

## **2009 LEGISLATIVE UPDATE**

### Summary of Changes Affecting Texas Probate, Guardianship, and Trust Law

Authored and Presented By:

**WILLIAM D. PARGAMAN**

Brown McCarroll, L.L.P.

111 Congress Avenue, Suite 1400

Austin, Texas 78701-4043

Main: (512) 472-5456

Direct: (512) 479-9728

[bpargaman@mailbmc.com](mailto:bpargaman@mailbmc.com)

[www.brownmccarroll.com](http://www.brownmccarroll.com)

Based on Prior Presentations and Presented By:

**GLENN M. KARISCH**

The Karisch Law Firm, PLLC

7200 North MoPac Blvd., Suite 300

Austin, Texas 78731

(512) 328-6346

[karisch@texasprobate.com](mailto:karisch@texasprobate.com)

[www.texasprobate.com](http://www.texasprobate.com)

**Updated July 9, 2009**

**This paper was updated following Governor Perry's June 21<sup>st</sup> deadline to sign or veto bills. The author believes the List of Bills That Passed and Effective Dates to be accurate.**

State Bar of Texas

August 12, 2009

(Live Webcast)





**WILLIAM D. (BILL) PARGAMAN**  
Partner

Direct: 512-479-9728  
Email: [bpargaman@mailbmc.com](mailto:bpargaman@mailbmc.com)  
[www.brownmccarroll.com](http://www.brownmccarroll.com)

**Legal Experience**

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

**Education**

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

**Professional Licenses**

- Attorney at Law, Texas, 1981

**Court Admissions**

- United States Tax Court

**Speeches and Publications**

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

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

**Professional Memberships and Activities**

- American College of Trust and Estate Counsel, Fellow
- State Bar of Texas
  - Real Estate, Probate and Trust Law Section, Member
  - Real Estate, Probate, and Trust Law Council, Member, 2004–2008
  - Legislative – Probate Committee, Member, 2000–Present (Co-Chair, 2008–Present)
  - Trust Code Committee, Member, 2000–Present (Chair, 2004–2008)
  - Uniform Trust Code Study Project, Articles 7–9 & UPIA, Subcommittee Member, 2000–2003
  - Probate Code Codification Committee, Legislative Liaison Subcommittee Member, 2007–Present
- Texas Board of Legal Specialization (Estate Planning and Probate Law), Examiner, 1995–1997

## **William D. Pargaman**

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

### **Honors**

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

### **Community Involvement**

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

# **Glenn M. Karisch**

The Karisch Law Firm, PLLC  
7200 North MoPac Blvd., Suite 300 • Austin, Texas 78731  
Mailing Address: P.O. Box 160457 • Austin, Texas 78716-0457  
(512) 328-6346 • Fax (512) 342-7060  
karisch@texasprobate.com  
www.texasprobate.com

## **Education**

The University of Texas School of Law, Austin, Texas  
Juris Doctor with Honors, 1980  
The University of Texas at Austin, Austin, Texas  
Bachelor of Journalism with Highest Honors, 1977

## **Professional Experience**

The Karisch Law Firm, PLLC, Austin, Texas, 2008 – Present  
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 Council, State Bar of Texas  
Chair, 2007 – 8; Chair-Elect, 2006 – 7; Treasurer, 2005 – 6; Council Member, 1999 – 2003;  
Chair, Guardianship Law Committee, 1999 – 2000; Chair, Trust Code Committee, 2000 – 4;  
Chair, Probate Legislation Committee, 2003 – Present (Co-Chair Beginning 2008).  
Chair, Estate Planning and Probate Section, Austin Bar Association, 1996 – 7

## **Partial List of Legal Articles and Papers**

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

“UPIA Handbook,” The Texas Probate Website [texasprobate.com] (2003 – 4).

“Multi-Party Accounts and Other Non-Probate Assets in Texas,” University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference (2000), updated through 2008 on the Texas Probate Web Site [texasprobate.com].

“Modifying and Terminating Irrevocable Trusts,” State Bar of Texas Advanced Estate Planning and Probate Law Course (1999), updated through 2008 on The Texas Probate Web Site [texasprobate.com].

“Protecting the Surviving Spouse,” State Bar of Texas Advanced Estate Planning and Probate Law Course (2006), updated through 2008 on The Texas Probate Web Site [texasprobate.com].

“Court-Created Trusts in Texas,” State Bar of Texas Advanced Drafting: Estate Planning and Probate Law Course (1995), updated through 2008 on The Texas Probate Web Site [texasprobate.com].

Legislative Updates, 1999 – 2007, The Texas Probate Web Site [texasprobate.com].



# 2009 Legislative Update

## Summary of Changes Affecting Texas Probate, Guardianship, and Trust Law

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# 2009 Legislative Update

## Summary of Changes Affecting Texas Probate, Guardianship, and Trust Law

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The Texas Legislature began its 81<sup>st</sup> Regular Session on January 13, 2009. The session ends June 1, 2009. This paper presents a summary of the bills relating to probate (*i.e.*, decedents' estates), guardianship, and trust law.

### 1. Introduction and Acknowledgments.

A lot of effort goes into the legislative process. In the best of circumstances, this effort is manifested by passing quality legislation and defeating poor legislation. Of course, each session some shoddy things slip through and other deserving things fail to pass. The reader can judge if the 2009 batch will be worth the effort.

A lot of the effort in the 2009 session, as in past sessions, will come from the Real Estate, Probate and Trust Law Section of the State Bar of Texas ("REPTL"). REPTL, with its approximately 7,000 members, has been active in proposing legislation in this area for more than 25 years. During the past two years, its Council, headed by Glenn Karisch of Austin (Immediate Past Chair) and Harry Wolff of San Antonio (Chair-Elect), and its legislative committees and their respective chairs (Mary Burdette of Dallas (Past Chair) and Jim Woo of San Antonio (Current Chair) – Probate, Linda Goehrs of Houston – Guardianships, and Bill Pargaman of Austin (Past Chair) and Shannon Guthrie of Dallas (Current Chair) – Trusts), worked hard to come up with a package which addresses the needs of its members and the public, and continue to work hard to get the package enacted into law. Austin lawyer Barbara Klitch provides invaluable service tracking legislation for REPTL.

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

REPTL works closely with the Texas Academy of Probate and Trust Lawyers (Al Golden of Austin,

Chair, Tom Featherston of Waco, Treasurer, and Clint Hackney, Lobbyist). The Academy is a group of attorneys who are board certified in Estate Planning and Probate Law and/or are members of the American College of Trust and Estate Counsel (ACTEC) who go the extra mile and help support quality legislation in this area. Attorneys who are eligible for membership but who are not yet members should consider supporting this fine organization. **You'll find a membership application for the Academy at the end of this paper.**

Other groups have an interest in legislation in this area, and REPTL tries to work with them to mutual advantage. These include the statutory probate judges (Judge Guy Herman of Austin, Presiding Statutory Probate Judge) and the Wealth Management and Trust Division of the Texas Bankers Association (Leslie Amann of Houston, Chair-Elect, Deborah Cox of Dallas, Governmental Relations Chair, and John Brigance, Executive Director).

Last, and of course not least, are the legislators and their capable staffs. In recent sessions, Rep. Will Hartnett of Dallas, Chair of the House Judiciary Committee, and Senator Jeff Wentworth of San Antonio, Chair of the Senate Committee on Jurisprudence, together with their staffs, have been particularly helpful and have worked particularly hard on legislation in this area. We anticipate their continued help. While Rep. Hartnett is still on the new House Committee on Judiciary & Civil Jurisprudence (which consolidates the old Judiciary and Civil Practices Committees), the new chair is Rep. Todd Hunter of Corpus Christi. Senator Wentworth remains chair of the Senate Committee on Jurisprudence. And this year, Senator Kirk Watson of Austin (also on the Jurisprudence Committee) helped us immensely by agreeing to sponsor all of our REPTL bills in the Senate.

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

## 2. The Players.<sup>1</sup>

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

**2.1. REPTL.** The Real Estate, Probate and Trust Law Section of the State Bar of Texas, acting through its Council. Many volunteer Section members who are not on the Council give much of their time, energy and intellect in formulating REPTL-carried legislation. REPTL is not allowed to sponsor legislation or oppose legislation without the approval of the Board of Directors of the State Bar. There is no provision to support legislation offered by someone other than REPTL, and the ability of REPTL to react during the legislative session is hampered by the necessity for Bar approval. REPTL has received permission to carry its proposals discussed in this paper in the 2009 session and are identified as REPTL proposals.

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

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

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

**2.5. The Texas Legislative Council.** Among other duties, the Texas Legislative Council provides bill drafting and research services to the Texas Legislature and legislative agencies. All proposed legislation must be reviewed (and usually revised) by the Legislative Council before a Representative or Senator may introduce it. In addition, as part of its continuing statutory revision program, the Legislative Council has embarked on, and is the primary drafter of, a nonsubstantive revision of the Texas Probate Code (discussed below). The portions of the Probate Code proposed for nonsubstantive revision by the 81st Legislature are under the direction of Maria Breitschopf of the Legislative Council's legal staff. Questions, comments, or suggestions relating to the project may be directed to Ms. Breitschopf at P.O. Box 12128, Austin, Texas 78711, or 512-463-1155.

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

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<sup>1</sup> The "Players" and the "Process" excerpts are adapted, updated, and expanded from a 1993 Legislative Update prepared by Alvin J. Golden with his permission

the legislators, who make sure that the bill does not get off track.

### 3. The Process.

#### 3.1. *The Genesis of REPTL's Package.*

REPTL<sup>2</sup> begins work on its legislative package shortly after the previous legislative session ends. In August or September of odd-numbered years, the chairs of the main REPTL legislative committees (Decedents' Estates, Guardianship, and Trust Code) put together lists of proposals for discussion by their committees. These items are usually gathered from a variety of sources. They may be ideas that REPTL Council or committee members come up with on their own, or they may be suggestions from practitioners around the state, accountants, law professors, legislators, judges – you name it. Most suggestions usually receive at least some review at the committee level.

#### 3.2. *Preliminary Approval by the REPTL Council.*

The full "PTL" or probate, guardianship, and trust law side of the REPTL Council reviews each committee's suggestions and gives preliminary approval (or rejection) to those proposals at its Fall meeting (usually in September or October) in odd-numbered years. Draft language may or may not be available for review at this stage – this step really involves a review of concepts, not language.

#### 3.3. *Actual Language is Drafted by the Committees, With Council Input and Approval.*

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

#### 3.4. *REPTL's Package is Submitted to the Bar.*

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

#### 3.5. *Legislative Policy Committee Review.*

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

#### 3.6. *State Bar Board of Directors Approval.*

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

#### 3.7. *REPTL is Ready to Go.*

After REPTL receives approval from the State Bar's Board of Directors to carry its package, it then meets with appropriate Representatives and Senators to obtain sponsors, who submit the legislation to the Legislative Council for review, revision, and drafting in bill form. REPTL's legislation is usually filed (in several different bills) in the early days of the sessions that begin in January of odd-numbered years.

#### 3.8. *This Year's REPTL Package.*

The REPTL package this year included a Decedents' Estates bill (**H.B. 3350**), a Guardianship bill (**H.B. 3080**), a Trust Code bill (**H.B. 2368**), a Statutory Probate Court Venue Clarification bill (**H.B. 2367**), and two bills designed to fit into the new Estates Code that will go into effect in 2014, one dealing with Independent Administration changes (**H.B. 3085**) and one dealing with Jurisdiction and Venue issues (**H.B. 3086**). REPTL also received permission to support the Nonsubstantive Recodification

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<sup>2</sup> Note that the "RE" or real estate side of REPTL usually does not have a legislative package, but is very active in monitoring legislation filed in its areas of interest.

bill (**H.B. 2502**) that enacts a new Estates Code to replace the current Probate Code in 2014, although strictly speaking, that wasn't a "REPTL" bill. Ultimately, only the Guardianship bill, the Trust Code Bill, and the Nonsubstantive Recodification Bill passed.

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

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

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

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

#### 4. Key Dates.

Key dates for the enactment of bills in the 2009 legislative session include:

- **Monday, November 10, 2008** – Prefiling of legislation for the 81<sup>st</sup> Legislature begins
- **Tuesday, January 13, 2009** (1<sup>st</sup> day) – 81<sup>st</sup> Legislature convenes at noon
- **Friday, March 13, 2009** (60<sup>th</sup> day) – Deadline for filing most bills and joint resolutions
- **Monday, May 11, 2009** (119<sup>th</sup> day) – Last day for House committees to report House bills and joint resolutions
- **Thursday, May 14, 2009** (122<sup>nd</sup> day) – Last day for House to consider nonlocal House bills and joint resolutions on **second** reading
- **Friday, May 15, 2009** (123<sup>rd</sup> day) – Last day for House to consider nonlocal House bills and joint resolutions on **third** reading
- **Saturday, May 23, 2009** (131<sup>st</sup> day) – Last day for House committees to report Senate bills and joint resolutions
- **Tuesday, May 26, 2009** (134<sup>th</sup> day) – Last day for House to consider most Senate bills and joint resolutions on **second** reading
- **Wednesday, May 27, 2009** (135<sup>th</sup> day) – Last day for House to consider most Senate bills or joint resolutions on **third** reading
- Last day for Senate to consider any bills or joint resolutions on third reading
- **Friday, May 29, 2009** (137<sup>th</sup> day) – Last day for House to consider Senate amendments
- Last day for Senate committees to report all bills
- **Sunday, May 31, 2009** (139<sup>th</sup> day) – Last day for House to adopt conference committee reports
- Last day for Senate to concur in House amendments or adopt conference committee reports
- **Monday, June 1, 2009** (140<sup>th</sup> day) – Last day of 81<sup>st</sup> Regular Session; corrections only in House and Senate



- **Sunday, June 21, 2009** (20<sup>th</sup> day following final adjournment) – Last day governor can sign or veto bills passed during the previous legislative session
- **Monday, August 31, 2009** (91<sup>st</sup> day following final adjournment) – Date that bills without specific effective dates (that could not be effective immediately) become law

## 5. The Big ‘Un – Probate Code Recodification.

**5.1. A New Beginning. January 1, 2014.** Less than five years from now. That’s a date you’ll need to remember if you’re still practicing in our area. It is the proposed effective date of our new Estates Code, which will replace our current Probate Code. Here’s the story . . . .

**5.2. Our Current Probate Code is Not a “Code”.** Texas has had a number of statutory compilations during its history. In 1925, the 39<sup>th</sup> Legislature adopted its fourth bulk revision of Texas laws, the Revised Statutes of Texas, 1925.<sup>3</sup> In 1936, The Vernon Law Book Company published an unannotated compilation of the 1925 Revised Civil and Criminal Statutes, updated with changes through January 1, 1936. Between 1936 and 1948, this was updated with non-cumulative biennial supplements. In 1948, a new compilation was published, and biennial updates continued. The “Texas Probate Code” was first enacted in 1955, effective January 1, 1956. However, Texas had not yet adopted any organized system of statutory codification at the time, so the Texas Probate Code was incorporated into Vernon’s Revised Civil Statutes, known as the “Black Statutes” for those of us old enough to have practiced with the hard copies of these volumes.

**5.3. The “Codification” Process Began in 1963, After Our Probate Code Was Enacted.** In the 38 years since the 1925 general revision of Texas laws, the statutes had become confusing and difficult to use. In 1963, the 58<sup>th</sup> Legislature passed S.B. 367, which ordered the creation of a permanent, ongoing statutory revision program. The Texas Legislative Council was charged with making a complete, **non-substantive** revision of Texas statutes.

Legislation enacting new code sections is generally based on a Revisor’s Report which contains the proposed language of the new code, the language of the old statutes, and brief notes. When the program is complete, all general and permanent statutes will be included in one of 27 codes. The Probate Code is not a “code” for purposes of the Code Construction Act and the Legislative Council codification initiative since (1) it was enacted before the codification effort began, and (2) it does not comply with the organizational and stylistic principles of modern Texas codes. (The Criminal Procedure Code is the only other remaining “uncodified” code. The Probate Code just happened to draw the short straw in 2006.)

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

**5.5. The “Estates ~~and~~ Guardianship Code.”** Legislative Council chose the “Estates and Guardianship Code” as the new name for the recodified Probate Code. It was filed as **H.B. 2502** by Rep. Hartnett and **S.B. 2071** by Senator Duncan. However, Rep. Hartnett felt that the new name was a mouthful, so the name of the new Code was shortened to just the “Estates Code” when it was passed on the floor of the House.

**5.6. REPTL’s Probate Codification Committee.** When REPTL learned in the summer of 2006 that the Legislative Council was going to codify

<sup>3</sup> The source of this “timeline” is <http://www.lrl.state.tx.us/research/texasLawTimeline.html>.

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

1. REPTL and the Legislative Council would cooperate in determining how the new code would be organized.
2. The Legislative Council would take the lead in drafting the new code, although REPTL's committee would work on some of the thorniest provisions, like jurisdiction, venue, and independent administration, where it was considered difficult or impossible to codify the current statutes without some tweaking.
3. The chapters of the code governing decedents' estates would be drafted first, with a goal of submitting these chapters to the Legislature for adoption in 2009.
4. The remaining chapters of the code, including those provisions governing guardianships and powers of attorney, would be drafted after the 2009 session, with a goal of submitting these chapters to the Legislature for adoption in 2011.
5. The new code would become effective after the 2011 session. (But see Section 5.12.)
6. REPTL would assist the Legislative Council during the entire legislative process, including providing expert review of chapters as they are drafted and expert testimony about legislation before the Legislature.

**5.7. The "Substantive" Recodification.**

Lisa Jamieson of Fort Worth chairs the subcommittee dealing with jurisdiction and venue, while Stephanie Donaho of Houston chairs the independent administration subcommittee.

**5.8. The Substantive Recodification Bills DID NOT Pass (Or at Least Not the Independent Administration Bill.** Neither of the substantive recodification bills described below passed both

houses of the legislature. They fell victim to the last-minute logjam of bills in the Senate that had a multitude of causes, an explanation of which would substantially lengthen this paper. So why are they still being described in some detail? For two reasons. First, due to the hard work of Rep. Will Hartnett and the cooperation of Senator John Carona, the language of the jurisdiction bill was engrafted at the last minute onto the conference committee report for S.B. 408, a bill otherwise dealing with judicial administration, and passed **on the last day of the session**. Second, you'll see the independent administration bill again as part of REPTL's 2011 legislative package.



(The first of many references to a logjam.)

**5.9. Jurisdiction and Venue.** The jurisdiction and venue provisions were originally revised with the goal of making them more streamlined and easier to understand. However, because of the different courts in Texas that have original probate jurisdiction based on which county you find yourself in, there is a limit to how much streamlining can be achieved. A version of these revisions was filed as **H.B. 3086** by Rep. Hartnett. However, due to opposition from Texans for Lawsuit Reform and the Texas Civil Justice League to some of the proposed venue changes, all of the venue provisions were stripped from the bill prior to its approval in the House. And as noted, the stripped down language was eventually added to **S.B. 408** before it was passed. The venue provisions may be restored in some form in a 2011 proposal if an acceptable compromise can be reached with the elements that opposed them this year.

**5.9.1. "Probate Proceedings."** The term "probate proceedings" is used to define the matters that must be brought in a court exercising original

probate jurisdiction. In addition to the jurisdiction of a court to exercise original probate jurisdiction over “probate proceedings,” the provisions set out each court’s power to hear matters “related to a probate proceeding.” If a matter is merely “related to a probate proceeding,” then it need not be brought in the court exercising original probate jurisdiction unless that court is a statutory probate court. All matters “related to a probate proceeding” must be brought in a statutory probate court unless the statutory probate court has concurrent jurisdiction with the district court on a matter related to a probate proceeding.

**5.9.2. Types of Courts** The types of courts exercising original probate jurisdiction will not change. However, the probate jurisdiction of county courts at law is expanded to include the interpretation and administration of testamentary trusts if the will creating the trust was admitted to probate in that court.

**5.9.3. Contested Matters** The provisions outlining the transfer of contested matters from a court with original probate jurisdiction are being modified slightly with the hope of alleviating some of the jurisdictional traps that have been associated with these transfer statutes.

- **Transfer to District Court.** If a contested matter is transferred from a county court to a district court, any matter related to the probate proceeding may also be brought in the district court proceeding. The district court, on its own motion or the motion of any party, may determine that the new matter is not contested and transfer the new matter back to the county court that had original jurisdiction of the probate proceeding. In addition, jurisdiction for any other contested matters filed after the transfer of a contested matter to district court will be in the **same** district court.
- **Assignment of Statutory Probate Judge.** If a contested matter is assigned to a statutory probate judge, then any other contested matters filed after the assignment must be assigned to a statutory probate judge.
- **Transfer to County Court at Law.** In those counties where there is a county court at law exercising original probate jurisdiction, a contested matter must be transferred to

that county court at law on motion of any party. In addition, the judge of the county court, on his or her own motion or on the motion of any party, may transfer the entire proceeding to the county court at law. If only the contested portion of the proceeding is transferred to the county court at law, it may be returned to the county court for further proceedings once resolved.

**5.9.4. Statutory Probate Courts** A new provision grants statutory probate courts concurrent jurisdiction with district courts over certain matters involving trusts and powers of attorney, and certain matters involving a personal representative in personal injury lawsuits.

**5.9.5. Transfer Powers** In the introduced version of H.B. 3086, the Section 5B transfer power of statutory probate courts was preserved, with the limitation that venue for actions by or against a personal representative for personal injury, death or property damage related to the personal injury or death must be determined under Section 15.007 of the Civil Practice and Remedies Code. This change was designed to help clarify that the statutory probate court still had its transfer powers as previously found in Section 5B except in the limited situations where the Probate Code provides that venue is governed by the Civil Practice and Remedies Code. However, as noted above, these provisions drew opposition and therefore were stripped from the bill prior to its passage in the House. Nor were they added to the version of S.B. 408 that eventually passed.

**5.9.6. Venue** The general venue provisions were not materially changed, but they were consolidated into a single section to make them easier to locate. This includes venue for heirship proceedings which was previously located in the heirship provisions. However, these noncontroversial venue provisions were stripped from the bill as well to deflect opposition. Therefore, the current venue provisions will need to be incorporated into the new Estates Code in a “nonsubstantive” recodification drafted for the 2011 session.

**5.10. Independent Administration.** The independent administration revisions are contained in **H.B. 3085** filed by Rep. Hartnett. Since there was no testimony in opposition to these provisions in either house, expect them to

be included in much the same form in REPTL's 2011 legislative package. The changes attempt to bring some further **substantive** clarification to three areas of independent administration:

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

A fourth nonsubstantive benefit is the reorganization of the independent administration provisions in a logical manner. The current provisions are a conglomeration of sections added at various times with little effort to group similar provisions together. The revisions organize the entire body of law into a logical order, starting with creating of the independent administration, then general administrative provisions, then procedures for handling claims, exemptions, and allowances, then accountings, successors, and beneficiary remedies, and finally, closing and distributions.

**5.10.1. *Independent Administration by Agreement*** Provisions are added allowing parents of minor children and trustees to consent to independent administration by agreement where no conflict exists.

**5.10.2. *Power of Sale by Consent*** The revisions confirm that an independent representative may sell **without** a court order under the same circumstances that a dependent representative could sell **with** a court order. In administrations without a will, or where a will fails to expressly grant a power of sale, an independent administrator may be granted a power of sale over real property in the order of appointment if the beneficiaries who would receive the real property consent to the power (avoiding a later need to obtain their consent). Perhaps more importantly from a practical standpoint, the revisions include a new concept (borrowed from the Trust Code) providing statutory protection for third parties who rely on the apparent authority of an independent representative where a power of sale is granted

in the will or the representative provides an affidavit that the sale is necessary under the circumstances described in current Probate Code Section 341(1).

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

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

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

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

**5.10.7. *Notice of Closing Estate*** In addition to existing procedures for closing independent administrations, an administrator

may elect to close an independent administration by filing an affidavit stating that all known debts have been paid, or have been paid to the extent the assets of the estate will permit; that all remaining assets have been distributed; and the names and addresses of the distributees. Once the administration is closed, third parties may deal directly with the distributees.

**5.10.8. Closing Not Required** A new provision explicitly recognizes that independent administrations are not **required** to be closed

**5.10.9. Determination of Heirships** Prior to emerging from the House, the bill was amended to require a judicial determination of heirship in the event of an independent administration by agreement in an intestate situation. (This is already the case by local rule in most statutory probate courts.)

**5.11. Other Changes Awaiting the 2011 Session.** This session's proposals will not include revisions to the entire Probate Code. Revisions to the guardianship provisions and other miscellaneous portions of the Probate Code will have to wait for the 2011 legislative session.

**5.12. Effective Date of the New Estates Code.** While only a portion of the Probate Code will be recodified in the 2009 session, for simplicity's sake, REPTL pushed for a single effective date for the entire recodification effort. Therefore, the effective date would have to await the end of the 2011 session. However, Legislative Council felt it important that all recodified portions of the Probate Code be enacted with a cushion of at least one session following enactment but prior to effectiveness. This would provide enough time to review the enactments and correct any errors or omissions in a subsequent legislative session prior to anything becoming effective. In order to provide that one-session cushion for the portions to be enacted in the **2011** session, the effective date of the newly recodified Estates Code (with whatever new name is chosen for it) would have to be delayed until **after** the **2013** session. And since it appears to make more sense to have any new rules apply on a calendar year basis, the new Estates Code will have an effective date of **January 1, 2014**. However, REPTL's contributions (the jurisdiction

provisions, along with the independent administration changes) will be enacted as changes to the current Probate Code with an effective date of September 1, 2009.

**5.13. Construction of Codification Act.** In the 1999 case of *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278 (Tex. 1999), the Supreme Court apparently gave effect to a substantive change due to language used in a bill that was intended to be a nonsubstantive codification. Two bills have been introduced to reverse this result: **H.B. 4126** filed by Rep. Hartnett, and **S.B. 2038** filed by Senator Duncan. While the two bills take slightly different routes to get there, they arrive at a similar result – a nonsubstantive codification should be interpreted the same as the prior law it codifies. S.B. 2038 passed both houses, but prior to the end of the legislative session, became one of the first bills vetoed by Gov. Perry. According to a report in the Austin American-Statesman, "Perry told lawmakers that if they intend a law to accomplish a specific purpose, they should write it clearly."

## 6. Changes Affecting Decedents' Estates.

**6.1. The REPTL Decedents' Estates Bill.** The REPTL 2009 decedent's estates legislative package was relatively modest, given the resources being devoted to the recodification project. It was filed by Rep. Hartnett as **H. B. 3350**. It, too, fell victim to the last-minute logjam of bills in the Senate and failed to pass. However, there were only two relatively minor proposals affecting decedents' estates.

**6.1.1. Repeal of Testamentary Provision for Management of Separate Property (Section 70).** Section 70 allows a testator to include a provision in his or her will giving the surviving spouse the power to keep testator's separate property together until each of the beneficiaries becomes an adult, using the same provisions applicable to the management of community property. Since this provision is rarely (if ever) used, REPTL proposed repealing it. This repeal was also contained in **H.B. 1968** filed by Rep. Hartnett (which also fell victim to the same last-minute logjam).

**6.1.2. "One-Step" Procedure for Will Execution.** Ever find yourself trying to explain to your

clients why it's necessary for them and the witnesses to sign the will twice? Ever consider the procedure archaic? Well REPTL has something just for you – a handy, dandy revision to Section 59 that allows an **optional** method of simultaneously executing, attesting, and making a will self-proved, so that everyone signs just once. For those of you who think this is just too radical a departure from current law, rest assured that the Uniform Probate Code has contained an optional one-step method for years. Further, if that still doesn't make you feel better, the tried-and-true two-step method will remain available. While this provision did not pass, a taste of it will be available starting September 1<sup>st</sup> when a similar provision relating to self-proving affidavits in guardianship designations goes into effect, thanks to **H.B. 3080**, REPTL's guardianship bill (discussed below).

### **6.2. No Contest Provisions in Wills.**

Rep. Hartnett filed **H.B. 1969** which makes no contest provisions unenforceable if probable cause exists for commencing the contest and the contest was brought and maintained in good faith.

### **6.3. Reference to Prior Divorce in Probate Application.**

Rep. Paxton filed **H.B. 1460** and **H.B. 1461**, that revise the required contents of applications to probate wills to state whether a marriage of the decedent was ever dissolved after the execution of the will.

## **7. Changes Affecting Guardianships.**

### **7.1. The REPTL Guardianship Bill.**

The REPTL guardianship package, incorporated in **H.B. 3080** filed by Rep. Hartnett, deals mostly with compensation issues.

#### **7.1.1. More Frequent Periodic Compensation of Guardians and Trustees.**

Sections 665 and 868 would be revised to allow the court to authorize guardians and trustees of management trusts to receive estimated commissions on a quarterly basis, rather than having to await the approval of the annual account. The court will still retain the power to review and approve the total commission upon review of the account, including the power to require the guardian or trustee to refund commissions should it turn out that the estimated quarterly payments exceeded the commissions finally allowed.

#### **7.1.2. Additional Compensation for Guardians of the Person**

In situations where most of the ward's assets are managed in a trust, it may be unreasonable to limit the compensation of the guardian of the person to five percent of the income received and five percent of the expenses paid by the guardian of the estate. A further revision to Section 665 would allow the court to exceed this limit in appropriate circumstances.

#### **7.1.3. Compensation for Attorneys Serving as Guardians**

New Section 665D places restrictions on the attorney's fees charged by attorneys who are also serving as guardians. Their invoices must include a detailed description of the services performed, and they are only entitled for attorney's fees for **legal services**. They may not receive attorney's fees for services as guardian that are not legal services. (A similar proposal was introduced, but did not pass, in the 2007 session. Although it was not a REPTL proposal, its substance has been incorporated into the REPTL package for 2009.)

#### **7.1.4. Compensation of Attorneys Seeking to Establish Management Trusts.**

Section 665B is clarified to allow awarding attorney's fees to attorneys representing a person seeking to create a management trust under Section 867.

#### **7.1.5. "One-Step" Procedure for Guardianship Declaration Execution**

The same optional one-step method for will execution described above will also be made available to declarations of guardians for minor children (Section 677A) and for the declarant (Section 679).

#### **7.1.6. Smaller Management Trusts.**

A committee substitute for **H.B. 3080** allows appointment of noncorporate trustees of management trusts up to \$150,000, and management trusts in excess of that amount if the applicant has been unable to find a financial institution in the geographic area willing to serve. In addition, the committee substitute provides a mechanism for transferring the assets of a management trust to a pooled income trust, such as the Master Pooled Trust operated by The Arc of Texas.

### **7.2. Examination Requirements.**

Rep. Naishtat filed **H.B. 889** and Senator Uresti filed its companion, **S.B. 2344**, which is the version that eventually passed both houses. This bill revises

the required information in a physician's affidavit, and adds certain additional examination requirements when a guardianship is sought for persons with mental retardation. (This appears similar to H.B. 1708 filed in 2007.) The detailed changes to Section 687 and the physician's affidavit can be found in the portion of this paper outlining the specific changes to the guardianship portion of the Probate Code.

**7.3. Payment of Attorney's Fees of Guardianship Applicant.**

Rep. Naishtat filed **H.B. 587** that allows a probate court to authorize the payment of **reasonable and necessary** attorney's fees incurred by the applicant for creation of a guardianship. Payment from the county treasury may be authorized if the court satisfies itself that the attorney is not being paid from some other source.

**7.4. Medical Assistance Program Reimbursement for Guardianship Expenses.**

Senator Uresti filed **S.B. 2435** which permits a court that appoints a guardian for a recipient of medical assistance who has "applied income" to order the following expenses to be paid under the medical assistance program (within a stated amount for each): compensation of the guardian, costs of establishing or terminating the guardianship, and other administration costs.

**7.5. Appointment of DADS as Guardian.**

Senator Harris filed **S.B. 271** which would allow a court to appoint the Department of Aging and Disability Services as guardian in certain limited circumstances where there is no one else available to serve. Because appointment of DADS under this provision is allowed without DADS making the application for guardianship, total statewide appointments under this provision are limited to 55 per year, distributed roughly equally among DADS' regions in the state.

**7.6. DADS Determination of Need for Guardianship.**

Rep. Hartnett filed **H.B. 3112** relating to DADS' determination of the need for a guardianship.

**7.7. Notification of Exemption of Trusts from Liability for Support.**

Senator Van de Putte filed **S.B. 584**, requiring notification to a patient

of a mental health or resident care facility of the exemption of certain trusts from the liability to pay for support. (This appears similar to S.B. 973 filed in 2007.)

**7.8. Criminal History Background Checks for "Professional" Guardians.**

Senator Uresti filed **S.B. 1053 and 1055--57**, all of which deal with criminal history background checks for certain "professional" guardians (and elimination of duplicate checks). Rep. Naishtat filed **H.B. 2047-50** as identical companion bills, but the Senate versions passed both houses.

**8. Changes Affecting Trusts.**

**8.1. The REPTL Trust Code Bill.**

The REPTL Trust Code package is also much more modest than the past three sessions. It was filed by Rep. Hartnett as **H.B. 2368**.

**8.1.1. Trustee's Power to Make Non-HEMS Distributions to Himself.**

Trusts may give trustees the power to make distributions to the beneficiaries in the trustees' sole discretion, without any standard, or in accordance with a standard that is not "ascertainable." This rarely causes problems unless the trustee, herself, is also a beneficiary. This may result in unintended estate tax and creditor problems for the trustee-beneficiary. A well-drafted trust would contain a savings provision cutting back on the trustee's power to make distributions to herself, limited those distributions to health, education, support, and maintenance. New Section 113.029 would add a statutory savings provision to correct poorly-drafted trusts that would protect trustee-beneficiaries from attorneys who accidentally give them an unascertainable power to distribute to themselves for, *e.g.*, comfort, benefit, welfare, or well-being. The proposal does not completely suspend a distribution power; it carves it back to permissible limits. The provision would require language expressly referring to the new statute to "opt out" of its restrictions, but would be applicable only to trusts that became irrevocable following its enactment.

**8.1.2. Attorneys ad Litem Under the Trust Code.**

Section 115.014 is amended to add express statutory authorization for the appointment of attorneys ad litem in Trust Code proceedings,

and to provide for compensation of them and guardians ad litem.

**8.1.3. Distributions from IRAs and Other Retirement Plans to Marital Trusts.**

Section 116.172 is amended to incorporate the current proposed response of the American College of Trust and Estate Counsel to objections raised by the Internal Revenue Service (in Rev. Rul. 2006-26) that our current default statute may not contain an effective marital deduction savings clause for IRA's and qualified retirement plans payable to a trust designed to qualify for a QTIP marital deduction election.

**8.1.4. Trustee Named as Beneficiary in Insurance Policy.**

Section 1104.021 of the Insurance Code contains a reference to a trust that "designates a beneficiary" of a life insurance policy. This proposal changes the reference to a trust that "is designated as a beneficiary" of a life insurance policy.

**8.1.5. Persons Who May Disclaim Interests in Trusts.**

This minor change to Trust Code Section 112.010 would add a reference to independent administrators, in addition to independent executors, as persons who may disclaim an interest in a trust. (While the latter is defined to include the former in the Probate Code, there is no such definition in the Trust Code.)

**8.1.6. Effect of Divorce on Revocable Trusts.**

REPTL's Decedents' Estates Bill, **H.B. 3350**, also amended Probate Code Sections 471, 472, and 473 to conform these provisions relating to revocable trusts to the similar changes relating to wills in Section 69 of the Probate Code made in the last legislative session. They revoke provisions in favor of the former spouse's relatives following dissolution of a marriage, and add references to a declaration that a marriage is void (in addition to divorce and annulment). However, as noted above, H.B. 3350 did not pass, so these changes will have to await 2011.

**8.1.7. Protecting Directed Trustees.**

TBA and others have expressed concerns that our current Section 114.003 does not contain a bright-line test for when a trustee may follow (without liability) the directions of a third party who is given a power to direct the trustee's actions in

the trust agreement. At TBA's request, REPTL included proposed changes to Section 114.003 designed to clarify when trustees have to listen to, and when they have a duty to ignore, a the person holding a power to direct the trustee's actions. However, due to continued concerns regarding the proposed language, this provision was removed from the Trust Code bill prior to its approval in the House. Back to the drawing board for the 2011 session ...

**8.2. Continuation of Title Insurance Coverage.**

Rep. Paxton also filed **H.B. 3768** which attempted to continue title insurance coverage for property transferred into an inter vivos trust for the settlor's benefit. The conference committee report adopted by both houses directs the commission of the Department of Insurance (if we still have one) to adopt provisions in an owner's policy of title insurance issued to an individual that continue coverage for (i) a person who inherits from the named insured, (ii) a spouse who receives title in a divorce from the named insured, (iii) the trustee of a trust established by the named insured after the date of the policy, or (iv) the beneficiaries of that trust after the named insured's death. This change applies to policies issued on or after January 1, 2010.

**8.3. No Contest Provisions in Trusts.**

Rep. Hartnett filed **H.B. 1969** which makes no contest provisions unenforceable if probable cause exists for commencing the contest and the contest was brought and maintained in good faith.

**8.4. Actions by Cotrustees.**

Rep. Geren filed **H.B. 3635** which outlines how the remaining co-trustees act in the event of a "temporary suspension" of a trustee. Significant revisions from the introduced version were negotiated by Academy representatives before final passage.

**9. Changes to Jurisdiction and Venue.**

**9.1. Genesis of the REPTL Venue Clarification Bill.**

(The REPTL Venue Clarification Bill, **H.B. 2367**, did not pass due to opposition from Texans for Lawsuit Reform and the Texas Civil Justice League to some of its provisions. However, since some form of this bill may be reintroduced in 2011, a description of the need for the bill and its proposed solution is appropriate.) Since 1983, statutory probate



courts have had the power to transfer cases filed elsewhere that are appertaining or incident to an estate pending in that court for trial and disposition. One of the reasons for authorizing the courts to make such a transfer is to permit these courts to resolve issues upon which the prompt and efficient administration of an estate depends. However, this transfer authority has generated some controversy and accusations of forum shopping due to the occasional transfer of personal injury or wrongful death cases by a statutory probate court to itself where the appropriateness of the new venue was considered questionable.

**9.1.1. Civil Practice and Remedies Code Section 15.007.** In 1995, the legislature added Section 15.007 to the Texas Civil Practice and Remedies Code, effective for cases filed on or after August 28, 1995. This venue statute, entitled **Conflict With Certain Provisions**, provides:

Notwithstanding Sections 15.004, 15.005, and 15.031, to the extent that **venue** under this chapter for a suit by or against an executor, administrator, or guardian as such, for personal injury, death, or property damage conflicts with **venue** provisions under the Texas Probate Code, this chapter controls. (emphasis supplied)

This was part of then-Governor Bush's first tort reform push. The intent seems clear: follow the normal venue rules in personal injury, death, or property damage cases, rather than the Probate Code's "by or against a personal representative" rule. However, this statute was not interpreted in this manner by statutory probate courts, due to the statute's reference to "venue" provisions under the Probate Code. For the most part, statutory probate judges insisted that Sections 5A, 5B, 607, and 608 were **jurisdictional** statutes, not venue statutes. Therefore, they argued, Civil Practice and Remedies Code Section 15.007 didn't control those jurisdictional statutes.

**9.1.2. Gonzalez v. Reliant Energy, Inc.** On March 11, 2005, in the midst of the 2005 session, the Texas Supreme Court decided the *Gonzalez v. Reliant Energy, Inc.*, case (159 S.W.3d 615 (2005)). This case involved a wrongful death

action brought in the Hidalgo County statutory probate court, where the estate administration was pending, rather than in Harris or Fort Bend Counties, where venue would otherwise lie. The Texas Supreme Court acknowledged that the estate administration was properly brought in the Hidalgo County statutory probate court, and that the same court had jurisdiction over the wrongful death and survival action. However, the provision granting the statutory probate court jurisdiction **did not** confer venue. The Supreme Court disagreed, holding that Section 15.007 of the Civil Practice and Remedies Code prohibits such a transfer when there is a timely objection.

**9.1.3. 2007 Legislative Proposal.** The Supreme Court's decision in *Gonzalez v. Reliant Energy* led to concerns among some practitioners that appropriate property damage claims, such as theft by an executor or guardian, would not be transferable under a strict reading of Section 15.007, since its reference to property damage claims was not expressly limited to those arising out of wrongful death and personal injury claims. H. B. 660 was introduced in the 2007 session to address this concern and to clarify that for matters not specifically covered by the trump statute, a statutory probate court may transfer causes of action appertaining or incident to an estate or guardianship without concern for venue. The proposal would have amended Section 15.007 of the Civil Practice and Remedies Code by limiting the actions concerning property damage to which that section applied to property damage related to a personal injury or death suit. While H. B. 660 passed in the House, its companion bill, S. B. 392, failed to emerge from the Senate Jurisprudence Committee.

**9.1.4. The 2009 REPTL Venue Clarification Bill.** The 2009 REPTL proposal is substantively similar to the 2007 proposal. It was filed by Rep. Hartnett as **H.B. 2367**. In addition to the amendment to Section 15.007, it amends Sections 5B and 608 to specifically except out cases to which Section 15.007 applies. It also adds new Sections 7 and 610A to the Probate Code that would have the effect of empowering a statutory probate court to transfer any case that was not covered by Section 15.007.

However, as noted above, this proposal did not pass.

**9.1.5. Senate Jurisprudence Committee Interim Report.** In December, the Senate Jurisprudence Committee issued an interim report. This issue was discussed. The Committee's recommendation is that in order to exercise a transfer power, the statutory probate court must have at least permissive venue of the transferred cause of action.

**9.1.6. Proper Venue Required.** Perhaps in response to the interim report, Senator Hinojosa filed **S.B. 1267**, which requires a statutory probate court to have mandatory or property venue of an action to exercise its transfer power under Sections 5B or 608. This proposal did not pass either.

## 10. Changes Affecting Charitable Trusts or Organizations.

**10.1. Restriction on Relocation of Charitable Trusts.** Senator Shapleigh filed **S.B. 666** which would add new Trust Code Section 113.029, restricting the ability of a trustee of a charitable trust to relocate the administration of the trust or the trust assets without the settlor's consent. A compromise was reached by an ad hoc committee including REPTL members, the Attorney General's office, Statutory Probate Judges, and Sen. Shapleigh's office. (Yes, the unfortunate number of the bill did not go unnoticed by those involved.)

**10.2. AG Participation in Breach of Fiduciary Duty Claims Involving Charitable Trusts.** Senator Harris filed **S.B. 917** and **S.B. 918** (Rep. Leibowitz filed identical **H.B. 2417** and **H.B. 2416**, but the Senate versions passed). The former incorporates the definition of "charitable trust" from Property Code Section 123.001 into Probate Code Section 5(e)'s reference to a statutory probate court's jurisdiction over an action involving a charitable trust. The latter clarifies that the venue is in Travis County for a proceeding brought by the Attorney General's office against a charity for breach of fiduciary duty. (Current Property Code Section 123.005 only refers to actions against a fiduciary or managerial agent of a charitable trust, not the charity itself.)

**10.3. Charitable Gift Annuities.** Rep. Eiland filed **H.B. 1293** which, among other things, amends and rearranges several of the definitions relating to charitable annuity contracts, including the definition of a charitable gift annuity, which is now defined by reference to its definition in §102.001 of the Insurance Code.

## 11. Court Administration

**11.1. References to Court's "Minutes."** Rep. Naishtat filed **H.B. 585** that changes numerous references in the Probate Code to the court's minutes to references to the judge's probate or guardianship docket.

**11.2. Replacement of Recused Statutory Probate Judges.** In recent years, there has been some disagreement relating to the procedure to be followed when a motion to recuse a statutory probate judge is filed. It now appears clear that the presiding judge of the administrative region in which the statutory probate court is located appoints the judge to hear the recusal motion. However, despite that clarification, it remains unclear who appoints the replacement judge if the recusal motion is granted. **H.B. 763**, filed by Rep. Hartnett, makes clear that in the event the judge of a statutory probate court recuses himself or herself, or a motion to recuse that judge is granted, the presiding judge of the statutory probate courts (currently Judge Guy Herman of Travis County) fills the vacancy. On the other hand, **S.B. 683**, filed by Senator Wentworth, takes the exact opposite approach and provides that the presiding judge of the administrative region in which the statutory probate court is located, and not the presiding judge of the statutory probate courts, fills the vacancy. The Senate bill is the version that ultimately passed, but it was amended in the House to provide that if the presiding judge of the administrative region does not fill the vacancy within 15 days, then the presiding judge of the statutory probate courts may fill the vacancy.

**11.3. Associate Statutory Probate Judges.** Rep. Gonzales filed **H.B. 3315** which contained provisions relating to the term and compensation of associate judges of statutory probate courts. While this bill did not pass, the

substance of the bill appears to have been incorporated into **S.B. 683**.

**11.4. Eligibility of Former Statutory Probate Judges for Assignment.** Rep. Hartnett filed **H.B. 764** and Senator Wentworth filed **S.B. 477** which are similar bills disqualifying former statutory probate judges from assignments if they were publicly reprimanded or censured by the State Commission on Judicial Conduct, or left office while an investigation by that office was pending. The House version of the bill passed.

**11.5. Supplemental Longevity Pay for Statutory Probate Judges.** Rep. Hartnett filed **H.B. 765** which requires counties to pay statutory probate judges the same supplemental longevity pay that district judges are entitled to receive.

## 12. Nontestamentary Transfers.

**12.1. Convenience Accounts.** Rep. Deshotel filed **H.B. 3075**, a proposal by the Independent Bankers Association of Texas (“IBAT”) that provides for the addition of “convenience signers” to a number of account types, not just the typical joint account without survivorship rights that is currently considered a “convenience account.”

## 13. Disability Documents.

**13.1. Digital or Electronic Signatures in Advance Directives; Notarization in Lieu of Witnesses.** Rep. Hartnett filed **H.B. 2585** which provides for the use of digital or electronic signatures in advance directives such as medical powers of attorney or out-of-hospital DNR orders. (Please don’t ask me how these work! It involves use of either a digital signature that uses an algorithm approved by the Texas Department of Health (soon to be known as the Department of State Health Services), or an electronic signature that is capable of verification.) By the time the bill passed, it also included provisions allowing a principal to sign a directive to physicians, an out-of-hospital DNR order, or a medical power of attorney before a notary public, in lieu of the two witnesses who are normally required.

**13.2. Power of Attorney for Child.** Rep. Herrero filed **H.B. 1940** that would allow one parent to give a child’s grandparent, adult sibling, or

adult aunt or uncle authority to make decisions regarding the child if the other parent is unwilling or unable to execute the power or make decisions regarding the care of the child. Its companion, **S.B. 1598**, filed by Senator Watson, is the version that passed.

**13.3. Revised Uniform Anatomical Gift Act.** Rep. Zerwas filed **H.B. 2027** which adopts the Revised Uniform Anatomical Gift Act as new chapter 692A of the Health and Safety Code. (Yes, we know this is not technically a “disability document,” but we think it fits best here in the outline.) Senator Harris filed a companion, **S.B. 2091**, but the House version passed.

## 14. Exempt Property.

**14.1. Transfer of Homestead into Trust.** Rep. Paxton filed **H.B. 3767** which was intended to clarify that a homestead exemption for creditor purposes is not lost merely because it is transferred into an *inter vivos* trust. Academy representatives worked with Rep. Paxton’s office to improved the statutory language of the bill and provide a result that, while not necessarily perfect, provides some clarification to an area in need of same.

## 15. Changes Affecting Marital Property.

**15.1. Replacement of Economic Contribution with Claims for Reimbursement.** The Family Law Section proposed a substantial rewrite of the economic contribution provisions currently found at Family Code Section 3.401, *et seq.* Near the end of the 1999 legislative session, statutes were enacted designed to replace the case law regarding “equitable claims for reimbursement” with a statutory rule recognizing an “equitable interest.” The statutes created as many problems as they solved. A joint committee comprised of family law practitioners and probate lawyers worked on revisions adopted in 2001 and amended in 2003. However, after a number of years of working under this statutory framework, the Family Law Section has apparently given up and would rather return to a case-by-case equitable system.

**15.1.1. Replacement of Statutory Economic Contribution Formula with Equitable Remedy.** Senator Harris filed

**S.B. 866**, which essentially replaces the statutory formula for economic contribution with an equitable reimbursement remedy, removing some certainty but providing more flexibility to the court. Family Code Section 3.402 is changed from a definition of the amount of a statutory “economic contribution” amount to a list of elements of a claim for reimbursement. The following is the list of those elements, which we believe to be nonexclusive (new elements are in *italics*):

- *the payment by one marital estate of the unsecured liabilities of another marital estate;*
- *inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse;*
- the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;
- the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;
- the reduction of the principal amount of that part of a debt, including a home equity loan, incurred during a marriage secured by a lien on property and incurred for the acquisition of, or for capital improvements to, property
- the reduction of the principal amount of that part of a debt incurred during a marriage secured by a lien on property owned by a spouse for which the creditor agreed to look for repayment solely to the separate marital estate of the spouse on whose property the lien attached, and incurred for the acquisition of, or for capital improvements to, the property;
- the refinancing of a principal amount to the extent the refinancing reduces that principal amount; and
- capital improvements to property other than by incurring debt.

**15.1.2. *Exercise of Discretion.*** Courts are specifically directed to use equitable principles in determining reimbursement claims, and to consider offsets where appropriate, including offsets related to the benefits of use and enjoyment of property (consideration of such an offset is currently prohibited by Section 3.403(e)). The reimbursement claim for funds expended by one estate for improvements to another would be measured by the enhancement in value to the benefited estate.

**15.1.3. *Permissive Equitable Lien to Secure Claim for Reimbursement.*** Upon dissolution of the marriage, Family Code Section 3.406 would be amended to **permit** the imposition of a lien to secure a claim for reimbursement, rather than **mandate** a lien to secure a claim for economic contribution.

**15.2. *Protection of State Retirement System Benefits from Criminal Restitution of Spouse.*** Senator Duncan filed **S.B. 2324**, which provides that the benefits under any state retirement system account that are the participating spouse’s sole management community property are not subject to any claim for payment of a criminal restitution judgment entered against the non-participant spouse, except to the extent of the latter’s interest in those benefits under a qualified domestic relations order.

## **16. Other Notable Bills that Did Not Pass.**

**16.1. *Pre-Death Probate?*** Here’s an interesting one. Senator Wentworth filed **S.B. 1789** which would have allowed a person who has executed a will disinheriting an heir to seek a court order while alive that the person has testamentary capacity, is not suffering from undue influence, is not being tortiously interfered with, and there is no other cause of action having the effect of defeating the person’s will. The effect of the order is to bar the disinherited heir from contesting the will. **Even more notable is that the trial court’s order is nonappealable.**

**16.2. *Notice to Beneficiaries*** Senator Wentworth, who introduced the legislation in the last session expanding the notice to beneficiaries from charitable organization to all beneficiaries, filed **S.B. 319** which would have **repealed** the existing Section 128A notice requirements and

enacted a new Section 128C identical to the old notice-to-charities provision. However, after a mid-February hearing at which at least one statutory probate judge expressed support for the current notice provisions, no action was taken to revise the current provisions.

**16.3. Limitation on Use of Small Estate Affidavit for Homesteads.** Currently, the decedent's homestead is the only real property that may be transferred using a small estate affidavit. **H.B. 3314**, filed by Rep. Gonzales, would have further limited the use of the affidavit to situations where the distributee occupied the property as the distributee's principal residence at the decedent's death and is otherwise entitled to the property.

**16.4. Timing of Section 149B Distribution Petitions.** **H.B. 1968**, filed by Rep. Hartnett, would have, among other things, allowed the filing of a petition to distribute an estate subject to independent administration two years from the date letters testamentary or of administration are first issued. (The current statute is tied to the date an independent administration was created and the order appointing the independent executor was entered. This leads to confusion regarding when a petition could be filed in a case where a subsequent independent executor or administrator was appointed.)

**16.5. Liabilities of Personal Representatives and Remedies for Breach of Fiduciary Duty.** **H.B. 1968** would have also outlined the damages resulting from a breach of fiduciary duty by a personal representative, including losses incurred by the estate, profit made by the personal representative, profit that would have accrued to the estate but for the breach, exemplary damages, and costs and fees (new Probate Code Section 236). This appears to be based primarily on Trust Code Section 114.001(c). **H.B. 1968** also outlined a dozen remedies available for breach of fiduciary duty (new Probate Code Section 236A). The latter appears to be based primarily on new Trust Code Section 114.008, added in 2005.

**16.6. Regulation of Heir Finders.** Senator Wentworth filed **S.B. 1243** which

would have provided for the regulation of "heir finders" by the Texas Private Security Board.

**16.7. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Or Not.** Rep. Truitt filed **H.B. 2260** which would have adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. This is really a jurisdictional provision dealing with interstate guardianship issues. A joint committee consisting of statutory probate court judges and REPTL representatives recommended deferring consideration of this act until 2011. As a compromise, a stripped-down version of the bill merely added criteria for a court to consider in deciding whether or not to exercise jurisdiction.

**16.8. RAP Modification.** Rep. Hartnett filed **H.B. 990**, a TBA proposal that would have modified the Rule Against Perpetuities found in Trust Code Section 112.036 to provide a flat 200-year perpetuities period, rather than the traditional "lives-in-being plus 21 years" test. TBA's position is that "[t]he current statute, adapted from English feudal law, is antiquated, hard to interpret by fiduciaries and estate planners and contrary to modern estate planning desires of Texas citizens. Life expectancies have increased dramatically and Texas citizens who wish to provide for future generations are forced to take advantage of estate planning services in a growing number of other states (23) where this rule already has been updated. This modest clarification and enhancement will assist fiduciaries and estate planners with a greater definition of terms and will benefit Texas citizens by enabling them to understand in plain English their access to estate planning options." The REPTL Council believes that there is no consensus either way among REPTL members, so REPTL took no position on this proposal.

**16.9. Charitable Gift Annuities.** Senator Ellis filed **S.B. 961** which would have authorized the Department of Insurance to investigate whether a charitable organization issuing a charitable gift annuity meets the criteria required by Section 102.002 of the Insurance Code. Rep. Smithee filed **H.B. 2650**, the companion bill.

- 16.10. *Cy Pres Funds.*** Senator Ogden filed **S.B. 2350** which would have authorized the court to award “cy pres” funds in an action brought by the attorney general arising from conduct harmful to consumers or the public generally. Those funds were to be set aside in a separate account and distributed by the attorney general to nonprofit, charitable, or educational entities to fund programs providing assistance to consumers.
- 16.11. *Proceedings in Absence of Statutory Probate Judge.*** Rep. Hartnett filed **H.B. 1809** which would have allowed statutory probate judges to hear matters pending in another statutory probate court in the same county in the absence of the judge of the latter court (so long as another judge had not been assigned by the presiding judge of the statutory probate courts).
- 16.12. *Agent’s Execution of and Acknowledgement of Duties Under Power of Attorney.*** Rep. Guillen filed **H.B. 2331** which, as introduced, would have required the designated agent to sign a financial power of attorney at the time of execution by the principal. The statutory form would have been changed to spell out a number of fiduciary duties assumed by the agent and delete the provision allowing designation of alternate agents. After negotiations with Academy representatives, the version approved in committee merely required the agent to execute a notice acknowledging the agent’s duties prior to engaging in a transaction involving more than \$1,000 – leaving the statutory form alone.

## **17. Not So Fast, My Friends ...**

- 17.1. *Trust Decanting.*** Many trusts already contain a decanting provision that allows the trustee to distribute the assets of a trust to another trust for the benefit of the beneficiaries of the trust. This is typically known as a “decanting” provision. A popular change that has been “sweeping the nation” is a **statutory** decanting provision (for trusts without a decanting provision). Many of the new provisions are designed to apply only in situations where the trustee already has broad discretion over distributions – akin to a “best interests” standard. TBA would like to see such a proposal to allow trustees to “clear out the

administrative deadwood” of older trusts. REPTL has considered decanting proposals, and likely will have its own proposal in the 2011 session, but for now would like the opportunity to review what other states pass in the meantime.

- 17.2. *Revocable Trust Provisions.*** REPTL still would like to add provisions regarding revocable trusts to the Trust Code. However, this project has been delayed because of energies diverted to the Probate Code Recodification project. The Uniform Trust Code contains model provisions dealing with some of these issues, but they require significant revision for use in Texas where we have many trusts with two settlors, *i.e.*, the typical joint revocable trust created by spouses that holds community property, and possibly separate property of each spouse.

- 17.3. *Uniform Power of Attorney Act.*** In 2006, the National Conference of Commissioners on Uniform State Laws promulgated a new Uniform Power of Attorney Act. REPTL is in the process of studying this act with a view towards a 2011 proposal.

- 17.4. *Anti-Jarboe Amendment?*** An early-2007 bankruptcy decision interpreting Texas law (the *Jarboe* case) held that the exemption of IRA’s by Property Code Section 42.0021 did not extend to inherited IRA’s (other than spousal IRA’s). Most of us were surprised at this interpretation, especially since the court paid lip service to the strong Texas public policy favoring debtors. Members of the Texas Academy drafted language during that session to reverse the result in that case. The proposal made no headway in the 2007 session.

REPTL considered this provision again for the 2009 legislative package, but declined to include it because of the perceived lack of consensus among its members. However, there may be some other group that proposes this change.

## **18. Conclusion.**

This session was very contentious at the beginning and at the end, but fairly calm in the middle. It was a somewhat disappointing year for REPTL, because for the first time in a number of years, a significant portion of its legislative package failed to pass.

However, for the most part, that failure was unrelated to the substance of its legislation. The proposals, like many other good proposals, were caught up in the aforementioned logjam. With preparation, REPTL hopes to pass this legislation (and any other good ideas its members come up with in the next year) in 2011.





**List of Bills That Passed and Effective Dates<sup>1</sup>**

(Note that the following list includes all bills tracked by REPTL that passed, including many bills not discussed in this paper.)

<b>Bill Number</b>	<b>Caption</b>	<b>Status</b>	<b>Earliest Effective Date</b>
HB 144	Relating to an additional filing fee for civil cases filed in Bexar County.	06/19/2009 E Signed by Governor	6/19/2009
HB 216	Relating to the regulation of certain boarding home facilities and assisted living facilities; providing penalties.	06/19/2009 E Signed by Governor	9/1/09 <sup>2</sup>
HB 396	Relating to expunction of a notice of lis pendens.	06/19/2009 E Signed by Governor	9/1/09
HB 585	Relating to records related to an estate of a decedent or incapacitated person.	06/19/2009 E Signed by Governor	6/19/2009
HB 587	Relating to the payment of attorney's fees to an attorney representing an applicant for the appointment of a guardian.	06/19/2009 E Signed by Governor	9/1/09
HB 610	Relating to the establishment of the Legislative Committee on Aging and other initiatives relating to the aging population of this state.	06/19/2009 E Signed by Governor	9/1/09
HB 704	Relating to the jurisdiction of a court over a child in the managing conservatorship of the state after the child's 18th birthday.	05/23/2009 E Signed by Governor	5/23/2009
HB 748	Relating to the provision of services to certain individuals with developmental disabilities by a state school or state center.	06/19/2009 E Signed by Governor	6/19/2009
HB 764	Relating to eligibility for assignment as a visiting judge.	06/19/2009 E Signed by Governor	9/1/09
HB 765	Relating to supplemental payments made to certain statutory probate court judges.	06/19/2009 E Signed by Governor	6/19/2009
HB 802	Relating to the creation of the lifespan respite services program.	06/19/2009 E Signed by Governor	9/1/09
HB 806	Relating to health benefit plan coverage for certain prosthetic devices, orthotic devices, and related services.	05/13/2009 E Signed by Governor	9/1/09
HB 888	Relating to the detention and examination of certain persons accepted for a preliminary mental health examination.	06/19/2009 E Signed by Governor	6/19/2009
HB 890	Relating to the terminology used to describe certain judicial officers.	06/19/2009 E Signed by Governor	9/1/09
HB 1081	Relating to requiring posting of certain information regarding nursing homes and related institutions on the Department of Aging and Disability Services website.	05/23/2009 E Signed by Governor	9/1/09
HB 1233	Relating to the court-ordered administration of psychoactive medication to certain criminal defendants.	06/19/2009 E Signed by Governor	6/19/2009
HB 1293	Relating to the sale and marketing of life insurance and annuities.	6/19/2009 E Vetoed by the Governor	N/A
HB 1294	Relating to certain certifications, professional designations, and education requirements regarding the sale of life insurance and annuities.	06/19/2009 E Signed by Governor	9/1/09
HB 1454	Relating to the establishment of a volunteer-supported decision-making advocate pilot program for persons with intellectual and developmental disabilities and persons with other cognitive disabilities.	05/20/2009 E Signed by Governor	5/20/09
HB 1460	Relating to the contents of an application for probate of a written will.	06/19/2009 E Signed by Governor	9/1/09
HB 1461	Relating to the contents of an application for probate of a will	06/19/2009 E Signed by Governor	9/1/09

<sup>1</sup> This paper was updated June 22, 2009, following Governor Perry's June 21<sup>st</sup> deadline to sign or veto bills. The author believes this List of Bills That Passed and Effective Dates to be accurate.

<sup>2</sup> Some provisions take effect September 1, 2010.

**2009 Legislative Update**

<b>Bill Number</b>	<b>Caption</b>	<b>Status</b>	<b>Earliest Effective Date</b>
	as a muniment of title.	Governor	
HB 1843	Relating to the disposition of cash in possession of a deceased pauper.	06/19/2009 E Signed by Governor	6/19/2009
HB 1969	Relating to the enforcement of certain provisions in a will or trust that forfeit or void devises or interests.	06/19/2009 E Signed by Governor	6/19/2009
HB 1990	Relating to a diabetes self-management training pilot program under the state Medicaid program.	05/23/2009 E Signed by Governor	5/23/09
HB 2027	Relating to adoption of the Revised Uniform Anatomical Gift Act; providing criminal penalties.	05/27/2009 E Signed by Governor	9/1/09
HB 2093	Relating to the certification of a county jailer as a special officer for offenders with mental impairments.	06/19/2009 E Signed by Governor	9/1/09
HB 2191	Relating to prohibiting contact between an employee of a facility that serves the elderly or disabled persons, whose criminal history has not been verified, and a patient or resident of the facility.	06/19/2009 E Signed by Governor	9/1/09
HB 2303	Relating to the scope of services of and the persons who may be provided services by a community center.	06/19/2009 E Signed by Governor	6/19/2009
HB 2328	Relating to the punishment for certain fraud offenses committed against elderly individuals.	06/19/2009 E Signed by Governor	9/1/09
HB 2368	Relating to trusts.	06/19/2009 E Signed by Governor	9/1/09
HB 2465	Relating to taking a deposition of an elderly or disabled victim of or witness to an offense.	06/19/2009 E Signed by Governor	9/1/09
HB 2502	Relating to the adoption of a nonsubstantive revision of provisions of the Texas Probate Code relating to decedents' estates and the redesignation of certain other provisions of the Texas Probate Code, including conforming amendments and repeals.	06/19/2009 E Signed by Governor	1/1/14
HB 2585	Relating to digital or electronic signatures and witness signatures on advance directives.	06/19/2009 E Signed by Governor	9/1/09
HB 2654	Relating to imposition of the motor vehicle sales tax on motor vehicles transferred as the result of a gift.	06/19/2009 E Signed by Governor	9/1/09
HB 3075	Relating to the designation of convenience signers on certain accounts established at financial institutions.	06/19/2009 E Signed by Governor	6/19/2009
HB 3080	Relating to guardianships and other matters relating to incapacitated persons.	06/19/2009 E Signed by Governor	9/1/09
HB 3112	Relating to the referral of an elderly or disabled person to the Department of Aging and Disability Services and the determination by that agency of the need for a guardianship for that person.	06/19/2009 E Signed by Governor	9/1/09
HB 3601	Relating to the authority of a county clerk to post official and legal notices by electronic display.	06/19/2009 E Signed by Governor	6/19/2009
HB 3635	Relating to administration of a trust with cotrustees.	06/19/2009 E Signed by Governor	9/1/09
HB 3637	Relating to filing fees in civil actions and proceedings and the use of those fees, to costs on conviction in certain courts, to money paid into the registry of a court in certain counties, and to the appointment of counsel in certain suits.	06/19/2009 E Signed by Governor	9/1/09
HB 3767	Relating to homestead property transferred to a trustee of certain trusts.	06/19/2009 E Signed by Governor	9/1/09
HB 3768	Relating to continuation of title insurance coverage of transferred property.	06/19/2009 E Signed by Governor	9/1/09
HB 4154	Relating to the creation by the Health and Human Services Commission of a volunteer advocate program for certain elderly individuals.	06/19/2009 E Signed by Governor	9/1/09
HB 4276	Relating to a transportation plan for persons furloughed or	06/19/2009 E Signed by	9/1/09

**Summary of Changes Affecting Texas Probate, Guardianship, and Trust Law**

<b>Bill Number</b>	<b>Caption</b>	<b>Status</b>	<b>Earliest Effective Date</b>
	discharged from certain mental health facilities.	Governor	
SB 37	Relating to providing home-based and community-based support services under the Medicaid program to persons who are deaf-blind with multiple disabilities.	05/30/2009 E Signed by Governor	5/30/09
SB 187	Relating to a Medicaid buy-in program for certain children with disabilities.	05/13/2009 E Signed by Governor	9/1/09
SB 271	Relating to informal caregiver support services and to the appointment of a successor guardian for certain wards adjudicated as totally incapacitated.	06/19/2009 E Signed by Governor	6/19/2009
SB 408	Relating to jurisdiction, venue, and appeals in certain matters, including the jurisdiction of and appeals from certain courts and administrative decisions and the appointment of counsel in certain appeals.	06/19/2009 E Signed by Governor	9/1/09 <sup>3</sup>
SB 530	Relating to the disposition of cash in possession of a deceased pauper.	06/19/2009 E Signed by Governor	6/19/2009
SB 584	Relating to notification to a patient of a state-operated mental health facility or resident of a residential care facility of the exemption of certain trusts from liability to pay for support.	06/19/2009 E Signed by Governor	6/19/2009
SB 643	Relating to the protection and care of individuals with mental retardation and to certain legal protections for individuals with disabilities; providing criminal penalties.	6/11/2009 E Signed by the Governor	6/11/2009
SB 666	Relating to the administration of charitable trusts.	06/19/2009 E Signed by Governor	9/1/09
SB 683	Relating to the employment, powers, and duties of and procedures for matters referred to a statutory probate court judge or associate judge.	06/19/2009 E Signed by Governor	9/1/09
SB 705	Relating to long-term care consumer information and Medicaid waiver programs.	06/19/2009 E Signed by Governor	6/19/2009
SB 866	Relating to the rights and liabilities of the parties in a suit for dissolution of a marriage and certain post-dissolution proceedings.	06/19/2009 E Signed by Governor	9/1/09
SB 917	Relating to the definition of charitable trust for purposes of court jurisdiction.	05/23/2009 E Signed by Governor	5/23/09
SB 918	Relating to attorney general participation in proceedings involving charitable trusts.	05/23/2009 E Signed by Governor	5/23/09
SB 1053	Relating to the appointment or removal of guardians of incapacitated persons.	06/19/2009 E Signed by Governor	9/1/09
SB 1055	Relating to reporting and application requirements regarding certain public and private guardians.	06/19/2009 E Signed by Governor	9/1/09
SB 1056	Relating to authorizing a criminal justice agency to disclose certain criminal history record information and to orders of disclosure regarding such information.	06/19/2009 E Signed by Governor	6/19/2009
SB 1057	Relating to criminal history record information relating to persons who are certified to provide guardianship services.	06/19/2009 E Signed by Governor	6/19/2009
SB 1208	Relating to the creation of an appellate judicial system for the Seventh Court of Appeals District.	06/19/2009 E Signed by Governor	9/1/09
SB 1369	Relating to the appointment of attorneys ad litem and to court-appointed volunteer advocates in certain suits affecting the parent-child relationship.	06/19/2009 E Signed by Governor	9/1/09
SB 1484	Relating to delivery of certain services through consumer direction to elderly persons and persons with disabilities.	05/27/2009 E Signed by Governor	5/27/09
SB 1557	Relating to the early identification of criminal defendants who are or may be persons with mental illness or mental retardation.	06/19/2009 E Signed by Governor	9/1/09
SB 1589	Relating to the reporting and handling of unclaimed property.	05/27/2009 E Signed by	9/1/09

<sup>3</sup> Provisions added to Estates Code effective 1/1/14.

**2009 Legislative Update**

<b>Bill Number</b>	<b>Caption</b>	<b>Status</b>	<b>Earliest Effective Date</b>
		Governor	
SB 1598	Relating to an agreement authorizing a nonparent relative of a child to make certain decisions regarding the child; providing a penalty.	06/19/2009 E Signed by Governor	6/19/2009
SB 1803	Relating to the Glenda Dawson Donate Life-Texas Registry.	06/19/2009 E Signed by Governor	9/1/09
SB 1804	Relating to medical assistance reimbursement for wheeled mobility systems for recipients of medical assistance.	06/19/2009 E Signed by Governor	9/1/09
SB 1824	Relating to the Interagency Task Force for Children with Special Needs.	06/19/2009 E Signed by Governor	9/1/09
SB 1969	Relating to nonsubstantive additions to and corrections in enacted codes, to the nonsubstantive codification or disposition of various laws omitted from enacted codes, to conforming codifications enacted by the 80th Legislature to other Acts of that legislature, and to the repeal of certain unconstitutional laws.	05/20/2009 E Signed by Governor	9/1/09 <sup>4</sup>
SB 2038	Relating to the construction of nonsubstantive codifications and revisions of statutes.	05/29/2009 E Vetoed by the Governor	N/A
SB 2324	Relating to the classification of certain types of marital property in regards to claims for payment of a criminal restitution judgment.	06/19/2009 E Signed by Governor	9/1/09
SB 2344	Relating to examination requirements in certain guardianship matters concerning persons with mental retardation.	06/19/2009 E Signed by Governor	9/1/09
SB 2435	Relating to medical assistance program reimbursement for guardianship expenses of certain recipients.	06/19/2009 E Signed by Governor	9/1/09

<sup>4</sup> Some provisions take effect September 1, 2010.

2009 Amendments to the Texas Probate Code – Changes Affecting Decedents’ Estates

**Sec. 3. DEFINITIONS AND USE OF TERMS.**

Except as otherwise provided by Chapter XIII of this Code, when used in this Code, unless otherwise apparent from the context:

(a)-(t) [No change]

~~(u) “Minutes” means the probate minutes.~~

(t)-(aa) [No change]

(bb) "Probate proceeding" is synonymous with the terms "Probate matter," [~~"Probate proceedings,"~~] "Proceeding in probate," and "Proceedings for probate." The term means a matter or proceeding related to the estate of a decedent [are synonymous] and includes:

(1) the probate of a will, with or without administration of the estate;

(2) the issuance of letters testamentary and of administration;

(3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;

(4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;

(5) a claim arising from an estate administration and any action brought on the claim;

(6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate; and

(7) a will construction suit [include a matter or proceeding relating to the estate of a decedent].

(cc)-(mm) [No change]

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: “(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.”

**~~Sec. 4. JURISDICTION OF COUNTY COURT WITH RESPECT TO PROBATE PROCEEDINGS. [Repealed]~~**

~~Repealed by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: “(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.”~~

**Sec. 4A. GENERAL PROBATE COURT JURISDICTION; APPEALS.**

(a) All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. The court exercising original probate jurisdiction also has jurisdiction of all matters related to the probate proceeding as specified in Section 4B of this code for that type of court.

(b) A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy.

(c) A final order issued by a probate court is appealable to the court of appeals.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: “(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or

*the proceeding was commenced, and the former law is continued in effect for that purpose.”*

**Sec. 4B. MATTERS RELATED TO PROBATE PROCEEDING.**

(a) For purposes of this code, in a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:

(1) an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative;

(2) an action against a surety of a personal representative or former personal representative;

(3) a claim brought by a personal representative on behalf of an estate;

(4) an action brought against a personal representative in the representative's capacity as personal representative;

(5) an action for trial of title to real property that is estate property, including the enforcement of a lien against the property; and

(6) an action for trial of the right of property that is estate property.

(b) For purposes of this code, in a county in which there is no statutory probate court, but in which there is a county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:

(1) all matters and actions described in Subsection (a) of this section;

(2) the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and

(3) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.

(c) For purposes of this code, in a county in which there is a statutory probate court, a matter related to a probate proceeding includes:

(1) all matters and actions described in Subsections (a) and (b) of this section; and

(2) any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: “(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.”*

**Sec. 4C. ORIGINAL JURISDICTION FOR PROBATE PROCEEDINGS.**

(a) In a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, the county court has original jurisdiction of probate proceedings.

(b) In a county in which there is no statutory probate court, but in which there is a county court at law exercising original probate jurisdiction, the county court at law exercising original probate jurisdiction and the county court have concurrent original jurisdiction of probate proceedings, unless otherwise provided by law. The judge of a county court may hear probate proceedings while sitting for the judge of any other county court.

(c) In a county in which there is a statutory probate court, the statutory probate court has original jurisdiction of probate proceedings.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: “(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.”*

**Sec. 4D. JURISDICTION OF CONTESTED PROBATE PROCEEDING IN COUNTY WITH**

**NO STATUTORY PROBATE COURT OR STATUTORY COUNTY COURT.**

(a) In a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, when a matter in a probate proceeding is contested, the judge of the county court may, on the judge's own motion, or shall, on the motion of any party to the proceeding, according to the motion:

(1) request the assignment of a statutory probate court judge to hear the contested matter, as provided by Section 25.0022, Government Code; or

(2) transfer the contested matter to the district court, which may then hear the contested matter as if originally filed in the district court.

(b) If a party to a probate proceeding files a motion for the assignment of a statutory probate court judge to hear a contested matter in the proceeding before the judge of the county court transfers the contested matter to a district court under this section, the county judge shall grant the motion for the assignment of a statutory probate court judge and may not transfer the matter to the district court unless the party withdraws the motion.

(c) A party to a probate proceeding may file a motion for the assignment of a statutory probate court judge under this section before a matter in the proceeding becomes contested, and the motion is given effect as a motion for assignment of a statutory probate court judge under Subsection (a) of this section if the matter later becomes contested.

(d) Notwithstanding any other law, a transfer of a contested matter in a probate proceeding to a district court under any authority other than the authority provided by this section:

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

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

(e) A statutory probate court judge assigned to a contested matter under this section has the jurisdiction and authority granted to a statutory probate court by this code. On resolution of a contested matter for which a statutory probate court

judge is assigned under this section, including any appeal of the matter, the statutory probate court judge shall return the matter to the county court for further proceedings not inconsistent with the orders of the statutory probate court or court of appeals, as applicable.

(f) A district court to which a contested matter is transferred under this section has the jurisdiction and authority granted to a statutory probate court by this code. On resolution of a contested matter transferred to the district court under this section, including any appeal of the matter, the district court shall return the matter to the county court for further proceedings not inconsistent with the orders of the district court or court of appeals, as applicable.

(g) The county court shall continue to exercise jurisdiction over the management of the estate, other than a contested matter, until final disposition of the contested matter is made in accordance with this section. After a contested matter is transferred to a district court, any matter related to the probate proceeding may be brought in the district court. The district court in which a matter related to the probate proceeding is filed may, on its own motion or on the motion of any party, find that the matter is not a contested matter and transfer the matter to the county court with jurisdiction of the management of the estate.

(h) If a contested matter in a probate proceeding is transferred to a district court under this section, the district court has jurisdiction of any contested matter in the proceeding that is subsequently filed, and the county court shall transfer those contested matters to the district court. If a statutory probate court judge is assigned under this section to hear a contested matter in a probate proceeding, the statutory probate court judge shall be assigned to hear any contested matter in the proceeding that is subsequently filed.

(i) The clerk of a district court to which a contested matter in a probate proceeding is transferred under this section may perform in relation to the contested matter any function a county clerk may perform with respect to that type of matter.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: "(i) The changes in law made by this section apply only to an action filed or a*

*proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.”*

**Sec. 4E. JURISDICTION OF CONTESTED PROBATE PROCEEDING IN COUNTY WITH NO STATUTORY PROBATE COURT.**

(a) In a county in which there is no statutory probate court, but in which there is a county court at law exercising original probate jurisdiction, when a matter in a probate proceeding is contested, the judge of the county court may, on the judge's own motion, or shall, on the motion of any party to the proceeding, transfer the contested matter to the county court at law. In addition, the judge of the county court, on the judge's own motion or on the motion of a party to the proceeding, may transfer the entire proceeding to the county court at law.

(b) A county court at law to which a proceeding is transferred under this section may hear the proceeding as if originally filed in that court. If only a contested matter in the proceeding is transferred, on the resolution of the matter, the matter shall be returned to the county court for further proceedings not inconsistent with the orders of the county court at law.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: “(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.”*

**Sec. 4F. EXCLUSIVE JURISDICTION OF PROBATE PROCEEDING IN COUNTY WITH STATUTORY PROBATE COURT.**

(a) In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all probate proceedings, regardless of whether contested or uncontested. A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is

concurrent with the jurisdiction of a district court as provided by Section 4H of this code or with the jurisdiction of any other court.

(b) This section shall be construed in conjunction and in harmony with Section 145 of this code and all other sections of this code relating to independent executors, but may not be construed to expand the court's control over an independent executor.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: “(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.”*

**Sec. 4G. JURISDICTION OF STATUTORY PROBATE COURT WITH RESPECT TO TRUSTS AND POWERS OF ATTORNEY.**

In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of:

(1) an action by or against a trustee;

(2) an action involving an inter vivos trust, testamentary trust, or charitable trust;

(3) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and

(4) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: “(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose.”*



**Sec. 4H. CONCURRENT JURISDICTION WITH DISTRICT COURT.**

A statutory probate court has concurrent jurisdiction with the district court in:

(1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative;

(2) an action by or against a trustee;

(3) an action involving an inter vivos trust, testamentary trust, or charitable trust;

(4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;

(5) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and

(6) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: "(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose."*

*[Note: The following is the text of Section 5 as amended by SB 917. Section 5 was also repealed by SB 408, which had the last legislative vote of the two bills. See the text of Government Code Section 312.014 following Section 5.]*

**Sec. 5. JURISDICTION WITH RESPECT TO PROBATE PROCEEDINGS. [Repealed?]**

(a)-(d) [No change]

(e) A statutory probate court has concurrent jurisdiction with the district court in all personal injury, survival, or wrongful death actions by or against a person in the person's capacity as a personal representative, in all actions by or against a

trustee, in all actions involving an inter vivos trust, testamentary trust, or charitable trust, and in all actions involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate. For purposes of this section, "charitable trust" includes a charitable trust as defined by Section 123.001, Property Code.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (SB 917, effective immediately upon enactment).*

**Repealed** by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: "(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose."

*Government Code Section 312.014 provides:*

**Sec. 312.014. IRRECONCILABLE AMENDMENTS.**

(a) *If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.*

(b) *If amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails.*

(c) *In determining whether amendments to the same statute enacted at the same session of the legislature are irreconcilable, text that is reenacted because of the requirement of Article III, Section 36, of the Texas Constitution is not considered to be irreconcilable with additions or omissions in the same text made by another amendment. Unless clearly indicated to the contrary, an amendment that reenacts text in compliance with that constitutional requirement does not indicate legislative intent that the reenacted text prevail over changes in the same text made by another amendment, regardless of the relative dates of enactment.*

(d) In this section, the date of enactment is the date on which the last legislative vote is taken on the bill enacting the statute.

(e) If the journals or other legislative records fail to disclose which of two or more bills in conflict is latest in date of enactment, the date of enactment of the respective bills is considered to be, in order of priority:

(1) the date on which the last presiding officer signed the bill;

(2) the date on which the governor signed the bill; or

(3) the date on which the bill became law by operation of law.

**Sec. 5A. MATTERS APPERTAINING AND INCIDENT TO AN ESTATE. [Repealed]**

*Repealed by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: "(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose."*

**Sec. 5B. TRANSFER OF PROCEEDING.**

(a) A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to the judge's [his] court from a district, county, or statutory court a cause of action related to a probate proceeding [appertaining to or incident to an estate] pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.

(b) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: "(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced*

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

**Sec. 8. CONCURRENT VENUE AND TRANSFER OF PROCEEDINGS.**

(a)-(b) [No change]

(c) Transfer of Proceeding.

(1) Transfer for Want of Venue. If it appears to the court at any time before the final decree that the proceeding was commenced in a court which did not have priority of venue over such proceeding, the court shall, on the application of any interested person, transfer the proceeding to the proper county by transmitting to the proper court in such county the original file in such case, together with certified copies of all entries in the judge's probate docket [minutes] theretofore made, and the probate of the will, determination of heirship, or administration of the estate in such county shall be completed in the same manner as if the proceeding had originally been instituted therein; but, if the question as to priority of venue is not raised before final decree in the proceedings is announced, the finality of such decree shall not be affected by any error in venue.

(2) [No change]

(d)-(e) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 13. JUDGE'S PROBATE DOCKET.**

The county clerk shall keep a record book to be styled "Judge's Probate Docket," and shall enter therein:

(a)-(c) [No change]

(d) A notation [minute] of each order, judgment, decree, and proceeding had in each estate, with the date thereof.

(e) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 23. DECREES [AND SIGNING OF MINUTES].**

All decisions, orders, decrees, and judgments of the county court in probate matters shall be rendered in open court except in cases where it is otherwise specially provided. ~~[The probate minutes shall be approved and signed by the judge on the first day of each month, except, however, that if the first day of the month falls on a Sunday, such approval shall be entered on the preceding or succeeding day.]~~

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 51. TRANSFER OF PROCEEDING WHEN WILL PROBATED OR ADMINISTRATION GRANTED.**

If an administration upon the estate of any such decedent shall be granted in the State, or if the will of such decedent shall be admitted to probate in this State, after the institution of a proceeding to declare heirship, the court in which such proceeding is pending shall, by an order entered of record therein, transfer the cause to the court of the county in which such administration shall have been granted, or such will shall have been probated, and thereupon the clerk of the court in which such proceeding was originally filed shall send to the clerk of the court named in such order, a certified transcript of all pleadings, ~~[docket]~~ entries in the judge's probate docket, and orders of the court in such cause. The clerk of the court to which such cause shall be transferred shall file the transcript and record the same in the judge's probate docket [minutes] of ~~that~~ the court and shall docket such cause, and the same shall thereafter proceed as though originally filed in that court. The court, in its discretion, may consolidate the cause so transferred with the pending proceeding.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 53. EVIDENCE; UNKNOWN PARTIES AND INCAPACITATED PERSONS.**

(a) The court in its discretion may require all or any part of the evidence admitted in a proceeding to declare heirship to be reduced to writing, and subscribed and sworn to by the witnesses, respectively, and filed in the cause, and recorded in the judge's probate docket [minutes of the court].

(b) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 64. FORFEITURE CLAUSE.**

A provision in a will that would cause a forfeiture of a devise or void a devise or provision in favor of a person for bringing any court action, including contesting a will, is unenforceable if:

(1) probable cause exists for bringing the action; and

(2) the action was brought and maintained in good faith.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 1969, effective immediately upon enactment).*

*Sections 4(a) and (c) of HB 1969 provide: "(a) Section 64, Texas Probate Code, as added by this Act, applies only to the estate of a decedent who dies on or after the effective date of this Act. The estate of a decedent who dies before the effective date of this Act is governed by the law in effect on the date of the decedent's death, and the former law is continued in effect for that purpose.*

*"(c) The intent of this Act is to clarify existing law."*

*Sections 5 of HB 1969 provides: "This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2009."*

**Sec. 81. CONTENTS OF APPLICATION FOR LETTERS TESTAMENTARY.**

(a) For Probate of a Written Will. A written will shall, if within the control of the applicant, be filed with the application for its probate, and shall remain in the custody of the county clerk unless removed therefrom by order of a proper court. An application for probate of a written will shall state:

(1)-(7) [No change]

(8) Whether a marriage of the decedent was ever dissolved after the will was made, whether by divorce, annulment, or a declaration that the

marriage was void [divorced], and if so, when and from whom.

(9) [No change]

(b) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 1460), effective September 1, 2009. Section 2 of HB 1460 provides: "The changes in law made by this Act to Section 81(a), Texas Probate Code, apply only to an application for probate of a written will that is filed on or after the effective date of this Act. An application for probate of a written will that is filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."*

**Sec. 89A. CONTENTS OF APPLICATION FOR PROBATE OF WILL AS MUNIMENT OF TITLE.**

(a) A written will shall, if within the control of the applicant, be filed with the application for probate as a muniment of title, and shall remain in the custody of the county clerk unless removed from the custody of the clerk by order of a proper court. An application for probate of a will as a muniment of title shall state:

(1)-(7) [No change]

(8) Whether a marriage of the decedent was ever dissolved after the will was made, whether by divorce, annulment, or a declaration that the marriage was void [divorced], and if so, when and from whom.

(9) [No change]

(b) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 1461), effective September 1, 2009. Section 2 of HB 1461 provides: "The changes in law made by this Act to Section 89A(a), Texas Probate Code, apply only to an application for probate of a will as a muniment of title filed on or after the effective date of this Act. An application for probate of a will as a muniment of title filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."*

**Sec. 95. PROBATE OF FOREIGN WILL ACCOMPLISHED BY FILING AND RECORDING.**

(a)-(c) [No change]

(d) Probate Accomplished by Recording.

(1) Will admitted in domiciliary jurisdiction. If the will has been probated or established in the jurisdiction in which the testator was domiciled at the time of his death, it shall be the ministerial duty of the clerk to record such will and the evidence of its probate or establishment in the judge's probate docket [minutes of the court]. No order of the court is necessary. When so filed and recorded, the will shall be deemed to be admitted to probate, and shall have the same force and effect for all purposes as if the original will had been probated by order of the court, subject to contest in the manner and to the extent hereinafter provided.

(2) Will admitted in non-domiciliary jurisdiction. If the will has been probated or established in another jurisdiction not the domicile of the testator, its probate in this State may be contested in the same manner as if the testator had been domiciled in this State at the time of his death. If no contest is filed, the clerk shall record such will and the evidence of its probate or establishment in the judge's probate docket [minutes of the court], and no order of the court shall be necessary. When so filed and recorded, it shall be deemed to be admitted to probate, and shall have the same force and effect for all purposes as if the original will had been probated by order of the court, subject to contest in the manner and to the extent hereafter provided.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 101. NOTICE OF CONTEST OF FOREIGN WILL.**

Within the time permitted for the contest of a foreign will in this State, verified notice may be filed and recorded in the judge's probate docket [minutes] of the court in this State in which the will was probated, or the deed records of any county in this State in which such will was recorded, that proceedings have been instituted to contest the will in the foreign jurisdiction where it was probated or established. Upon such filing and recording, the

force and effect of the probate or recording of the will shall cease until verified proof is filed and recorded that the foreign proceedings have been terminated in favor of the will, or that such proceedings were never actually instituted.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 190. OATHS OF EXECUTORS AND ADMINISTRATORS.**

(a)-(c) [No change]

(d) Filing and Recording of Oaths. All such oaths may be taken before any officer authorized to administer oaths, and shall be filed with the clerk of the court granting the letters, and shall be recorded in the judge's probate docket [~~minutes of such court~~].

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 322. CLASSIFICATION OF CLAIMS AGAINST ESTATES OF DECEDENT.**

Claims against an estate of a decedent shall be classified and have priority of payment, as follows:

Class 1-Class 5. [No change.]

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

Class 7-Class 8. [No change.]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 1969), effective September 1, 2009.*

**Sec. 369. POOLING OR UNITIZATION OF ROYALTY OR MINERALS.**

(a) [No change]

(b) Procedure for Authorizing Pooling or Unitization. Pooling or unitization, when not adequately provided for by an existing lease or leases on property owned by the estate, may be authorized by the court in which the proceedings are pending pursuant to and in conformity with the following rules:

(1) Contents of Application. The personal representative of the estate shall file with the county clerk of the county where the probate proceeding is pending his written application for authority (a) to enter into pooling or unitization agreements supplementing, amending, or otherwise relating to, any existing lease or leases covering property owned by the estate, or (b) to commit royalties or other interest in minerals, whether subject to lease or not, to a pooling or unitization agreement. The application shall also (c) describe the property sufficiently, as required in original application to lease, (d) describe briefly the lease or leases, if any, to which the interest of the estate is subject, and (e) set out the reasons why the proposed agreement concerning such property should be made. A true copy of the proposed agreement shall be attached to the application and by reference made a part thereof, but the agreement shall not be recorded in the judge's probate docket [~~minutes~~]. The clerk shall immediately, after such application is filed, call it to the attention of the judge.

(2)-(4) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 409. MONEY BECOMING DUE PENDING FINAL DISCHARGE.**

Until the order of final discharge of the personal representative is entered in the judge's probate docket [~~minutes of the court~~], money or other thing of value falling due to the estate while the account for final settlement is pending may be paid, delivered, or tendered to the personal representative, who shall issue receipt therefor, and the obligor and/or payor shall be thereby discharged of the obligation for all purposes.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 430. RECEIPT OF COMPTROLLER.**

Whenever an executor or administrator pays the comptroller any funds of the estate he represents, under the preceding provisions of this Code, he shall take from the comptroller a receipt for such payment, with official seal attached, and shall file the same with the clerk of the court ordering such payment; and such receipt shall be recorded in the judge's probate docket [~~minutes of the court~~].

**2009 Legislative Update**

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*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_  
(HB 585, effective immediately upon enactment).*

2009 Amendments to the Texas Probate Code – Changes Affecting Guardianships

**Sec. 601. DEFINITIONS.**

In this chapter:

(1)-(16) [No change]

~~(17) “Minutes” means the guardianship minutes.~~

(18)-(33) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 609. CONTESTED GUARDIANSHIP OF THE PERSON OF A MINOR.**

(a) [No change]

(b) The probate court that transfers a proceeding under this section to a court with proper jurisdiction over suits affecting the parent-child relationship shall send to the court to which the transfer is made the complete files in all matters affecting the guardianship of the person of the minor and certified copies of all entries in the judge's guardianship docket ~~[minutes]~~. The transferring court shall keep a copy of the transferred files. If the transferring court retains jurisdiction of the guardianship of the estate of the minor or of another minor who was the subject of the suit, the court shall send a copy of the complete files to the court to which the transfer is made and shall keep the original files.

(c) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 623. JUDGE’S GUARDIANSHIP DOCKET.**

(a) The county clerk shall keep a record book to be styled "Judge's Guardianship Docket" and shall enter in the record book:

(1)-(3) [No change]

(4) a notation ~~[minute]~~, including the date, of each order, judgment, decree, and proceeding in each estate; and

(5) [No change]

(b) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec 631. CLERK’S DUTIES.**

(a) [No change]

(b) By transmitting to the proper court in the proper county for venue purposes the original file in the case, with certified copies of all entries in the judge's guardianship docket ~~[minutes]~~ made in the file, an administration of the guardianship in the proper county for venue purposes shall be completed in the same manner as if the proceeding had originally been instituted in that county.

(c) The clerk of the court from which the proceeding is transferred shall transmit to the court to which the proceeding is transferred the original file in the proceeding and a certified copy of the entries in the judge's guardianship docket ~~[minutes]~~ that relate to the proceeding.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 650. DECREES ~~[AND SIGNING OF MINUTES]~~.**

A decision, order, decree, or judgment of the court in a guardianship matter must be rendered in open court, except in a case in which it is otherwise expressly provided. ~~[The judge shall approve and sign the guardianship minutes on the first day of each month. If the first day of the month falls on a Saturday, Sunday, or legal holiday, the judge's approval shall be entered on the preceding or succeeding day.]~~

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 665. COMPENSATION OF GUARDIANS AND TEMPORARY GUARDIANS.**

(a) The court may authorize compensation for a guardian or a temporary guardian serving as a

guardian of the person alone from available funds of the ward's estate or other funds available for that purpose. The court may [~~shall~~] set the compensation in an amount not exceeding five percent of the ward's gross income.

(a-1) In determining whether to authorize compensation for a guardian under this section, the court shall consider the ward's monthly income from all sources and whether the ward receives medical assistance under the state Medicaid program.

(b) The guardian or temporary guardian of an estate is entitled to reasonable compensation on application to the court at the time the court approves any annual accounting or final accounting filed by the guardian or temporary guardian under this chapter. A fee of five percent of the gross income of the ward's estate and five percent of all money paid out of the estate, subject to the award of an additional amount under Subsection (c) of this section following a review under Subsection (c)(1) of this section, is considered reasonable under this subsection if the court finds that the guardian or temporary guardian has taken care of and managed the estate in compliance with the standards of this chapter.

(c) On application of an interested person or on its own motion, the court may:

(1) review and modify the amount of compensation authorized under Subsection (a) or [Subsection] (b) of this section if the court finds that the amount is unreasonably low when considering the services rendered as guardian or temporary guardian; and

(2) authorize compensation for the guardian or temporary guardian in an estimated amount the court finds reasonable that is to be paid on a quarterly basis before the guardian or temporary guardian files an annual or final accounting if the court finds that delaying the payment of compensation until the guardian or temporary guardian files an accounting would create a hardship for the guardian or temporary guardian.

(d) A finding of unreasonably low compensation may not be established under Subsection (c) of this section solely because the amount of compensation is less than the usual and customary charges of the person or entity serving as guardian or temporary guardian. A court that

authorizes payment of estimated quarterly compensation under Subsection (c) of this section may later reduce or eliminate the guardian's or temporary guardian's compensation if, on review of an annual or final accounting or otherwise, the court finds that the guardian or temporary guardian:

(1) received compensation in excess of the amount permitted under this section;

(2) has not adequately performed the duties required of a guardian or temporary guardian under this chapter; or

(3) has been removed for cause.

(d-1) If a court reduces or eliminates a guardian's or temporary guardian's compensation as provided by Subsection (d) of this section, the guardian or temporary guardian and the surety on the guardian's or temporary guardian's bond are liable to the guardianship estate for any excess compensation received.

(e)-(h) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(b) of HB 3080 provides: "Sections 665, 665B, and 868, Texas Probate Code, as amended by this Act, and Section 665D, Texas Probate Code, as added by this Act, apply to the payment, reduction, or elimination of compensation for services performed on or after the effective date of this Act. Payment, reduction, or elimination of compensation for services performed before the effective date of this Act is governed by the law in effect on the date the services were performed, and the former law is continued in effect for that purpose."*

*[Note: The text of Section 665B as amended by both HB 3080 and HB 587 is reproduced below. HB 3080 had the last legislative vote of the two bills. See the text of Government Code Section 312.014 reproduced below.]*

*Government Code Section 312.014 provides:*

*Sec. 312.014. IRRECONCILABLE AMENDMENTS.*

*(a) If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.*



(b) If amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails.

(c) In determining whether amendments to the same statute enacted at the same session of the legislature are irreconcilable, text that is reenacted because of the requirement of Article III, Section 36, of the Texas Constitution is not considered to be irreconcilable with additions or omissions in the same text made by another amendment. Unless clearly indicated to the contrary, an amendment that reenacts text in compliance with that constitutional requirement does not indicate legislative intent that the reenacted text prevail over changes in the same text made by another amendment, regardless of the relative dates of enactment.

(d) In this section, the date of enactment is the date on which the last legislative vote is taken on the bill enacting the statute.

(e) If the journals or other legislative records fail to disclose which of two or more bills in conflict is latest in date of enactment, the date of enactment of the respective bills is considered to be, in order of priority:

(1) the date on which the last presiding officer signed the bill;

(2) the date on which the governor signed the bill; or

(3) the date on which the bill became law by operation of law.

**Sec. 665B. COMPENSATION OF ATTORNEY REPRESENTING APPLICANT [~~CERTAIN ATTORNEYS~~].**

(a) A court that creates a guardianship or creates a management trust under Section 867 of this code for a ward under this chapter, on request of a person who filed an application to be appointed guardian of the proposed ward, an application [~~or~~] for the appointment of another suitable person as guardian of the proposed ward, or an application for the creation of the management trust, may authorize compensation of an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is

appointed the ward's guardian or whether a management trust is created, from:

(1) available funds of the ward's estate or management trust, if created; or

(2) the county treasury if:

(A) the ward's estate or, if created, management trust, is insufficient to pay for the services provided by the attorney; and

(B) funds in the county treasury are budgeted for that purpose.

(b) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(b) of HB 3080 provides: "Sections 665, 665B, and 868, Texas Probate Code, as amended by this Act, and Section 665D, Texas Probate Code, as added by this Act, apply to the payment, reduction, or elimination of compensation for services performed on or after the effective date of this Act. Payment, reduction, or elimination of compensation for services performed before the effective date of this Act is governed by the law in effect on the date the services were performed, and the former law is continued in effect for that purpose."*

**Sec. 665B. PAYMENT OF ATTORNEY'S FEES TO [~~COMPENSATION OF~~] CERTAIN ATTORNEYS.**

(a) A court that creates a guardianship for a ward under this chapter, on request of a person who filed an application to be appointed guardian of the proposed ward or for the appointment of another suitable person as guardian of the proposed ward, may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, to [~~compensation of~~] an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian, from:

(1) available funds of the ward's estate; or

(2) subject to Subsection (c) of this section, the county treasury if:

(A) the ward's estate is insufficient to pay for the services provided by the attorney; and

(B) funds in the county treasury are budgeted for that purpose.

(b) The court may not authorize attorney's fees [compensation] under this section unless the court finds that the applicant acted in good faith and for just cause in the filing and prosecution of the application.

(c) The court may authorize the payment of attorney's fees from the county treasury under Subsection (a) of this section only if the court is satisfied that the attorney to whom the fees will be paid has not received, and is not seeking, payment for the services described by that subsection from any other source.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 587), effective September 1, 2009. Section 2 of HB 587 provides: "Section 665B, Texas Probate Code, as amended by this Act, applies only to the payment of attorney's fees with respect to an application for the appointment of a guardian that is filed on or after the effective date of this Act. The payment of attorney's fees with respect to an application for the appointment of a guardian filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."*

**Sec. 665D. COMPENSATION AND PAYMENT OF ATTORNEY'S FEES OF ATTORNEY SERVING AS GUARDIAN.**

(a) Notwithstanding any other provision of this subpart, an attorney who serves as guardian and who also provides legal services in connection with the guardianship is not entitled to compensation for the guardianship services or payment of attorney's fees for the legal services from the ward's estate or other funds available for that purpose unless the attorney files with the court a detailed description of the services performed that identifies which of the services provided were guardianship services and which were legal services.

(b) An attorney described by Subsection (a) of this section is not entitled to payment of attorney's fees for guardianship services that are not legal services.

(c) The court shall set the compensation of an attorney described by Subsection (a) of this section

for the performance of guardianship services in accordance with Section 665 of this code. The court shall set attorney's fees for an attorney described by Subsection (a) of this section for legal services provided in accordance with Sections 665A, 665B, and 666 of this code.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(b) of HB 3080 provides: "Sections 665, 665B, and 868, Texas Probate Code, as amended by this Act, and Section 665D, Texas Probate Code, as added by this Act, apply to the payment, reduction, or elimination of compensation for services performed on or after the effective date of this Act. Payment, reduction, or elimination of compensation for services performed before the effective date of this Act is governed by the law in effect on the date the services were performed, and the former law is continued in effect for that purpose."*

**Sec. 670. COMPENSATION OF CERTAIN GUARDIANS; CERTAIN OTHER GUARDIANSHIP COSTS.**

(a) In this section:

(1) "Applied income" means the portion of the earned and unearned income of a recipient of medical assistance or, if applicable, the recipient and the recipient's spouse, that is paid under the medical assistance program to a nursing home in which the recipient resides.

(2) "Medical assistance" has the meaning assigned by Section 32.003, Human Resources Code.

(b) Notwithstanding any other provision of this chapter and to the extent permitted by federal law, a court that appoints a guardian for a recipient of medical assistance who has applied income may order the following to be paid under the medical assistance program:

(1) compensation to the guardian in an amount not to exceed \$175 per month;

(2) costs directly related to establishing or terminating the guardianship, not to exceed \$1,000 except as provided by Subsection (c) of this section; and

(3) other administrative costs related to the guardianship, not to exceed \$1,000 during any three-year period.

(c) Costs ordered to be paid under Subsection (b)(2) of this section may include compensation and expenses for an attorney ad litem or guardian ad litem and reasonable attorney's fees for an attorney representing the guardian. The costs ordered to be paid may exceed \$1,000 if the costs in excess of that amount are supported by documentation acceptable to the court and the costs are approved by the court.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (SB 2435), effective September 1, 2009. Sections 3 and 4 of SB 2435 provide:

“SECTION 3. The changes in law made by this Act apply to a guardianship created before, on, or after the effective date of this Act.

“SECTION 4. If before implementing any provision of this Act a state agency determines that a waiver or authorization from a federal agency is necessary for implementation of that provision, the agency affected by the provision shall request the waiver or authorization and may delay implementing that provision until the waiver or authorization is granted.”

**Sec. 677A. WRITTEN DECLARATIONS BY CERTAIN PARENTS TO APPOINT GUARDIANS FOR THEIR CHILDREN.**

(a)-(f) [No change]

(g) A declaration and affidavit may be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's child. The following form may, but need not, be used:

**DECLARATION OF APPOINTMENT OF GUARDIAN FOR MY CHILDREN IN THE EVENT OF MY DEATH OR INCAPACITY**

I, \_\_\_\_\_, make this Declaration to appoint as guardian for my child or children, listed as follows, in the event of my death or incapacity:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(add blanks as appropriate)

I designate \_\_\_\_\_ to serve as guardian of the person of my (child or children), \_\_\_\_\_ as first alternate guardian of the person of my (child or children), \_\_\_\_\_ as second alternate guardian of the person of my (child or children), and \_\_\_\_\_ as third alternate guardian of the person of my (child or children).

I direct that the guardian of the person of my (child or children) serve (with or without) bond.

(If applicable) I designate \_\_\_\_\_ to serve as guardian of the estate of my (child or children), \_\_\_\_\_ as first alternate guardian of the estate of my (child or children), \_\_\_\_\_ as second alternate guardian of the estate of my (child or children), and \_\_\_\_\_ as third alternate guardian of the estate of my (child or children).

If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes guardian of my (child or children).

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_

Declarant

\_\_\_\_\_  
\_\_\_\_\_

Witness

Witness

**SELF-PROVING AFFIDAVIT**

Before me, the undersigned authority, on this date personally appeared \_\_\_\_\_, the declarant, and \_\_\_\_\_ and \_\_\_\_\_ as witnesses, and all being duly sworn, the declarant said that the above instrument was his or her Declaration of Appointment of Guardian for the Declarant's

Children in the Event of Declarant's Death or Incapacity and that the declarant had made and executed it for the purposes expressed in the declaration. The witnesses declared to me that they are each 14 years of age or older, that they saw the declarant sign the declaration, that they signed the declaration as witnesses, and that the declarant appeared to them to be of sound mind.

\_\_\_\_\_  
Declarant

\_\_\_\_\_  
Affiant

\_\_\_\_\_  
Affiant

Subscribed and sworn to before me by \_\_\_\_\_, the above named declarant, and \_\_\_\_\_ (names of affiants) affiants, on this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public in and for the

State of Texas

My Commission expires:  
\_\_\_\_\_

(i) As an alternative to the self-proving affidavit authorized by Subsection (g) of this section, a declaration of appointment of a guardian for the declarant's children in the event of the declarant's death or incapacity may be simultaneously executed, attested, and made self-proved by including the following in substantially the same form and with substantially the same contents:

I, \_\_\_\_\_, as declarant, after being duly sworn, declare to the undersigned witnesses and to the undersigned authority that this instrument is my Declaration of Appointment of Guardian for My Children in the Event of My Death or Incapacity, and that I have made and executed it for the purposes expressed in the declaration. I now sign this declaration in the presence of the attesting

witnesses and the undersigned authority on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Declarant

The undersigned, \_\_\_\_\_ and \_\_\_\_\_, each being 14 years of age or older, after being duly sworn, declare to the declarant and to the undersigned authority that the declarant declared to us that this instrument is the declarant's Declaration of Appointment of Guardian for the Declarant's Children in the Event of Declarant's Death or Incapacity and that the declarant executed it for the purposes expressed in the declaration. The declarant then signed this declaration and we believe the declarant to be of sound mind. We now sign our names as attesting witnesses on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

Subscribed and sworn to before me by the above named declarant, and affiants, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public in and for the State of Texas

My Commission Expires: \_\_\_\_\_

(j) A declaration that is executed as provided by Subsection (i) of this section is considered self-proved to the same extent a declaration executed with a self-proving affidavit under Subsection (g) of this section is considered self-proved.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(a) of HB 3080 provides: "Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act."*

**Sec. 679. DESIGNATION OF GUARDIAN BEFORE NEED ARISES.**

(a)-(h) [No change]

(i) A declaration and affidavit may be in any form adequate to clearly indicate the declarant's intention to designate a guardian. The following form may, but need not, be used:

**DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR NEED OF GUARDIAN**

I, \_\_\_\_\_, make this Declaration of Guardian, to operate if the need for a guardian for me later arises.

1. I designate \_\_\_\_\_ to serve as guardian of my person, \_\_\_\_\_ as first alternate guardian of my person, \_\_\_\_\_ as second alternate guardian of my person, and \_\_\_\_\_ as third alternate guardian of my person.

2. I designate \_\_\_\_\_ to serve as guardian of my estate, \_\_\_\_\_ as first alternate guardian of my estate, \_\_\_\_\_ as second alternate guardian of my estate, and \_\_\_\_\_ as third alternate guardian of my estate.

3. If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes my guardian.

4. I expressly disqualify the following persons from serving as guardian of my person: \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

5. I expressly disqualify the following persons from serving as guardian of my estate: \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

Signed this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Declarant

\_\_\_\_\_  
\_\_\_\_\_

Witness

Witness

**SELF-PROVING AFFIDAVIT**

Before me, the undersigned authority, on this date personally appeared \_\_\_\_\_, the declarant, and \_\_\_\_\_ and \_\_\_\_\_ as witnesses, and all being duly sworn, the declarant said that the above instrument was his or her Declaration of Guardian and that the declarant had made and executed it for the purposes expressed in the declaration. The witnesses declared to me that they are each 14 years of age or older, that they saw the declarant sign the declaration, that they signed the declaration as witnesses, and that the declarant appeared to them to be of sound mind.

\_\_\_\_\_  
Declarant

\_\_\_\_\_  
\_\_\_\_\_  
Affiant Affiant

Subscribed and sworn to before me by the above named declarant and affiants on this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public in and for the  
State of Texas  
My Commission expires:  
\_\_\_\_\_

(k) As an alternative to the self-proving affidavit authorized by Subsection (i) of this section, a Declaration of Guardian in the Event of Later Incapacity or Need of Guardian may be simultaneously executed, attested, and made self-proved by including the following in substantially the same form and with substantially the same contents:

I, \_\_\_\_\_, as declarant, after being duly sworn, declare to the undersigned witnesses and to the undersigned authority that this instrument is my Declaration of Guardian in the Event of Later Incapacity or Need of Guardian, and that I have made and executed it for the purposes expressed in the declaration. I now sign this declaration in the presence of the attesting witnesses and the undersigned authority on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Declarant

The undersigned, \_\_\_\_\_ and \_\_\_\_\_, each being 14 years of age or older, after being duly sworn, declare to the declarant and to the undersigned authority that the declarant declared to us that this instrument is the declarant's Declaration of Guardian in the Event of Later Incapacity or Need of Guardian and that the declarant executed it for the purposes expressed in the declaration. The declarant then signed this declaration and we believe the declarant to be of sound mind. We now sign our names as attesting witnesses on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

Subscribed and sworn to before me by the above named declarant, and affiants, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public in and for the State of Texas

My \_\_\_\_\_ Commission Expires: \_\_\_\_\_

(l) A declaration that is executed as provided by Subsection (k) of this section is considered self-proved to the same extent a declaration executed with a self-proving affidavit under Subsection (i) of this section is considered self-proved.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(a) of HB 3080 provides: "Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act."

**Sec. 681. PERSONS DISQUALIFIED TO SERVE AS GUARDIANS.**

A person may not be appointed guardian if the person is:

(1)-(8) [No change]

(9) a person disqualified in a declaration made under Section 679 of this code; [ø]

(10) a nonresident person who has not filed with the court the name of a resident agent to accept service of process in all actions or proceedings relating to the guardianship; or

(11) a person who does not have the certification to serve as guardian that is required by Section 697B of this code.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (SB 1053), effective September 1, 2009.

**Sec. 687. EXAMINATIONS AND REPORTS.**

(a) Except as provided by Subsection (c) of this section, the [The] court may not grant an application to create a guardianship for an incapacitated person, other than a minor[~~, person whose alleged incapacity is mental retardation,~~] or person for whom it is necessary to have a guardian appointed only to receive funds from a governmental source, unless the applicant presents to the court a written letter or certificate from a physician licensed in this state that is dated not earlier than the 120th day before the date of the filing of the application and based on an examination the physician performed not earlier than the 120th day before the date of the filing of the application. The letter or certificate must:

(1) describe the nature, ~~and~~ degree, and severity of incapacity, including functional deficits, if any, regarding the proposed ward's ability to:

(A) handle business and managerial matters;

(B) manage financial matters;

(C) operate a motor vehicle;

(D) make personal decisions regarding residence, voting, and marriage; and

(E) consent to medical, dental, psychological, or psychiatric treatment [the medical history if reasonably available];

(2) provide an evaluation of the proposed ward's physical condition and mental function and summarize the proposed ward's medical history if reasonably available ~~[a medical prognosis specifying the estimated severity of the incapacity];~~

(3) state how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the person's physical or mental health, including the proposed ward's ability to:

(A) understand or communicate;

(B) recognize familiar objects and individuals;

(C) perform simple calculations;

(D) reason logically; and

(E) administer to daily life activities;

(4) state whether any current medication affects the demeanor of the proposed ward or the proposed ward's ability to participate fully in a court proceeding;

(5) describe the precise physical and mental conditions underlying a diagnosis of a mental disability, and state whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting ~~[senility, if applicable];~~

(6) in providing a description under Subdivision (1) of this subsection regarding the proposed ward's ability to operate a motor vehicle and make personal decisions regarding voting, state whether in the physician's opinion the proposed ward:

(A) has the mental capacity to vote in a public election; and

(B) has the ability to safely operate a motor vehicle; and

(7) include any other information required by the court.

(b) ~~If [Except as provided by Subsection (e) of this section, if]~~ the court determines it is necessary, the court may appoint the necessary physicians to examine the proposed ward. The court must make its determination with respect to the necessity for a physician's examination of the proposed ward at a hearing held for that purpose. Not later than the fourth day before the date of the hearing, the applicant shall give to the proposed ward and the proposed ward's attorney ad litem written notice specifying the purpose and the date and time of the hearing. A physician who examines the proposed ward, other than a physician or psychologist who examines the proposed ward under Subsection ~~(c)(2)~~ ~~[(e)]~~ of this section, shall make available to an attorney ad litem appointed to represent the proposed ward, for inspection, a written letter or certificate from the physician that complies with the requirements of Subsection (a) of this section.

(c) If the basis of the proposed ward's alleged incapacity is mental retardation, the court may not grant an application to create a guardianship for the proposed ward unless the applicant presents to the court:

(1) a written letter or certificate that:

(A) complies with Subsection (a) of this section; and

(B) states that the physician has made a determination of mental retardation in accordance with Section 593.005, Health and Safety Code; or

(2) both:

~~(A) [shall be examined by a physician or psychologist licensed in this state or certified by the Texas Department of Mental Health and Mental Retardation to perform the examination, unless there is] written documentation showing [filed with the court that shows] that, not earlier than 24 months before the date of the hearing, the proposed ward has been examined by a physician or psychologist licensed in this state or certified by the Department of Aging and Disability Services to perform the examination, in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind; and~~

~~(B) the physician's or psychologist's [according to the rules adopted by the Texas Department of Mental Health and Mental Retardation not earlier than 24 months before the date of a hearing to appoint a guardian for the proposed ward. The physician or psychologist shall conduct the examination according to the rules adopted by the Texas Department of Mental Health and Mental Retardation and shall submit] written findings and recommendations, including a statement as to whether the physician or psychologist has made a determination of mental retardation in accordance with Section 593.005, Health and Safety Code [to the court].~~

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 2344), effective September 1, 2009. Section 2 of SB 2344 provides: "The changes in law made by this Act to Section 687, Texas Probate Code, apply only to an application for the creation of a guardianship filed on or after the effective date of this Act. An application for the creation of a guardianship filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."*

#### **Sec. 695. APPOINTMENT OF SUCCESSOR GUARDIAN.**

(a)-(b) [No change]

(c) The court may appoint the Department of Aging and Disability Services as a successor guardian of the person or estate, or both, of a ward who has been adjudicated as totally incapacitated if:

(1) there is no less restrictive alternative to continuation of the guardianship;

(2) there is no family member or other suitable person, including a guardianship program, willing and able to serve as the ward's successor guardian;

(3) the ward is located more than 100 miles from the court that created the guardianship;

(4) the ward has private assets or access to government benefits to pay for the needs of the ward;

(5) the department is served with citation and a hearing is held regarding the department's appointment as proposed successor guardian; and

(6) the appointment of the department does not violate a limitation imposed by Subsection (d) of this section.

(d) The number of appointments under Subsection (c) of this section is subject to an annual limit of 55. The appointments must be distributed equally or as near as equally as possible among the health and human services regions of this state. The Department of Aging and Disability Services at its discretion may establish a different distribution scheme to promote the efficient use and administration of resources.

(e) If the Department of Aging and Disability Services is named as a proposed successor guardian in an application in which the department is not the applicant, citation must be issued and served on the department as provided by Section 633(c)(5) of this code.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 271, effective immediately upon enactment). Section 4 of SB 271 provides: "If before implementing any provision of this Act a state agency determines that a waiver or authorization from a federal agency is necessary for implementation of that provision, the agency affected by the provision shall request the waiver or authorization and may delay implementing that provision until the waiver or authorization is granted."*

*Sections 5 of SB 271 provides: "This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for*



immediate effect, this Act takes effect September 1, 2009.”

**Sec. 697. REGISTRATION OF PRIVATE PROFESSIONAL GUARDIANS.**

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

(1) educational background and professional experience;

(2) three or more professional references;

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

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

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

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

(7) the certification number or provisional certification number issued by the Guardianship Certification Board to the private professional guardian or person.

(e) Not later than January 31 ~~[February 1]~~ of each year, the clerk shall submit to the Guardianship Certification Board ~~[and the Health and Human Services Commission]~~ the names and business addresses of private professional guardians who have satisfied the registration requirements under this section during the preceding year.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 1055), effective September 1, 2009.

**Sec. 697A. LIST OF CERTAIN PUBLIC GUARDIANS MAINTAINED BY COUNTY CLERKS OR GUARDIANSHIP CERTIFICATION BOARD.**

(a) Not later than January 31 of each year, each ~~[Each]~~ guardianship program operating in a county shall submit ~~[annually]~~ to the county clerk a copy of the report submitted to the Guardianship Certification Board under Section 111.044, Government Code ~~[statement containing the name, address, and telephone number of each individual employed by or volunteering or contracting with the program to provide guardianship services to a ward or proposed ward of the program].~~

(b) Not later than January 31 ~~[February 1]~~ of each year, the Department of Aging and Disability Services shall submit to the Guardianship Certification Board a statement containing:

(1) the name, address, and telephone number of each department employee who is or will be providing guardianship services to a ward or proposed ward on behalf of the department; and

(2) the name of each ~~[the]~~ county ~~[or counties]~~ in which each employee named in Subdivision (1) of this subsection is providing or is authorized to provide those services.

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

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 1055), effective September 1, 2009.

**Sec. 698. ACCESS TO CRIMINAL HISTORY RECORDS.**

(a) Except as provided by Subsections (a-1), ~~[and]~~ (a-5), and (a-6) of this section, the clerk of the county having venue over the proceeding for the appointment of a guardian shall obtain criminal history record information that is maintained by the Department of Public Safety or the Federal Bureau of Investigation identification division relating to:

(1)-(5) [No change]

(a-6) The clerk described by Subsection (a) of this section is not required to obtain criminal history record information for a person who holds a certificate issued under Section 111.042, Government Code, or a provisional certificate issued under Section 111.0421, Government Code, if the Guardianship Certification Board conducted a criminal history check on the person before issuing or renewing the certificate. The board shall provide to the clerk at the court's request the criminal history record information that was obtained from the Department of Public Safety or the Federal Bureau of Investigation.

(b) The criminal history record information obtained or provided under Subsection (a), [Ø] (a-5), or (a-6) of this section is for the exclusive use of the court and is privileged and confidential. The criminal history record information may not be released or otherwise disclosed to any person or agency except on court order or consent of the person being investigated. The county clerk may destroy the criminal history information records after the records are used for the purposes authorized by this section.

(b-1) The criminal history record information obtained under Subsection (a-4) of this section is for the exclusive use of the court or Guardianship Certification Board, as appropriate, and is privileged and confidential. The information may not be released or otherwise disclosed to any person or agency except on court order, with the [Ø] consent of the person being investigated, or as authorized by Subsection (a-6) of this section or Section 411.1386(a-6), Government Code. The county clerk or Guardianship Certification Board may destroy the criminal history record information after the information is used for the purposes authorized by this section.

(c)-(f) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (SB 1057, effective immediately upon enactment). Sections 4, 5, and 6 of SB 1057 provide:*

*SECTION 4. The changes in law made by this Act apply to a proceeding for the appointment of a guardian that is pending or filed on or after the effective date of this Act.*

*SECTION 5. Notwithstanding Section 4 of this Act, the requirement that the Guardianship Certification*

*Board provide criminal history record information to a county clerk on request that is imposed by Subsection (a-6), Section 411.1386, Government Code, as added by this Act, and Subsection (a-6), Section 698, Texas Probate Code, as added by this Act, applies only with respect to criminal history record information obtained by the board on or after January 1, 2009.*

*SECTION 6. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2009.*

**Sec. 753. MONEY BECOMING DUE PENDING FINAL DISCHARGE.**

Money or any other thing of value falling due to the estate or ward while the account for final settlement is pending, other than money or any other thing of value held under Section 703(c) of this code, until the order of final discharge of the guardian is entered in the judge's guardianship docket [~~minutes of the court~~], may be paid, delivered, or tendered to the emancipated ward, the guardian, or the personal representative of the deceased ward's estate, who shall issue a receipt for the money or other thing of value, and the obligor or payor shall be discharged of the obligation for all purposes.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 585, effective immediately upon enactment).*

**Sec. 761. REMOVAL.**

(a)-(c) [No change]

(c-1) In addition to the authority granted to the court under Subsection (c) of this section, the court may, on the complaint of the Guardianship Certification Board, remove a guardian who would be ineligible for appointment under Section 681 of this code because of the guardian's failure to maintain the certification required under Section 697B of this code. The guardian shall be cited to appear and contest the request for removal under this subsection in the manner provided by Subsection (c) of this section.

(d)-(g) [No change]

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_  
(SB 1053), effective September 1, 2009.

**Sec. 767. POWERS AND DUTIES OF GUARDIANS OF THE PERSON.**

(a) [No change]

(b) Notwithstanding Subsection (a)(4) of this section, a guardian of the person of a ward has the power to personally transport the ward or to direct the ward's transport by emergency medical services or other means to an inpatient mental health facility for a preliminary examination in accordance with Subchapters A and C, Chapter 573, Health and Safety Code.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_  
(HB 3080), effective September 1, 2009.  
Section 14(a) of HB 3080 provides: "Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act."

**Sec. 849. POOLING OR UNITIZATION OF ROYALTY OR MINERALS.**

(a)-(b) [No change]

(c) The guardian of the estate shall file with the county clerk of the county in which the guardianship proceeding is pending the guardian's written application for authority to enter into a pooling or unitization agreement supplementing, amending, or otherwise relating to, any existing lease covering property owned by the estate, or to commit royalties or other interest in minerals, whether subject to lease or not, to a pooling or unitization agreement. The application must also describe the property sufficiently as required in the original application to lease, describe briefly the lease to which the interest of the estate is subject, and set out the reasons the proposed agreement concerning the property should be made. A true copy of the proposed agreement shall be attached to the application and by reference made a part of the application, but the agreement may not be recorded in the judge's guardianship docket ~~[minutes]~~. The clerk shall immediately, after the application is filed, call it to the attention of the judge.

(d)-(f) [No change]

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_  
(HB 585, effective immediately upon enactment).

**Sec. 867. CREATION OF MANAGEMENT TRUST.**

(a)-(b-2) [No change]

(b-3) The court shall conduct a hearing to determine incapacity under Subsection (b-1) of this section using the same procedures and evidentiary standards as required in a hearing for the appointment of a guardian for a proposed ward. The court shall appoint an attorney ad litem and, if necessary, may appoint a guardian ad litem, to represent the interests of the alleged incapacitated person in the proceeding.

(c) Subject to Subsection (d) of this section, [If the value of the trust's principal is \$50,000 or less, the court may appoint a person other than a financial institution to serve as trustee of the trust only] if the court finds that it is [the appointment to be] in the ward's or incapacitated person's best interests, the court may appoint a person or entity that meets the requirements of Subsection (e) of this section to serve as trustee of the trust instead of appointing a financial institution to serve in that capacity.

(d) If the value of the trust's principal is more than \$150,000 ~~[\$50,000]~~, the court may appoint a person or entity other than a financial institution in accordance with Subsection (c) of this section to serve as trustee of the trust only if the court, in addition to the finding required by that subsection, finds that the applicant for the creation of the trust, after the exercise of due diligence, has been unable to find a[-

~~[(1) no]~~ financial institution in the geographic area ~~[is]~~ willing to serve as trustee~~[-and~~

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

(e) The following are eligible for appointment as trustee under Subsection (c) or (d) of this section:

(1) an individual, including an individual who is certified as a private professional guardian;

(2) a nonprofit corporation qualified to serve as a guardian; and

~~(3) a guardianship program [Before making a finding that there is no financial institution willing to serve as trustee under Subsection (d)(1) of this section, the court must check any list of corporate fiduciaries located in this state that is maintained at the office of the presiding judge of the statutory probate courts or at the principal office of the Texas Bankers Association].~~

(f) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(c) of HB 3080 provides: "Sections 867 and 870, Texas Probate Code, as amended by this Act, and Section 868C, Texas Probate Code, as added by this Act, apply to an application for the creation, modification, or termination of a management trust under Subpart N, Part 4, Chapter XIII, Texas Probate Code, that is filed on or after the effective date of this Act. An application for the creation, modification, or termination of a management trust filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."*

#### **Sec. 868. TERMS OF MANAGEMENT TRUST.**

(a) Except as provided by Subsection (d) of this section, a trust created under Section 867 of this code must provide that:

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

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

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

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

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

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

~~(B) determined, paid, reduced, and eliminated in the same manner as compensation of a guardian of an estate under Section 665 of this code.~~

(b)-(f) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(a) of HB 3080 provides: "Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act."*

#### **Sec. 868C. TRANSFER OF MANAGEMENT TRUST PROPERTY TO POOLED TRUST.**

(a) If the court determines that it is in the ward's or incapacitated person's best interests, the court may order the transfer of all property in a management trust created under Section 867 of this code to a subaccount of a pooled trust established in accordance with Subpart I, Part 5, of this chapter. The transfer of property from the management trust to the subaccount of the pooled trust shall be treated as a continuation of the management trust and may not be treated as the establishment of a new trust for purposes of 42 U.S.C. Section 1396p(d)(4)(A) or (C) or otherwise for purposes of the ward's or incapacitated person's eligibility for medical assistance under Chapter 32, Human Resources Code.

(b) The court may not allow termination of the management trust created under Section 867 of this code from which property is transferred under this section until all of the property in the management trust has been transferred to the subaccount of the pooled trust.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3080), effective September 1, 2009.*

*Section 14(c) of HB 3080 provides: “Sections 867 and 870, Texas Probate Code, as amended by this Act, and Section 868C, Texas Probate Code, as added by this Act, apply to an application for the creation, modification, or termination of a management trust under Subpart N, Part 4, Chapter XIII, Texas Probate Code, that is filed on or after the effective date of this Act. An application for the creation, modification, or termination of a management trust filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.”*

**Sec. 870. TERMINATION OF TRUST.**

(a) [No change]

(b) If the ward or incapacitated person is not a minor, the trust terminates on the date the court determines that continuing the trust is no longer in the ward's or incapacitated person's best interests, subject to Section 868C(b) of this code, or on the death of the ward or incapacitated person.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(c) of HB 3080 provides: “Sections 867 and 870, Texas Probate Code, as amended by this Act, and Section 868C, Texas Probate Code, as added by this Act, apply to an application for the creation, modification, or termination of a management trust under Subpart N, Part 4, Chapter XIII, Texas Probate Code, that is filed on or after the effective date of this Act. An application for the creation, modification, or termination of a management trust filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose.”*

**Sec. 875. TEMPORARY GUARDIAN—PROCEDURE.**

(a)-(j) [No change]

(k) If an application for a temporary guardianship, for the conversion of a temporary guardianship to a permanent guardianship, or for a permanent guardianship is challenged or contested, the court, on the court's own motion or on the motion of any interested party, may appoint a [new] temporary guardian or grant a temporary restraining order under Rule 680, Texas Rules of Civil

Procedure, or both, without issuing additional citation if the court finds that the appointment or the issuance of the order is necessary to protect the proposed ward or the proposed ward's estate.

(l) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(a) of HB 3080 provides: “Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act.”*

**Sec. 885. RECEIVERSHIP.**

(a) When the estate of a minor or other incapacitated person or any portion of the estate of the minor or other incapacitated person appears in danger of injury, loss, or waste and in need of a guardianship or other representative and there is no guardian of the estate who is qualified in this state and a guardian is not needed, the county judge of the county in which the minor or other incapacitated person resides or in which the endangered estate is located shall enter an order, with or without application, appointing a suitable person as receiver to take charge of the estate. The court order shall require a receiver appointed under this section to give bond as in ordinary receiverships in an amount the judge deems necessary to protect the estate. The court order shall specify the duties and powers of the receiver as the judge deems necessary for the protection, conservation, and preservation of the estate. The clerk shall enter an order made under this section in the judge's guardianship docket [~~on the minutes of the court~~]. The person who is appointed as receiver shall make and submit a bond for the judge's approval and shall file the bond, when approved, with the clerk. The person who is appointed receiver shall proceed to take charge of the endangered estate pursuant to the powers and duties vested in the person by the order of appointment and subsequent orders made by the judge.

(b) During the pendency of the receivership, when the needs of the minor or other incapacitated person require the use of the income or corpus of the estate for the education, clothing, or subsistence of the minor or other incapacitated person, the judge,

with or without application, shall enter an order in the judge's guardianship docket [~~on the minutes of the court~~] that appropriates an amount of income or corpus that is sufficient for that purpose. The receiver shall use the amount appropriated by the court to pay a claim for the education, clothing, or subsistence of the minor or other incapacitated person that is presented to the judge for approval and ordered by the judge to be paid.

(c)-(f) [No change]

(g) An order or a bond, report, account, or notice in a receivership proceeding must be recorded in the judge's guardianship docket [~~minutes of the court~~].

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 585, effective immediately upon enactment).*

## **SUBPART I. ESTABLISHMENT OF POOLED TRUST SUBACCOUNTS; TRANSFERS**

### **Sec. 910. DEFINITIONS.**

In this subpart:

(1) "Beneficiary" means a minor, a disabled person, or any other incapacitated person for whom a subaccount is established.

(2) "Medical assistance" means benefits and services under the medical assistance program administered under Chapter 32, Human Resources Code.

(3) "Pooled trust" means a trust that meets the requirements of 42 U.S.C. Section 1396p(d)(4)(C) for purposes of exempting the trust from the applicability of 42 U.S.C. Section 1396p(d) in determining the eligibility of a person who is disabled for medical assistance.

(4) "Subaccount" means an account in a pooled trust established solely for the benefit of a beneficiary.

### **Sec. 911. APPLICATION.**

A person interested in the welfare of a minor, a disabled person, or any other incapacitated person may apply to the court for the establishment of a subaccount for the benefit of the minor, disabled

person, or other incapacitated person as the beneficiary.

### **Sec. 912. APPOINTMENT OF ATTORNEY AD LITEM.**

The court shall appoint an attorney ad litem for a person who is a minor or has a mental disability and who is the subject of an application under Section 911 of this code. The attorney ad litem is entitled to a reasonable fee and reimbursement of expenses to be paid from the person's property.

### **Sec. 913. TRANSFER.**

If the court finds that it is in the best interests of a person who is the subject of an application under Section 911 of this code, the court may order:

(1) the establishment of a subaccount of which the person is the beneficiary; and

(2) the transfer to the subaccount of any of the person's property on hand or accruing to the person.

### **Sec. 914. TERMS OF SUBACCOUNT.**

Unless the court orders otherwise, the terms governing the subaccount must provide that:

(1) the subaccount terminates on the earliest of the date of:

(A) the beneficiary's 18th birthday, if the beneficiary is not disabled on that date and was a minor at the time the subaccount was established;

(B) the beneficiary's death; or

(C) an order of the court terminating the subaccount; and

(2) on termination, any property remaining in the beneficiary's subaccount after making any required payments to satisfy the amounts of medical assistance reimbursement claims for medical assistance provided to the beneficiary under this state's medical assistance program and other states' medical assistance programs shall be distributed to:

(A) the beneficiary, if on the date of termination the beneficiary is living and is not incapacitated;

(B) the beneficiary's guardian, if on the date of termination the beneficiary is living and is incapacitated; or

(C) the personal representative of the beneficiary's estate, if the beneficiary is deceased on the date of termination.

**Sec. 915. JURISDICTION EXCLUSIVE.**

Notwithstanding any other law, the court that orders the establishment of a subaccount for a beneficiary has exclusive jurisdiction of a subsequent proceeding or action that relates to both the beneficiary and the subaccount, and the proceeding or action may only be brought in that court.

**Sec. 916. FEES AND ACCOUNTING.**

(a) The manager or trustee of a pooled trust may:

(1) assess fees against a subaccount of that pooled trust established under this subpart in accordance with the manager's or trustee's standard fee structure; and

(2) pay those fees from the subaccount.

(b) If required by the court, the manager or trustee of the pooled trust shall file a copy of the annual report of account with the court clerk.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 3080), effective September 1, 2009. Section 14(d) of HB 3080 provides: "Subpart I, Part 5, Chapter XIII, Texas Probate Code, as added by this Act, applies to an application for the establishment of a subaccount of a pooled trust that is filed on or after the effective date of this Act."*





2009 Amendments to the Texas Probate Code – Changes Affecting Other Provisions

**Sec. 438B. CONVENIENCE SIGNER ON OTHER ACCOUNTS.**

(a) An account established by one or more parties at a financial institution that is not designated as a convenience account, but is instead designated as a single-party account or another type of multiple-party account, may provide that the sums on deposit may be paid or delivered to the parties or to one or more convenience signers "for the convenience of the parties."

(b) Except as provided by Subsection (c) of this section:

(1) the provisions of Section 438A of this chapter apply to an account described by Subsection (a) of this section, including provisions relating to the ownership of the account during the lifetimes and on the deaths of the parties and provisions relating to the powers and duties of the financial institution at which the account is established; and

(2) any other law relating to a convenience signer applies to a convenience signer designated as provided by this section to the extent the law applies to a convenience signer on a convenience account.

(c) On the death of the last surviving party to an account that has a convenience signer designated as provided by this section, the convenience signer does not have a right of survivorship in the account and the estate of the last surviving party owns the account unless the convenience signer is also designated as a P.O.D. payee or as a beneficiary.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3075, effective immediately upon enactment). Section 3 of HB 3075 provides: "The changes in law made by this Act apply to an account with a financial institution for which a convenience signer is designated, regardless of whether the account was established or the convenience signer was designated before, on, or after the effective date of this Act."*

**Sec. 439A. UNIFORM SINGLE-PARTY OR MULTIPLE-PARTY ACCOUNT FORM.**

(a) A contract of deposit that contains provisions substantially the same as in the form

provided by Subsection (b) of this section establishes the type of account selected by a party. The provisions of this part of Chapter XI of this code govern an account selected under the form[ ~~other than a single-party account without a P.O.D. designation~~]. A contract of deposit that does not contain provisions substantially the same as in the form provided by Subsection (b) of this section is governed by the provisions of this chapter applicable to the account that most nearly conforms to the depositor's intent.

(b) A financial institution may use the following form to establish the type of account selected by a party:

UNIFORM SINGLE-PARTY OR MULTIPLE-PARTY ACCOUNT SELECTION FORM NOTICE: The type of account you select may determine how property passes on your death. Your will may not control the disposition of funds held in some of the following accounts. You may choose to designate one or more convenience signers on an account, even if the account is not a convenience account. A designated convenience signer may make transactions on your behalf during your lifetime, but does not own the account during your lifetime. The designated convenience signer owns the account on your death only if the convenience signer is also designated as a P.O.D. payee or trust account beneficiary.

Select one of the following accounts by placing your initials next to the account selected:

\_\_\_\_ (1) SINGLE-PARTY ACCOUNT WITHOUT "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the name of the party:

\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_ (2) SINGLE-PARTY ACCOUNT WITH "P.O.D." (PAYABLE ON DEATH) DESIGNATION. The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate.

Enter the name of the party:

\_\_\_\_\_

Enter the name or names of the P.O.D. beneficiaries:

\_\_\_\_\_

\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_ (3) MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

Enter the names of the parties:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_

\_\_\_\_ (4) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes to the surviving parties.

Enter the names of the parties:

\_\_\_\_\_

\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_ (5) MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND P.O.D. (PAYABLE ON DEATH) DESIGNATION. The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of the last surviving party, the ownership of the account passes to the P.O.D. beneficiaries.

Enter the names of the parties:

\_\_\_\_\_

\_\_\_\_\_

Enter the name or names of the P.O.D. beneficiaries:

\_\_\_\_\_

\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_

\_\_\_\_ (6) CONVENIENCE ACCOUNT. The parties to the account own the account. One or more convenience signers to the account may make account transactions for a party. A convenience signer does not own the account. On the death of the last surviving party, ownership of the account passes as a part of the last surviving party's estate under the last surviving party's will or by intestacy. The financial institution may pay funds in the account to a convenience signer before the financial institution receives notice of the death of the last surviving party. The payment to a convenience signer does not affect the parties' ownership of the account.

Enter the names of the parties:

\_\_\_\_\_  
\_\_\_\_\_

Enter the name(s) [~~names~~] of the convenience signer(s) [~~signers~~]:

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_ (7) TRUST ACCOUNT. The parties named as trustees to the account own the account in proportion to the parties' net contributions to the account. A trustee may withdraw funds from the account. A beneficiary may not withdraw funds from the account before all trustees are deceased. On the death of the last surviving trustee, the ownership of the account passes to the beneficiary. The trust account is not a part of a trustee's estate and does not pass under the trustee's will or by intestacy, unless the trustee survives all of the beneficiaries and all other trustees.

Enter the name or names of the trustees:

\_\_\_\_\_  
\_\_\_\_\_

Enter the name or names of the beneficiaries:

\_\_\_\_\_  
\_\_\_\_\_

Enter the name(s) of the convenience signer(s), if you want one or more convenience signers on this account:

\_\_\_\_\_  
\_\_\_\_\_

(c)-(d) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3075, effective immediately upon enactment). Section 3 of HB 3075 provides: "The changes in law made by this Act apply to an account with a financial institution for which a convenience signer is designated, regardless of whether the account was established or the convenience signer was designated before, on, or after the effective date of this Act."*



2009 Amendments to the Texas Trust Code

**Sec. 111.0035. DEFAULT AND MANDATORY RULES; CONFLICT BETWEEN TERMS AND STATUTE.**

(a) [No change]

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

(1) the requirements imposed under Section 112.031;

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

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

(4) a trustee's duty:

(A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:

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

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

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

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

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

(B) remove a trustee under Section 113.082;

(C) exercise jurisdiction under Section 115.001;

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

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

(6) the applicability of Section 112.038.

(c) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 1969, effective immediately upon enactment). Sections 4(b) and (c) of HB 1969 provide: “(b) Section 112.038, Property Code, as added by this Act, and Section 111.0035(b), Property Code, as amended by this Act, apply to a trust existing on or created on or after the effective date of this Act.*

*“(c) The intent of this Act is to clarify existing law.”*

*Sections 5 of HB 1969 provides: “This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2009.”*

**Sec. 112.010. ACCEPTANCE OR DISCLAIMER BY OR ON BEHALF OF BENEFICIARY.**

(a)-(b) [No change]

(c) Except as provided by Subsection (c-1) ~~of this section~~, the following persons may disclaim an interest in a trust created in any manner other than by will:

(1) a beneficiary, including a beneficiary of a spendthrift trust;

(2) the personal representative of an incompetent, deceased, unborn or unascertained, or minor beneficiary, with court approval by the court having jurisdiction over the personal representative; and

(3) the independent executor or independent administrator of a deceased beneficiary, without court approval.

(c-1) A person authorized to disclaim an interest in a trust under Subsection (c) [~~of this section~~] may not disclaim the interest if the person in the person's [~~his~~] capacity as beneficiary, personal representative, [~~or~~] independent executor, or independent administrator has either exercised dominion and control over the interest or accepted any benefits from the trust.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 2368), effective September 1, 2009. Sections 10(b) and (c) of HB 2368 provide: “(b) Except as otherwise expressly provided by the will, the terms of the trust, or this Act, the changes in law made by this Act apply to:

“(1) a trust existing or created on or after September 1, 2009;

“(2) the estate of a decedent who dies before September 1, 2009, if the probate or administration of the estate is pending as of September 1, 2009; and

“(3) the estate of a decedent who dies on or after September 1, 2009.

“(c) For a trust existing on September 1, 2009, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2009.”

**Sec. 112.038. FORFEITURE CLAUSE.**

A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is unenforceable if:

(1) probable cause exists for bringing the action; and

(2) the action was brought and maintained in good faith.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 1969, effective immediately upon enactment). Sections 4(b) and (c) of HB 1969 provide: “(b) Section 112.038, Property Code, as added by this Act, and Section 111.0035(b), Property Code, as amended by this Act, apply to a trust existing on or created on or after the effective date of this Act.

“(c) The intent of this Act is to clarify existing law.”

Sections 5 of HB 1969 provides: “This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2009.”

**Sec. 113.029. DISCRETIONARY POWERS; TAX SAVINGS.**

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to Subsection (d), and unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply:

(1) a person, other than a settlor, who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power the exercise of which is limited or prohibited by Subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not limited or prohibited by Subsection (b). If the power of all trustees is limited or prohibited by Subsection (b), the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined by Section 2056(b)(5) or 2523(e), Internal Revenue Code of 1986, was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c), Internal Revenue Code of 1986.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 2368), effective September 1, 2009. Section 10(a) of HB 2368 provides: "The changes in law made by Section 113.029, Property Code, as added by this Act, apply only to a trust that is created or becomes irrevocable on or after September 1, 2009."*

**Sec. 113.029. RELOCATION OF ADMINISTRATION OF CHARITABLE TRUST.**

(a) In this section:

(1) "Charitable entity" has the meaning assigned by Section 123.001.

(2) "Charitable trust" means a trust:

(A) the stated purpose of which is to benefit only one or more charitable entities; and

(B) that qualifies as a charitable entity.

(3) "Trust administration" means the grant-making function of the trust.

(b) Except as provided by this section or specifically authorized by the terms of a trust, the trustee of a charitable trust may not change the location in which the trust administration takes place from a location in this state to a location outside this state.

(c) If the trustee decides to change the location in which the trust is administered from a location in this state to a location outside this state, the trustee shall:

(1) if the settlor is living and not incapacitated:

(A) consult the settlor concerning the selection of a new location for the administration of the trust; and

(B) submit the selection to the attorney general; or

(2) if the settlor is not living or is incapacitated:

(A) propose a new location; and

(B) submit the proposal to the attorney general.

(d) The trustee may file an action in the district court or statutory probate court in which the trust was created seeking a court order authorizing the trustee to change the location in which the trust is administered to a location outside this state. The court may exercise its equitable powers to effectuate the original purpose of the trust.

(e) Except as provided by Subsection (b), the location in which the administration of the trust takes place may not be changed to a location outside this state unless:

(1) the charitable purposes of the trust would not be impaired if the trust administration is moved; and

(2) a district court or statutory probate court authorizes the relocation.

(f) The attorney general may bring an action to enforce the provisions of this section. If a trustee of a charitable trust fails to comply with the provisions of this section, the district court or statutory probate court in the county in which the trust administration was originally located may remove the trustee and appoint a new trustee. Costs of a proceeding to remove a trustee, including reasonable attorney's fees, may be assessed against the removed trustee. This provision is in addition to and does not supersede the provisions of Chapter 123.

(g) This section does not affect a trustee's authority to sell real estate owned by a charitable trust.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 666), effective September 1, 2009. Section 2 of SB 666 provides: "Except as otherwise provided by*

*a will, the terms of a trust, or this Act, the changes in law made by this Act apply to: (1) a trust existing or created on or after September 1, 2009; (2) the estate of a decedent who dies before September 1, 2009, if the probate or administration of the estate is pending on or after September 1, 2009; and (3) the estate of a decedent who dies on or after September 1, 2009.”*

**Sec. 113.085. EXERCISE OF POWERS BY MULTIPLE TRUSTEES.**

(a)-(b) [No change]

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

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

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

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

(e) [No change]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 3635), effective September 1, 2009. Section 2 of HB 3635 provides: “Section 113.085, Property Code, as amended by this Act, applies only to a trust existing on or after September 1, 2009, regardless of the date the trust was created.”*

**Sec. 115.013. PLEADINGS AND JUDGMENTS.**

(a)-(c) [No change]

(d) Notice under Section 115.015 [~~115.014 of this Act~~] shall be given either to a person who will

be bound by the judgment or to one who can bind that person under this section, and notice may be given to both. Notice may be given to unborn or unascertained persons who are not represented under Subdivision (1) or (2) of Subsection (c) by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_\_ (HB 2368), effective September 1, 2009. Sections 10(b) and (c) of HB 2368 provide: “(b) Except as otherwise expressly provided by the will, the terms of the trust, or this Act, the changes in law made by this Act apply to:*

*“(1) a trust existing or created on or after September 1, 2009;*

*“(2) the estate of a decedent who dies before September 1, 2009, if the probate or administration of the estate is pending as of September 1, 2009; and*

*“(3) the estate of a decedent who dies on or after September 1, 2009.*

*“(c) For a trust existing on September 1, 2009, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2009.”*

**Sec. 115.014. GUARDIAN OR ATTORNEY AD LITEM.**

(a) [No change]

(b) At any point in a proceeding a court may appoint an attorney ad litem to represent any interest that the court considers necessary, including an attorney [~~A court shall appoint a guardian~~] ad litem to defend an action under Section 114.083 [~~of this Act~~] for a beneficiary of the trust who is a minor or who has been adjudged incompetent.

(c) [No change]

(d) A guardian ad litem is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding.

(e) An attorney ad litem is entitled to reasonable compensation for services in the amount set by the court in the manner provided by Section 114.064.



Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 2368), effective September 1, 2009. Sections 10(b) and (c) of HB 2368 provide: “(b) Except as otherwise expressly provided by the will, the terms of the trust, or this Act, the changes in law made by this Act apply to:

“(1) a trust existing or created on or after September 1, 2009;

“(2) the estate of a decedent who dies before September 1, 2009, if the probate or administration of the estate is pending as of September 1, 2009; and

“(3) the estate of a decedent who dies on or after September 1, 2009.

“(c) For a trust existing on September 1, 2009, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2009.”

#### **Sec. 116.006. JUDICIAL CONTROL OF DISCRETIONARY POWER.**

(a)-(c) [No change]

(d) If the trustee of a trust reasonably believes that one or more beneficiaries of such trust will object to the manner in which the trustee intends to exercise or not exercise a discretionary power conferred by Section 116.005 [~~of this chapter~~], the trustee may petition the court having jurisdiction over the trust, and the court shall determine whether the proposed exercise or nonexercise by the trustee of such discretionary power will result in an abuse of the trustee's discretion. The trustee shall state in such petition the basis for its belief that a beneficiary would object. The failure or refusal of a beneficiary to sign a waiver or release is not reasonable grounds for a trustee to believe the beneficiary will object. The court may appoint one or more guardians ad litem or attorneys ad litem pursuant to Section 115.014 [~~of this subtitle~~]. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the trustee relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an

abuse of discretion. The trustee shall advance from the trust principal all costs incident to the judicial determination, including the reasonable attorney's fees and costs of the trustee, any beneficiary or beneficiaries who are parties to the action and who retain counsel, [~~and~~] any guardian ad litem, and any attorney ad litem. At the conclusion of the proceeding, the court may award costs and reasonable and necessary attorney's fees as provided in Section 114.064 [~~of this subtitle~~], including, if the court considers it appropriate, awarding part or all of such costs against the trust principal or income, awarding part or all of such costs against one or more beneficiaries or such beneficiary's or beneficiaries' share of the trust, or awarding part or all of such costs against the trustee in the trustee's individual capacity, if the court determines that the trustee's exercise or nonexercise of discretionary power would have resulted in an abuse of discretion or that the trustee did not have reasonable grounds for believing one or more beneficiaries would object to the proposed exercise or nonexercise of the discretionary power.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 2368), effective September 1, 2009. Sections 10(b) and (c) of HB 2368 provide: “(b) Except as otherwise expressly provided by the will, the terms of the trust, or this Act, the changes in law made by this Act apply to:

“(1) a trust existing or created on or after September 1, 2009;

“(2) the estate of a decedent who dies before September 1, 2009, if the probate or administration of the estate is pending as of September 1, 2009; and

“(3) the estate of a decedent who dies on or after September 1, 2009.

“(c) For a trust existing on September 1, 2009, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2009.”

#### **Sec. 116.172. DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR PAYMENTS.**

(a) In this section:

(1) “Future payment asset” means the asset from which a payment is derived.

(2) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer [~~including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan~~].

(3) "Separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b)-(g) [No change]

(h) Subsections (j) and (k) apply and Subsections (b) and (c) do not apply in determining the allocation of a payment made from a separate fund to:

(1) a trust to which an election to qualify for a marital deduction under Section 2056(b)(7), Internal Revenue Code of 1986, has been made; or

(2) a trust that qualifies for the marital deduction under Section 2056(b)(5), Internal Revenue Code of 1986 [~~If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction~~].

(i) Subsections (h), (j), and (k) do not apply if and to the extent that a series of payments would, without the application of Subsection (h), qualify for the marital deduction under Section 2056(b)(7)(C), Internal Revenue Code of 1986.

(j) The trustee shall determine the internal income of the separate fund for the accounting period as if the separate fund were a trust subject to this code. On request of the surviving spouse, the trustee shall demand of the person administering the separate fund that this internal income be distributed to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund, and the balance to the principal. On request of the surviving spouse, the trustee shall allocate principal to income to the

extent the internal income of the separate fund exceeds payments made to the trust during the accounting period from the separate fund.

(k) If the trustee cannot determine the internal income of the separate fund but can determine the value of the separate fund, the internal income of the separate fund shall be four percent of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund shall be the product of the interest rate and the present value of the expected future payments, as determined under Section 7520, Internal Revenue Code of 1986, for the month preceding the accounting period for which the computation is made.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 2368), effective September 1, 2009. Sections 10(b) and (c) of HB 2368 provide: "(b) Except as otherwise expressly provided by the will, the terms of the trust, or this Act, the changes in law made by this Act apply to:*

*"(1) a trust existing or created on or after September 1, 2009;*

*"(2) the estate of a decedent who dies before September 1, 2009, if the probate or administration of the estate is pending as of September 1, 2009; and*

*"(3) the estate of a decedent who dies on or after September 1, 2009.*

*"(c) For a trust existing on September 1, 2009, that was created before that date, the changes in law made by this Act apply only to an act or omission relating to the trust that occurs on or after September 1, 2009."*

2009 Selected Amendments to the Texas Property Code (Other than the Trust Code)

**Sec. 41.0021. HOMESTEAD IN QUALIFYING TRUST.**

(a) In this section, "qualifying trust" means an express trust:

(1) in which the instrument or court order creating the express trust provides that a settlor or beneficiary of the trust has the right to:

(A) revoke the trust without the consent of another person;

(B) exercise an inter vivos general power of appointment over the property that qualifies for the homestead exemption; or

(C) use and occupy the residential property as the settlor's or beneficiary's principal residence at no cost to the settlor or beneficiary, other than payment of taxes and other costs and expenses specified in the instrument or court order:

(i) for the life of the settlor or beneficiary;

(ii) for the shorter of the life of the settlor or beneficiary or a term of years specified in the instrument or court order; or

(iii) until the date the trust is revoked or terminated by an instrument or court order recorded in the real property records of the county in which the property is located and that describes the property with sufficient certainty to identify the property; and

(2) the trustee of which acquires the property in an instrument of title or under a court order that:

(A) describes the property with sufficient certainty to identify the property and the interest acquired; and

(B) is recorded in the real property records of the county in which the property is located.

(b) Property that a settlor or beneficiary occupies and uses in a manner described by this

subchapter and in which the settlor or beneficiary owns a beneficial interest through a qualifying trust is considered the homestead of the settlor or beneficiary under Section 50, Article XVI, Texas Constitution, and Section 41.001.

(c) A married person who transfers property to the trustee of a qualifying trust must comply with the requirements relating to the joinder of the person's spouse as provided by Chapter 5, Family Code.

(d) A trustee may sell, convey, or encumber property transferred as described by Subsection (c) without the joinder of either spouse unless expressly prohibited by the instrument or court order creating the trust.

(e) This section does not affect the rights of a surviving spouse or surviving children under Section 52, Article XVI, Texas Constitution, or Part 3, Chapter VIII, Texas Probate Code.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (HB 3767), effective September 1, 2009. Section 2 of HB 3767 provides: "This Act applies only to a transfer that is effective on or after the effective date of this Act. A transfer that is effective before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose."*

*[Note: The text of Section 123.005 as amended by both SB 918 and SB 408 is reproduced below. SB 408 had the last legislative vote of the two bills. See the text of Government Code Section 312.014 reproduced below.]*

*Government Code Section 312.014 provides:*

*Sec. 312.014. IRRECONCILABLE AMENDMENTS.*

*(a) If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.*

*(b) If amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are*

irreconcilable, the latest in date of enactment prevails.

(c) In determining whether amendments to the same statute enacted at the same session of the legislature are irreconcilable, text that is reenacted because of the requirement of Article III, Section 36, of the Texas Constitution is not considered to be irreconcilable with additions or omissions in the same text made by another amendment. Unless clearly indicated to the contrary, an amendment that reenacts text in compliance with that constitutional requirement does not indicate legislative intent that the reenacted text prevail over changes in the same text made by another amendment, regardless of the relative dates of enactment.

(d) In this section, the date of enactment is the date on which the last legislative vote is taken on the bill enacting the statute.

(e) If the journals or other legislative records fail to disclose which of two or more bills in conflict is latest in date of enactment, the date of enactment of the respective bills is considered to be, in order of priority:

(1) the date on which the last presiding officer signed the bill;

(2) the date on which the governor signed the bill; or

(3) the date on which the bill became law by operation of law.

**Sec. 123.005. BREACH OF FIDUCIARY DUTY; VENUE.**

~~[(a)]~~ Venue in a proceeding brought by the attorney general alleging breach of a fiduciary duty by a charitable entity or a fiduciary or managerial agent of a charitable trust shall be a court of competent jurisdiction in Travis County or in the county where the defendant resides or has its principal office.

~~[(b) The attorney general, if successful in the proceeding, is entitled to recover from a fiduciary or managerial agent of a charitable trust actual costs incurred in bringing the suit and may recover reasonable attorney's fees.]~~

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 918), effective September 1, 2009. Section 3 of SB 918 provides: "The change in law made by this

Act applies only to a proceeding commenced on or after the effective date of this Act. A proceeding commenced before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose."

**Sec. 123.005. BREACH OF FIDUCIARY DUTY.**

(a) Venue in a proceeding brought by the attorney general alleging breach of a fiduciary duty by a fiduciary or managerial agent of a charitable trust shall be a court of competent jurisdiction in Travis County or in the county where the defendant resides or has its principal office. To the extent of a conflict between this subsection and any provision of the Texas Probate Code providing for venue of a proceeding brought with respect to a charitable trust created by a will that has been admitted to probate, this subsection controls.

(b) [No change]

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 408), effective September 1, 2009. Section 12(i) of SB 408 provides: "(i) The changes in law made by this section apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose."

**Sec. 123.006. ATTORNEY'S FEES.**

(a) In a proceeding subject to Section 123.005, the attorney general, if successful in the proceeding, is entitled to recover from the charitable entity or fiduciary or managerial agent of the charitable trust actual costs incurred in bringing the suit and may recover reasonable attorney's fees.

(b) In a proceeding in which the attorney general intervenes under this chapter, other than a proceeding subject to Section 123.005, a court may award the attorney general court costs and reasonable and necessary attorney's fees as may seem equitable and just.

Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 918), effective September 1, 2009. Section 3 of SB 918 provides: "The change in law made by this Act applies only to a proceeding commenced on or

*after the effective date of this Act. A proceeding commenced before the effective date of this Act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.”*



2009 Selected Amendments to the Texas Family Code

**Sec. 3.007. PROPERTY INTEREST IN CERTAIN EMPLOYEE BENEFITS.**

(a)-(b) [Repealed]

(c) [No change]

(d) A spouse who is a participant in an employer-provided stock option plan or an employer-provided restricted stock plan has a separate property interest in the options or restricted stock granted to the spouse under the plan as follows:

(1) if the option or stock was granted to the spouse before marriage but required continued employment during marriage before the grant could be exercised or the restriction removed, the spouse's separate property interest is equal to the fraction of the option or restricted stock in which:

(A) the numerator is the sum of:

(i) the period from the date the option or stock was granted until the date of marriage; and

(ii) if the option or stock also required continued employment following the date of dissolution of the marriage before the grant could be exercised or the restriction removed, the period from the date of dissolution of the marriage until the date the grant could be exercised or the restriction removed; and

(B) the denominator is the period from the date the option or stock was granted until the date the grant could be exercised or the restriction removed; and

(2) if the option or stock was granted to the spouse during the marriage but required continued employment following the date of dissolution of the [after] marriage before the grant could be exercised or the restriction removed, the spouse's separate property interest is equal to the fraction of the option or restricted stock in which:

(A) the numerator is the period from the date of dissolution [~~or termination~~] of the marriage

until the date the grant could be exercised or the restriction removed; and

(B) the denominator is the period from the date the option or stock was granted until the date the grant could be exercised or the restriction removed.

(e) [No change]

(f) [Repealed]

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 666), effective September 1, 2009. Sections 12, 13, and 14 of SB 666 provide:*

*SECTION 12. The changes in law made by this Act to Section 3.007, Family Code, apply to:*

*(1) a suit for dissolution of a marriage pending before a trial court on or filed on or after the effective date of this Act; and*

*(2) the estate of a person who dies on or after the effective date of this Act.*

*SECTION 13. (a) In regard to a claim under Subchapter E, Chapter 3, Family Code, that arises from a suit for dissolution of a marriage, the changes in law made by this Act to that subchapter apply only to a claim made in a suit filed on or after the effective date of this Act. A claim made in a suit filed before the effective date of this Act is governed by the law in effect on the date the suit was filed, and the former law is continued in effect for that purpose.*

*(b) In regard to a claim under Subchapter E, Chapter 3, Family Code, that arises from the death of a spouse, the changes in law made by this Act to that subchapter apply only to a claim arising from a death that occurs on or after the effective date of this Act. A claim arising from a death that occurs before the effective date of this Act is governed by the law in effect on the date of death, and the former law is continued in effect for that purpose.*

*SECTION 14. The changes in law made by this Act to Chapter 9, Family Code, apply only to a proceeding commenced under that chapter on or after the effective date of this Act. A proceeding*

commenced under Chapter 9, Family Code, before the effective date of this Act is governed by the law in effect immediately before that date, and the former law is continued in effect for that purpose.

**Sec. 3.202. RULES OF MARITAL PROPERTY LIABILITY.**

(a)-(d) [No change]

(e) For purposes of this section, all retirement allowances, annuities, accumulated contributions, optional benefits, and money in the various public retirement system accounts of this state that are community property subject to the participating spouse's sole management, control, and disposition are not subject to any claim for payment of a criminal restitution judgment entered against the nonparticipant spouse except to the extent of the nonparticipant spouse's interest as determined in a qualified domestic relations order under Chapter 804, Government Code.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 2324), effective September 1, 2009. Sections 2 of SB 2324 provides: "This Act applies only to a claim for payment of a criminal restitution judgment issued on or after the effective date of this Act. A claim for payment of a criminal restitution judgment issued before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose."*

**CHAPTER 3. MARITAL PROPERTY RIGHTS AND LIABILITIES.**

**SUBCHAPTER E. CLAIMS FOR ~~ECONOMIC CONTRIBUTION AND~~ REIMBURSEMENT.**

**Sec. 3.401. DEFINITIONS.**

In this subchapter:

~~[(1) "Claim for economic contribution" means a claim made under this subchapter.~~

~~[(2) "Economic contribution" means the contribution to a marital estate described by Section 3.402.~~

~~[(3) "Equity" means, with respect to specific property owned by one or more marital estates, the amount computed by subtracting from the fair market value of the property as of a specific~~

~~date the amount of a lawful lien specific to the property on that same date.]~~

(4)-(5) [No change]

*See history note following Sec. 3.007.*

**Sec. 3.402. CLAIM FOR REIMBURSEMENT; OFFSETS ~~[ECONOMIC CONTRIBUTION].~~**

(a) For purposes of this subchapter, a claim for reimbursement includes:

(1) payment by one marital estate of the unsecured liabilities of another marital estate;

(2) inadequate compensation for the time, toil, talent, and effort of a spouse by a business entity under the control and direction of that spouse;

~~(3) ["economic contribution" is the dollar amount of:~~

~~[(1)] the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage;~~

~~(2) [(2)] the reduction of the principal amount of a debt secured by a lien on property received by a spouse by gift, devise, or descent during a marriage, to the extent the debt existed at the time the property was received;~~

~~(3) [(3)] the reduction of the principal amount of that part of a debt, including a home equity loan:~~

~~(A) incurred during a marriage;~~

~~(B) secured by a lien on property; and~~

~~(C) incurred for the acquisition of, or for capital improvements to, property;~~

~~(4) [(4)] the reduction of the principal amount of that part of a debt:~~

~~(A) incurred during a marriage;~~

~~(B) secured by a lien on property owned by a spouse;~~

~~(C) for which the creditor agreed to look for repayment solely to the separate marital~~



estate of the spouse on whose property the lien attached; and

(D) incurred for the acquisition of, or for capital improvements to, property;

(7) ~~[(5)]~~ the refinancing of the principal amount described by Subdivisions (3)-(6) ~~[(4)-(4)]~~, to the extent the refinancing reduces that principal amount in a manner described by the applicable ~~[appropriate]~~ subdivision; ~~[and]~~

(8) ~~[(6)]~~ capital improvements to property other than by incurring debt; and

(9) the reduction by the community property estate of an unsecured debt incurred by the separate estate of one of the spouses.

(b) The court shall resolve a claim for reimbursement by using equitable principles, including the principle that claims for reimbursement may be offset against each other if the court determines it to be appropriate.

(c) Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate, except that the separate estate of a spouse may not claim an offset for use and enjoyment of a primary or secondary residence owned wholly or partly by the separate estate against contributions made by the community estate to the separate estate.

(d) Reimbursement for funds expended by a marital estate for improvements to another marital estate shall be measured by the enhancement in value to the benefited marital estate.

(e) The party seeking an offset to a claim for reimbursement has the burden of proof with respect to the offset ~~["Economic contribution" does not include the dollar amount of:~~

~~[(1) expenditures for ordinary maintenance and repair or for taxes, interest, or insurance; or~~

~~[(2) the contribution by a spouse of time, toil, talent, or effort during the marriage].~~

*See history note following Sec. 3.007.*

**~~Sec. 3.403. CLAIM BASED ON ECONOMIC CONTRIBUTION. [Repealed]~~**

*See history note following Sec. 3.007.*

**Sec. 3.404. APPLICATION OF INCEPTION OF TITLE RULE; OWNERSHIP INTEREST NOT CREATED.**

(a) [No change]

(b) A ~~[The]~~ claim for reimbursement ~~[economic contribution created]~~ under this subchapter does not create an ownership interest in property, but does create a claim against the property of the benefited estate by the contributing estate. The claim matures on dissolution of the marriage or the death of either spouse.

*See history note following Sec. 3.007.*

**Sec. 3.406. EQUITABLE LIEN.**

(a) On dissolution of a marriage, the court may ~~[shall]~~ impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against ~~[economic contribution in]~~ that property by a contributing ~~[another]~~ marital estate.

(b) On the death of a spouse, a court may ~~[shall]~~, on application for a claim for reimbursement ~~[of economic contribution]~~ brought by the surviving spouse, the personal representative of the estate of the deceased spouse, or any other person interested in the estate, as defined by Section 3, Texas Probate Code, impose an equitable lien on the property of a benefited marital estate to secure a claim for reimbursement against that property ~~[economic contribution]~~ by a contributing marital estate.

(c) [Repealed]

*See history note following Sec. 3.007.*

**~~Sec. 3.407. OFFSETTING CLAIMS. [Repealed]~~**

*See history note following Sec. 3.007.*

**~~Sec. 3.408. CLAIM FOR REIMBURSEMENT. [Repealed]~~**

*See history note following Sec. 3.007.*

**Sec. 3.410. EFFECT OF MARITAL PROPERTY AGREEMENTS.**

A premarital or marital property agreement, whether executed before, on, or after September 1, 2009 [~~1999~~], that satisfies the requirements of Chapter 4 is effective to waive, release, assign, or partition a claim for economic contribution, reimbursement, or both, under this subchapter to the same extent the agreement would have been effective to waive, release, assign, or partition a claim for economic contribution, reimbursement, or both under the law as it existed immediately before September 1, 2009 [~~1999~~], unless the agreement provides otherwise.

*See history note following Sec. 3.007.*

**Sec. 7.007. DISPOSITION OF CLAIM FOR ~~[ECONOMIC CONTRIBUTION OR CLAIM FOR] REIMBURSEMENT.~~**

~~[(a) In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for economic contribution as provided by Subchapter E, Chapter 3, and in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage, shall:~~

~~[(1) order a division of a claim for economic contribution of the community marital estate to the separate marital estate of one of the spouses;~~

~~[(2) order that a claim for an economic contribution by one separate marital estate of a spouse to the community marital estate of the spouses be awarded to the owner of the contributing separate marital estate; and~~

~~[(3) order that a claim for economic contribution of one separate marital estate in the separate marital estate of the other spouse be awarded to the owner of the contributing marital estate.~~

~~[(b)] In a decree of divorce or annulment, the court shall determine the rights of both spouses in a claim for reimbursement as provided by Subchapter E, Chapter 3, and shall apply equitable principles to:~~

(1) determine whether to recognize the claim after taking into account all the relative circumstances of the spouses; and

(2) order a division of the claim for reimbursement, if appropriate, in a manner that the court considers just and right, having due regard for the rights of each party and any children of the marriage.

*See history note following Sec. 3.007.*

**Sec. 9.014. ATTORNEY'S FEES.**

The court may award reasonable attorney's fees [~~as costs~~] in a proceeding under this subchapter. The court may order the attorney's fees to be paid directly to the attorney, who may enforce the order for fees in the attorney's own name by any means available for the enforcement of a judgment for debt.

*See history note following Sec. 3.007.*

**Sec. 9.106. ATTORNEY'S FEES.**

In a proceeding under this subchapter, the court may award reasonable attorney's fees incurred by a party to a divorce or annulment against the other party to the divorce or annulment. The court may order the attorney's fees to be paid directly to the attorney, who may enforce the order for fees in the attorney's own name by any means available for the enforcement of a judgment for debt.

*See history note following Sec. 3.007.*

**Sec. 9.205. ATTORNEY'S FEES.**

In a proceeding to divide property previously undivided in a decree of divorce or annulment as provided by this subchapter, the court may award reasonable attorney's fees [~~as costs~~]. The court may order the attorney's fees to be paid directly to the attorney, who may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt.

*See history note following Sec. 3.007.*

**CHAPTER 34. AUTHORIZATION  
AGREEMENT FOR NONPARENT RELATIVE**

**Sec. 34.001. APPLICABILITY.**

This chapter applies only to an authorization agreement between a parent of a child and a person who is the child's:

- (1) grandparent;
- (2) adult sibling; or
- (3) adult aunt or uncle.

**Sec. 34.002. AUTHORIZATION AGREEMENT.**

(a) A parent or both parents of a child may enter into an authorization agreement with a relative of the child listed in Section 34.001 to authorize the relative to perform the following acts in regard to the child:

(1) to authorize medical, dental, psychological, or surgical treatment and immunization of the child, including executing any consents or authorizations for the release of information as required by law relating to the treatment or immunization;

(2) to obtain and maintain health insurance coverage for the child and automobile insurance coverage for the child, if appropriate;

(3) to enroll the child in a day-care program or preschool or in a public or private primary or secondary school;

(4) to authorize the child to participate in age-appropriate extracurricular, civic, social, or recreational activities, including athletic activities;

(5) to authorize the child to obtain a learner's permit, driver's license, or state-issued identification card;

(6) to authorize employment of the child; and

(7) to apply for and receive public benefits on behalf of the child.

(b) To the extent of any conflict or inconsistency between this chapter and any other

law relating to the eligibility requirements other than parental consent to obtain a service under Subsection (a), the other law controls.

(c) An authorization agreement under this chapter does not confer on a relative of the child listed in Section 34.001 the right to authorize the performance of an abortion on the child or the administration of emergency contraception to the child.

**Sec. 34.003. CONTENTS OF  
AUTHORIZATION AGREEMENT.**

(a) The authorization agreement must contain:

(1) the following information from the relative of the child to whom the parent is giving authorization:

(A) the name and signature of the relative;

(B) the relative's relationship to the child; and

(C) the relative's current physical address and telephone number or the best way to contact the relative;

(2) the following information from the parent:

(A) the name and signature of the parent; and

(B) the parent's current address and telephone number or the best way to contact the parent;

(3) the information in Subdivision (2) with respect to the other parent, if applicable;

(4) a statement that the relative has been given authorization to perform the functions listed in Section 34.002(a) as a result of a voluntary action of the parent and that the relative has voluntarily assumed the responsibility of performing those functions;

(5) statements that neither the parent nor the relative has knowledge that a parent, guardian, custodian, licensed child-placing agency, or other authorized agency asserts any claim or authority

inconsistent with the authorization agreement under this chapter with regard to actual physical possession or care, custody, or control of the child;

(6) statements that:

(A) to the best of the parent's and relative's knowledge:

(i) there is no court order or pending suit affecting the parent-child relationship concerning the child;

(ii) there is no pending litigation in any court concerning:

(a) custody, possession, or placement of the child; or

(b) access to or visitation with the child; and

(iii) the court does not have continuing jurisdiction concerning the child; or

(B) the court with continuing jurisdiction concerning the child has given written approval for the execution of the authorization agreement accompanied by the following information:

(i) the county in which the court is located;

(ii) the number of the court; and

(iii) the cause number in which the order was issued or the litigation is pending;

(7) a statement that the authorization is made in conformance with this chapter;

(8) a statement that the parent and the relative understand that each party to the authorization agreement is required by law to immediately provide to each other party information regarding any change in the party's address or contact information;

(9) a statement by the parent that establishes the circumstances under which the authorization agreement expires, including that the authorization agreement:

(A) is valid until revoked;

(B) continues in effect after the death or during any incapacity of the parent; or

(C) expires on a date stated in the authorization agreement; and

(10) space for the signature and seal of a notary public.

(b) The authorization agreement must contain the following warnings and disclosures:

(1) that the authorization agreement is an important legal document;

(2) that the parent and the relative must read all of the warnings and disclosures before signing the authorization agreement;

(3) that the persons signing the authorization agreement are not required to consult an attorney but are advised to do so;

(4) that the parent's rights as a parent may be adversely affected by placing or leaving the parent's child with another person;

(5) that the authorization agreement does not confer on the relative the rights of a managing or possessory conservator or legal guardian;

(6) that a parent who is a party to the authorization agreement may terminate the authorization agreement and resume custody, possession, care, and control of the child on demand and that at any time the parent may request the return of the child;

(7) that failure by the relative to return the child to the parent immediately on request may have criminal and civil consequences;

(8) that, under other applicable law, the relative may be liable for certain expenses relating to the child in the relative's care but that the parent still retains the parental obligation to support the child;

(9) that, in certain circumstances, the authorization agreement may not be entered into without written permission of the court;

(10) that the authorization agreement may be terminated by certain court orders affecting the child;

(11) that the authorization agreement is void unless the parties mail a copy of the authorization agreement to a parent who was not a party to the authorization agreement, if the parent is living and the parent's parental rights have not been terminated, not later than the 10th day after the date the authorization agreement is signed; and

(12) that the authorization agreement does not confer on a relative of the child the right to authorize the performance of an abortion on the child or the administration of emergency contraception to the child.

**Sec. 34.004. EXECUTION OF AUTHORIZATION AGREEMENT.**

(a) The authorization agreement must be signed and sworn to before a notary public by the parent and the relative.

(b) A parent may not execute an authorization agreement without a written order by the appropriate court if:

(1) there is a court order or pending suit affecting the parent-child relationship concerning the child;

(2) there is pending litigation in any court concerning:

(A) custody, possession, or placement of the child; or

(B) access to or visitation with the child; or

(3) the court has continuing, exclusive jurisdiction over the child.

(c) An authorization agreement obtained in violation of Subsection (b) is void.

**Sec. 34.005. DUTIES OF PARTIES TO AUTHORIZATION AGREEMENT.**

(a) If both parents did not sign the authorization agreement, the parties shall mail a copy of the executed authorization agreement to the parent who

was not a party to the authorization agreement at the parent's last known address not later than the 10th day after the date the authorization agreement is executed if that parent is living and that parent's parental rights have not been terminated. An authorization agreement is void if the parties fail to comply with this subsection.

(b) A party to the authorization agreement shall immediately inform each other party of any change in the party's address or contact information. If a party fails to comply with this subsection, the authorization agreement is voidable by the other party.

**Sec. 34.006. AUTHORIZATION VOIDABLE.**

An authorization agreement is voidable by a party if the other party knowingly:

(1) obtained the authorization agreement by fraud, duress, or misrepresentation; or

(2) made a false statement on the authorization agreement.

**Sec. 34.007. EFFECT OF AUTHORIZATION AGREEMENT.**

(a) A person who is not a party to the authorization agreement who relies in good faith on an authorization agreement under this chapter, without actual knowledge that the authorization agreement is void, revoked, or invalid, is not subject to civil or criminal liability to any person, and is not subject to professional disciplinary action, for that reliance if the agreement is completed as required by this chapter.

(b) The authorization agreement does not affect the rights of the child's parent or legal guardian regarding the care, custody, and control of the child, and does not mean that the relative has legal custody of the child.

(c) An authorization agreement executed under this chapter does not confer or affect standing or a right of intervention in any proceeding under Title 5.

**Sec. 34.008. TERMINATION OF AUTHORIZATION AGREEMENT.**

(a) Except as provided by Subsection (b), an authorization agreement under this chapter

terminates if, after the execution of the authorization agreement, a court enters an order:

(1) affecting the parent-child relationship;

(2) concerning custody, possession, or placement of the child;

(3) concerning access to or visitation with the child; or

(4) regarding the appointment of a guardian for the child under Section 676, Texas Probate Code.

(b) An authorization agreement may continue after a court order described by Subsection (a) is entered if the court entering the order gives written permission.

(c) An authorization agreement under this chapter terminates on written revocation by a party to the authorization agreement if the party:

(1) gives each party written notice of the revocation;

(2) files the written revocation with the clerk of the county in which:

(A) the child resides;

(B) the child resided at the time the authorization agreement was executed; or

(C) the relative resides; and

(3) files the written revocation with the clerk of each court:

(A) that has continuing, exclusive jurisdiction over the child;

(B) in which there is a court order or pending suit affecting the parent-child relationship concerning the child;

(C) in which there is pending litigation concerning:

(i) custody, possession, or placement of the child; or

(ii) access to or visitation with the child; or

(D) that has entered an order regarding the appointment of a guardian for the child under Section 676, Texas Probate Code.

(d) If an authorization agreement executed under this chapter does not state when the authorization agreement expires, the authorization agreement is valid until revoked.

(e) If both parents have signed the authorization agreement, either parent may revoke the authorization agreement without the other parent's consent.

**Sec. 34.009. PENALTY.**

(a) A person commits an offense if the person knowingly:

(1) presents a document that is not a valid authorization agreement as a valid authorization agreement under this chapter;

(2) makes a false statement on an authorization agreement; or

(3) obtains an authorization agreement by fraud, duress, or misrepresentation.

(b) An offense under this section is a Class B misdemeanor.

*Amended by Acts 2009, 81<sup>st</sup> Legislature, Ch. \_\_\_\_ (SB 1598, effective immediately upon enactment).*

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