

2019 Texas Legislative Update

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Juris Doctor with Honors, 1980
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Professional Experience

The Karisch Law Firm, PLLC, 2008 -
Barnes & Karisch, P. C., Austin, Texas, 1998 - 2007
Ikard & Golden, P. C., Austin, Texas, 1992 - 1998
Hoffman & Stephens, P. C., Austin, Texas, 1991-1992
The Texas Methodist Foundation, Austin, Texas, Vice President and General Counsel, 1989-1991
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Professional Activities

Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
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Real Estate, Probate and Trust Law Section, State Bar of Texas
Section Chair, 2007-2008
Council Member, 1999-2003
Chair, Probate Legislation Committee, 2003 - 2008
Chair, Trust Code Committee, 2000-2004
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Chair, Subcommittee Studying Uniform Principal and Income Act, 2000 - 2002
Chair, Guardianship Law Committee, 1999-2000
Estate Planning and Probate Section, Austin Bar Association, Chair, 1996-97

Partial List of Legal Articles and Papers

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

Legislative updates on Texas probate, guardianship and trust legislation at numerous continuing legal education seminars, 2003 – 2017, on texasprobate.com, 1997 – 2017, and in *O'Connor's Probate/Estates Code Plus* (2003 – 2017).

“The Broken Trust and Will Toolbox – Trust Modifications and Terminations, Will and Trust Reforms and Decanting,” State Bar of Texas Advanced Estate Planning and Probate Course (2019).

“Disclaimers under the New Texas Uniform Disclaimer of Property Interests Act,” (with Thomas M. Featherston, Jr. and Julia E. Jonas), State Bar of Texas Advanced Estate Planning and Probate Course (2015), updated on texasprobate.com.

“Problems with the Texas Disclaimer Statutes and What to Do About Them,” (with Julia E. Jonas), State Bar of Texas Advanced Estate Planning and Probate Course (2014).

“Multi-Party Accounts and Other Non-Probate Assets in Texas,” University of Texas CLE Estate Planning, Guardianship and Elder Law (2011), updated on texasprobate.com.

“Dealing with Dysfunctional Clients,” State Bar of Texas Advanced Estate Planning and Probate Course (2010).

“Bypass Trust Basics,” University of Texas CLE Estate Planning, Guardianship and Elder Law (2010).

“Night of the Living Trust: Living in the World of Non-Probate Assets,” National Committee on Planned Giving (2009).

“Protecting the Surviving Spouse and Protecting Yourself After *Belt v. Oppenheimer*,” State Bar of Texas Advanced Estate Planning and Probate Law Course (2006), updated on texasprobate.com.

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

“The New Guardianship Rules Regarding Inventories, Monthly Allowances and Investments,” State Bar of Texas Guardianship Law Course (2004).

“Top Ten Brilliance and Blunders: A View from the Webmaster,” State Bar of Texas Annual Advanced Estate Planning and Probate Course (2002).

“Modifying and Terminating Irrevocable Trusts,” State Bar of Texas Advanced Estate Planning and Probate Law Course (1999), updated on texasprobate.com.

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

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1. Introduction

The 2019 Texas Legislature made no huge changes to Texas probate, guardianship and trust law. Still, even in a quiet session there are changes about which practitioners need to know. As always, the Real Estate, Probate and Trust Law Section of the State Bar of Texas (“REPTL”) was active and accomplished a lot.

This is not a complete list of changes. For a more comprehensive update, including section-by-section changes to the Estates Code and Trust Code, see William Pargaman’s legislative materials on the Saunders, Norval, Pargaman and Atkins, LLP, website. All references to section numbers are to the Texas Estates Code unless otherwise indicated.

2. Decedents’ estates

The 2019 changes make life easier for estate planning and probate attorneys dealing with decedents’ estates. That is REPTL’s goal every session, but sometimes it seems like there are several nit-picky trap-like changes. That’s not the case in 2019, where most changes make things easier on the attorney and the client.

2.1. Getting non-probate asset information

Increasingly banks and other financial institutions have made it difficult for the personal representative of a decedent’s estate to get information about survivorship, pay-on-death and transfer-on-death accounts as well as insurance and retirement accounts paid to a named beneficiary. New Section 111.102 requires a financial institution, upon the request of an executor or administrator, to provide all information it would have provided to the decedent as of the date of death had the decedent requested it, without regard to whether the decedent’s estate has an interest in the multi-party account, the property subject to a possible non-probate transfer or an



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insurance contract. The information must be provided to the executor or administrator to the extent not prohibited by federal or other state law. This will make it easier for the executor or administrator to review account agreements to see if they in fact created survivorship accounts. It also will make it easier to get information for purposes of creditors' claims and estate tax returns. The change applies to accounts existing on September 1, 2019, as well as new accounts.

2.2. Delegating the appointment of an administrator

New Section 254.006 permits a testator to give the named executor or another person the authority to designate one or more persons to serve as administrator of the estate. It is common for a trustee or trust protector to be given the power to name a successor trustee. Now this will be possible for estate administrations.

Here are some things to consider about the new statute:

A. Change those will forms! If the will does not grant the power to designate an administrator, the power does not exist. In most cases a testator is likely to wish to give any executor – or at least the last-named executor – the power to name a successor administrator to facilitate the continued administration of the estate in the event of the executor's death or resignation. This is likely to be one of those provisions that is included in the default form and taken out in appropriate cases, rather than one that gets added only occasionally.

B. Unless the will provides otherwise, the person designated to serve as administrator under Section 254.006 serves only if all named executors die, resign or fail to qualify. However, a testator may expressly give the executor or other person the power to designate an administrator and have that designation take precedence over the named successors.

C. If the will provided for independent administration, then the administrator who is designated under Section 254.006 will be an independent administrator as well, since the designee has the same rights, powers and duties as the executor named in the will.

D. While in most cases it will be the named executor who designates a successor, a person other than the executor may be given this power. Consider the following possibilities:

1. Another fiduciary such as a trust protector may be given the power to designate an administrator.

2. It is not necessary for the will to name an executor so long as a person is given the power to designate an administrator. For example, the will may leave the estate to a charity and authorize the charity to designate an administrator. Section 256.051 was amended to give a person designated as administrator standing to file an application to probate a will.

2.3. Converting muniment of title to an administration

If a will is admitted as a muniment of title and something later happens to make an administration necessary, new Section 257.151 makes it possible to go back to court and obtain the appointment of a personal representative, so long as the application for letters testamentary or of administration is filed no later than the fourth anniversary of the decedent's death.

2.4. Using only one disinterested witness in heirships

Heirships must be proven by the testimony of two disinterested witnesses, but now Section 202.151 has been amended to provide that, if the court is satisfied that, after a diligent search, only one disinterested witness can be found, the court may permit the heirship to be proven by the testimony of just one witness.

2.5. Waiver of bond by consent where will does not waive bond

Under Section 401.004 prior to being amended, the distributees of an intestate estate could agree to waive the bond requirement for an independent administrator but the beneficiaries under a will with no bond waiver provision could not. Now the beneficiaries under a will also may agree to waive the bond requirement for an independent executor.

2.6. Executor's access to digital assets

Sections 351.106 (for dependent administrations) and Section 402.003 (for independent administrations) permits the personal representative to obtain a court order to obtain access to digital information. These sections permit the order to be issued at the time the administration is opened, so it may be good practice to ask for this order routinely in applications for letters testamentary or of administration.

2.7. Class 1 claims changed to \$15,000 for illness expenses and \$15,000 for funeral expenses

Under prior law, Class 1 claims totaling \$15,000 were allowed for expenses of the last illness and funeral expenses. This was \$15,000 for both, not for each, so the priority of funeral claims could be diluted if there were significant last illness claims, and vice versa. Now Sections 355.102 and 355.103 have been amended to allow Class 1 claims of \$15,000 for funeral expenses and \$15,000 for expenses of last illness.

2.8. No duty to pursue survivorship funds without demand

Section 113.252 provided that any suit by a personal representative to recover survivorship or pay-on-death funds to satisfy estate liabilities had to be commenced on or before the second anniversary of the decedent's death. This section was amended to provide that the personal representative may file a suit seeking to recover such funds only if he or she receives a written demand to do so by a surviving spouse, creditor or a person acting on behalf of a minor child of the deceased party. Thus, the personal representative has no duty to pursue recovery of such assets unless he or she receives such a demand.

2.9. **Publication on government website**

Section 51.054 was amended to provide that, in cases involving decedents' estates where notice to a person is required to be served by publication, the notice must be published in a newspaper *and* posted on a public information website created and maintained by the Office of Court Administration. The date of service is the earlier of the date published in a newspaper or the date posted on the website, while proof of service will consist of the publisher's affidavit and an affidavit obtained from the Office of Court Administration.

2.10. **Extending the inventory deadline extends the affidavit in lieu deadline, too**

In the "how do people come up with this stuff" department, apparently some courts took the position that, while the deadline for filing an inventory may be extended, doing so did not extend the deadline for filing an affidavit in lieu of inventory. Thus, if the inventory deadline was extended, an inventory would have to be filed even if the conditions permitting filing an affidavit in lieu of inventory existed. Now Section 309.056 has been amended to provide that an extension of the deadline to file an inventory is considered an extension of the filing period for an affidavit in lieu of inventory.

2.11. **Court may award attorney's fees to successful contestants**

Under prior law a court hearing a will contest was *required* to award attorney's fees to a named executor who defends the will in good faith and with just cause, whether or not successful, and was *permitted* to award attorney's fees to a will beneficiary who defends the will in good faith and with just cause, whether or not successful. Now Section 352.052 has been amended to add that the court is *permitted* to award attorney's fees to an interested person other than a creditor who successfully contests a will in good faith and with just cause.

2.12. **Will reformations in courts having original probate jurisdiction**

Section 31.001 was amended and Section 255.456 was added to make clear that (a) a will modification or reformation proceeding is a "probate proceeding" to be brought in the court of original probate jurisdiction and (b) the same rules about assignment of a statutory probate judge or transfer to a district court which apply to other contested proceedings in a "constitutional county court" apply in will modification or reformation actions.

2.13. **Clarifying who inherits community estate**

Section 201.003 (the successor to old Probate Code Section 45) was amended to make clear that, if a decedent is survived by a spouse and at least one of the decedent's descendants is not also a descendant of the spouse, one-half of the entire community estate (in other words, the deceased spouse's one-half) passes to the decedent's descendants. Prior to the change there was some confusion (apparently caused by the migration of the Probate Code provision to the Estates Code) as to whether only half of the decedent's share the community estate passed to

descendants. The change makes it clear that the decedent's descendants get half of the entire community estate, not one-fourth.

2.14. Changes affecting transfer on death deeds

Texas added its transfer on death deed ("TODD") statute in 2015 and included an optional statutory TODD form. The form was confusing, and there are other sources of TODD forms. Rather than fixing the form, the Legislature repealed it (Sections 114.151 through 114.152). The Legislature directed the Supreme Court to promulgate TODD forms for use by the public. Even after the repeal is effective on September 1, 2019, the repealed form may be used since the statutes do not require the use of any particular form.

The Legislature also amended Section 114.102 to permit the recording of a memorandum sufficient to give notice of the conveyance of an interest, rather than requiring the filing of the conveyance instrument itself, prior to the transferor's death in order to void a prior TODD on the same property.

2.15. Terminating residential lease after tenant's death

Section 92.0162 was added to the Property Code to permit the personal representative of a decedent's estate to terminate a residential lease early, thus avoiding liability for future rent.

2.16. Sales of real property in dependent administrations

The procedures for selling real property in a dependent administration (various sections between Section 356.401 and 356.558) were tweaked, including the private sale by contract or sale by auction. Among other changes, the amendments provide for the court to "approve" the sale, not "confirm" it.

2.17. Contingent fee contracts.

Section 351.152 was amended to clarify that no court approval is required for contingent fee contracts entered into by dependent administrators so long as the fee does not exceed a one-third interest in property.

2.18. Property tax homestead exemption for jointly owned inherited property

Several sections of the Tax Code (including Tax Code Section 11.13) were amended to incorporate the concept of "heir property." "Heir property" is real property owned by one or more persons, at least one of whom claims the property as his or her residence homestead, that was acquired by will, transfer on death deed or intestacy. If property is heir property, then the entire property qualifies for the residential homestead exemption for ad valorem tax purposes so long as at least one owner claims the property as his or her residence homestead.

2.19. Failed devise to charity

Section 255.152 addresses what happens if a specific or residuary gift under a will fails for any reason. In general, failed specific devises pass as part of the residuary estate and failed residuary devises pass to the remaining residuary beneficiaries or by intestacy if there are no remaining residuary beneficiaries. Section 255.152 was amended to say that, unless the will provides otherwise, these failed devise rules do not apply to charitable gifts. Apparently the attorney general intended this change to mean that, absent a provision in the will to the contrary, a failed charitable gift invokes the *cy pres* doctrine permitting a court to find a suitable substitute charity.

3. Trust law changes

Here are the key changes to the Trust Code and other statutes related to trusts:

3.1. Person directing a trustee must be a fiduciary in most cases

It has become increasingly common for trust instruments to designate a “trust protector,” “trust director,” or “trust advisor,” who has the authority to take certain actions. Usually these provisions say that the trustee must comply with the direction of this person. Corporate trustees are concerned about their potential liability to beneficiaries if they act in accordance with instructions from a trust advisor or similar person. In 2015 the Texas legislature enacted Section 114.0031 of the Property (Trust) Code, which is a virtual verbatim copy of Delaware’s directed trust statute.

Unsurprisingly, the statute offers clear protection for trustees who are directed to act, but it does little to protect beneficiaries. A key problem with the 2015 statute is that, while a “trust advisor” is presumed to be a fiduciary, it did not require him or her to be a fiduciary. Thus, the settlor could provide in the trust instrument that Joe could direct the trustee to sell or not sell a particular asset and that, in so doing, Joe is not subject to fiduciary duties. If Joe’s direction was clearly not in the best interests of the trust beneficiaries, the beneficiaries could be left without recourse.

Section 114.0031 was amended to provide that a person directing the trustee (called a “trust advisor” in the statute) is a fiduciary regardless of trust terms to the contrary, with two exceptions: (1) if the advisor’s only power is to remove and appoint trustees, advisors, etc., and he or she does not appoint himself or herself, then the settlor may provide that he or she is not subject to fiduciary duties; and (2) the statute does not prohibit the exercise of a power in a nonfiduciary capacity for grantor trust purposes.

This applies to existing trusts as well as new trusts. The effective date provision reads: “Except as specifically provided by a trust term in effect before September 1, 2019, the changes ... apply to a trust created before, on, or after September 1, 2019, with respect to an action taken or not taken on or after September 1, 2019, by a trustee, custodian or other person with respect to the trust.” So what is to be done with an existing trust which provides that the trust advisor is not a fiduciary? Presumably the amendment means that actions he or she takes prior to September 1, 2019, are not subject to fiduciary duties, but actions taken on or after September 1, 2019, will be

judged on a fiduciary basis. Consider if trust protectors, advisors, etc., should be warned about their potential greater liability for actions on or after September 1, 2019.

While a trust advisor may be required to be a fiduciary, the statute does not say against what standard his or her conduct will be judged. For this reason, in new instruments it makes sense to consider limiting the advisor's duties in appropriate cases. For example, applying Trust Code Section 111.0035(b)(4)(B), it appears that virtually all of the fiduciary duties applicable to trustees may be waived other than the duty to act in good faith and in accordance with the purposes of the trust. Perhaps the instrument could say that the trustee owes no duties other than the duty to act in good faith and in accordance with the purposes of the trust.

3.2. Court's jurisdiction over trustee's fees and attorney's fees

Trust Code Section 111.0035 was amended to make clear that the settlor may not include a term in a trust which takes away the court's power to order a disgorgement of trustee's fees, nor may the settlor include a term which takes away the court's power to make an award of costs and attorney's fees under Trust Code Section 114.064.

3.3. Will construction statutes imported into the Trust Code

Section 112.0335 was enacted to provide that, unless the terms of the trust provide otherwise, Chapter 255 of the Estates Code (Construction and Interpretation of Wills) applies at a settlor's death to the construction of at-death transfers from a revocable trust as if the settlor is the testator and the trust beneficiaries are the devisees. It also provides that the abatement of bequests rules in Estates Code Section 355.109 apply to at-death transfers from a revocable trust.

3.4. Decanting into a trust established under same instrument

In a move fit for the movie *The Matrix*, Section 112.0715 was added to the Trust Code to permit the "second trust" in a decanting to be a trust created under the same trust instrument as the first trust, in which case the property does not have to be retitled. So, the first trust is being decanted into the second trust, but the second trust is governed by the same trust instrument as the first trust? This neat trick avoids the need to retitle trust property and may make it less likely that the decanting will be treated as a taxable event.

4. Changes affecting guardianships and persons with disabilities

REPTL's comprehensive guardianship bill was vetoed by the governor because of a non-REPTL provision added to the bill late in the session. Therefore, many good changes to the guardianship statutes were not made. Here are some the key changes which were made to guardianship law and the statutes directly affecting persons with disabilities:

4.1. Publication on government website

Section 1051.054 was amended to provide that, in cases involving guardianships where notice to a person is required to be served by publication, the notice must be published in a newspaper *and* posted on a public information website created and maintained by the Office of Court Administration. The date of service is the earlier of the date published in a newspaper or the date posted on the website, while proof of service will consist of the publisher's affidavit and an affidavit obtained from the Office of Court Administration.

4.2. Compensation of guardians of Medicaid recipients

Section 1155.202 was amended to increase the compensation which may be paid to a guardian for a recipient of medical assistance from \$175 per month to \$250 per month.

4.3. Support for Adult Child Paid to SNT

Family Code Section 154.302 permits a court to order either or both parents to provide for the support of an adult disabled child. New subsection (c) provides that the court may designate a special needs trust and provide that support payments be made to that special needs trust.

5. Changes affecting disability documents

There were no changes to the Statutory Durable Power of Attorney form, the Medical Power of Attorney form, or the Directive to Physicians form.

There were minor changes to the Appointment for Disposition of Remains form found in Section 711.002 of the Health and Safety Code. They are not significant but they require updating the form. The amendment also provides that the court with jurisdiction to hear disputes among the named agents is in the court with probate jurisdiction.