2007 Legislative Update

Summary of Changes Affecting Probate, Guardianship and Trust Law

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Education

The University of Texas School of Law, Austin, Texas
Juris Doctor with Honors, 1980
The University of Texas at Austin, Austin, Texas
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Professional Experience

Barnes & Karisch, P. C., Austin, Texas, 1998 - 2007
Ikard & Golden, P. C., Austin, Texas, 1992 - 8
Hoffman & Stephens, P. C., Austin, Texas, 1991-2
The Texas Methodist Foundation, Austin, Texas, Vice President and General Counsel, 1989-1991
Coats, Yale, Holm & Lee, Houston, Texas, 1980-1989

Professional Activities

Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
American College of Trust and Estate Counsel (Fellow)
Real Estate, Probate and Trust Law Section, State Bar of Texas
Chair, 2007-Present; Chair-Elect, 2006-7; Treasurer, 2005-6; Council Member, 1999-2003; Chair, Guardianship Law Committee, 1999-2000; Chair, Trust Code Committee, 2000-2004; Chair, Probate Legislation Committee, 2003-Present.
Chair, Estate Planning and Probate Section, Travis County Bar Association, 1996-97

Legal Articles and Papers

Author and Editor, Texas Probate Web Site [www.texasprobate.com] and email mailing list [probate@io.com] (1995-Present).

"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).

"Modifying and Terminating Irrevocable Trusts," State Bar of Texas Advanced Estate Planning and Probate Law Course (1999), updated through 2005 on The Texas Probate Web Site [www.texasprobate.com]

"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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The 80th Regular Session of the Texas Legislature, which ended May 28, 2007, will be remembered by many for the fight over the speaker's chair, for the threatened filibuster over the voter photo ID bill and for general rancor and animosity. Legislation in the probate, guardianship and trust areas was affected by each of these things. Some initiatives died because of it, while others passed but required much more effort than normal.

In the final analysis, of course, lawyers and others who work in the estate planning, probate, guardianship and trust areas will remember the session by how the changes affected their practices. They will ask:

- Were there any significant changes that will have an immediate effect on my practice?
- Were there relatively minor but helpful changes that will improve the way wills work and estates, guardianships and trusts are administered?
- Were there any unnecessary, nit-picking changes that seem designed only to complicate my life?
- Were there any crazy changes which seem to make no sense?

As with most sessions, but perhaps with a little more vigor this time, the answers are Yes, Yes, Yes and Yes. This paper will discuss all of them, beginning with the two changes that I consider to be the most significant. With the exception of these two changes, I leave you to guess which bills are the answers to which questions.

If it is any consolation, I believe that, if it were not for the efforts of the groups and individuals listed below and others that I will unintentionally fail to mention, things could have been much, much worse. The probate bar found itself acting much more defensively than usual, and multiple initiatives that could have corrupted the Probate and Trust Codes were beaten back like the Vandals at the gates of Rome. . . . wait, the Vandals sacked Rome. Hopefully that's a bad analogy and not a portent of sessions to come.

Despite contentiousness from outside the probate community, the following groups worked harder than ever to reach consensus on legislation:

- The Real Estate, Probate and Trust Law Section of the State Bar of Texas ("REPTL"), which is the 7,000-member-strong group which brings forward positive legislative initiatives in the probate, guardianship and trust areas.
- The Texas Academy of Probate and Trust Lawyers (the "Academy"), which consists of attorneys who either are board certified in estate planning and probate law or are members of the American College of Trust and Estate Counsel ("ACTEC") and responds to events that happen after the deadline for REPTL-State Bar approval. An Academy Membership Application is attached as Appendix "B."
- The Statutory Probate Judges of Texas, who hear the vast majority of probate and guardianship cases in the state.
- The Wealth Management and Trust Division of the Texas Bankers Association ("TBA"), which represents the interests of corporate fiduciaries in the state.

As a result of much hard work, for the first time in several sessions most of the legislative initiatives of these groups proceeded through the legislative process with no opposition from within the estate planning and probate community.

The list of persons who helped this session is so long that I am sure I will leave someone off. Nevertheless, and with apologies to those omitted, these people went above and beyond the call of duty: Judge Guy Herman of Travis County, Judges Pat Ferchill and Steve King of Tarrant County and Judge Nikki DeShazo of Dallas County; Dave Folz, Deborah Cox, Janice Torgeson and John Brigance of the TBA; Barbara Klitch and Clint Hackney, who worked beyond normal human endurance on REPTL and Academy matters; Bill Pargaman, Linda Goehrs, Mary Burdette, who chaired REPTL's main legislative committees, together with their committee members; Harry Wolff, James Woo, Art Bayern, Deborah Green, Jerry Jones, Al Golden and Frank Ikard, who took time to attend hearings and meetings at the Capitol to move REPTL's legislation; and Law Professors Mark Ascher and Stanley Johanson of the University of Texas, Gerry Beyer of Texas Tech and Thomas Featherston of Baylor.

Of course, nothing is possible without the hard work and cooperation of legislators. This session, special thanks goes to Rep. Will Hartnett, Sen. Jeff Wentworth and Sen. Robert Duncan and their staffs for sponsoring REPTL legislation; Rep. Elliott Naishtat, Rep. Ken Paxton, Sen. Juan Hinojosa, Sen. Carlos Uresti, Sen. Chris Harris and Sen. Kirk Watson and their staffs for working with the Academy and REPTL; and the staffs of the House Judiciary and Senate Jurisprudence Committees, who had to figure out what all these esoteric bills meant.

Finally, I especially thank my wife, Suzanne, and my children, Julia, Augustus, Cooper and Jack, for letting their husband and father spend more time on legislation than on billable work for the second session in a row.

Veto and Effective Date Information

None of the bills referred to in this paper were vetoed. The Governor signed all but one, and he allowed that one – HB 568 – to become law without his signature. All bills mentioned are effective September 1, 2007, unless otherwise indicated.

1. The Big Two.

Departing from tradition, this paper discusses in detail the two changes which I believe will have the most impact on the most people at the beginning of the paper rather than in their normal spots in the subject-by-subject narrative which follows.

1.1. Notice to Beneficiaries that Will Has Been Probated. The change that will have the quickest, most notable impact on lawyers who handle decedents' estates is the amendment to Section 128A of the Texas Probate Code. Previously this section required the personal representative of a decedent's estate to give charities named as beneficiaries in the will notice of the fact that the will has been probated within thirty (30) days of when it was probated.

SB 593 amends Section 128A to require personal representatives to give notice to all beneficiaries -- not just charities -- within sixty (60) days of the date a will is probated, unless one of the three exceptions applies, and to file an affidavit or certificate with the court within ninety (90) days confirming that notice was given or explaining why it was not given.

1.1.1. The Reason for the Amendment Requiring Notice. A series of articles in *The Austin American-Statesman* in 2006 reported on a lawyer who had served as independent executor of estates and was accused of misappropriating thousands of dollars from those estates. The stories focused on the plight of the will beneficiaries, who said they did not know the will had been probated or that the lawyer had been appointed independent executor because no one gave them notice. If they had known of the estate administration, they reasoned, perhaps they could have acted to prevent the loss of property.

At about the same time as these articles were published, the Senate Jurisprudence Committee announced a between-sessions hearing on "fiduciary oversight" in statutory probate courts. Many of the witnesses at the hearing were the attorneys or family members of disgruntled (and unsuccessful) litigants who complained about practices in certain statutory probate courts. The newspaper stories and the hearings led to suggestions for legislative changes. Among the ideas discussed were:

- Prohibiting lawyers from serving as guardians or personal representatives.

- Prohibiting lawyers serving as guardians or personal representatives from providing legal services to themselves (and, therefore, prohibiting them from charging their hourly rates as lawyers for services).
- Requiring court appointment of fiduciaries to come in order from a list not maintained by the probate court.
- Requiring all beneficiaries and heirs to receive notice that a will has been offered for probate.
- Requiring all independent executors to post a bond, even if the will waives the bond requirement.
- Requiring recusals of statutory probate judges to be heard by non-statutory probate judges.

Senator Jeff Wentworth, chair of the Senate Jurisprudence Committee, and Rep. Will Hartnett, chair of the House Judiciary Committee, were contacted by the *American-Statesman* reporter and were quoted as being concerned about the no notice issue and as planning to offer legislation to address this concern. The Academy quickly tapped its resource of talented and experienced probate lawyers and drafted proposed legislation to address the notice to beneficiaries problem.

The Academy's approach was to require notice *after* probate rather than notice *before* probate. Requiring the notice before probate would result in serious slowdowns in administrations, since the notice process would have to be completed before administration was opened (unless a temporary administration was necessary). Section 128A was already on the books, and it required notice to charities *after* the will is probated. The Academy adapted it to include notice to beneficiaries other than charities, and then tried to make the system work with the least amount of headaches and expense. The Academy offered its drafts to Rep. Hartnett and Sen. Wentworth, and the two bills these legislators filed (SB 593 and HB 2507) were based on the Academy draft. Here's a detailed analysis of SB 593, which passed the Legislature and becomes effective September 1, 2007:

1.1.2. To Whom Is Notice Given? New Section 128A(b) requires notice to be given to "each beneficiary named in the will whose identity and address are known to the personal representative or, through reasonable diligence, can be ascertained." Subsection (d), discussed below, provides some exceptions, but the starting point is that "each beneficiary named in the will" gets notice.

A. "Beneficiary." Section 128A(a) defines "beneficiary" for purpose of the notice as:

> a person, entity, state, governmental agency of the state, charitable organization, or trust entitled to receive real or personal property under the terms of a decedent's will, to be determined for purposes of this section with the assumption that each person who is alive on the date of the decedent's death survives any period required to receive the bequest as specified by the terms of the will.

This appears to be an all-inclusive definition as to direct estate beneficiaries, including both life tenants and remaindermen of true life estates. (Notice to trust beneficiaries is discussed below.) The last phrase of Subsection (a) is intended to permit the required notice to go out within 60 days of probate even if the beneficiary named in the will has to survive the decedent for, say, 120 days, in order to take. The personal representative is entitled to assume (but only for purposes of satisfying the notice requirement) that everyone living at the decedent's death will reach the required survival date. Thus, if the will leaves a gift to a 98-year-old on life support if she survives the testator by 90 days, the notice would go to the 98-year-old and not the children (at least assuming she was alive when the notice was sent).

B. "Named in the Will." Section 128A(b) requires notice to be given to "each beneficiary named in the will" (with some exceptions, discussed below). What does it mean to be "named in the will?" If the will leaves property to "my descendants, per stirpes" without giving the names of any or all of the descendants entitled to receive property, are the nameless descendants "named in the will" for purposes of receiving notice?

The safest practice will be to comply with the notice requirement with respect to beneficiaries identified by class or status rather than name if these

beneficiaries are known to the personal representative or can be ascertained with reasonable effort. Subsection (b) refers to beneficiaries "named" in the will whose "identity" and address are known or can be reasonably obtained. It makes no sense for the statute to address whether or not the beneficiary's "identity" is known or can be ascertained if he or she is "named in the will." Therefore, the safe practice will be to read "named in the will" broadly to include persons whose name does not appear in the will itself but are identified by class or status. There is little or no downside to giving the notice in these cases. The personal representative may be under a common law duty to notify these beneficiaries even if the new statute does not require it. On the other hand, if there is a long-lost family member whose name is omitted from the will but who later asserts a right to receive property, the "named in the will" requirement may provide some protection for the personal representative from fiduciary liability for failing to give that person the Section 128A notice.

C. Known or Ascertainable Identity and Address. What if the personal representative does not know the identity or address of a beneficiary? Section 128A(b) requires the personal representative to attempt to ascertain the beneficiary's identity and address "through reasonable diligence." One assumes that, at a minimum, this requires the personal representative to inquire among the known beneficiaries about the existence and address of others who, by name, class or status, are entitled to benefits under the will.

This requirement should not be interpreted as requiring the same level of inquiry as that of an attorney ad litem in an heirship proceeding. In an heirship, the decedent died without a will, so there is no reason to presume that the list of heirs stops with the ones who come forward. On the other hand, a decedent dying testate probably named persons close to him or her to benefit and to serve as personal representative. A reduced level of scrutiny should be required of personal representatives under Section 128A, unless there is a reason to suspect that there is a missing beneficiary (such as a person identified by name in the will as a beneficiary whose address is unknown.

What if the personal representative is unable to ascertain the identity and/or whereabouts of a beneficiary prior to the 60th day after the date the will is probated? Subsection (g), discussed below, requires this fact to be stated in the affidavit or certificate filed with the court. If the identity and/or address of a beneficiary is discovered after the 60th day, Subsection (b) requires the notice to be given to him or her as soon as possible after the personal representative becomes aware of that information.

D. Special Rules for Certain Types of Beneficiaries. Section 128A(c) gives the personal representative guidance about notifying certain types of beneficiaries.

1) Trusts. If all or a portion of the estate passes in trust to the trustee of a trust, then Subsection (c)(1) requires the notice to be sent to the trustee of the trust, unless the personal representative and the trustee are the same person. In those cases, having the personal representative notify himself or herself as trustee would not meet the statute's purpose. For this reason, if the personal representative and the trustee are the same person, the notice must be given to the income beneficiaries unless the personal representative is the trustee, in which case the personal representative shall give the notice to the "person or class of persons first eligible to receive the trust income, to be determined for purposes of this subdivision as if the trust were in existence on the date of the decedent's death." In other words, the personal representative/trustee would send the notice to the persons who would be the initial income beneficiaries of the trust as of the decedent's death without regard to whether those persons survive until the date of trust funding and, therefore, actually become income beneficiaries.

2) Minors and Incapacitated Persons. If the beneficiary has a court-appointed conservator or guardian, Section 128A(c)(2) requires the notice intended for that beneficiary to be given to his or her conservator or guardian. If the beneficiary is a minor with no conservator or court-appointed guardian, then Subsection (c)(3) requires the notice to be given to a parent of the minor. The statute says "a" parent, not "both" parents, so the personal representative will have to decide which parent to notify in the case of divorced parents. Of course, it would be safest, and best, to serve both parents in that case, but it may not be required. Unlike Subsection (c)(1) with respect to trusts, Subsections (c)(2) and (c)(3) do not instruct the personal representative to notify someone else if he or she

also is the conservator, guardian or parent of the child.

3) Charities Which Cannot be Notified. If the beneficiary is a charity that for any reason cannot be notified, then Section 128A(c)(4) requires the notice to be given to the attorney general. I believe this subsection may apply in the following situations:

- The will names a charity as beneficiary which no longer exists and for which there is no apparent successor.
- The will names a charity whose address cannot be determined.
- The will names a class of charities as beneficiary rather than an individual charity.

E. Exceptions to the Notice Requirement. As initially proposed, SB 593 contained no exceptions to the notice requirement. The Academy pushed for inclusion of exceptions, including an exception for cash gifts of $1,000 or less. While the Academy was able to get that exception into the House version of the bill, the final conference committee version deleted that exception. Therefore, under the new Section 128A, unless another exception applies, ***every beneficiary must receive the notice regardless of the size of the bequest or devise.*** Still, the final version contains these exceptions to the notice requirement:

1) Beneficiaries Who Have Appeared. Section 128A(d)(1) provides that the personal representative is not required to give notice to beneficiaries who made an appearance in the probate proceeding before the will was admitted to probate. For example, a party to a will contest does not need to receive the notice since presumably he or she already knows the contents of the will and the fact that it was probated.

Of course, the applicant for probate also has made an appearance in the probate proceeding before the will is probated. Since the applicant usually is the person appointed as personal representative, usually the personal representative who also is a beneficiary is not required to give notice to himself or herself.

2) Beneficiaries Who Have Waived Notice. By far the most useful exception is found in Section 128A(d)(2): No notice need be given to a beneficiary who:

> received a copy of the will that was admitted to probate and waived the right to receive the notice in an instrument that:
>
> > (A) acknowledges the receipt of the copy of the will;
> >
> > (B) is signed by the beneficiary; and
> >
> > (C) is filed with the court.

a) Received Copy of Will Admitted to Probate. This exception will enable avoiding the notice requirement in many "happy family" situations. In order to use the exception, the beneficiary must have received a copy of the will admitted to probate, but the statute does not require that the copy be a file-stamped copy or that the beneficiary receive a copy of the order admitting the will to probate. Therefore, the personal representative or his or her attorney should be able to distribute copies of the will to be probated among family members and ask them to sign waivers before the application for probate is filed and/or the probate hearing is held.

b) Waiver. The beneficiary must sign a waiver of the right to receive the statutory notice that (1) acknowledges receipt of the copy of the will, (2) is signed by the beneficiary and (3) is filed with the court.

While the statute requires the beneficiary to acknowledge receipt of a copy of the will and sign the waiver, it does not require the beneficiary's signature to be acknowledged or sworn. Therefore, no notarization should be necessary for the waiver to be effective.

The waiver must be filed with the court in order to be effective. I anticipate that the waivers either will be filed with the application to probate the will, at the time of the hearing or when the certificate or acknowledgment required by Section 128A(g), described below, is filed.

1.1.3. What Must the Notice Contain? Section 128A(e) provides that the notice must:

- State the name and address of the beneficiary to whom the notice is given (or, for notices given to representatives of the beneficiary as permitted by Subsection (c), discussed above, the name and address of the beneficiary *and* of the person to whom the notice is given);

- State the decedent's name;

- State that the decedent's will has been admitted to probate;

- State that the beneficiary to whom or for whom the notice is given is named as a beneficiary in the will; and

- Include copies of the will and the order admitting it to probate.

An earlier version of this legislation would have required the personal representative to inform the beneficiary of certain fiduciary duties, including the duty to keep the beneficiary informed. This requirement is not in the final version of the bill.

1.1.4. How Must the Notice be Sent? Section 128A(f) requires the notice to be sent by certified or registered mail, return receipt requested. There's no provision for hand delivery, overnight courier delivery or telephone facsimile delivery.

1.1.5. How is Satisfaction of the Notice Requirement Proven? Prior to its amendment by SB 593, Section 128A required the personal representative to prove that the required notice to a charity had been sent by filing a copy of the notice with the court. There was some support for retaining that method of proof, but the Academy foresaw these problems:

- Since the notices required copies of the will and order admitting it to probate, a copy of each notice would be 10 -- 100 pages long. This would substantially increase the size of each case file.

- If a copy of each notice was filed, court personnel may have difficulty determining the parties to whom notice was required to be given. At a minimum, this would require someone in the judge's office to review the will for the names of beneficiaries. In some cases, the beneficiaries' names may not be apparent from the will.

For these reasons, the Academy urged, and the Legislature adopted, an affidavit or certificate approach to proving that notice was given. The advantages of the approach are:

- It permits the status of notice to be summarized in one place for the benefit of court personnel and others who examine the court file.

- It focuses the personal representative's thinking on completion of the notice requirement by requiring the personal representative or his or her attorney to list each beneficiary and the notice status.

- It permits the personal representative or his or her attorney to explain why a particular beneficiary has not been notified, enabling the court to determine if estate resources should be used to continue the search for the missing beneficiary.

- It takes up less room in the court file.

A. Contents of Affidavit or Certificate. Section 128A(g) requires the personal representative to file with the clerk of the court a sworn affidavit of the personal representative, or a certificate signed by his or her attorney, stating:

(1) The name and address of each beneficiary notified (or, if the beneficiary's representative was notified pursuant to Subsection (c), then the name and address of the beneficiary and the person to whom notice was given);

(2) The name and address of each beneficiary who filed a waiver of the notice;

(3) The name of each beneficiary whose identity or address could not be ascertained despite the personal representative's exercise of reasonable diligence; and

(4) Any other information necessary to explain why the personal representative was unable to give the notice to or for any beneficiary required to receive the notice.

The names and addresses of all beneficiaries -- including beneficiaries who signed and filed waivers -- must be included in the affidavit or certificate and that the affidavit or certificate must be filed even if all beneficiaries sign and file waivers. This is a public disclosure of information not previously required to be made. The statute does not say if the address must be a physical address or if a post office box address is satisfactory. It also does not say if "in care of" or other types of addresses can be used. If the beneficiary is represented by an attorney, perhaps the attorney's address can be given for the beneficiary. In these cases, it probably is a good idea for the personal representative to obtain a written request from the beneficiary or his or her attorney to use the attorney's address.

B. When Must It Be Filed? Section 128A(g) requires the affidavit or certificate to be filed "not later than the 90th day after the date of an order admitting a will to probate." This often will be the due date of the inventory, appraisement and list of claims, although that instrument's filing deadline is 90 days after the personal representative qualifies. So, if the personal representative does not qualify on the date the will is admitted to probate (for example, if he or she does not attend the hearing and submits his or her oath (and bond, if required) a few days after the hearing), the Section 128A affidavit or certificate will be due a few days before the inventory is due.

If the notice must be given within 60 days, why does the personal representative have up to 90 days to file the affidavit or certificate? In an attempt to keep the costs of complying with the notice requirement down, Rep. Will Hartnett, the House sponsor, had the idea of permitting the certificate or affidavit to be included with another pleading filed with the court. One pleading that always is filed is the inventory. Therefore, while the notice must be given within 60 days of the probate hearing, proof of giving the notice (in the form of a Section 128A affidavit or certificate) need not be filed until 90 days after the probate hearing.

However, the statute makes clear that the 90-day requirement for filing the Section 128A affidavit or certificate cannot be extended. Tex. Prob. Code §128A(h). Therefore, even if the personal representative obtains an extension of the deadline for filing the inventory, he or she must file the affidavit or certificate by the 90-day deadline. If the personal representative anticipates asking for an extension of the deadline for filing the inventory, he or she can put the affidavit or certificate in the application for the extension. In fact, Subsection (h) anticipates that this may happen.

C. Affidavit or Certificate? Which should be filed, the personal representative's affidavit or his or her lawyer's certificate? It depends on the attorney's preference and the convenience of obtaining the personal representative's affidavit. In most cases, the attorney will send the notices on the personal representative's behalf, so the attorney is in the best position to describe the efforts taken to give the notice. On the other hand, the attorney likely is acting on information provided by the personal representative when trying to locate beneficiaries. Also, the personal representative's signature on the inventory, appraisement and list of claims is likely to be required at the same time (discussed below), so it may be convenient to obtain his or her sworn signature.

The "certificate" of the attorney is intended to be similar to the certificate of service attached to pleadings. Therefore, it need not be sworn.

1.1.6. Notice Not Required in Intestate Estates or When Will is Probated as Muniment of Title. Section 128A requires the personal representative to give this notice within 60 days after probate of the will. Therefore, if there is no probate administration or no will, the notice is not required.

The Section 128A notice serves no purpose in the administration of an intestate decedent's estate. All heirs must be served (or waive citation) in a proceeding to determine heirship. Therefore, each has an opportunity to participate in the proceeding and take steps to protect his or her rights.

If the will is probated as a muniment of title, there is no probate administration of the testator's estate. Since no personal representative is appointed, Section 128A is inapplicable. Similar protection is

afforded in the case of a will probated as a muniment of title by requiring the applicant to file an affidavit of fulfillment. Tex. Prob. Code §89C(d).

1.1.7. Effective Date. The amendments to Section 128A apply only to "the estates of decedents dying on or after" September 1, 2007. Therefore, if the will of a person who dies before September 1, 2007, is probated after that date, the new notice requirement does not apply.

1.1.8. Practice Tips. I offer the following unsolicited practice tips about the new Section 128A notice requirement, completely without warranty of any kind, express or implied, etc.:

A. Get the Beneficiaries' Names and Addresses When the Will is Drafted. In many cases attorneys end up handling the probates of the wills they draft. Make every effort to get the names and addresses and, if possible, the social security numbers of the will beneficiaries from the testator at the time of the estate planning conference. This information does not have to be included in the will (and, in fact, should not be included in the will in many cases), but it will make it easier to locate the beneficiaries after the testator's death.

B. Be Ready to Address the Notice Issue at the Initial Probate Conference. Be ready to collect signatures on waivers as soon as possible after the death of the testator. Prepare standard waiver forms with blanks that can be filled in with the name of the decedent and the name and address of the beneficiary. Have these ready in the temporary client file or in a conference room drawer so that they can be used at the initial conference with the potential client in a probate matter. In many cases, the applicant will bring other family members to the meeting, and there will be no better time to get them to sign the waiver. They must be given a copy of the will admitted to probate in order for the waiver to be truthful and effective, but usually a copy of the will is available at the initial conference. If beneficiaries don't attend the meeting, the applicant can take the blank waiver forms and copies of the will with him or her to start the process of getting the waivers.

C. Get the Waivers Notarized If Possible. Even though Section 128A does not require the signature of the beneficiary on a waiver to be notarized, try to get them notarized if possible. Some other waivers required in probate matters must be notarized, so the judge is going to be much more comfortable with notarized waivers.

D. If Privacy is an Issue, Creativity is Required to Avoid Disclosing the Names and Addresses of the Beneficiaries. For the first time, the names and addresses of the beneficiaries under a will must be filed in the clerk's official court file. Even when a living trust-based plan is used for privacy reasons, the names and addresses of the current income beneficiaries of the trust must be filed with the clerk if the personal representative and the trustee of the living trust are the same person. In most cases, putting the name and address of a beneficiary in the public court file is no big deal. In those cases where it *is* a big deal and where the family wishes to avoid that disclosure, consider the following strategies:

- Use the beneficiary's attorney's address for a beneficiary. (For example, say the following in the Section 128A affidavit: "Hillary Rodham Clinton is a beneficiary of the estate. She filed a waiver with the court. Her address is: In care of Glenn M. Karisch, Barnes & Karisch, P. C., 2901-D Bee Caves Road, Austin, Texas 78746.") As long as a legitimate address is used and the beneficiary can be reached through that address, there is no public policy reason why this should not work. Of course, it still requires the name of the beneficiary to be included.

- In living trust-based plans, consider having different persons serve as the trustee of the living trust and the personal representative of the estate. This negates the requirement that the notice go to income beneficiaries and, therefore, prevents the disclosure of the names and addresses of the income beneficiaries (other than the trustee, whose name and address must be given). If it is desired that the personal representative also serve as trustee of the living trust, his or her succession to trustee could be provided for in the trust instrument.

- Consider filing the will as a muniment of

title in appropriate cases, including in cases where the will pours over to a living trust.

E. Give the Notice to All "Real" Beneficiaries Even if Some Are Not "Named in the Will." As mentioned above, it is possible to read Section 128A(b) to require the notice to be given only to beneficiaries whose names actually appear in the will. However, a more reasonable reading of that provision requires the notice to be given to beneficiaries defined by class or status rather than by name. For example, the will may give a gift to "my descendants, per stirpes" without naming each such person. Giving the notice to anyone who may be required to receive it is almost always going to be the right choice, so don't let personal representative clients wear you down on this point.

F. Has Anyone Every Told You That Engagement Letters are Important? Make sure the engagement letter addresses this new responsibility. In most cases, the attorney is probably going to send the required notices, while the personal representative may solicit waivers. The attorney should be clear that he or she is relying on the information the personal representative provides, including the validity of waivers he or she solicits and the accuracy of the names and addresses provided to the attorney. If the personal representative "forgets" a long-lost brother or sister, make it clear in the engagement letter that the failure to notify this person is not the attorney's fault.

G. When in Doubt, Use the Affidavit and Not the Certificate. Make your client swear to the efforts to notify beneficiaries and, tacitly, the validity of the waivers.

H. Add the Affidavit Form to All Appropriate Pleading Forms. Rather than adding other dates to your office tickler system, plan on including the personal representative's affidavit about notice at the end of the inventory. Then, if the inventory is filed on time, the personal representative can swear to the notice affidavit when he or she swears to the inventory. Don't let the inventory go past due without filing an application for extending the inventory deadline, but remember to include the notice affidavit in that application since the deadline for filing the notice affidavit cannot be extended.

One court coordinator asked me to encourage attorneys who combine the notice affidavit with another pleading to mention the notice in the title of the pleading. For example, the name of the pleading may be "Inventory, Appraisement and List of Claims; Section 128A Affidavit."

1.2. Repeal of the Statutory Duty To Keep Trust Beneficiaries Informed.

1.2.1. Problem? What Problem? A reasonably alert estate planning and probate attorney probably has noticed that Texas's trust statutes have been undergoing an overhaul lately. In 2003 the Legislature enacted Texas versions of the Uniform Prudent Investor Act and the Uniform Principal and Income Act. Then, in 2005, REPTL's trust bill attempted to "cherry-pick" the best of the Uniform Trust Code ("UTC") for incorporation in the Texas Trust Code.

One of the 2005 changes was the enactment of Section 111.0035 of the Trust Code. The Texas Trust Code primarily provides default rules that apply unless the settlor of the trust imposes a different rule in the trust instrument. The general rule is that the trust terms stated by the settlor trump contrary provisions in the Trust Code. Prior to 2003, most experienced trust professionals in Texas assumed that there were a few trust principles which could not be overridden. For example, most trust lawyers would have said in 2002 that a trust instrument that says the trustee is accountable to no one and may lie, cheat and steal from the trust without liability would not be enforceable -- it either would be carved back by a court on public policy grounds or it would not be considered a trust and, therefore, not be subject to the Trust Code.

Despite this general assumption, the Trust Code itself in 2002 only expressly prevented the settlor from waiving two provisions -- the corporate self-dealing prohibitions contained in Sections 113.052 and 113.053. (By the way, in a coincidental change, the 2007 Legislature has eliminated the prohibition against waiving these two self-dealing rules for corporate trustees, so now the Trust Code does not prevent the settlor from waiving these rules. This change is discussed below.)

Then the Texas Supreme Court announced its decision in *Texas Commerce Bank v. Grizzle,* 96 S. W. 2d 240 (Tex. 2002). The court allowed an

exculpation provision to be enforced to protect the trustee, stating that the only thing a settlor could not change about Texas trust law was the waiver of the two corporate self-dealing rules. While the exculpation provision in *Grizzle* was held to exculpate only negligent conduct, in some minds the opinion raised the possibility that the Court may find that willful and grossly negligent conduct could be exculpated by the settlor. This would have been contrary to trust principles, including the Restatement of Trusts.

An immediate reaction to *Grizzle* was the 2003 enactment of a Trust Code provision limiting the enforceability of an exculpation provision. *See* former Tex. Trust Code §113.059 (2003), now Tex. Trust Code §114.007. A more deliberate reaction was the 2005 enactment of Section 111.0035. This section attempts to collect in one place all of the trust principles which cannot be overridden by the terms of the trust -- the so-called "mandatory rules." The Uniform Trust Code uses this approach, and REPTL adapted the UTC statute for Texas.

One mandatory provision in the UTC is the duty to keep certain beneficiaries informed about certain aspects of the trust administration. Under the UTC approach, the settlor could relieve the trustee of the duty to keep underage beneficiaries (under age 25) and remote beneficiaries informed, but the settlor could not relieve the trustee of the duty to keep certain "qualified beneficiaries" informed.

This is a laudable notion -- a trustee who doesn't have to account to anyone is hardly a trustee. The concept proved difficult to incorporate into Texas law, however. The Texas Trust Code has always required the trustee to respond to a beneficiary's demand for an accounting (*see* Tex. Trust Code §113.151), but the statute did not impose an affirmative duty on a trustee to disclose information when it had not been demanded. On the other hand, Texas courts have imposed an affirmative common law duty of disclosure on trustees in some cases. *See Montgomery v. Kennedy*, 669 S. W. 2d 309 (Tex. 1984).

If a non-statutory duty to disclose existed, how could Section 111.0035 be drafted so that this duty could be waived by settlors to a reasonable extent? Halfway through the 2005 session, the solution presented itself: If the common law duty was codified, it would be easier to identify what could be waived under Section 111.0035. Thus, Section 113.060 was born.

Section 113.060 attempted to draw from the language of the Uniform Trust Code and the *Montgomery v. Kennedy* opinion to affirmatively state a trustee's duty to keep beneficiaries informed. Unfortunately, lawyers and trustees almost immediately saw problems with its wording. Here are a few of its problems:

- It is one thing to have a common law duty to keep beneficiaries informed. It is quite another to have it stated in black and white in a statute.

- Since the Texas Trust Code does not employ the concept of a "qualified beneficiary" -- a beneficiary whose interest in the trust is significant -- Section 113.060 imposed this duty with respect to "beneficiaries," which could include persons whose interests are very remote.

- The UTC attempted to state what types of disclosures would meet the standard. The Texas version did not.

- A good argument can be made that the broad language in *Montgomery v. Kennedy* that was incorporated into Section 113.060 really was intended to address material, unusual transactions being considered by the trustee, rather than day-to-day activities. The statute doesn't make this distinction.

Many prominent trust officers and attorneys immediately began to think of ways to fix Section 113.060. Two possibilities were to define what types of disclosure is required and to narrow the group of beneficiaries entitled to the notice. Unfortunately, no consensus could be reached on exactly how to do this. On the other hand, one consensus was easily reached -- everyone thought Texas was better off before the enactment of Section 113.060 than after it. There was no agreement on exactly what the common law duty is and how far it reaches, but everyone was more comfortable with the common law duty than the statutory duty.

Therefore, in REPTL's 2007 trust bill (HB 564),

Section 113.060 is repealed, and transitional language is included in the bill to indicate everyone's desire to return to the good ole days prior to 2005 when Texas only had the common law duty. Section 22 of HB 564 states:

> The enactment of Section 113.060, Property Code, by Chapter 148, Acts of the 79th Legislature, Regular Session, 2005, was not intended to repeal any common-law duty to keep a beneficiary of a trust informed, and the repeal by this Act of Section 113.060, Property Code, does not repeal any common-law duty to keep a beneficiary informed. The common-law duty to keep a beneficiary informed that existed immediately before January 1, 2006, is continued in effect.

REPTL tried to make the 113.060 repeal retroactive to January 1, 2006, which was the effective date of the enactment of Section 113.060. However, the Legislative Council would not allow this. However, HB 564 does make the Section 113.060 repeal effective immediately. The Governor signed HB 564 on June 15, 2007, so that is its effective date.

A corresponding amendment to Section 111.0035 (also effective June 15, 2007) makes it possible for a settlor to waive the common law duty with respect to beneficiaries under age 25 and certain remote beneficiaries.

1.2.2. Practice Tips. Here are more of my practice tips, which were not solicited and are not guaranteed.

A. It's Time for the Mother of All Disclosures. Now that the repeal of Section 113.060 is effective, trustees have an 17 ½ -month window of added exposure for failing to disclose information to beneficiaries -- January 1, 2006 (when Section 113.060 became effective) until June 15, 2007 (when the Governor signed the bill). How can a trustee best protect itself from added liability due to the short-lived Section 113.060? Disclose. Disclose everything the trustee can think of to disclose, and disclose it to every beneficiary that can be located, regardless of remoteness. There are two significant risks for trustees in failing to meet the Section 113.060 disclosure requirements: (1) a risk of removal by a court and (2) delaying the beginning of the statute of limitations for undisclosed breaches of trust. A significant disclosure to all beneficiaries at the time of the repeal of Section 113.060 helps with both of these risks. A court is less likely to remove the trustee if it appears that the trustee was trying to comply with this confusing statute, and the more the trustee discloses, the more likely the statute of limitations will start to run on breaches of trust.

B. Consider Waiving the Duty in New Trust Documents. Section 111.0035 tells settlors how far they can go in relieving the trustee of the duty to disclose. In appropriate cases, consider relieving the trustee of this duty to the extent allowed. Appropriate cases might include bypass trusts with the surviving spouse as trustee and GST dynasty-type trusts with the primary beneficiary serving as trustee.

2. Changes Affecting Trusts

Following are summaries of the 2007 changes to Texas statutes affecting trusts, with the exception of the repeal of Section 113.060 of the Texas Trust Code and the corresponding change to Section 111.0035, which are discussed above.

2.1. Settlor Can Permit Self-Dealing by Corporate Trustees. The Legislature finally will permit settlors to waive the previously un-waivable prohibitions of self-dealing by corporate trustees. Such waivers have been permitted for non-corporate trustees since before the enactment of the Trust Code in 1983. HB 564 amends Trust Code Sections 111.0035(b)(2) and 114.005(a), as well as Section 187.005(b) of the Finance Code to remove the prohibition that a settlor could not waive the self-dealing rules in Sections 113.052 and 113.053.

Note that this change does not authorize self-dealing; rather, it permits the settlor to include in the trust terms a waiver of the duty not to self-deal by a corporate trustee. If the trust terms do not alter the trustee's duties, the trustee still is prohibited by the Trust Code from entering into certain self-dealing transactions (*see, e.g.,* Texas Trust Code §§ 113.052 and 113.053).

This change is consistent with the trend in trust law to give the trustee greater and greater latitude in how to invest the trust assets. When Texas adopted the Uniform Prudent Investor Act (effective January 1, 2004), serious consideration was given to eliminating the rule prohibiting settlors from waiving the duty not to self-deal. The comments to the Uniform Prudent Investor Act encourage this, since the Act's philosophy is that all types of investments should be permitted and the trustee should be judged on portfolio performance, not the performance of each individual investment. However, in 2003, there still was opposition to eliminating this provision (perceived as a consumer protection measure), so the Texas version of the Uniform Prudent Investor Act was enacted without the repeal of these prohibitions.

This change particularly will be useful to corporate trustees managing large, sophisticated trusts with non-traditional investments such as hedge funds. Many corporate trustees set up in-house limited partnerships or other vehicles with which to pool their clients' investments (to permit flow-through of tax effects, for example). Most of these investment vehicles violate Trust Code § 113.053. However, if the trustee can persuade the settlor to waive the duty to avoid self-dealing with respect to this type of investment, the Texas trustee can compete with out-of-state rivals in offering these investments.

The amendment to Section 111.0035, which permits a settlor to include a provision in the trust relieving a corporate trustee from the self-dealing rules, is effective June 15, 2007. However, the amendment to Section 114.005 and to Finance Code Section 187.005 are effective September 1, 2007. I believ this means that, if a trust instrument relieves the corporate trustee from the self-dealing duty, the corporate trustee may begin the actions which otherwise would violate Texas Trust Code Sections 113.052 and 113.053 on June 15, 2007, but no effective release of liability by a beneficiary for violating Sections 113.052 or 113.053 by a corporate trustee will be valid if executed before September 1, 2007.

Even though this change makes it possible to waive the duty not to self-deal for corporate trustees, planners should tread slowly into these waters. There's a reason that the default rule in Texas still prohibits these types of transactions.

2.2. Trustees Will Find it Easier to Deal With Third Parties. HB 564 substantially amends Section 114.081 and adds Section 114.086 to the Trust Code to offer greater protection to third parties dealing with a trustee and to permit a trustee to provide a certificate of trust to third parties instead of the full trust instrument. Both of these sections are Texanized versions of similar provisions from the Uniform Trust Code.

The change to the title of Section 114.081 says it all. Previously, that section was entitled "Payment of Money to Trustee." Now it is entitled "Protection of Person Dealing With Trustee." Under the former statute, a person who "actually and in good faith pays to a trustee money that the trustee is authorized to receive is not responsible for the proper application of the money according to the trust." Under the new statute, a person who "deals with a trustee in good faith and for fair value" is not liable to the trustee or the beneficiaries if the trustee has exceeded the trustee's authority in dealing with the person. The statute also now protects a third party from further inquiry into the trustee's power and the appropriateness of the trustee's actions if the third party deals in good faith and receives either a certificate of trust or a copy of the trust instrument.

New Section 114.086 provides statutory authority for the common practice of having the trustee to provide a certificate containing appropriate excerpts of the trust instrument documenting the trustee's authority to act, rather than requiring the trustee to provide the entire trust instrument. Section 114.086(d) makes it clear that the certificate does not have to include the dispositive provisions of the trust. Thus, the trustee may be able to close a real estate transaction with, and the title company and third parties may be able to rely upon, a trust certificate that does not disclose the names of the beneficiaries or their respective interests.

2.3. Trust Jurisdiction Clarified. HB 564 amends Section 115.001 of the Trust Code to make it clear that the list of actions over which district courts (and, because of Trust Code Section 115.001(d) and Probate Code Section 5(e), statutory probate courts) have jurisdiction is not an exclusive list. Rather, Section 115.001(a) was changed to provide that such courts have jurisdiction over "all proceedings by or against a trustee."

2.4. Changes Affecting 142 Trusts. No organized group began the 2007 legislative session with the intention of making any changes to Section 142.005, which governs court-created trusts commonly referred to as "142 Trusts." However, due to one of those wrinkles in the fabric of the universe that only seem to occur in that big pink granite building in Austin, Section 142.005 emerged from the session like a 1974 Chevy Nova on "Pimp My Ride."

HB 564's changes to Section 142.005 fall in two distinct categories. First, provisions were added that attempted to deal with concerns that the mother of a beneficiary of a 142 Trust addressed to the Governor's office. Section 142.005(b) now requires the first page of the trust instrument to contain this notice:

> NOTICE: THE BENEFICIARY AND CERTAIN PERSONS INTERESTED IN THE WELFARE OF THE BENEFICIARY MAY HAVE REMEDIES UNDER SECTION 114.008 OR 142.005, PROPERTY CODE.

Also, new Subsection (k) permits the parent of a beneficiary (or certain other persons acting on the beneficiary's behalf) to ask the court that created the 142 Trust to appoint a guardian ad litem to "investigate and report to the court whether the trustee should be removed for failing or refusing to make distributions for the health, education, support or maintenance of the beneficiary required under the terms of the trust." Subsection (l) assures that the parent or other interested person asking for the ad litem gets reimbursed for up to $1,000 in attorneys' fees.

If that smells like a bunch of Elgin Hot Sausage being made, I offer my humble apologies. But, as the old German-American saying goes, when you are making sausage, try to make it good-tasting sausage. If Section 142.005 was going to be tweaked, it might as well be tweaked. Deborah Green, to whom I also apologize for failing to use a vegetarian-approved metaphor, helped with the second category of Section 142.005 changes by suggesting a number of changes to Section 142.005 to make 142 Trusts easier to use as special needs trusts. As included in the final version of HB 564, these include:

- (Hopefully) making it possible for persons who are "disabled" for federal benefits purposes to use 142 Trusts even though they are not "incapacitated" for purposes of Section 142.007.

- Permitting 142 Trusts to be altered from the "mandatory" terms if necessary to qualify the beneficiary for "public benefits or assistance under a state or federal program," not just to meet the requirements of 42 U.S.C. Section 1396p(d)(4)(A).

- Permitting non-corporate trustees in certain circumstances when the trust corpus is less than $50,000.

The changes to Section 142.005 apply to existing trusts as well as new trusts. Trustees of existing trusts should consider if they must comply with the new notice requirement in Section 142.005(b), and, if so, how. There are only two ways I can think of to get the notice on the first page of an existing trust instrument:

- Apply to the court for it to be added to the trust instrument; or

- Just stick it on there without court approval.

Neither of these options seems reasonable in most cases. Spending trust resources to get the notice on the trust instrument seems like a waste, and modifying the trust instrument to include the notice without court approval seems ill-advised. Trustees should consider corresponding with the beneficiary's parents or other surrogates to inform them of the law change, the required notice, and the new rights under Subsection (k) and (l), and to let them know that the trustee doesn't intend to ask the court to modify the trust to include the required notice (due to the expense to the trust) unless requested to do so. That should limit the damages for failing to add the notice.

2.5. New Options with the Transfers to Minors Act. Several sections of Chapter 141 of the Property Code were amended by HB 564 to:

- Make it possible for the custodian to place the assets remaining in the custodial account into a Section 2503(c) "qualified minor's trust." Thus, if the value of the assets in the

account has grown to the extent that the custodian and the minor are concerned about the ability of the minor to manage the assets at age 21, the custodian can place the assets in a trust which gives the minor the power to withdraw the property for a limited period at age 21, after which the property that is not withdrawn is held in a trust for the minor until he or she reaches an older age.

- Make it easier to pay retirement plan benefits to an UTMA custodian. This has become more important due to the stricter designated beneficiary rules the Internal Revenue Service is now applying to trusts receiving benefits.

This part of HB 564 becomes effective on September 1, 2007, and applies to "trusts existing" on that date. Hopefully it also applies to custodial accounts existing on that date, but that is not clear from the statute.

2.6. Fixing a Bug in the Charitable Trust Litigation Statute. Chapter 123 of the Property Code addresses attorney general participation in "proceedings involving charitable trusts." In 2005, Section 123.003 was amended to increase the length of time between notice to the attorney general and the date on which a hearing can be held to 25 days. Since the definition of "proceeding involving a charitable trust" is so broadly defined in Chapter 123, the Academy asked the attorney general's office in 2005 to make it clear that the notice requirement did not apply to uncontested probates. The language added by the attorney general's office that was intended to make this clear can also be read to require notice to the attorney general only if the proceeding was under Probate Code Section 83, which applies when two wills are offered for probate.

HB 564 fixes this problem (hopefully) by more carefully wording the exception in Section 123.003(a) for uncontested probates.

2.7. Termination of Uneconomic Trusts. HB 564 adds Section 112.059 to the Trust Code to permit the trustee to terminate a trust in certain circumstances if the value of trust property is less than $50,000. This type of provision is found in many trust instruments. Now it is the default rule.

2.8. Other Technical or Minor Changes Affecting Trusts. HB 564 makes the following additional changes to the Trust Code:

- Certain definitions in Sections 111.004 and 116.002 were made consistent with each other.

- Section 112.035(d) was amended to help assure that spendthrift trust protection is not lost when a intentionally defective grantor trust is used.

- Section 113.058, regarding the trustee's bond, was cleaned up, and the 2005 amendment to the section was clarified to make it clear that a court may order the trustee to post a bond even in cases where the trust instrument waives the bond. As initially filed, HB 564 would have reversed the Texas rule regarding bonds, so that a bond would be required only if the instrument required it or a judge ordered it. However, that change failed to pass the Senate, so the Texas rule still is that a bond is required of non-corporate trustees unless the trust instrument waives the bond.

- Section 113.085(a) was amended to make it consistent with pre-2005 Texas law. Because of 2005 amendments, some practitioners feared that co-trustees had a duty to attempt to get unanimous approval before a majority was authorized to act. HB 564 eliminates the implication that an attempt at a unanimous decision must be made. A majority of co-trustees can simply act without the joinder of all co-trustees.

- Section 116.172 -- the Texas version of the rule regarding allocating deferred compensation receipts under the Uniform Principal and Income Act -- was tweaked for the second session in a row.

- Under the existing Texas version of the rule regarding allocation of oil, gas and mineral receipts under the Uniform Principal and Income Act, "nominal" delay rental and "nominal" annual rent on a mineral lease was

treated as income, while amounts that are "more than nominal" are allocated equitably. Tex. Trust Code §116.174(a). This was the case despite the requirement in Section 116.171 that "insubstantial" amounts should be allocated to principal. HB 564 amends Section 116.174(a) to provide that all delay rental and annual rental on a mineral lease is income.

3. Changes Affecting Decedents' Estates

Following is a summary of legislative changes affecting decedents' estates, other than the amendments to Probate Code Section 128A, which are discussed above.

3.1. Marriage Voidable Based on Mental Incapacity. HB 391 adds new Section 47A to the Probate Code to permit a post-death challenge to the validity of a marriage based on the mental incapacity of one of the spouses. Previously the Family Code permitted such challenges to be brought prior to death, but once one of the spouses died, the marriage could not be challenged. This left a door open for abusive caregivers -- one that could not be closed despite terrible facts.

As a section of the State Bar, REPTL is required to circulate its legislative proposals to all sections of the bar and to obtain the approval of the State Bar Board of Directors before it is permitted to urge the adoption of the legislation. This proposal was reviewed by the Family Law Section, which requested changes to the bill that were made in Summer 2006 as part of the bar approval process. Nonetheless, the Family Law Foundation, which is closely affiliated with the Section, opposed HB 391 when it came up for hearing in the House. The version which passed is a compromise that was necessary to avoid Family Law Foundation opposition.

As it passed, Section 47A permits a challenge first brought after the death of one of the spouses to void a marriage that occurred within three years of the death. Marriages that occurred more than three years before the death of a spouse cannot be challenged unless there was at death a pending Family Code action or guardianship proceeding in which the court has been asked to void the marriage under Chapter 6, Family Code. In addition, the compromise requires any post-death challenge to the validity of a marriage based on incapacity to be brought within one year of the death of the spouse.

The standards under Section 47A are difficult to meet, but at least there is a procedure to deal with the most egregious cases.

3.2. Judge May Require a New Bond Without Hearing. Under current Section 205 of the Probate Code, if the judge determines that the amount of an administrator's bond is insufficient, the judge must cause the administrator to be cited to appear and show cause why the bond should not be increased. HB 1709 amends Sections 205 and 206 to permit the judge without notice or hearing to order that the bond be increased. In many cases, such as when real property is sold, it will be obvious to everyone that the bond must be increased. These changes will make it unnecessary for the court to hold a show cause hearing just to increase the bond. In those cases where the administrator believes that the bond should not be increased or that the amount of the new bond is too high, Section 206 permits the administrator to demand a hearing on the order.

3.3. Operation of a Business in a Dependent Administration. If a decedent dies intestate holding a farm or business as a sole proprietorship, the dependent administrator appointed by the court faces an uphill battle. How can the administrator hope to operate the business when the rules governing dependent administration rely on court approval for most actions?

The current Section 238 provides an answer, but some (including title companies) believed it did not go far enough. It permits the administrator to ask the court for orders authorizing it to take certain actions without needing further court approval.

HB 1352 amends Section 238. The amended section goes into much greater detail about the types of orders that may be entered and the scope of the administrator's authority under those orders. For example, the court can order that the administrator is permitted to sell real estate without further order of the court. This could be useful if the decedent was a real estate developer and the administrator needs to sell lots to keep the business going.

The new version makes clear, however, that all such authority of the personal representative must be obtained from the court. The court must carefully scrutinize orders requested under new Section 238 due to the broad authority that can be given in such orders.

3.4. Unpaid Child Support Claims Against the Decedent's Estate. Currently Section 154.006 of the Family Code provides that, unless the court orders otherwise, child support obligations end when the obligor dies. Of course, most well-drafted divorce decrees provide that the child support obligation survives the death of the obligor. This leads to problems for the personal representative of the obligor's estate, since the claim for future child support is not a liquidated claim.

SB 617 amends Section 154.006 of the Family Code to reverse the general rule. Under the new rule, the child support obligation survives the death of the obligor even if the divorce decree does not so provide. The bill also adds Sections 154.015 and 154.016 to the Family Code to provide for the acceleration of child support obligations on the death of the obligor. The changes anticipate that the family court will determine a liquidated amount of the child support obligation using discounting analysis and other means. Section 154.016 permits the court to require that one's child support obligations be "secured" by the purchase of life insurance, and it provides a means for determining what portion of the life insurance goes to pay the child support obligation. Any child support obligation that remains unpaid can be reduced to a liquidated sum by the family court. An amendment to Section 322 of the Probate Code makes the obligee's claim for the liquidated sum a Class 4 claim.

This will increase the amount of Class 4 claims in probate estates, and therefore make it less likely that creditors holding claims of a lower priority will be paid. The probate judge's job should be easier under the new provisions, since it is the family court, not the probate court, that must set the amount of the accelerated, liquidated claim.

3.5. No Hearing Required on Application to Sell Real Estate. HB 391 repeals Section 343, adds Section 345A and amends Sections 344, 345 and 346 to make it easier to sell real estate in a dependent administration. Under the changes, if there is no opposition to the application to sell, the court may order the sale without a hearing. Section 345A(b) permits the court to require a hearing even if there is no opposition.

3.6. Venue of Heirship Proceedings. REPTL attempted to clarify the venue and transfer rules for statutory probate courts in non-personal injury cases in light of the decision in *Gonzalez v. Reliant Energy, Inc.*, 159 S. W. 3d 615 (Tex. 2005). However, this bill (HB 660) failed to pass.

Nonetheless, there was a venue clean-up of sorts this session. HB 391 amends Sections 8 and 48(a) of the Probate Code to make the venue of heirship proceedings more consistent with other proceedings involving decedents' estates. Previously if no other venue rules applied and no administration was pending, Section 48(a) required a determination of heirship application to be filed in the county where the decedent owned real property. Now that section provides that the venue is determined under Section 6, which is the primary venue statute regarding decedents' estates. This should move the proper venue of some heirship proceedings from the county where real property is located to the county of the decedent's domicile.

3.7. Genetic Testing in Heirship Proceedings. SB 1624 adds Sections 53A, 53B, 53C, 53D and 53E to the Probate Code, establishing a procedure for using genetic testing in heirship proceedings. The procedure is modeled after, and refers to, the Family Code procedures on the same subject.

3.8. Disinheriting Bad Parents. HB 568 adds Subsections (e) and (f) to Section 41, permitting the probate court to disinherit a parent who abandoned the child or its pregnant mother or committed certain enumerated criminal acts. A parent who is disinherited is treated as having predeceased the child and, therefore, does not inherit from or through the child.

3.9. Say Goodbye to Nuncupative Wills and Qualified Community Administrations. Two bills actually took the time and energy to remove two old and little-used probate institutions. HB 391 eliminates oral nuncupative wills. From here on out, folks are just going to have to write it down. HB 1710 eliminates qualified community administrations.

Non-qualified community administrations survived, as did the surviving spouse's right to manage his or her sole management community property under former Section 177(b) (now simply Section 177). It is surprising how many sections of the Probate Code have something to do with nuncupative wills or qualified community administrations. Care to guess? See the end of the paper (before the appendices) for the answer.

3.10. Soldiers Killed in Combat Zone Do Not Pay Probate Fees. HB 3787 (effective June 15, 2007) adds Section 11A to the Probate Code, exempting the estates of service men and women killed in a combat zone from paying probate fees.

3.11. Disclaimer Statute Cleaned Up. HB 391 gives Section 37A a face-lift, reorganizing the subsections and giving them names. The only substantive change is to the deadline for a charity or governmental organization to file a disclaimer. Previously the charity or organization had nine months from the date it received the Section 128A notice. Since Section 128A was substantially rewritten, a certain charity with an orange tower located just north of the Capitol complex in Austin asked for, and received, a change to new Subsection (h), giving charities until the first anniversary of the receipt of the Section 128A notice or six months after the personal representative files the inventory, whichever is later. The disclaimer face-lift also caused a minor change to Section 37B(b).

3.12. Effect of Divorce on Will Provisions. HB 391 amends Section 69 of the Probate Code to assure the result reached by the Texas Supreme Court in *In re Estate of Nash*, 2007 WL 1163925, 50 Tex. Sup. Ct. J. 649 (Tex. Apr 20, 2007). Instead of the divorce voiding all provisions "in favor of the testator's former spouse," the amended Section 69 also treats "each relative of the former spouse who is not a relative of the testator" as having failed to survive the testator, thus voiding gifts to and fiduciary appointments of the former spouse's relatives.

3.13. Change in Proof Required to Prove Contents of Lost Will. Since the Probate Code was first enacted more than 50 years ago, a person wishing to admit a lost will to probate under Section 85 had to (among other things) prove the contents of the will by the testimony of a credible witness who has read it or hear it read. HB 391 amends Section 85 to permit such proof "the testimony of a credible witness who has read the will, has heard the will read, *or can identify a copy of the will."* This is a statutory recognition that, with today's technology, a copy of the will is probably the best way to prove the contents of the will.

3.14. Granting Letters of Administration. HB 391 makes two distinct changes to Section 178 of the Probate Code. First, it permits a named executor who fails to present the will for probate within 30 days of the decedent's death to show the court good cause for not presenting the will and thereby avoid having letters of administration with will annexed granted to someone else. Second, it provides that a necessity for an administration exists if the administration is necessary to receive or recover funds or other property due the estate.

3.15. Other Technical or Minor Changes Affecting Decedents' Estates. Bills passing the 80th Regular Session of the Texas Legislature also made these changes affecting decedents' estates:

- A minor change to the definition of "interested persons" in Section 3(r) of the Probate Code (HB 391).
- Increasing the fee for depositing a will with the county clerk during the testator's lifetime from $3 to $5 (Section 71, HB 290, effective June 15, 2007).
- Removing the word "neglect" from Section 83(c) (HB 391).
- Removing the requirement that the applicant's social security number be included in an emergency intervention application filed under Sections 111 or 112 of the Probate Code (HB 391, effective June 15, 2007).
- The title to Section 128B of the Probate Code changed (SB 593).
- Sections 149C, regarding removal of independent executors, and 222, regarding removal of dependent administrators, were changed to correspond to the amendments to Section 128A regarding notice to

beneficiaries that a will has been probated (SB 593).

- Amending Section 179 to require that a person wishing to file an opposition to the application for letters of administration be an "interested person" (HB 391).

- Amending Section 190(b) to remove the word "neglected" from the oath of an administrator.

4. Changes Affecting Guardianships

4.1. Protecting the Right of an Incapacitated Person to Vote (and Drive). HB 417 made several changes to the Probate Code and the Election Code intended to protect incapacitated persons' right to vote and, in some cases, drive. Section 682 of the Probate Code requires the application for a guardianship to state if the applicant seeks to take away the right of an adult proposed ward to vote or hold a license to operate a motor vehicle. This is intended to put the proposed ward on notice that his or her constitutional right to vote is threatened by the proceeding, thus affording the proposed ward due process. *See Doe v. Rowe,* 156 F.Supp. 2d 35 (D.Me. 2001). Section 687 is amended to require the physician's certificate to state whether in the physician's opinion the proposed ward has the mental capacity to vote or safely operate a motor vehicle. Section 693(a) is amended to, in effect, provide that a determination by the court that a person is totally incapacitated means that the person cannot vote or operate a motor vehicle and that the order appointing the guardian must so provide. Sections 694G and 694H are amended to require guardianship modification orders to address the ward or former ward's right to vote. Finally, it makes several changes to the Election Code to reflect that some wards retain the right to vote and others do not.

4.2. Criminal Background Checks for All Guardians, Except Family Members and Lawyers. Section 698 of the Probate Court was amended late in the session to require the clerk to obtain a criminal background check on each person proposed to serve as a guardian, including temporary guardians and successor guardian. However, family members of the proposed ward and attorneys are exempt from the criminal background check requirement. Section 698(a-1). Rather than waiting for the clerk to obtain the background check, an applicant subject to the requirement may submit the criminal history record, so long as it is dated within 30 days of the hearing.

4.3. Judge May Require a New Bond Without Hearing. Under current Section 713 of the Probate Code, if the judge determines that the amount of a guardian's bond is insufficient, the judge must cause the guardian to be cited to appear and show cause why the bond should not be increased. HB 1709 amends Sections 713 and 714 to permit the judge without notice or hearing to order that the bond be increased. In many cases, such as when real property is sold, it will be obvious to everyone that the bond must be increased. These changes will make it unnecessary for the court to hold a show cause hearing just to increase the bond. In those cases where the guardian believes that the bond should not be increased or that the amount of the new bond is too high, Section 714 permits the guardian to demand a hearing on the order.

4.4. No Hearing Required on Application to Sell Real Estate. HB 417 repeals Section 822, adds Section 824A and amends Sections 823, 824 and 825 to make it easier to sell real estate in a guardianship. Under the changes, if there is no opposition to the application to sell, the court may order the sale without a hearing. Section 345A(b) permits the court to require a hearing even if there is no opposition.

4.5. No Plan is the Default Investment Plan. A couple of sessions ago, Section 855B was added to the Probate Code, requiring each guardian of the estate to file an application for the approval of an investment plan within 180 days of qualifying as guardian. Several courts have adopted local rules saying that the application for approval of investment plan need be filed only if the guardian wishes to opt out of the approved investments in Section 855 of the Probate Code. Now HB 417 has amended Section 855B to follow this lead. Under the amendment, a guardian must either have the estate assets invested according to Section 855(b) or file an application for approval of an investment plan within 180 days of qualifying. Section 855B(a-1) permits the approval of an investment plan without a hearing.

4.6. Interstate Guardianship Disputes. HB 342 (effective June 15, 2007) adds Section 894 to the Probate Code to give probate courts a basis for

resolving interstate venue disputes such as the Glasser case from San Antonio. The statute permits the Texas court to delay further action if another guardianship application is filed in a foreign jurisdiction. It directs the court to determine whether venue is "more suitable" in Texas or in the foreign jurisdiction, considering, among other things, the interests of justice, the best interests of the ward and the convenience of the parties. The statute permits the court to enter orders protecting the ward or the ward's property during this delay.

As more and more people spend time in different states each year, there are likely to be more disputes over which state is the proper forum for a guardianship. The Texas statute gives this state's courts some basis for resolving the dispute. The National Conference of Commissioners on Uniform State Laws is considering a uniform act on this subject which, if adopted in a sufficient number of states, could help solve this problem.

4.7. Court Must Have Probate Jurisdiction to Create 867 Trust. HB 519 amends Section 867(b-1) of the Probate Code to clarify that, under the 2005 amendments to that section, the "proper court" which may create a guardianship management trust (often called an "867 Trust") must be "exercising probate jurisdiction." The 2005 amendments were not intended to permit district courts or other courts not exercising probate jurisdiction to create 867 Trusts, and HB 519 makes that clear, as well as providing a means for getting applications filed in the wrong court transferred to the correct court.

4.8. "Ineligible" Guardians May Be Removed. Section 681 lists the grounds for a court considering whether or not to appoint a guardian to determine that a prospective guardian is ineligible to serve. However, current law does not provide a specific basis for removal of (1) a guardian who was ineligible when appointed but whose ineligibility was not detected at the time of appointment or (2) a guardian who becomes ineligible after being appointed. HB 417 amends Section 761(c) to make the guardian's subsequent ineligibility a basis for removal. It also amends Sections 695, 760(b) and 761(f) to permit the appointment of a successor guardian immediately, without citation or notice, if a necessity exists.

4.9. Appointing Non-Spouses as Co-Guardians. HB 417 amends Section 690 of the Probate Code to permit the appointment of both parents of an adult incapacitated child if the child has never been the subject of a suit affecting the parent-child relationship or if both parents were named joint managing conservators of the child. The bill also amends Section 690 to provide that joint guardians will be appointed only if it is in the best interest of the ward.

4.10. SAPCR Versus Guardianship Jurisdiction. HB 585 (effective June 15, 2007) adds Subsection (k) to Section 606 to provide that a probate court has jurisdiction to hear a guardianship proceeding with respect to an adult disabled child who became the subject of a suit affecting the parent-child relationship (SAPCR) when the child was a minor, notwithstanding the continuing, exclusive jurisdiction of the SAPCR court. It also adds Section 682A to the Probate Code. This late-session addition is a not-too-successful attempt to make the probate court have to appoint as guardian the person appointed by the SAPCR court as conservator and to make the probate court "preserve the terms of possession and access to the ward" that the SAPCR court set, as much as possible. However, since the probate court is bound by these requirements only if it is able to make the findings required by Section 684 of the Probate Code, and since Section 684 requires the probate court to find, among other things, that the applicant is eligible to serve as guardian, the probate court retains some say in how the guardianship is established.

4.11. Various Application and Ad Litem Issues. HB 417 makes several tweaks of the application process, including a few that affect ad litems. Sections 645 and 646 are amended to provide that, unless the court otherwise orders, a guardian ad litem and attorney ad litem appointed in connection with an application for a guardianship are discharged when the order appointing the guardian or dismissing the application is entered. Section 683(a) is amended to provide that, if the court investigator or a guardian ad litem is appointed to investigate whether a guardianship is necessary, and if such person determines that a guardianship is not necessary, he or she need not file an application for creation of a guardianship. Sections 683(c), 694C and 694L are amended to provide that the ad litems appointed under those sections (regarding court-initiated guardianships and restoration/modification

proceedings) are entitled to be paid even if no guardianship is established or no changes are made.

4.12. Other Technical or Minor Changes Affecting Guardianships. Bills passing the 80th Regular Session of the Texas Legislature also made these changes affecting guardianships:

- HB 417 amends Section 665A of the Probate Code to make the payment for professional services apply to professionals appointed under any provisions of Chapter XII of the Probate Code, not just Sections 646 or 687.

- SB 291 amends Sections 697A, 697B and 698 regarding public guardians, private professional guardians and the Guardianship Certification Board.

5. Other Legislation

5.1. Recusals in Statutory Probate Courts. SB 406 amends Section 25.00255 of the Government Code, removing the presiding statutory probate judge's power to assign a judge to hear a motion for the recusal or disqualification of a statutory probate judge. Under SB 406, the presiding statutory probate judge forwards the request for assignment of a judge to hear the recusal to the local administrative judge, who assigns a judge to hear the motion. The bill also adds new Government Code Section 25.00256, which addresses "tertiary recusal motions." When a party has filed two recusal motions in a case, subsequent (or tertiary) motions shall not cause the other proceedings in the matter to stop.

5.2. Uniform Prudent Management of Institutional Funds Act. HB 860 enacts the Uniform Prudent Management of Institutional Funds Act in Chapter 163 of the Property Code. The act is modeled after the Uniform Prudent Investor Act (Chapter 117 of the Trust Code). It applies to funds managed by charitable institutions for itself. It applies to trusts with only charitable beneficiaries (including trusts that had non-charitable beneficiaries whose interests in the trust have terminated), but only if the trustee and beneficiary are both charitable institutions. If the act applies to a fund, then the Trust Code does not apply.

5.3. Filing Fees. Several bills affect filing fees. HB 1295 requires the clerks in all counties (not just statutory probate court counties) to collect a $20 supplemental fee on original probate actions and certain contested probate actions. The money is used to pay guardians ad litems and attorneys ad litem appointed in court-initiated guardianship proceedings under Section 683 of the Probate Code and to fund local guardianship programs that provide guardians for indigent incapacitated persons who do not have family members suitable and willing to serve as guardians. HB 2359 affects how the $40 filing fee collected in statutory probate courts is divided among the statutory probate court counties. SB 819 permits avoidance of the $25 filing fee for inventories filed more than 90 days after the personal representative qualifies if the deadline for filing the inventory is extended by the court. HB 290 (effective June 15, 2007) increases the fee for depositing a will with the county clerk during the testator's lifetime from $3 to $5.

5.4. Statutory Probate Judges' Bonds. HB 2967 (effective October 1, 2007) requires all statutory probate judges to execute a $500,000 performance bond. Under current law, the amounts of those bonds varies.

5.5. State Court Review of Medicaid Decisions. HB 75 permits state court judicial review on final determinations for Medicaid benefits. Medicaid is the only state benefit program that does not permit the applicant to appeal an administrative law judge's decision to a state district court. HB 75 removes the Medicaid exemption from state court review.

5.6. Minimum Personal Needs Allowance Increased to $60. HB 52 increases the minimum personal needs allowance for certain recipients of Medicaid benefits in long-term care facilities from $45 to $60 per month.

5.7. Social Security Numbers and Driver's License Numbers on Pleadings. In order to make it easier for title companies and others to determine the identity of judgment debtors on abstracts of judgment, SB 699 requires that each party's initial pleading in a civil action filed in a district court, county court or statutory county court include the last three digits of the party's drivers license number and the last three digits of the party's social security

number. The Academy was able to get proceedings in statutory probate courts exempted from this requirement. Unfortunately, probate and guardianship cases in non-statutory probate court counties will be subject to the requirement. The requirement applies to civil actions filed on or after September 1, 2007.

5.8. Social Security Numbers in Documents Filed with Clerk. Meanwhile, HB 2061(effective March 28, 2007) was rushed through the Legislature to protect clerks who unintentionally disclose a person's social security number by allowing a document containing the number to be examined by a member of the public. The bill also requires the clerk to remove all but the last four digits of a person's social security number from a filed document if the person so requests.

6. Conclusion

The answer is 28.

Appendix "A" – List of Bills and Effective Dates

Bill Number	*Status*	*Earliest Effective Date*
HB 0052	Signed	September 1, 2007
HB 0075	Signed	September 1, 2007
HB 0290	Signed	June 15, 2007
HB 0342	Signed	June 15, 2007
HB 0391	Signed	June 15, 2007*
HB 0417	Signed	September 1, 2007
HB 0519	Signed	September 1, 2007
HB 0564	Signed	June 15, 2007*
HB 0568	Became Law Without Governor's Signature	September 1, 2007
HB 0585	Signed	June 15, 2007
HB 0860	Signed	September 1, 2007
HB 1295	Signed	September 1, 2007
HB 1352	Signed	September 1, 2007
HB 1709	Signed	September 1, 2007
HB 1710	Signed	September 1, 2007
HB 2061	Signed	March 28, 2007
HB 2359	Signed	September 1, 2007
HB 2967	Signed	October 1, 2007
HB 3787	Signed	June 15, 2007
SB 0291	Signed	September 1, 2007
SB 0406	Signed	September 1, 2007
SB 0506	Signed	April 25, 2007
SB 0593	Signed	September 1, 2007
SB 0617	Signed	September 1, 2007
SB 0699	Signed	September 1, 2007
SB 0819	Signed	September 1, 2007
SB 1624	Signed	September 1, 2007

* Most parts of this bill have a September 1, 2007, effective date.

Appendix "B" -- Academy Membership Application

Texas Academy of Probate and Trust Lawyers

Membership Application/2007 Dues Notice

List below the information to be included in the membership roster.

_____
Name

_____
Firm or School/University

_____
Address

_____, Texas _____
City Zip

_____ _____
Telephone Number Fax Number

_____
E-mail

Please Check the Appropriate Boxes: Dues

☐ Board Certified, Estate Planning and Probate Law,
Texas Board of Legal Specialization ***and/or***
☐ Fellow, American College of Trust and Estate Counsel $125.00

☐ I am an Academician $75.00

Please make your check payable to the **Texas Academy of Probate and Trust Lawyers** and mail to the following:

Texas Academy of Probate and Trust Lawyers
c/o Tom Featherston, Treasurer
1114 S. University Parks Drive
Waco, TX 76798-7288

If you have any questions, contact Al Golden, Academy Chair, at (512) 472-5675 or ajg@ikardgolden.com

Appendix "C" -- Ten Things to Change Now

Most changes made by the 80th Texas Legislature affecting probate, guardianship and trust law became effective September 1, 2007. Here are ten things that lawyers who practice in this area should do now to comply with these changes. For a more thorough explanation of the changes, see my 2007 Texas Legislative Update.

1. ***Include identifying numbers in probate and guardianship applications that are not filed in statutory probate court.*** As crazy as it sounds in this era of hightened privacy concerns, SB 699 requires the first pleading filed by a party to any civil action filed after September 1, 2007, to include the last three digits of the party's social security number and the last three digits of the party's driver's license number. With the support of the Texas Academy of Probate and Trust Lawyers, Rep. Will Hartnett of Dallas was able to amend this bill at the last minute to make actions in statutory probate courts exempt from the requirements of this bill. Are probate actions "civil actions" that are subject to the bill? There's no reason to think otherwise. So, until a court rules otherwise, if you are filing an application to probate a will, application for appointment of a guardian or other initial pleading in a non-statutory probate court after September 1, 2007, your client must include the last three digits of his or her social security number and driver's license number in the pleading. This change was requested by title companies, who want an easy way to distinguish between persons with the same or similar names in searching real property records for abstracts of title. Perhaps local county court judges and local statutory county court judges can adopt local rules that the new requirement does not apply to probate matters. After all, core probate and guardianship proceedings rarely end in an abstract of judgment.

2. ***Independent executors must notify all beneficiaries that the will has been probated and prove that notice was given by filing an affidavit.*** For every person who dies on or after September 1, 2007, the personal representative appointed after a will is probated must notify all beneficiaries named in the will within 60 days of the date the will is probated. The notice must include a copy of the will and the order admitting it to probate. There are special rules for trusts, minors and incapacitated persons. Waivers are permitted. Personal representatives prove that they complied with the new requirements of Section 128A by filing an affidavit within 90 days of probate. See my 2007 Texas Legislative Update for a detailed explanation of this change. Also, see my forms for the Notice to Beneficiaries, Waiver of Notice, Receipt and Waiver of Notice, and Affidavit of Compliance Under Section 128A at www.texasprobate.com.

3. ***Better check the statute before doing the next 142 Trust.*** Substantial changes to Property Code Section 142.005 became effective September 1, 2007. The first page of every 142 Trust must include a statutory warning. Persons who are disabled for purposes of receiving federal benefits but who are not incapacitated for purposes of Property Code Section 142.007 or for purposes of guardianships now may file for creation of a 142 Trust themselves (without the aid of a next friend or guardian ad litem). Several changes enhance the use of 142 Trusts as special needs trusts. Chances are, you need to make several changes to your 142 Trust form.

4. ***Guardianship applications must state that the proposed ward's right to vote and drive may be affected.*** In order to better protect the civil and constitutional rights of incapacitated persons, the application for a guardianship that may result in the loss of the proposed ward's right to vote or drive a car must disclose this fact. Also, the physician's certificate and order requirements were changed to make the decision of the court regarding the ward's voting rights and driving rights more explicit. Be sure your guardianship application and order comply with these changes, and be sure the physician's certificate includes explicit statements about the proposed ward's ability to vote and drive.

5. ***Don't give the title company the whole trust agreement; give it a certificate of trust.*** Texas finally has a statute that permits a trustee to provide third parties with a certificate describing the trustee's powers

rather than providing the entire trust instrument. Trust Code Section 114.086 states the requirements for a certificate of trust. The certificate permits the third party to ascertain that the trustee has the authority to complete the transaction in question without requiring a disclosure of all of the trust terms. Since a trustee has a duty to keep private matters regarding the trust and its beneficiaries, a cautious trustee always will opt for the certificate if given a choice.

6. ***Your boilerplate provision authorizing a trustee to self-deal now permits corporate trustees to self-deal.*** Since Texas has had statutes governing trusts, settlors have not been permitted to waive the statutory prohibitions against self-dealing for corporate trustees. Uncle Benny or Aunt Sue could be authorized to self-deal, but not Big State Bank and Trust. Now settlors are permitted to waive self-dealing rules for corporate trustees as well as individual trustees. This will come in handy in some cases (for example, to authorize a corporate trustee to utilize an affiliated hedge fund as a trust investment), but be aware that provisions buried in your trust instruments which were intended to authorize family members serving as trustee to self-deal now may authorize corporate trustees to do so as well, unless the wording limits this effect. And why exactly did you have a self-dealing authorization in your boilerplate provision in the first place?

7. ***Texas statutes now recognize the existence of copiers.*** In 1955, when the Texas Probate Code was enacted, copy machines were rare. (I remember my dad had a weird kind of machine that made sort of a negative of a document. That was in the early 1960s, though.) That is probably why Section 85 required the testimony of someone who had read a lost will or heard it read to prove up the contents of a lost will. Now, since virtually every lawyer keeps a photographic copy of each signed will in his or her files, maybe looking at the signed copy is a slightly more reliable way to prove the contents of the lost will. Section 85 was amended in 2007 to permit this method of proving up the will. So, in your next lost will case, change your pleadings and consider this new-fangled method of proving what a document says.

8. ***Prospective guardians must provide criminal background checks, unless. . . .*** Section 698 of the Probate Code was amended to require the clerk to obtain a criminal background check on each person proposed to serve as a guardian or temporary guardian. Before you call the DPS to get your client's record, however, note that the bill was amended late in the session so that it does not apply to family members or attorneys. If it doesn't apply to family members and it doesn't apply to lawyers, to whom does it apply? Non-lawyer employees of private professional guardians and providers of community guardianship services will be subject to the requirement, as well as the fairly rare case in which a non-family member and non-attorney is proposed as a guardian.

9. ***Deja vu, Part 1: "No plan" is the default investment plan in guardianships again.*** For the longest time, guardians of the estate had to obtain court approval of an investment plan only if they were not going to follow the statutorily-approved guardianship investments. Then, in 2003 Section 855B of the Texas Probate Code was amended to require guardians of the estate to file an investment plan within 180 days of qualifying as guardian. Now, that section is amended to provide that the guardian must file an investment plan only if he or she plans to deviate from the statutorily-approved guardianship investments. Hey, isn't this where I got on?

10. ***Deja vu, Part 2: Back to the common law duty of trustees to keep beneficiaries informed.*** Prior to 2005, the Texas Trust Code contained no provision imposing an affirmative duty on trustees to keep beneficiaries informed about the trust. There was a requirement to respond to an accounting demand by a beneficiary, and the Supreme Court had found a duty to exist in the common law in some cases, but the Trust Code was missing this requirement. Then, in 2005, Section 113.060 was added to the Trust Code, imposing such a duty. After much hue and cry, and after attempts to reach an agreement on amending its terms, Section 113.060 was repealed effective June 17, 2007. However, the bill repealing Section 113.060 says that the common law duty prior to 2005's enactment of Section 113.060 continues to exist. I believe this is where I get off. . . .

Appendix "D" -- Section 128A Forms

Under the 2007 amendment to Probate Code Section 128A, personal representatives are required to give notice to beneficiaries within 60 days after a will is probated. The new requirement applies to decedent's dying on or after September 1, 2007. Here are Glenn Karisch's forms for use in connection with that section, provided without warranty of any kind, including warranty of merchantability or fitness for a particular purpose:

1. Notice to Beneficiaries Under Section 128A

[Firm Name]
[Firm Address]

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED #_____

[Beneficiary Name]
[Beneficiary Address]

Re: Estate of [Decedent's Name], Deceased; Cause No. [Number] in the Probate Court No. 1 of Travis County, Texas

Dear [Beneficiary Name]:

[Executor Name] has retained this firm to represent her in her capacity as Independent Executor of the Estate of [Decedent Name], Deceased (referred to in this letter as the "Estate"). I am writing this letter to you on behalf of [Executor Name]. Section 128A of the Texas Probate Code requires the independent executor of an estate to notify all beneficiaries of the Estate that the will has been probated. Accordingly, you are hereby notified that:

1. [Decedent Name]'s will dated [Date of Will] was admitted to probate in the Probate Court No. 1 of Travis County, Texas, under Cause No. [Number], and [Executor Name] was appointed as and qualified as independent executor of the Estate on [Date of Qualification].

2. [Beneficiary Name] is named as a beneficiary in the will.

3. The name and address of [Executor Name] is: [Executor Name], Estate of [Decedent Name], c/o [Firm Name], [Firm Address].

4. A copy of the will and order admitting it to probate is attached.

This firm represents [Executor Name]. It does not represent you or the Estate.

Very truly yours,

[Lawyer Name]

Enclosures

2. Waiver of Notice Under Section 128A

CAUSE NO. _____

ESTATE OF	**§**	**IN THE _____ COURT**
	§	
_____,	**§**	**OF**
	§	
DECEASED	**§**	**_____ COUNTY, TEXAS**

WAIVER OF NOTICE PURSUANT TO
TEXAS PROBATE CODE SECTION 128A

1. My name is _____.
2. My address is _____.
3. I am a beneficiary under the will of _____.
4. The date of the will is _____.
5. I acknowledge that I have received a copy of the will. I waive my right to receive the notice that the personal representative otherwise would have to send me under the terms of Section 128A of the Texas Probate Code. The personal representative does not have to send me the Section 128A notice.

My signature: _____

THE STATE OF TEXAS

COUNTY OF _____

This instrument was acknowledged before me on the____ day of _____, 200__, by

_____.

_____
Notary Public, State of Texas

3. Receipt and Waiver of Notice (For use in cases where the personal representative can distribute a specific gift to the beneficiary within 60 days of probating the will. The form serves as a receipt and a waiver of the Section 128A notice requirement.)

CAUSE NO. _____

ESTATE OF	**§**	**IN THE _____ COURT**
	§	
_____,	**§**	**OF**
	§	
DECEASED	**§**	**_____ COUNTY, TEXAS**

RECEIPT AND WAIVER OF NOTICE

1. My name is _____.

2. My address is _____.

3. I am a beneficiary under the will of _____.

4. The date of the will is _____.

5. I acknowledge that I have received a copy of the will. I waive my right to receive the notice that the personal representative otherwise would have to send me under the terms of Section 128A of the Texas Probate Code. The personal representative does not have to send me the Section 128A notice.

6. I also acknowledge that I have received the following property, which was given to me under the terms of the will: _____

_____

My signature: _____

THE STATE OF TEXAS

COUNTY OF _____

This instrument was acknowledged before me on the____ day of _____, 200__, by

_____.

_____

Notary Public, State of Texas

4. Affidavit of Compliance with Section 128A

CAUSE NO. [Number]

ESTATE OF	**§**	**IN THE PROBATE COURT**
	§	
[Decedent Name],	**§**	**NO. 1 OF**
	§	
DECEASED	**§**	**TRAVIS COUNTY, TEXAS**

INDEPENDENT EXECUTOR'S AFFIDAVIT OF NOTICE PURSUANT TO TEXAS PROBATE CODE SECTION 128A

THE STATE OF TEXAS

COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared [Executor Name], independent executor of the Estate of [Decedent Name], Deceased, who, after being duly sworn by me, did upon oath swear, state and affirm as follows:

1. ***Introduction.*** I, [Executor Name], am the independent executor of the Estate of [Decedent Name], Deceased. [Decedent Name] (the "Decedent") died [Date of Death]. Decedent's will dated [Date of Will] was admitted to probate and [Executor Name] qualified as independent executor of the Decedent's estate on [Date of Qualification]. This affidavit is being given to comply with the requirements of Section 128A of the Texas Probate Code.

2. ***Description of Decedent's Family and Beneficiaries.*** The Decedent was unmarried at the time of death. The Decedent previously was married to _____, who predeceased the Decedent. The Decedent had four children: [Child 1 Name], [Child 2 Name], [Child 3 Name] and [Executor Name]. These four children all survived the Decedent. These four children are the only beneficiaries named in the Decedent's will.

3. ***Notices Given.*** I gave notices that complied with Section 128A of the Texas Probate Code to the following persons at the following addresses by certified mail, return receipt requested, and I received back the green card evidencing that such persons received the notice:

[Child 1 Name]
[Child 1 Address]

[Child 2 Name]
[Child 2 Address]

4. ***Notices Not Required to Be Given.*** I did not give notice to the following persons at the following addresses because I was not required to do so by Section 128A of the Texas Probate Code:

A. ***Persons Waiving Notice.*** The following persons with the following addresses signed and filed a waiver meeting the requirements of Section 128A of the Texas Probate Code:

[Child 3 Name]
[Child 3 Address]

B. ***Persons Who Appeared in Probate Proceeding.*** The following persons appeared in this proceeding prior to the probate of the will:

[Executor Name]
[Executor Address]

5. ***Notices Unable to Be Given.*** I was unable to give notice to the following beneficiaries or possible beneficiaries under the will because I could not identify them or determine their whereabouts after the exercise of reasonable diligence. I do not intend to actively continue to try to locate these persons after the date hereof because of the cost and expense to the Estate unless ordered to do so by the Court. However, if I locate any of these persons after the making and filing of this affidavit, I will send them a notice under Section 128A:

None

6. I believe that I have complied with the requirements imposed on me by Section 128A.

_____
[Executor Name]

SWORN TO AND SUBSCRIBED BEFORE ME on the ____ day of _____, 200__.

_____
Notary Public, State of Texas