county where such part of the estate is situated, to appraise the property of the estate situated therein.

Amended by SB 347, effective September 1, 2005. Section 3 of SB 347 provides: "The changes in law made by this Act to Section 248, Texas Probate Code, apply only to the estate of a decedent who dies on or after the effective date of this Act. The estate of a decedent who dies before the effective date of this Act 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."

The change to Section 248 requires good cause before a court may appoint appraisers for the property of an estate.

Sec. 271. EXEMPT PROPERTY TO BE SET APART. (a) Unless an affidavit is filed under Subsection (b) of this section, immediately after the inventory, appraisement, and list of claims have been approved, the court shall, by order, set apart:

(1) the homestead for the use and benefit of the surviving spouse and minor children; and

(2) all other property of the estate that is exempt from execution or forced sale by the constitution and laws of this state for the use and benefit of the surviving spouse and minor children and unmarried children remaining with the family of the deceased[~~, all such property of the estate as is exempt from execution or forced sale by the constitution and laws of the state~~].

(b) Before the approval of the inventory, appraisement, and list of claims:

(1) [~~,~~] a surviving spouse or[~~,~~] any person who is authorized to act on behalf of minor children of the deceased[~~, or any unmarried children remaining with the family of the deceased~~] may apply to the court to have exempt property, including the homestead, set aside by filing an application and a verified affidavit listing all of the property that the applicant claims is exempt; and

(2) any unmarried children remaining with the family of the deceased may apply to the court to have all exempt property other than the homestead set aside by filing an application and a verified affidavit listing all of the other property that the applicant claims is exempt.

(c) An [~~The~~] applicant under Subsection (b) of this section bears the burden of proof by a preponderance of the evidence at any hearing on the application. The court shall set aside property of the decedent's estate that the court finds is exempt.

Amended by HB 1186, effective September 1, 2006. Section 9(c) of HB 1186 provides: "Sections 271, 272, and 322, Texas Probate Code, as amended by this Act, apply only to the estate of a decedent who dies on or after the effective date of this Act. The estate of a decedent who dies before the effective date of this Act 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."

Under prior law, Section 271 of the Probate Code set apart exempt property for the use and benefit of the surviving spouse, minor children, and unmarried children remaining with the family of the deceased.. This conflicts with the case of *Zwernemann v. Von Rosenburg*, 13 S.W. 485 (Tex. 1890) which held unconstitutional the predecessor statute which purported to give possessory rights in a homestead to an adult child. This amendment clarifies Section 271.

Sec. 272. TO WHOM DELIVERED. The exempt property set apart to the surviving spouse and children shall be delivered by the executor or administrator without delay as follows:

(a) If there be a surviving spouse and no children, or if the children be the children of the surviving spouse, the whole of such property shall be delivered to the surviving spouse.

(b) If there be children and no surviving spouse, such property, except the homestead, shall be delivered to such children if they be of lawful age, or to their guardian if they be minors.

(c) If there be children of the deceased of whom the surviving spouse is not the parent, the share of such children in such exempted property, except the homestead, shall be delivered to such children if they be of lawful age, or to their guardian, if they be minors.

(d) In all cases, the homestead shall be delivered to the surviving spouse, if there be one, and if there be no surviving spouse, to the guardian of the minor children [~~and unmarried children, if any, living with the family~~].

Amended by HB 1186, effective September 1, 2006. Section 9(c) of HB 1186 provides: "Sections 271, 272, and 322, Texas Probate Code, as amended by this Act, apply only to the estate of a decedent who dies on or after the effective date of this Act. The estate of a decedent who dies before the effective date of this Act 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."

Under prior law, Section 272 of the Probate Code provided for the delivery of homestead to the surviving spouse, minor children, and/or unmarried children remaining with the family of the deceased.. This conflicts with the case of *Zwernemann v. Von Rosenburg*, 13 S.W. 485 (Tex. 1890) which held unconstitutional the predecessor statute which purported to give possessory rights in a homestead to an adult child. This amendment clarifies Section 272.

Sec. 306. METHOD OF HANDLING SECURED CLAIMS FOR MONEY. (a) through (c) [no change].

(c-1) If a claimant presents a secured claim against an estate for a debt that would otherwise pass with the property securing the debt to one or more devisees in accordance with Section 71A(a) of this code and the claim is allowed and approved as a matured secured claim under Subsection (a)(1) of this section, the personal representative shall collect from the devisees the amount of the debt and pay that amount to the claimant in satisfaction of the claim. Each devisee's share of the debt is an amount equal to a fraction representing the devisee's ownership interest in the property, multiplied by the amount of the debt. If the personal representative is unable to collect from the devisees an amount sufficient to pay the debt, the personal representative shall sell the property securing the debt, subject to Part 5 of this chapter. The personal representative shall use the sale proceeds to pay the debt and any expenses associated with the sale and shall distribute the remaining sale proceeds to each devisee in an amount equal to a fraction

representing the devisee's ownership interest in the property, multiplied by the amount of the remaining sale proceeds. If the sale proceeds are insufficient to pay the debt and any expenses associated with the sale, the difference between the sum of the amount of the debt and the expenses associated with the sale and the sale proceeds shall be paid under Subsection (c) of this section.

(d) through (k) [no change].

Amended by HB 1186, effective September 1, 2005. Section 9(b) of HB 1186 provides: "Section 58b, Texas Probate Code, as amended by this Act, and Sections 71A and 306(c-1), Texas Probate Code, as added by this Act, apply only to a will executed on or after the effective date of this Act. A will that is executed before the effective date of this Act 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."

This change clarifies the procedure to be used if a creditor elects matured secured claim status for a debt secured by a lien on property specifically devised and subject to the new nonexoneration of liens statute, Probate Code Section 71A. In that case, the personal representative gives the devisees of the property the chance to satisfy the claim. If the devisees do not provide funds to satisfy the claim, the personal representative is empowered to sell the specifically devised property to raise money to pay the debt. The statute provides that any surplus goes to the specific devisees.

Sec. 322. CLASSIFICATION OF CLAIMS AGAINST ESTATES OF DECEDENT. Claims against an estate of a decedent shall be classified and have priority of payment, as follows:

Class 1. Funeral expenses and expenses of last sickness for a reasonable amount to be approved by the court, not to exceed a total of Fifteen Thousand Dollars, with any excess to be classified and paid as other unsecured claims.

Class 2. Expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate, including fees and expenses awarded under Section 243 of this code, and unpaid expenses of administration awarded in a guardianship of the decedent.

Class 3. Secured claims for money under Section 306(a)(1), including tax liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien, and when more than one mortgage, lien, or security interest shall exist upon the same property, they shall be paid in order of their priority.

Class 4. Claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment, as determined under Subchapter F, Chapter 157, Family Code.

Class 5. Claims for taxes, penalties, and interest due under Title 2, Tax Code; Chapter 8, Title 132, Revised Statutes; Section 81.111, Natural Resources Code; the Municipal Sales and Use Tax Act (Chapter 321, Tax Code); Section 451.404, Transportation Code; or Subchapter I, Chapter 452, Transportation Code.

Class 6. Claims for the cost of confinement established by the institutional division of the Texas Department of Criminal Justice under Section 501.017, Government Code.

Class 7. Claims for repayment of medical assistance payments made by the state under Chapter

32, Human Resources Code, to or for the benefit of the decedent.

Class 8. All other claims.

Amended by HB 1186, effective September 1, 2006. Section 9(c) of HB 1186 provides: "Sections 271, 272, and 322, Texas Probate Code, as amended by this Act, apply only to the estate of a decedent who dies on or after the effective date of this Act. The estate of a decedent who dies before the effective date of this Act 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."

This change makes it clear that administrative expenses in a guardianship (such as the attorneys' fees awarded to the guardian's attorney) do no lose their priority for payment just because the ward dies. Rather, they are entitled to Class 2 status in the decedent's estate.

CHAPTER XI-A. PROVISIONS APPLICABLE TO CERTAIN NONTESTAMENTARY TRANSFERS

Sec. 471. DEFINITIONS. In this chapter:

(1) "Disposition or appointment of property" includes a transfer of property or provision of any other benefit to a beneficiary under a trust instrument.

(2) "Divorced individual" means an individual whose marriage has been dissolved, regardless of whether by divorce or annulment.

(3) "Revocable," with respect to a disposition, appointment, provision, or nomination, means a disposition to, appointment of, provision in favor of, or nomination of an individual's spouse in a trust instrument executed by the individual before the dissolution of the individual's marriage to the spouse that the individual was solely empowered by law or by the trust instrument to revoke, regardless of whether the individual had the capacity to exercise the power at that time.

Added by HB 1186, effective September 1, 2005. Section 9(d) of HB 1186 provides: "Chapter XI-A, Texas Probate Code, as added by this Act, applies only to a trust instrument that was executed before, on, or after the effective date of this Act, by an individual whose marriage is dissolved on or after the effective date of this Act. A trust instrument that was executed by an individual whose marriage is dissolved before the effective date of this Act is governed by the law in effect on the date the marriage was dissolved, and the former law is continued in effect for that purpose."

Sec. 472. REVOCATION OF CERTAIN NONTESTAMENTARY TRANSFERS ON DISSOLUTION OF MARRIAGE. (a) Except as otherwise provided by a court order, the express terms of a trust instrument executed by a divorced individual before the individual's marriage was dissolved, or an express provision of a contract relating to the division of the marital estate entered into between a divorced individual and the individual's former spouse before, during, or after the marriage, the dissolution of the marriage revokes the following:

(1) a revocable disposition or appointment of property made by a divorced individual to the individual's former spouse in a trust instrument executed before the dissolution of the marriage;

(2) a provision in a trust instrument executed by a divorced individual before the dissolution of the marriage that confers a general or special power of appointment on the individual's

former spouse; and

(3) a nomination in a trust instrument executed by a divorced individual before the dissolution of the marriage that nominates the individual's former spouse to serve in a fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, agent, or guardian.

(b) After the dissolution of a marriage, an interest granted in a provision of a trust instrument that is revoked under Subsection (a)(1) or (2) of this section passes as if the former spouse of the divorced individual who executed the trust instrument disclaimed the interest granted in the provision, and an interest granted in a provision of a trust instrument that is revoked under Subsection (a)(3) of this section passes as if the former spouse died immediately before the dissolution of the marriage.

Added by HB 1186, effective September 1, 2005. Section 9(d) of HB 1186 provides: "Chapter XI-A, Texas Probate Code, as added by this Act, applies only to a trust instrument that was executed before, on, or after the effective date of this Act, by an individual whose marriage is dissolved on or after the effective date of this Act. A trust instrument that was executed by an individual whose marriage is dissolved before the effective date of this Act is governed by the law in effect on the date the marriage was dissolved, and the former law is continued in effect for that purpose."

Sec. 473. LIABILITY FOR CERTAIN PAYMENTS, BENEFITS, AND PROPERTY. (a) A bona fide purchaser of property from a divorced individual's former spouse or a person who receives from a divorced individual's former spouse a payment, benefit, or property in partial or full satisfaction of an enforceable obligation:

(1) is not required by this chapter to return the payment, benefit, or property; and

(2) is not liable under this chapter for the amount of the payment or the value of the property or benefit.

(b) A divorced individual's former spouse who, not for value, receives a payment, benefit, or property to which the former spouse is not entitled as a result of Section 472(a) of this code:

(1) shall return the payment, benefit, or property to the person who is otherwise entitled to the payment, benefit, or property as provided by this chapter; or

(2) is personally liable to the person described by Subdivision (1) of this subsection for the amount of the payment or the value of the benefit or property received.

Added by HB 1186, effective September 1, 2005. Section 9(d) of HB 1186 provides: "Chapter XI-A, Texas Probate Code, as added by this Act, applies only to a trust instrument that was executed before, on, or after the effective date of this Act, by an individual whose marriage is dissolved on or after the effective date of this Act. A trust instrument that was executed by an individual whose marriage is dissolved before the effective date of this Act is governed by the law in effect on the date the marriage was dissolved, and the former law is continued in effect for that purpose."

New Chapter XI-A (Probate Code Sections 471 -- 473) deals exclusively with the effect of divorce or annulment on living trusts. It is intended to make the effect of a divorce on a living trust-based estate plan the same or similar to the effect of a divorce on a will-based plan under Section 69 of the Texas

Probate Code.

Sec. 601. DEFINITIONS. In this chapter:

(1) through (12) [no change].

(12-a) "Guardianship Certification Board" means the Guardianship Certification Board established under Chapter 111, Government Code.

(13) "Guardianship program" has the meaning assigned by Section 111.001, Government Code [~~means a local, county, or regional program that provides guardianship and related services to an incapacitated person or other person who needs assistance in making decisions concerning the person's own welfare or financial affairs~~].

(14) through (23) [no change].

(24) "Private professional guardian" has the meaning assigned by Section 111.001, Government Code [~~means a person, other than an attorney or a corporate fiduciary, who is engaged in the business of providing guardianship services~~].

Amended by SB 6, effective September 1, 2005.

Some of the aspects of the regulation and certification of private professional guardians and guardianship programs have been placed in new Chapter 111 of the Government Code under authority of the new Guardianship Certification Board. These definitions reflect that change.

Sec. 615. TRANSFER [~~TRANSCRIPT~~] OF RECORD. When an order of removal is made under Section 614 of this code, the clerk shall record any unrecorded papers of the guardianship required to be recorded [~~and make out a complete certified transcript of all the orders, decrees, judgments, and proceedings in the guardianship~~]. On payment of the clerk's fee [~~fees~~], the clerk shall transmit [~~the transcript, with the original papers in the case,~~] to the county clerk of the county to which the guardianship was ordered removed:

(1) the case file of the guardianship proceedings; and

(2) a certified copy of the index of the guardianship records.

Amended by HB 1191, effective September 1, 2005. Section 11 of HB 1191 provides: "The changes in law made by this Act to Sections 615 and 616, Texas Probate Code, apply only to an application for transfer of a guardianship filed on or after the effective date of this Act. An application for transfer of a guardianship filed before the effective date of this Act 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. "

This section relates to records to be sent by the county clerk when a guardianship proceeding is transferred to another county. This change makes the procedure in guardianship cases more consistent with the procedure in decedent's estate cases under Section 8(c)(2) of the Probate Code. Under prior law the clerk was required to send not only the original papers in the case but also a transcript of the case to the new county. This meant that the county clerk had to make certified copies of all of the

proceedings (at the expense of the guardianship estate) and forward them along with the original papers in the proceeding. The certified copies were unnecessary since the original papers were also transferred. Under the change, the original case file is sent along with a certified copy of the index.

Sec. 616. REMOVAL EFFECTIVE. The order removing a guardianship does not take effect until:

(1) the case file and a certified copy of the index [~~transcript~~] required by Section 615 of this code are [~~is~~] filed in the office of the county clerk of the county to which the guardianship was ordered removed; and

(2) a certificate under the clerk's official seal and reporting the filing of the case file and a certified copy of the index [~~transcript~~] is filed in the court ordering the removal by the county clerk of the county to which the guardianship was ordered removed.

Amended by HB 1191, effective September 1, 2005. Section 11 of HB 1191 provides: "The changes in law made by this Act to Sections 615 and 616, Texas Probate Code, apply only to an application for transfer of a guardianship filed on or after the effective date of this Act. An application for transfer of a guardianship filed before the effective date of this Act 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. "

Sec. 672. ANNUAL DETERMINATION WHETHER GUARDIANSHIP SHOULD BE CONTINUED, MODIFIED, OR TERMINATED. (a) [no change].

(b) In reviewing a guardianship as provided by Subsection (a) of this section, a statutory probate court may:

(1) review any report prepared by a court investigator under Section 648A or 694A(c) of this code;

(2) review any report prepared by a guardian ad litem under Section 694A(c) of this code;

(3) review any report prepared by a court visitor under Section 648 of this code;

(4) [~~(3)~~] conduct a hearing; or

(5) [~~(4)~~] review an annual account prepared under Section 741 of this code or a report prepared under Section 743 of this code.

(c) through (e) [no change].

Amended by HB 1191, effective September 1, 2005.

This change permits the court to review a guardian ad litem's report prepared under Section 694A. This report relates to the guardian ad litem's findings in cases where modification or termination of a guardianship may be sought.

SUBPART J. LIABILITY OF GUARDIAN [~~FOR CONDUCT OF WARD~~]

Amended by SB 6, effective September 1, 2005.

Sec. 673. LIABILITY OF GUARDIAN FOR CONDUCT OF WARD.

Amended by SB 6, effective September 1, 2005.

Sec. 674. IMMUNITY OF GUARDIANSHIP PROGRAM. A guardianship program is not liable for civil damages arising from an action taken or omission made by a person while providing guardianship services to a ward on behalf of the guardianship program, unless the action or omission:

(1) was wilfully wrongful;

(2) was taken or made with conscious indifference or reckless disregard to the safety of the incapacitated person or another;

(3) was taken or made in bad faith or with malice; or

(4) was grossly negligent.

Added by SB 6, effective September 1, 2005.

This change is intended to provide guardianship programs with greater protection while providing guardianship services. Since such programs sometimes are guardians of last resort, they tend to be appointed in difficult cases with a greater potential for liability. This section makes them not liable for civil damages in cases of simple negligence.

Sec. 682. APPLICATION; CONTENTS. Any person may commence a proceeding for the appointment of a guardian by filing a written application in a court having jurisdiction and venue. The application must be sworn to by the applicant and state:

(1) the name, sex, date of birth, and address of the proposed ward;

(2) the name, relationship, and address of the person the applicant desires to have appointed as guardian;

(3) whether guardianship of the person or estate, or both, is sought;

(4) the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation of rights requested to be included in the court's order of appointment;

(5) the facts requiring that a guardian be appointed and the interest of the applicant in the appointment;

(6) the nature and description of any guardianship of any kind existing for the proposed ward in any other state;

(7) the name and address of any person or institution having the care and custody of the proposed ward;

(8) the approximate value and description of the proposed ward's property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled;

(9) the name and address of any person whom the applicant knows to hold a power of attorney signed by the proposed ward and a description of the type of power of attorney;

(10) if the proposed ward is a minor and if known by the applicant:

(A) the name of each parent of the proposed ward and state the parent's address or that the parent is deceased;

(B) the name and age of each sibling, if any, of the proposed ward and state the sibling's address or that the sibling is deceased; and

(C) if each of the proposed ward's parents and siblings are deceased, the names and addresses of the proposed ward's next of kin who are adults;

(11) if the proposed ward is a minor, whether the minor was the subject of a legal or conservatorship proceeding within the preceding two-year period and, if so, the court involved, the nature of the proceeding, and the final disposition, if any, of the proceeding;

(12) if the proposed ward is an adult and if known by the applicant:

(A) the name of the proposed ward's spouse, if any, and state the spouse's address or that the spouse is deceased;

(B) the name of each of the proposed ward's parents and state the parent's address or that the parent is deceased;

(C) the name and age of each of the proposed ward's siblings, if any, and state the sibling's address or that the sibling is deceased;

(D) the name and age of each of the proposed ward's children, if any, and state the child's address or that the child is deceased; and

(E) if the proposed ward's spouse and each of the proposed ward's parents, siblings, and children are deceased, or, if there is no spouse, parent, adult sibling, or adult child, the names and addresses of the proposed ward's next of kin who are adults;

(13) facts showing that the court has venue over the proceeding; and

(14) if applicable, that the person whom the applicant desires to have appointed as a guardian is a private professional guardian who <u>is certified under Subchapter C, Chapter 111, Government Code, and</u> has complied with the requirements of Section 697 of this code.

Amended by SB 6, effective September 1, 2005.

Sec. 694A. COMPLETE RESTORATION OF WARD'S CAPACITY OR MODIFICATION OF GUARDIANSHIP. (a) and (b) [no change].

(c) On receipt of an informal letter under Subsection (b) of this section, the court shall appoint the court investigator or a guardian ad litem to investigate the circumstances of the ward, including any circumstances alleged in the informal letter, to determine whether the ward is no longer an incapacitated person or whether a modification of the guardianship is necessary. The court investigator or guardian ad litem shall file with the court a report of the investigation's findings and conclusions and, if the court investigator or the guardian ad litem determines that it is in the best interest of the ward to terminate or modify the guardianship, the court investigator or guardian ad litem, as appropriate, shall file an application under Subsection (a) of this section on the ward's behalf. A guardian ad litem appointed under this subsection may also be appointed by the court to serve as attorney ad litem under Section 694C of this code.

(d) and (e) [no change].

Amended by HB 1191, effective September 1, 2005. Section 12 of HB 1191 provides: "The change in law made by this Act to Section 694A, Texas Probate Code, applies only to the procedure for receipt of an informal letter for which a court investigator or guardian ad litem is appointed on or after the effective date of this Act. A procedure for receipt of an informal letter for which a court investigator or guardian ad litem is appointed before the effective date of this Act is governed by the law in effect on the date the court investigator or guardian ad litem was appointed, and the former law is continued in effect for that purpose."

Under prior law, the court investigator or guardian ad litem was required to file an application for restoration of a ward's capacity or modification of a guardianship even in cases in which the investigator or ad litem believed that such action was not in the best interest of the ward. This change requires the investigator or ad litem to file a report and provides that he or she shall file the application to terminate or modify the guardianship only if he or she determines that termination or modification is in the best interests of the ward.

Sec. 695A. SUCCESSOR GUARDIANS FOR WARDS OF GUARDIANSHIP PROGRAMS OR GOVERNMENTAL ENTITIES. (a) [no change].

(a-1) If, while serving as a guardian for a ward under this chapter, the Department of Aging and Disability Services becomes aware of a guardianship program or private professional guardian willing and able to serve as the ward's successor guardian and the department is not aware of a family member or friend of the ward or any other interested person who is willing and able to serve as the ward's successor guardian, the department shall notify the court in which the guardianship is pending of the guardianship program's or private professional guardian's willingness and ability to serve.

(b) and (c) [no change].

Amended by SB 6, effective September 1, 2005.

Sec. 696. APPOINTMENT OF PRIVATE PROFESSIONAL GUARDIANS. A court may not appoint a private professional guardian to serve as a guardian or permit a private professional guardian to continue to serve as a guardian under this code if the private professional guardian:

(1) has not complied with the requirements of Section 697 of this code; or

(2) is not certified as provided by Section 697B of this code.

Amended by SB 6, effective September 1, 2005.

Sec. 696A. APPOINTMENT OF PUBLIC GUARDIANS. (a) An individual employed by or contracting with a guardianship program must be certified as provided by Section 697B of this code to provide guardianship services to a ward of the guardianship program.

(b) An employee of the Department of Aging and Disability Services must be certified as provided by Section 697B of this code to provide guardianship services to a ward of the department.

Added by SB 6, effective September 1, 2005.

Sec. 696B. APPOINTMENT OF FAMILY MEMBERS OR FRIENDS. A family member or friend of an incapacitated person is not required to be certified under Subchapter C, Chapter 111, Government Code, or any other law to serve as the person's guardian.

Added by SB 6, effective September 1, 2005.

Under the 2005 changes, private professional guardians and certain of their employees and agents, as well as employees of the Department of Aging and Disability Services who provide guardianship services, must be certified by the new Guardianship Certification Board. Volunteers at a guardianship program are not required to be certified, but employees and contractors of guardianship programs must be certified. Family members and friends of the ward do not have to be certified. Attorneys are excluded from the definition of "private professional guardian" in Gov. Code §111.001, so attorneys do not have to be certified by the Guardianship Certification Board in order to be appointed guardian. (Attorneys may have to be certified if they are employed by a private professional guardian, guardianship program or the Department of Aging and Disability Services to provide guardianship services-- *see* Prob. Code §697B -- but they do not have to be certified by the Guardianship Certification Board to provide legal representation to such entities in a guardianship proceeding.)

Sec. 697. REGISTRATION OF PRIVATE PROFESSIONAL GUARDIANS. (a) A private professional guardian must apply annually to the clerk of the county having venue over the proceeding for the appointment of a guardian for a certificate of registration [~~certification~~]. The application must include a sworn statement containing the following information concerning a private professional guardian or each person who represents or plans to represent the interests of a ward as a guardian on behalf of the private professional guardian:

(1) educational background and professional experience;

(2) three or more professional references;

(3) the names of all of the wards the private professional guardian or person is or will be serving as a guardian;

(4) the aggregate fair market value of the property of all wards that is being or will be managed by the private professional guardian or person;

(5) place of residence, business address, and business telephone number; and

(6) whether the private professional guardian or person has ever been removed as a guardian by the court or resigned as a guardian in a particular case, and, if so, a description of the circumstances causing the removal or resignation, and the style of the suit, the docket number, and the court having jurisdiction over the proceeding.

(b) [no change].

(c) The term of the registration [~~certification~~] begins on the date that the requirements are met and extends through December 31 of the initial year. After the initial year of registration [~~certification~~], the term of the registration [~~certification~~] begins on January 1 and ends on December 31 of each year. A renewal application must be completed during December of the year preceding the year for which the renewal is requested.

(d) [no change].

(e) Not later than February 1 of each year, the clerk shall submit to the Guardianship Certification Board and the Health and Human Services Commission the names and business addresses of private professional guardians who have satisfied the registration [~~certification~~] requirements under this section during the preceding year.

Amended by SB 6, effective September 1, 2005.

Even though the 2005 changes require private professional guardians and their employees to be certified by the new Guardianship Certification Board, they still must register with each county under Section 697.

Sec. 697A. LIST OF CERTAIN PUBLIC GUARDIANS MAINTAINED BY COUNTY CLERKS. (a) Each guardianship program operating in a county shall submit annually to the county clerk a statement containing the name, address, and telephone number of each individual employed by or volunteering or contracting with the program to provide guardianship services to a ward or proposed ward of the program.

(b) The Department of Aging and Disability Services, if the department files an application for and is appointed to serve as guardian for one or more incapacitated persons residing in the county as provided by Subchapter E, Chapter 161, Human Resources Code, shall submit annually to the county clerk the information required under Subsection (a) of this section for each department employee who is or will be providing guardianship services in the county on the department's behalf.

(c) Not later than February 1 of each year, the county clerk shall submit to the Guardianship Certification Board the information received under this section during the preceding year.

Added by SB 6, effective September 1, 2005.

Sec. 697B. CERTIFICATION REQUIREMENT FOR PRIVATE PROFESSIONAL GUARDIANS AND PUBLIC GUARDIANS. (a) The following persons must be certified under Subchapter C, Chapter 111, Government Code:

(1) an individual who is a private professional guardian;

(2) an individual who will represent the interests of a ward as a guardian on behalf of a private professional guardian;

(3) an individual providing guardianship services to a ward of a guardianship program on the program's behalf, except as provided by Subsection (d) of this section; and

(4) an employee of the Department of Aging and Disability Services providing guardianship services to a ward of the department.

(b) A person whose certification has expired must obtain a new certification under Subchapter C, Chapter 111, Government Code, to be allowed to provide or continue to provide guardianship services to a ward under this code.

(c) The court shall notify the Guardianship Certification Board if the court becomes aware of a person who is not complying with the terms of a certification issued under Subchapter C, Chapter 111, Government Code, or with the standards and rules adopted under that subchapter.

(d) An individual volunteering with a guardianship program is not required to be certified as provided by this section to provide guardianship services on the program's behalf.

Added by SB 6, effective September 1, 2005.

Under the 2005 changes, private professional guardians and certain of their employees and agents, as well as employees of the Department of Aging and Disability Services who provide guardianship services, must be certified by the new Guardianship Certification Board. Volunteers at a guardianship program are not required to be certified, but employees and contractors of guardianship programs must be certified. Family members and friends of the ward do not have to be certified. Attorneys are excluded from the definition of "private professional guardian" in Gov. Code §111.001, so attorneys do not have to be certified by the Guardianship Certification Board in order to be appointed guardian. (Attorneys may have to be certified if they are employed by a private professional guardian, guardianship program or the Department of Aging and Disability Services to provide guardianship services-- *see* Prob. Code §697B -- but they do not have to be certified by the Guardianship Certification Board to provide legal representation to such entities in a guardianship proceeding.)

Sec. 698. ACCESS TO CRIMINAL HISTORY RECORDS. (a) The clerk of the county having venue over the proceeding for the appointment of a guardian shall obtain criminal history record information that is maintained by the Department of Public Safety or the Federal Bureau of Investigation identification division relating to:

(1) a private professional guardian;

(2) each person who represents or plans to represent the interests of a ward as a guardian on behalf of the private professional guardian; [~~or~~]

(3) each person employed by a private professional guardian who will:

(A) have personal contact with a ward or proposed ward;

(B) exercise control over and manage a ward's estate; or

(C) perform any duties with respect to the management of a ward's estate;

(4) each person employed by or volunteering or contracting with a guardianship program to provide guardianship services to a ward of the program on the program's behalf; or

(5) an employee of the Department of Aging and Disability Services who is or will be providing guardianship services to a ward of the department.

(b) [no change].

(c) The court shall use the information obtained under this section only in determining whether to appoint, remove, or continue the appointment of a private professional guardian, a guardianship program, or the Department of Aging and Disability Services.

(d) and (e) [no change].

Amended by SB 6, effective September 1, 2005.

Sec. 700. OATH OF GUARDIAN. (a) [no change].

(b) A representative of the Department of Aging and Disability [~~Protective and Regulatory~~] Services shall take the oath required by Subsection (a) of this section if the department is appointed guardian.

Amended by SB 6, effective September 1, 2005.

Sec. 727. APPOINTMENT OF APPRAISERS. After letters of guardianship of the estate have been granted and on its own motion or on the motion [~~the application~~] of any interested person, [~~or if the court deems it necessary,~~] the court for good cause shown shall appoint at least one but not more than three disinterested persons who are citizens of the county in which letters were granted to appraise the property of the ward. If the court appoints an appraiser under this section and part of the estate is located in a county other than the county in which letters were granted, the court may appoint at least one but not more than three disinterested persons who are citizens of the county in which the part of the estate is located to appraise the property of the estate located in the county if the court considers it necessary to appoint an appraiser.

Amended by SB 347, effective September 1, 2005. Section 4 of SB 347 provides: "(a) The changes in law made by this Act to Section 727, Texas Probate Code, apply only to a guardianship proceeding commenced on or after the effective date of this Act. (b) A guardianship proceeding commenced before the effective date of this Act is governed by the law applicable to the proceeding immediately before the effective date of this Act, and that law is continued in effect for that purpose."

The change to Section 727 requires good cause before a court may appoint appraisers for the property of a guardianship estate.

Note: Section 761 was amended by HB 230, SB 346 and HB 1191. The changes made by SB 346 and HB 1191 are identical to each other. These changes, however, are not identical to the changes made by HB 230.

Sec. 761. REMOVAL. [As amended by SB 346 and HB 1191] (a) The court, on its own motion or on motion of any interested person, including the ward, and without notice, may remove any guardian, appointed under this chapter, who:

(1) neglects to qualify in the manner and time required by law;

(2) fails to return within 30 [~~90~~] days after qualification, unless the time is extended by order of the court, an inventory of the property of the guardianship estate and list of claims that have come to the guardian's knowledge;

(3) having been required to give a new bond, fails to do so within the time prescribed;

(4) absents himself from the state for a period of three months at one time without permission of the court, or removes from the state;

(5) cannot be served with notices or other processes because of the fact that:

(A) the guardian's whereabouts are unknown;

(B) the guardian is eluding service; or

(C) the guardian is a nonresident of this state who does not have a resident agent to accept service of process in any guardianship proceeding or other matter relating to the guardianship;

(6) has misapplied, embezzled, or removed from the state, or is about to misapply, embezzle, or remove from the state, all or any part of the property committed to the guardian's care; or

(7) has cruelly treated a ward, or has neglected to educate or maintain the ward as liberally as the means of the ward and the condition of the ward's estate permit.

(b) through (g) [no change].

Amended by HB 1191, effective September 1, 2005. Amended by SB 346, effective April 27, 2005.

Sec. 761. REMOVAL. [As amended by HB 230] (a) The court, on its own motion or on motion of any interested person, including the ward, and without notice, may remove any guardian, appointed under this chapter, who:

(1) neglects to qualify in the manner and time required by law;

(2) fails to return within 90 days after qualification, unless the time is extended by order of the court, an inventory of the property of the guardianship estate and list of claims that have come to the guardian's knowledge;

(3) having been required to give a new bond, fails to do so within the time prescribed;

(4) absents himself from the state for a period of three months at one time without permission of the court, or removes from the state;

(5) cannot be served with notices or other processes because of the fact that:

(A) the guardian's whereabouts are unknown;

(B) the guardian is eluding service; or

(C) the guardian is a nonresident of this state who does not have a resident agent to accept service of process in any guardianship proceeding or other matter relating to the guardianship;

(6) has misapplied, embezzled, or removed from the state, or is about to misapply, embezzle, or remove from the state, all or any part of the property committed to the guardian's care; [~~or~~]

(7) has neglected or cruelly treated a ward; [~~,~~] or

(8) has neglected to educate or maintain the ward as liberally as the means of the ward and the condition of the ward's estate permit.

(b) [no change].

(c) The court may remove a guardian on its own motion, or on the complaint of an interested person, after the guardian has been cited by personal service to answer at a time and place set in the notice, when:

(1) sufficient grounds appear to support belief that the guardian has misapplied, embezzled, or removed from the state, or that the guardian is about to misapply, embezzle, or remove from the state, all or any part of the property committed to the care of the guardian;

(2) the guardian fails to return any account or report that is required by law to be made;

(3) the guardian fails to obey any proper order of the court having jurisdiction with respect to the performance of the guardian's duties;

(4) the guardian is proved to have been guilty of gross misconduct or mismanagement in the performance of the duties of the guardian;

(5) the guardian becomes incapacitated, or is sentenced to the penitentiary, or from any other cause becomes incapable of properly performing the duties of the guardian's trust;

(6) [~~as guardian of the person,~~] the guardian neglects or cruelly treats the ward;

(6-a) the guardian [~~, or~~] neglects to educate or maintain the ward as liberally as the means of the ward's estate and the ward's ability or condition permit;

(7) the guardian interferes with the ward's progress or participation in programs in the community;

(8) the guardian fails to comply with the requirements of Section 697 of this code; or

(9) the court determines that, because of the dissolution of the joint guardians' marriage, the termination of the guardians' joint appointment and the continuation of only one of the joint guardians as the sole guardian is in the best interest of the ward.

Amended by HB 230, effective September 1, 2005. Section 2 of HB 230 provides: "The changes in law made by this Act to Sections 761(a) and (c), Texas Probate Code, apply only to a motion for the removal of a guardian made or filed on or after the effective date of this Act. A motion for the removal of a guardian made or filed before the effective date of this Act is governed by the law in effect on the date the motion was made or filed, and the former law is continued in effect for that purpose."

The change to Section 761(a)(2) reflects the 2003 change in the due date for a guardianship inventory. Since inventories now must be filed within 30 days of qualifying as guardian, the court's power to remove the guardian for failing to file the inventory is changed accordingly.

The change to Section 761(a)(7) and (c)(6) makes clear the court may remove a guardian who cruelly treats the ward.

Sec. 767. POWERS AND DUTIES OF GUARDIANS OF THE PERSON. (a) The guardian of the person is entitled to take [~~the~~] charge [~~and control~~] of the person of the ward, and the duties of the guardian correspond with the rights of the guardian. A guardian of the person has:

(1) the right to have physical possession of the ward and to establish the ward's legal domicile;

(2) the duty to provide [~~of~~] care, supervision [~~control~~], and protection for [~~of~~] the ward;

(3) the duty to provide the ward with clothing, food, medical care, and shelter;

(4) the power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward; and

(5) on application to and order of the court, the power to establish a trust in accordance with 42 U.S.C. Section 1396p(d)(4)(B), as amended, and direct that the income of the ward as defined by that section be paid directly to the trust, solely for the purpose of the ward's eligibility for medical assistance under Chapter 32, Human Resources Code.

(b) [no change].

Amended by SB 6, effective September 1, 2005.

Prior law provided that the guardian of the person was entitled to "control" the person of the ward and had the duty of care, "control" and protection of the ward. This change deletes the word "control" and instead speaks in terms of the guardian taking "charge"of the ward's person and having the duty to "provide supervision."

Sec. 776. AMOUNTS ALLOWABLE FOR EDUCATION AND MAINTENANCE OF WARD. (a) through (a-2) [no change].

(a-3) When different persons have the guardianship of the person and estate of a ward, the court's order setting a monthly allowance must specify the amount, if any, set by the court for the education and maintenance of the ward that the guardian of the estate shall pay and the amount, if any, the guardian of the estate shall pay to the guardian of the person [~~the monthly allowance set by the court~~], at a time specified by the court, for the education and maintenance of the ward. If the guardian of the estate fails to pay to the guardian of the person the monthly allowance set by the court, the guardian of the estate shall be compelled to make the payment by court order after the guardian is duly cited to appear.

(b) [no change].

Amended by HB 1191, effective September 1, 2005. Section 13 of HB 1191 provides: "The change in law made by this Act to Section 776, Texas Probate Code, applies only to an application for monthly allowance filed on or after the effective date of this Act. An application for monthly allowance filed before the effective date of this Act 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."

Under prior law, if different persons were serving as guardian of the person and guardian of the estate, the guardian of the estate was required to pay the monthly allowance to the guardian of the person. This change makes it possible for the court to permit the guardian of the estate to apply part or all of the monthly allowance directly without turning it over to the guardian of the person.

Sec. 781. BORROWING MONEY. (a) [no change].

(a-1) The guardian of the estate may also receive an extension of credit on the ward's behalf that is secured, wholly or partly, by a lien on real property that is the homestead of the ward, under court order, when necessary to:

(1) make improvements or repairs to the homestead; or

(2) pay for education or medical expenses of the ward.

(a-2) Proceeds of a home equity loan described by Subsection (a-1) of this section may be used only for the purposes authorized under Subsection (a-1) of this section and to pay the outstanding balance of the loan.

(b) When it is necessary to borrow money for any of the purposes authorized under Subsection (a) or (a-1) of this section, or to create or extend a lien on property of the estate as security, a sworn application for the authority to borrow money shall be filed with the court, stating fully and in detail the circumstances that the guardian of the estate believes make necessary the granting of the authority. On the filing of an application under this subsection, the clerk shall issue and cause to be posted a citation to all interested persons, stating the nature of the application and requiring the interested persons to appear and show cause why the application should not be granted.

(c) [no change].

Amended by HB 637, effective September 1, 2005.

This change makes it possible for the guardian of the estate to obtain a home equity loan to make improvements to the homestead or pay for the education or medical expenses of the ward.

Sec. 788. CLAIMS MUST BE AUTHENTICATED. Except as provided by Section 792 of this code [~~this section~~], with respect to the payment of an unauthenticated claim by a guardian, a guardian of the estate may not allow and the court may not approve a claim for money against the estate, unless the claim is supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed. If the claim is not founded on a written instrument or account, the affidavit must also state the facts on which the claim is founded. A photostatic copy of an exhibit or voucher necessary to prove a claim under this section may be offered with and attached to the claim instead of the original.

Amended by HB 1191, effective September 1, 2005.

Sec. 831. GUARDIAN PURCHASING PROPERTY OF THE ESTATE. (a) and (b) [no change].

(c) A [~~After issuing the notice required by this subsection, a~~] guardian of an estate may purchase property from the estate on the court's determination that the sale is in the best interest of the estate. [~~The guardian shall give notice by certified mail, return receipt requested, unless the court requires another form of notice, to each distributee of a deceased person's estate and to each creditor whose claim remains unsettled after presenting a claim within six months of the original grant of letters.~~] In the case of an application filed by the guardian of the estate of a ward, the court shall appoint an attorney ad litem to represent the ward with respect to the sale. The court may require [~~additional~~] notice [~~or it may allow for the waiver of the notice required~~] for a sale made under this subsection.

(d) [no change].

Amended by HB 1191, effective September 1, 2005. Section 14 of HB 1191 provides: "The change in law made by this Act to Section 831(c), Texas Probate Code, applies only to an application by a guardian of an estate for the purchase of estate property filed on or after the effective date of this Act. An application by a guardian of an estate for the purchase of estate property filed before the effective date of this Act 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."

Sec. 855B. PROCEDURE FOR MAKING INVESTMENTS OR RETAINING ESTATE ASSETS. (a) Not later than the 180th day after the date on which the guardian of the estate qualified as guardian or another date specified by the court, the guardian shall file a written application with the court for an order:

(1) authorizing the guardian to:

(A) develop and implement an investment plan for estate assets;

(B) invest in or sell securities under an investment plan developed under Paragraph (A) of this subdivision;

(C) declare that one or more estate assets must be retained, despite being underproductive with respect to income or overall return; or

(D) [~~(C)~~] loan estate funds, invest in real estate or make other investments, or purchase a life, term, or endowment insurance policy or an annuity contract; or

(2) modifying or eliminating the guardian's duty to invest the estate.

(b) On hearing the application under this section and on a finding by the preponderance of the evidence that the action requested in the application is in the best interests of the ward and the ward's estate, the court shall render an order granting the authority requested in the application or an order modifying or eliminating the guardian's duty to keep the estate invested. The order must state in reasonably specific terms:

(1) the nature of the investment, investment plan, or other action requested in the application and authorized by the court, including, if applicable, the authority to invest in and sell securities in accordance with the objectives of the investment plan;

(2) when an investment must be reviewed and reconsidered by the guardian; and

(3) whether the guardian must report the guardian's review and recommendations to the court.

(c) and (d) [no change].

(e) A citation or notice is not necessary to invest in or sell securities under an investment plan authorized by the court under Subsection (b)(1) of this section.

Amended by HB 1191, effective September 1, 2005. Section 15 of HB 1191 provides: "The change in law made by this Act to Section 855B, Texas Probate Code, applies only to an investment plan or a modification of an investment plan approved by a court on or after the effective date of this Act. An investment plan or a modification of an investment plan approved by a court before the effective date of this Act that is not modified on or after the effective date of this Act is governed by the law in effect on the date the investment plan was approved, and the former law is continued in effect for that purpose."

The 2003 changes required the guardian of an estate to file an investment plan. The 2005 changes make it clear that, if the purchase and sale of securities is part of a court-approved investment plan, the guardian need not follow the Probate Code procedures for the sale of personal property and need not serve citation on anyone in order to invest in and sell securities pursuant to the plan.

Sec. 865. POWER TO MAKE TAX-MOTIVATED GIFTS. (a) through (e) [no change].

(f) In an order entered under Subsection (a) of this section, the court may authorize the guardian to make gifts as provided by Subsection (a) of this section on an annual or other periodic basis without subsequent application to or order of the court if the court finds it to be in the best interest of the ward and the ward's estate. The court, on the court's own motion or on the motion of a person interested in the welfare of the ward, may modify or set aside an order entered under this subsection if the court finds that the ward's financial condition has changed in such a manner that authorizing the guardian to make gifts of the estate on a continuing basis is no longer in the best interest of the ward and the ward's estate.

Amended by HB 1501, effective September 1, 2005. Section 2 of HB 1501 provides: "The change in law made by this Act to Section 865, Texas Probate Code, applies only to an application for the establishment

of an estate plan filed on or after the effective date of this Act. An application for the establishment of an estate plan filed before the effective date of this Act 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."

This change permits the court to enter a standing order authorizing periodic gifting without requiring reapplication each year.

Sec. 867. CREATION OF MANAGEMENT TRUST. (a) [no change].

(a-1) The following persons may apply for the creation of a trust under this section:

(1) the guardian of the estate of a ward;

(2) the guardian of the person of a ward;

(3) the guardian of both the person of and estate of a ward;

(4) an attorney ad litem or guardian ad litem appointed to represent a ward or the ward's interests;

(5) a person interested in the welfare of an alleged incapacitated person who does not have a guardian of the estate; or

(6) an attorney ad litem or guardian ad litem appointed to represent an alleged incapacitated person who does not have a guardian or that person's interests.

(b) On application by an appropriate person as provided by Subsection (a-1) of this section [~~the guardian of a ward or by a ward's attorney ad litem or an incapacitated person's guardian ad litem at any time after the date of the ad litem's appointment under Section 646 or another provision of this code~~], the court with jurisdiction over the guardianship [~~in which the guardianship proceeding is pending~~] may enter an order that creates for the ward's [~~or incapacitated person's~~] benefit a trust for the management of guardianship funds [~~or funds of the incapacitated person's estate~~] if the court finds that the creation of the trust is in the ward's [~~or incapacitated person's~~] best interests. [~~Except as provided by Subsections (c) and (d) of this section, the court shall appoint a financial institution to serve as trustee of the trust.~~]

(b-1) On application by an appropriate person as provided by Subsection (a-1) of this section and regardless of whether an application for guardianship has been filed on the alleged incapacitated person's behalf, a proper court may enter an order that creates a trust for the management of the estate of an alleged incapacitated person who does not have a guardian if the court, after a hearing, finds that: (1) the person is an incapacitated person; and (2) the creation of the trust is in the incapacitated person's best interests.

(b-2) If a proceeding for the appointment of a guardian for an alleged incapacitated person is pending, an application for the creation of a trust for the alleged incapacitated person under Subsection (b-1) of this section must be filed in the same court in which the guardianship proceeding is pending.

(b-3) The court shall conduct a hearing to determine incapacity under Subsection (b-1) of this section using the same procedures and evidentiary standards as required in a hearing for the appointment of a guardian for a proposed ward.

(b-4) If, after a hearing, the court finds that a person for whom an application is filed under Subsection (b-1) of this section is an incapacitated person but that it is not in the incapacitated person's best interests to have the court create a management trust for the person's estate, the court may appoint a guardian of the person or estate, or both, for the incapacitated person without the necessity of instituting a separate proceeding for that purpose.

(b-5) Except as provided by Subsections (c) and (d) of this section, the court shall appoint a financial institution to serve as trustee of a trust created under this section.

(c) If the value of the trust's principal is $50,000 or less, the court may appoint a person other than a financial institution to serve as trustee of the trust only if the court finds the appointment to be in the ward's or incapacitated person's best interests.

(d) If the value of the trust's principal is more than $50,000, the court may appoint a person other than a financial institution to serve as trustee of the trust only if the court finds that:

(1) no financial institution is willing to serve as trustee; and

(2) the appointment is in the ward's or incapacitated person's best interests.

(e) [no change].

(f) If a trust is created for a ward, the [~~The~~] order shall direct a person holding property belonging to the ward or to which the ward is entitled [~~the guardian or another person~~] to deliver all or part of the property [~~assets of the guardianship~~] to a person or corporate fiduciary appointed by the court as trustee of the trust. If a trust is created for an incapacitated person who does not have a guardian, the order shall direct a person holding property belonging to the incapacitated person or to which the incapacitated person is entitled to deliver all or part of the property to the corporate fiduciary or other person appointed as trustee of the trust. The order shall include terms, conditions, and limitations placed on the trust. The court shall maintain the trust under the same cause number as the guardianship proceeding, if applicable.

Amended by HB 1472, effective September 1, 2005. Section 9 of HB 1472 provides: "This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose."

Guardianship management trusts have been around since 1993. Originally only guardians could apply for creation of a trust. Prior amendments have permitted attorneys ad litem and guardians ad litem to apply for creation of a trust. Some courts interpreted these amendments as permitting the creation of such trusts without the appointment of a guardian, while others still required the appointment of a guardian prior to creation of a trust.

Under the 2005 changes, if no guardianship exists, any interested person may apply for creation of a guardianship management trust, and it is clear that the court need not appoint a guardian prior to creating the trust. After a guardian is appointed, only a guardian or an ad litem may apply for creation of a trust, since permitting any interested person to apply could open the door to a disgruntled family member seeking creation of a guardianship management trust as a way to wrest the guardianship away from another family member.

Under the changes, if an application to create a trust is filed when no guardianship exists, the safeguards in place to protect alleged incapacitated persons apply (appointment of attorney ad litem to represent them, determination of incapacity by clear and convincing evidence, etc.). If during the course of hearing the application to create a trust, the court determines that a guardian should instead (or in addition) be appointed, no separate guardianship application is required.

The 2005 changes include a number of clarifying changes to Tex. Probate Code §§867 -- 873 intended to reflect that a guardianship management trust may exist for a "ward" (in cases where a trust is created after a guardianship exists) or for an "incapacitated person" (in cases where a trust is created and no guardianship exists).

Sec. 867A. VENUE. If a proceeding for the appointment of a guardian for the alleged incapacitated person is not pending on the date the application is filed, venue for a proceeding to create a trust for an alleged incapacitated person under Section 867(b-1) of this code must be determined in the same manner as venue for a proceeding for the appointment of a guardian is determined under Section 610 of this code.

Added by HB 1472, effective September 1, 2005. Section 9 of HB 1472 provides: "This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose."

Sec. 868. TERMS OF MANAGEMENT TRUST. (a) Except as provided by Subsection (d) of this section, a trust created under Section 867 of this code must provide that:

(1) the ward or incapacitated person is the sole beneficiary of the trust;

(2) the trustee may disburse an amount of the trust's principal or income as the trustee determines is necessary to expend for the health, education, support, or maintenance of the ward or incapacitated person;

(3) the income of the trust that the trustee does not disburse under Subdivision (2) of this subsection must be added to the principal of the trust;

(4) if the trustee is a corporate fiduciary, the trustee serves without giving a bond; and

(5) the trustee, on annual application to the court and subject to the court's approval, is entitled to receive reasonable compensation for services that the trustee provided to the ward or incapacitated person as the ward's or incapacitated person's trustee that is:

(A) to be paid from the trust's income, principal, or both; and

(B) determined in the same manner as compensation of a guardian of an estate under Section 665 of this code.

(b) The trust may provide that a trustee make a distribution, payment, use, or application of trust funds for the health, education, support, or maintenance of the ward or incapacitated person or of another person whom the ward or incapacitated person is legally obligated to support, as necessary and without the intervention of a guardian or other representative of the ward or of a representative of the

incapacitated person, to:

(1) the ward's guardian;

(2) a person who has physical custody of the ward or incapacitated person or another person whom the ward or incapacitated person is legally obligated to support; or

(3) a person providing a good or service to the ward or incapacitated person or another person whom the ward or incapacitated person is legally obligated to support.

(c) [no change].

(d) When creating or modifying a trust, the court may omit or modify terms required by Subsection (a)(1) or (2) of this section only if the court determines that the omission or modification:

(1) is necessary and appropriate for the ward or incapacitated person to be eligible to receive public benefits or assistance under a state or federal program that is not otherwise available to the ward or incapacitated person; and

(2) is in the ward's or incapacitated person's best interests.

(e) [no change].

(f) If the trustee determines that it is in the best interest of the ward or incapacitated person, the trustee may invest funds of the trust in the Texas tomorrow fund established by Subchapter F, Chapter 54, Education Code.

Amended by HB 1472, effective September 1, 2005. Section 9 of HB 1472 provides: "This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose."

Sec. 869. TRUST AMENDMENT, MODIFICATION, OR REVOCATION. (a) [no change].

(b) The ward or guardian of the ward's estate or the incapacitated person, as applicable, may not revoke the trust.

Amended by HB 1472, effective September 1, 2005. Section 9 of HB 1472 provides: "This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose."

Sec. 869C. JURISDICTION OVER TRUST MATTERS. A court that creates a trust under Section 867 of this code has the same jurisdiction to hear matters relating to the trust as the court has with respect to [~~the~~] guardianship and other matters covered by this chapter.

Amended by HB 1472, effective September 1, 2005. Section 9 of HB 1472 provides: "This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose."

Sec. 870. TERMINATION OF TRUST. (a) If the ward or incapacitated person is a minor, the trust terminates:

(1) on the death of the ward or incapacitated person or the ward's or incapacitated person's 18th birthday, whichever is earlier; or

(2) on the date provided by court order which may not be later than the ward's or incapacitated person's 25th birthday.

(b) If the ward or incapacitated person is not [~~an incapacitated person other than~~] a minor, the trust terminates on the date the court determines that continuing the trust is no longer in the ward's or incapacitated person's best interests or on the death of the ward or incapacitated person.

Amended by HB 1472, effective September 1, 2005. Section 9 of HB 1472 provides: "This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose."

Sec. 871. ANNUAL ACCOUNTING. (a) [no change].

(b) If a trust has been created under this section for a ward, the [~~The~~] trustee shall provide a copy of the annual account to the guardian of the ward's estate or person.

(c) [no change].

Amended by HB 1472, effective September 1, 2005. Section 9 of HB 1472 provides: "This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose."

Sec. 873. DISTRIBUTION OF TRUST PROPERTY. Unless otherwise provided by the court, the trustee shall:

(1) prepare a final account in the same form and manner that is required of a guardian under Section 749 of this code; and

(2) on court approval, distribute the principal or any undistributed income of the trust:

(A) to the ward or incapacitated person when the trust terminates on its own terms;

(B) to the successor trustee on appointment of a successor trustee; or

(C) to the representative of the deceased ward's or incapacitated person's estate on the ward's or incapacitated person's death.

Amended by HB 1472, effective September 1, 2005. Section 9 of HB 1472 provides: "This Act applies only to an application for the creation of a trust filed on or after the effective date of this Act. An application for the creation of a trust filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose."

Sec. 874. PRESUMPTION OF INCAPACITATION. The person for whom a temporary guardian is appointed under Section 875 of this code may not be presumed to be incapacitated.

Added by HB 1191, effective September 1, 2005.

The 2003 changes to Section 875 deleted this sentence: "A person for whom a temporary guardian has been appointed may not be presumed to be incapacitated." Deleting this sentence called into question whether the appointment of a temporary guardian, which may occur without all of the safeguards of a full guardianship proceeding, constitutes a finding of incapacity that could have adverse consequences for the ward, even though he or she may later be found not to be incapacitated. This change clarifies that appointment of a temporary guardian does not create a presumption of incapacity.

Sec. 875. TEMPORARY GUARDIAN -- PROCEDURE. (a) and (b) [no change].

(c) A sworn, written application for the appointment of a temporary guardian shall be filed before the court appoints a temporary guardian. The application must state:

(1) the name and address of the person who is the subject of the guardianship proceeding;

(2) the danger to the person or property alleged to be imminent;

(3) the type of appointment and the particular protection and assistance being requested;

(4) the facts and reasons supporting the allegations and requests;

(5) the name, address, and qualification of the proposed temporary guardian;

(6) the name, address, and interest of the applicant; and

(7) if applicable, that the proposed temporary guardian is a private professional guardian who is certified under Subchapter C, Chapter 111, Government Code, and has complied with the requirements of Section 697 of this code.

(d) through (i) [no change].

(j) The court may not customarily or ordinarily appoint the Department of Aging and Disability [~~Protective and Regulatory~~] Services as a temporary guardian under this section. The appointment of the department as a temporary guardian under this section should be made only as a last resort.

(k) and (l) [no change].

Amended by SB 6, effective September 1, 2005.

The changes to Section 875 reflect the new certification requirement for private professional guardians under Chapter 111 of the Government Code. They also discourage, but do not prohibit, the appointment of the Department of Aging and Disability Services as a temporary guardian of last resort.

Sec. 889A. MORTGAGE OF RESIDENTIAL HOMESTEAD INTEREST OF A MINOR WITHOUT GUARDIANSHIP. (a) In this section:

(1) “Home equity loan” means a loan made under Section 50(a)(6), Article XVI, Texas Constitution.

(2) “Residence homestead” has the meaning assigned by Section 11.13, Tax Code.

(b) When a minor has an interest in a residence homestead and the net value of the interest does not exceed $100,000, a natural or adoptive parent, subject to Subsection (j) of this section, or the managing conservator, of a minor who is not a ward may apply to the court for an order authorizing the parent or managing conservator to receive, without being appointed guardian, an extension of credit on the minor's behalf that is secured, wholly or partly, by a lien on the homestead. Proceeds of the home equity loan attributable to the minor's interest may be used only to:

(1) make improvements to the homestead;

(2) pay for education or medical expenses of the minor; or

(3) pay the outstanding balance of the loan.

(c) The parent or managing conservator shall apply to the court under oath for the authority to encumber the residence homestead as provided by this section. Venue for the application is the same as venue for an application for the appointment of a guardian for a minor. The application must contain:

(1) the name and address of the minor;

(2) a legal description of the property constituting the homestead;

(3) a description of the minor's ownership interest in the property constituting the homestead;

(4) the name of the minor and the fair market value of the property constituting the homestead;

(5) the amount of the home equity loan;

(6) the purpose or purposes for which the home equity loan is being sought;

(7) a detailed description of the proposed expenditure of the loan proceeds to be received by the parent or managing conservator on the minor's behalf; and

(8) a statement that all loan proceeds received by the parent or managing conservator on the minor's behalf through a home equity loan authorized under this section shall be used in a manner that is for the minor's benefit.

(d) On receipt of the application, the court shall set the application for hearing at a date not earlier than the fifth day after the date the application is filed. If the court considers it necessary, the court may cause citation to be issued.

(e) Before the hearing, the parent or managing conservator shall file with the county clerk a

surety bond in an amount at least equal to two times the amount of the proposed home equity loan. The bond must be:

(1) payable to and approved by the court; and

(2) conditioned on the parent or managing conservator:

(A) using the proceeds of the home equity loan attributable to the minor's interest solely for the purposes authorized by this section; and

(B) making payments on the minor's behalf toward the outstanding balance of the home equity loan.

(f) At the time of the hearing of the application filed under this section, the court, on approval of the bond required by Subsection (e) of this section, shall authorize the parent or managing conservator to receive the extension of credit sought in the application if the court is satisfied from a preponderance of the evidence that the encumbrance is for a purpose described by Subsection (b)(1) or (2) of this section and is in the minor's best interests.

(g) A parent or managing conservator executing a home equity loan on a minor's behalf under this section shall file an annual report with the court regarding the transaction. When the parent or managing conservator has expended the proceeds of a home equity loan authorized under this section, the parent or managing conservator, in addition, shall file with the county clerk a sworn report accounting for the proceeds.

(h) The court may not discharge the person's sureties from all further liability under the bond until the court:

(1) has approved the filing of the parent's or managing conservator's reports required under Subsection (g) of this section;

(2) finds that the parent or managing conservator used loan proceeds resulting from the minor's interest solely for the purposes authorized by this section; and

(3) has been presented with satisfactory evidence that the home equity loan has been repaid and is no longer considered an outstanding obligation.

(i) After the first anniversary of the date a parent or managing conservator executes a home equity loan authorized under this section, the court may, on motion of the borrower, reduce the amount of the surety bond required under this section to an amount that is not less than the outstanding balance of the loan.

(j) A parent of a minor may file an application under this section only if the parent has a homestead interest in the property that is the subject of the application.

(k) A minor may not disaffirm a home equity loan authorized by the court under this section.

Amended by HB 637, effective September 1, 2005.

This change makes it possible for the parent or managing conservatory of a minor who has no court-appointed guardian to obtain a home equity loan to make improvements to the homestead or pay for the education or medical expenses of the minor without the need for a guardianship.

Sec. 890A. MORTGAGE OF RESIDENTIAL HOMESTEAD INTEREST OF A MINOR WARD. (a) In this section:

(1) "Home equity loan" means a loan made under Section 50(a)(6), Article XVI, Texas Constitution.

(2) "Residence homestead" has the meaning assigned by Section 11.13, Tax Code.

(b) This section applies only to a minor ward who has a guardian of the person but does not have a guardian of the estate.

(c) When a minor ward has an interest in a residence homestead and the net value of the interest does not exceed $100,000, the guardian of the person of the ward may apply to the court for an order authorizing the guardian to receive an extension of credit on the ward's behalf that is secured, wholly or partly, by a lien on the homestead. Proceeds of the home equity loan attributable to the minor's interest may be used only to:

(1) make improvements to the homestead;

(2) pay for the education or maintenance expenses of the ward; or

(3) pay the outstanding balance of the loan.

(d) Venue for the application is the same as venue for an application for the appointment of a guardian for a ward. The application must contain the same information required by Section 889A of this code.

(e) On receipt of the application, the court shall set the application for hearing at a date not earlier than the fifth day after the date the application is filed. If the court considers it necessary, the court may cause citation to be issued.

(f) The guardian of the person, before the hearing, shall file a surety bond with the county clerk to the same extent and in the same manner as a parent or managing conservator of a minor is required to provide a surety bond under Section 889A of this code.

(g) The procedures and evidentiary requirements for a hearing of an application filed under this section are the same as the procedures and evidentiary requirements for a hearing of an application filed under Section 889A of this code.

(h) At the time of the hearing of the application filed under this section, the court, on approval of a bond required by Subsection (f) of this section, shall authorize the guardian to receive the extension of credit sought in the application if the court is satisfied from a preponderance of the evidence that the encumbrance is for a purpose described by Subsection (c)(1) or (2) of this section and is in the ward's best interests.

(i) A guardian of the person executing a home equity loan on a ward's behalf must account for the

transaction, including the expenditure of the loan proceeds, in the annual accounting required by Section 741 of this code.

(j) The court may not discharge a guardian's sureties from all further liability under a bond required by this section or another provision of this code until the court:

(1) finds that the guardian used loan proceeds resulting from the ward's interest solely for the purposes authorized by this section; and

(2) has been presented with satisfactory evidence that the home equity loan has been repaid and is no longer considered an outstanding obligation.

(k) A minor ward may not disaffirm a home equity loan authorized by the court under this section.

Amended by HB 637, effective September 1, 2005.

This change makes it possible for the guardian of the person of a minor who has no court-appointed guardian of the estate to obtain a home equity loan to make improvements to the homestead or pay for the education or medical expenses of the ward without the need for a guardianship of the estate.

2005 Elder Law/Medicaid/Mental Health Legislation

This is a summary of legislation in the elder law, medicaid and mental health areas passed in the Regular Session of the 79th Texas Legislature, which concluded May 30, 2005. It was prepared by Glenn M. Karisch and may be incomplete. Information on each bill may be obtained from the Texas Legislature Online website, www.capitol.state.tx.us.

Bill #	***Description***	***Earliest Effective Date***
HB 224	Under Health and Safety Code §572.004, the parents, managing conservator, or guardian of a minor who was admitted for voluntary inpatient mental health services must be notified of the patient's written request for discharge. HB 224 revises the statute so that the parents, managing conservator, or guardian must be consulted about the request for discharge. If they object to the discharge, the facility must continue the treatment of the patient as a voluntary patient. It also adds language to provide that a person may administer psychoactive medication to a minor patient admitted for voluntary inpatient mental health services, even though the patient refuses the administration, if the patient's parent, managing conservator, or guardian consents to the administration on behalf of the patient.	5/17/05
HB 614	Extends the payment of foster care payments on behalf of a child after the age of 18 if the child is enrolled in a secondary school.	5/27/05
HB 669	Requires the commissioner of aging and disability services to appoint a work group to study registration of small assisted living facilities.	9/1/05
HB 801	Requires training of Department of Family and Protective Services personnel who receive reports of abuse and neglect.	9/1/05
HB 802	Provides procedure for paperwork completion by family members in investigations of reports of child abuse and neglect.	5/17/05
HB 1252	Requires the early screening, diagnosis, and treatment of chronic kidney disease under the medical assistance program if the Health and Human Services Commission (HHSC) finds it cost effective.	9/1/05
HB 1502	Relates to payment for medical assistance provided to an individual who is dually eligible for Medicaid and Medicare.	6/18/05
HB 1558	Permits the acceptance of an accreditation survey from an accreditation commission for an assisted living facility instead of an annual inspection, although certain restrictions apply.	1/1/06
HB 1771	Relates to the Medicaid managed care delivery system.	6/18/05

Bill #	*Description*	*Earliest Effective Date*
HB 1867	Creates a pilot program for the transfer of money appropriated for certain institutional care for children to provide community-based services for those children.	9/1/05
HB 1982	Creates a Texas Certified Retirement Community Program in which retirees and potential retirees are encouraged to make their homes in Texas communities that have met the criteria for certification.	9/1/05
HB 2080	A license to occupy a dwelling unit in a tax-exempt retirement community is not a taxable leasehold or possessory interest in real property for ad valorem tax purposes.	6/17/05
HB 2254	Reduces the penalty for failure by a disabled or elderly person to make a timely installment payment of ad valorem taxes imposed on the person's residence homestead.	9/1/05
HB 2518	Lists the requirements for participating in a mental health court program.	6/18/05
HB 2579	Provides procedures to ensure the involvement of parents and guardians of children placed in certain institutions.	9/1/05
HB 2819	Relating to accessible electronic and information technology for persons with disabilities.	9/1/05
HB 3235	Requires the provision of interpreter services if requested during the receipt of state-provided medical assistance to a deaf or hard of hearing recipient of state-provided medical assistance or their parents or guardians.	9/1/05
HB 3485	Would permit the appointment of criminal law hearing officers in Cameron County county courts and district courts. Among the jurisdiction given a criminal law hearing officer is concurrent jurisdiction with the Cameron County probate courts to hear emergency mental health matters under Chapter 573 of the Health and Safety Code. The probate courts are entitled to review or alter a mental health decision by a criminal law hearing officer.	9/1/05
HCR 37	Urges Congress to increase the presence of federal health and human services agencies, improve coordination of health and human services programs, and increase related funding in Texas.	
SB 6	This is a significant bill affecting protective services and certain family law and guardianship proceedings.	9/1/05
SB 40	Relates to permanency planning and procedures for children residing in state institutions.	9/1/05

Bill #	*Description*	*Earliest Effective Date*
SB 46	Relates to the establishment of a method to integrate benefits issuance and recipient identification for health and human services programs.	6/17/05
SB 48	Requires mandatory reporting of certain information by licensed nursing homes.	9/1/05
SB 325	Pertains to the type of restraints and seclusion used in certain health care facilities for persons with mental retardation. Prohibits certain restraint methods and permits health and human services agencies to adopt rules to define acceptable restraints and use of seclusion for behavior management.	9/1/05
SB 348	Changes the operating hours of the probate court for proceedings related to chemically dependent persons from open "at all times" to open "during normal business hours." However, the probate judge or magistrate would be available "at all times" at the request of a person in a proceeding for emergency detention or court ordered treatment.	5/3/05
SB 376	Establishes a pilot program to provide recipients of medical assistance with oral and written language interpreter services.	5/17/05
SB 396	Relates to the interagency exchange of information regarding certain offenders with special needs. Revises names of agencies.	6/17/05
SB 465	Relates to the administration of psychoactive medication to a patient that is subject to an order for inpatient mental health services.	6/17/05
SB 563	Relates to the prevention of Medicaid fraud.	9/1/05
SB 566	Creates a Medicaid buy-in program for employed persons with disabilities.	9/1/05
SB 626	Relates to medical assistance in certain alternative community-based care settings.	9/1/05
SB 630	Relates to audits of providers in the medical assistance program.	9/1/05
SB 874	Permits quality-of-care monitoring visits to long-term care facilities to be made with or without notice.	9/1/05
SB 1055	Permits the acceptance of an accreditation survey from an accreditation commission for an assisted living facility instead of an annual inspection, although certain restrictions apply. Also permits consumer choice of assisted living facilities in certain community care programs.	9/1/05

Bill #	*Description*	*Earliest Effective Date*
SB 1188	Establishes an office of community collaboration with the Health and Human Services Commission to improve elements of the health care system that are involved with the delivery of Medicaid services and sharing with Medicaid providers any best practices, resources, or other information regarding improvements to the health care system.	9/1/05
SB 1330	Requires certain facilities to offer the opportunity for pneumococcal and flu vaccines to elderly persons.	9/1/05
SB 1340	Provides for the regulation and reimbursement of health care services provided through telemedicine or telepsychiatry under the state Medicaid program.	9/1/05
SB 1525	Requires hospitals to limit manual patient handling or movement to emergency, life-threatening or exceptional situations.	1/1/06
SB 1830	Relates to the continuation of the quality assurance fee applicable to intermediate care facilities for persons with mental retardation.	6/17/05
SCR 27	Encourages Congress to eliminate caps on funded Medicare resident training positions.	
SJR 7	If this constitutional amendment is approved by voters on November 8, 2005, line of credit advances will be permitted under a reverse mortgage.	
Also of Note: The Governor vetoed HB 2572, which related to the provision of mental health and mental retardation services at the local level.		