2011 Legislative Update

Texas Probate, Guardianship and Trust Legislation

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Following is a discussion of the key legislation enacted by the 82nd Texas Legislature affecting attorneys practicing probate, guardianship and trust law. All legislation became effective September 1, 2011, unless otherwise noted.

For more information about 2011 legislation, including the text of the sections of the Probate Code and Trust Code that were amended, see Bill Pargaman's legislative update at http://www.brownmccarroll.com/public/documents/2011_REPTL_Update.pdf .

Legislation Affecting Decedents' Estates

Probate inventory may be kept private

The change that is likely to have the biggest impact on Texas probate lawyers is SB 1198's amendment to Section 250 of the Probate Code permitting independent executors to file an affidavit in lieu of an inventory, appraisement and list of claims if there are no unpaid debts, except for secured debts, taxes and administration expenses, at the time the inventory is due. The public disclosure of information in the inventory is unpopular with clients and drives some Texans to use a living trust-based plan when a will otherwise would suffice.

Here are the particulars of the change:

- Only independent executors and independent administrators are permitted to file an affidavit in lieu of an inventory. Dependent administrators must file a public inventory.

- The affidavit may be used if there are no unpaid estate debts, other than secured debts, taxes and administration expenses, at the time the inventory is due. If the independent executor can pay all unsecured debts between the date he or she qualifies and the due date of the inventory, the independent executor can avoid the public disclosure of inventory information.

- The change does not mean that it no longer is necessary to prepare an inventory. The independent executor still must prepare a verified, full and detailed inventory and deliver it to each estate beneficiary.

- Any person interested in the estate – specifically including a possible heir of the decedent or a beneficiary named in a prior will – is entitled to receive a copy of the inventory on request. The independent executor is protected from liability to the estate or its beneficiaries if he or she provides a copy of the inventory to a person the independent executor believes in good faith "may be" a person interested in the estate. If the independent executor refuses to give a person a copy of the inventory, he or she may apply to the court to compel the independent executor to do so.

The change to Section 250 necessitates changes to a number of related sections. An independent executor may be removed if he or she fails to file an inventory or the affidavit in lieu of an inventory (Section 149C). Successor independent executors also may file an affidavit in lieu of an inventory (Section 227). If additional property or claims are discovered, the independent executor either must file a supplemental inventory or a supplemental affidavit in lieu of an inventory (Section 256). The setting apart of exempt property (Section 271), the setting of the family allowance (Section 286) and the sale of property to raise funds for the family allowance (Section 293) are tied to the filing of the inventory or an affidavit in lieu of an inventory.

Does Probate Code Section 145 make filing an inventory mandatory despite the changes to Section 250? Section 145(b) provides:

> Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, ***and the return of an inventory, appraisement and list of claims of his estate.*** [Emphasis added]

Accordingly, most Texas wills parrot that sentence, including the "return" of an inventory. Since, in general, the terms of a will control over a statute, does the will require the filing of an inventory notwithstanding the new practice? The obvious answer is "No!" The legislative intent of the changes to Section 250 is clear. The fact that wills include the language from Section 145(b) expresses the testator's intent that he or she wants an independent administration; it is not a requirement to file an inventory when one is not required. Also, the statute (and, presumably, the will) provides for the "return" of an inventory, not the "filing" of an inventory. Section 250 still requires the preparation of an inventory, and it requires delivery of that inventory to the beneficiaries. Perhaps that is sufficient to be a "return of the inventory." Still, it probably would be good practice to modify the sentence in the will granting independent administration to reflect the possibility of an affidavit in lieu of filing the inventory. Here is suggested language:

> I direct that no action shall be had in any court exercising probate jurisdiction in relation to the settlement of my estate other than the probating and recording of my will and the return of an inventory, appraisement and list of claims of my estate; provided that, if the independent executor is permitted to file an affidavit in lieu of inventory under Texas law, I do not require the independent executor to file the inventory, appraisement and list of claims with the court.

In his legislative update, Bill Pargaman suggests simply putting "… if required by law" at the end of the required sentence.

It is likely that the Legislature will address this anomaly in 2013.

While Section 250 permits the independent executor to choose to file an inventory or an affidavit in lieu of an inventory, beneficiaries may believe that the independent executor has breached his or her duties if (a) he or she fails to use the affidavit in lieu of an inventory if the estate is eligible to do so and (b) he or she fails to quickly pay the decedent's unsecured debts (if it is possible to do so) in order to make the estate eligible for the affidavit in lieu of inventory. It may be hard for the independent executor to justify making an unnecessary public disclosure of asset information.

This change should make will-based plans more popular. Clients still may wish to use living trusts for other reasons (out-of-state real property, disability planning or fear of a will contest, for example), but they may not have to forego a will-based plan merely to avoid a public disclosure of information.

An affidavit in lieu of an inventory may be used for the estates of decedents dying on or after September 1, 2011. For persons who died before September 1, 2011, an inventory must be filed, even if the inventory is filed after September 1, 2011.

Sections affected: Probate Code Sections 15, 143, 149C, 227, 250, 256, 260, 271, 286 and 293.

Testator and Witnesses Need Sign Only Once

Under prior law, in order to make a will self-proved, the testator and each witness had to sign the will twice – once on the will itself and once on the self-proving affidavit. SB 1198 amends Section 59 of the Texas Probate Code to permit combining the execution of the will and the self-proving affidavit so that the testator and the witnesses only have to sign once. The statute includes the appropriate language to include in the will if the one-signature method is desired.

The one-signature method is optional. Testators still may use the two-signature method. However, there seems to be little downside to switching to the new method. The new method will make execution errors much less likely, and it speeds up the signing ceremony. If the client moves to another state which does not recognize a combined attestation clause and self-proving affidavit, the will still will be just as valid as the two-signature variety, although it may not be considered self-proved. That's not likely to happen, since Section 2-504 of the Uniform Probate Code permits combined attestations and self-proving affidavits, and the UPC has been enacted in one form or another in 20 states.

The change to Section 59 corresponds with changes to Sections 677A and 679 made in 2009 which adopted a one-signature method for declarations of guardian. Other changes in 2009 made it possible to use a notary public in lieu of witnesses on medical powers of attorney and on directives to physicians and family or surrogates. As a result of the 2009 and 2011 changes, attorneys may greatly streamline the document signing ceremony:

- The statutory durable power of attorney, medical power of attorney and directive to physicians or family and surrogates may be executed before a notary public, and no witnesses are required.

- The will, the declaration of guardian for minor children and the declaration of guardian in the event of later incapacity require two witnesses, but the testator/declarant and the witnesses need sign only once.

Section affected: Probate Code Section 59.

Significant Changes to Section 128A Notices to Beneficiaries

The 2007 amendment to Probate Code Section 128A caused much grumbling among probate lawyers. It required the personal representative of a testate decedent to send certified mail notices to (or obtain waivers from) all beneficiaries named in the will. The 2007 changes were a rush job to address concerns expressed in the Legislature over a sensational case in Travis County in which an independent executor was accused of misappropriating estate funds without ever telling the estate beneficiaries that he was the executor and that they had an interest in the estate. Because it was a rush job, 2007's Section 128A was rough around the edges and went further than has proven to be necessary.

SB 1198 amends Section 128A to make the rules about notices to beneficiaries much easier to meet. Here are the key changes:

- The notice does not have to be given to a beneficiary who is receiving $2,000 or less worth of property or who has received all gifts to which he or she is entitled within 60 days of the order admitting the will to probate.

- The notice or waiver need not include a copy of the will and the order admitting it to probate if it includes a written summary of the gifts to the beneficiary under the will, the court in which the will was admitted to probate, the docket number assigned to the estate, the date the will was admitted to probate and, if different, the date the court appointed the personal representative.

- The personal representative does not need to notify a beneficiary of a trust whose right to receive income distributions is at the sole discretion of the trustee if the trustee has given the notice to an ancestor of the beneficiary and there is no apparent conflict of interest between the ancestor and the beneficiary. This change may offer some help in the case of trusts permitting distributions to all of a person's descendants, but it will not help if the distribution standard is based on the health, education, maintenance and support needs of the beneficiary, since this is not a wholly discretionary standard.

SB 1198 clarifies that notices are not required if the will is probated as a muniment of title and that notices are not required to a person whose interest arises on the occurrence of a contingency which has not occurred.

The changes made by SB 1198 apply to the estate of a decedent dying on or after September 1, 2011. The old law must be followed for persons dying before that date.

Section affected: Probate Code Section 128A.

Survivorship Accounts: Holmes v. Beatty Expressly Overturned.

Holmes v. Beatty, 290 S.W.3d 852 (Tex. 2009), caused shockwaves in the probate and estate planning community for two reasons:

- First, and most importantly, the Supreme Court relaxed the standards for creating rights of survivorship with respect to community property, holding that a "joint tenancy" or " JT TEN" designation on an account is sufficient to create rights of survivorship in community property under Section 452 of the Texas Probate Code.

- Second, the Supreme Court held that stock certificates issued from a community property with right of survivorship brokerage account continue to be survivorship property even though the the certificates themselves do not meet the requirements for survivorship agreements.

SB 1198 overturns *Holmes* on the first of these points. It adds this sentence to Section 452: "A survivorship agreement will not be inferred from the mere fact that the account is a joint account or that the account is designated JT TEN, Joint Tenancy, joint, or other similar abbreviation." Parallel language is added to Section 439, which governs non-community property multi-party accounts. SB 1198 specifically states that the bill is intended to overturn the ruling of the Texas Supreme Court in *Holmes v. Beatty*.

These changes were intended to bring Section 452 – regarding community property with right of survivorship accounts – in line with Section 439 and the principles established by the Texas Supreme Court in *Stauffer v. Henderson,*801 S.W.2d 858 (Tex. 1990). Those principles apply to community property with right of survivorship accounts notwithstanding the slight differences in language between Sections 439 and 452.

The bill is silent on the other significant holding in *Holmes,* so stock certificates issued out of community property with right of survivorship accounts may continue to be survivorship property, at least to the extent described in *Holmes*.

Sections affected: Probate Code Sections 439 and 452.

Power of Sale in Independent Administrations

Most well-drafted wills expressly give the independent executor the power to sell real property. However, some wills do not include a power of sale provision. Also, when the distributees of an intestate estate agree on the appointment of an independent administrator, that administrator serves without the benefit of a power of sale provision. In those cases, when can the independent administrator sell real property without the joinder of the distributees? Under prior law, there

was no clear answer to this question. As a result, most title companies would not insure title if an independent administrator without the power of sale tried to sell real property of the estate, unless the distributees joined in the conveyance.

SB 1198 attempts to clarify the rules about sales of real property by independent administrators and to provide a means for independent administrators with no express power of sale to obtain the clear authority to sell real property.

New Section 145A permits the distributees of an estate to give the independent administrator the power of sale in cases where there is no will or where the will does not contain language authorizing him or her to sell real property. The distributees may give the independent administrator the power of sale by signing a consent *prior to the appointment of the independent administrator*, whereupon the court will include the power to sell in the order appointing the independent administrator. Thus, if the proposed independent administrator knows in advance that he or she may need to sell real property, he or she may ask the distributees to sign a consent giving the independent administrator the power of sale and file these consents with the application for appointment. The court, seeing that the distributees have consented to giving the independent administrator the power of sale, can include the power of sale in the order appointing the independent administrator. This permits title companies and other third parties to rely on that order when the independent administrator wishes to sell real property. If the independent administrator waits until after he or she is appointed to get the power of sale, it is too late – the distributees also must sign the deed (unless the sale is necessary to pay expenses of administration, funeral expenses and expenses of last sickness of decedent, and allowances and claims against the estate – see below.)

New Section 145C confirms that an independent executor has the power to sell real property if that power is expressly given to him or her in the will. In most cases in the Probate Code, the term "independent executor" includes "independent administrators." This is not the case in Section 145C, however. While an independent executor has the power of sale given in the will, an independent administrator with will annexed does not, since the testator is deemed to have given the power of sale only to the persons he or she named as independent executors in the will and not to an unnamed person later appointed as independent administrator.

Section 145C also provides that, unless limited by the terms of a will, both independent executors and independent administrators have the same power of sale for the same purposes as a personal representative has in a supervised (dependent) administration, but without the requirement of court approval and without the need to comply with the procedural requirements applicable to a supervised administration. Section 341 provides that a personal representative in a supervised administration with court approval may sell property when it appears necessary or advisable in order to:

(1) Pay expenses of administration, funeral expenses and expenses of last sickness of decedents, and allowances and claims against the estates of decedents.

(2) Dispose of any interest in real property of the estate of a decedent, when it is deemed to the best interest of the estate to sell such interest.

Clearly under new Section 145C an independent executor or independent administrator may sell real property if necessary to pay expenses, allowances and claims (Section 341(1)) regardless of whether the will contains a power of sale and so long as the terms of the will do not limit the power of sale. It is not so clear if an independent executor or independent administrator without an express power of sale may sell real property "when it is deemed to the best interest of the estate" (Section 341(2)). Section 145C(b) says he or she has the same power of sale for the same purposes as a dependent administrator, and a dependent administrator may apply to the court for a "best interest" sale, so it appears that independent executors and administrators are given this power. However, Section 145C(c) provides that a good faith unrelated purchaser of real property is protected if there is a power of sale given to the independent executor in the will, if the court grants a power of sale in the order appointing the independent executor or independent administrator, or if "the independent executor or independent administrator provides an affidavit, executed and sworn to under oath and recorded in the deed records of the county where the property is located, that the sale is necessary or advisable for any of the purposes described in Section 341(1) of this code." Since Section 341(1) permits sales to pay administrative expenses, allowances and claims, while Section 341(2) permits "best interest" sales, there is no third-party protection for "best interest" sales.

After chopping through the bushes on Sections 145A and 145C for a while, it appears that the power of sale in an independent administration may be summarized as follows:

- If the will expressly gives a power of sale, the independent executor named in the will has the power to sell real property for any purpose.

- An independent administrator with will annexed cannot use a power of sale granted in the will.

- If the distributees consent to giving the independent executor or independent administrator the power of sale and the order appointing the independent executor or independent administrator expressly grants the power of sale, the independent executor or independent administrator has the power to sell real property for any purpose.

- Unless the terms of a will limits the power, any independent executor or independent administrator may sell real property to pay administrative expenses, allowances and claims or if it is in the best interest of the estate – even if the will or order grant no power of sale – but a good faith third party purchaser will be protected only if the sale is to pay administrative expenses, allowances and claims. The third party is not protected if the reason for the sale is the best interest of the estate.

Section 145C(c)(2) makes clear that the signature or joinder of a devisee or heir is not required as to acts undertaken in good faith reliance on the independent executor's affidavit that the sale is for the purpose of paying administrative expenses, allowances or claims. Section 145C(c)(3) makes clear that the fact that an independent executor or administrator has the power to sell real property does not relieve him or her from any duty owed to a devisee or her in relation, directly or indirectly, to the sale.

Sections affected: Probate Code Sections 145A and 145C.

Claims in Independent Administrations

Section 146 addresses claims in independent administrations. SB 1198 makes several changes:

- Section 294(d) permits personal representatives to give notices to unsecured creditors, and those creditors are required to present their claim within 120 days of receipt of the notice, or the claim is barred. Section 146 makes it clear that Section 294(d) notices may be used in an independent administration. However, when used in an independent administration, the notice also must include a statement that a claim may be effectively presented by only one of the methods prescribed by Section 146. Section 146(b-4) prescribes these methods of giving notices by creditors:

    - A written instrument that is hand-delivered with proof of receipt, or mailed by certified mail, return receipt requested with proof of receipt, to the independent executor or the executor's attorney;

    - A pleading filed in a lawsuit with respect to the claim; or

    - A written instrument or pleading filed in the court in which the administration of the estate is pending.

- A secured creditor electing matured secured status must give notice to the independent administrator in one of the methods prescribed in Section 146(b-4) (described above) *and* must record a notice of the creditor's election in the deed records of the county in which the real property is located.

- A secured creditor electing matured secured status in an independent administration is entitled to the priority granted by the Probate Code, but the creditor is not entitled to exercise any remedies in a manner that prevents the payment of higher priority claims and allowances and, during the estate administration, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval. If the secured creditor elects matured secured status, the independent executor and not the secured creditor is empowered to sell the property if necessary to pay the claim. Still, the creditor with matured secured status is not powerless to protect itself. Section 146(b-1)(2) permits the matured secured creditor to seek judicial relief or to execute a judgment against the independent executor. Section 146(b-1)(3) coordinates with the no right to exoneration of lien statute (Section 71A), requiring the independent executor either to collect from the devisees the amount needed to pay the debt or to sell the property to raise money to pay the debt.

- A secured creditor with preferred debt and lien status is free to exercise judicial or extrajudicial collection rights, including the right to foreclose and execution, but the

creditor may not conduct a nonjudicial foreclosure sale within 6 months after letters are granted.

- In an independent administration, presentation of a statement of claim or a notice with respect to a claim to an independent executor does not toll the running of the statute of limitations with respect to that claim. Except as otherwise provided in Section 16.062 of the Civil Practices and Remedies Code, the running of the statute of limitations in an independent administration is tolled only by:
  - Written approval of a claim signed by an independent executor;
  - A pleading in a suit pending at the time of the decedent's death; or
  - A suit brought by the creditor against the independent executor.
- Section 146(b-7) states plainly that, other than as provided in Section 146, the procedural provisions of the Probate Code governing creditor claims in supervised (dependent) administrations do not apply to independent administrations. Among the procedural provisions that do not apply to independent administrations are Section 306(f) – (k) and Section 313. A creditor's claim is not barred solely because the creditor failed to file a suit not later than the 90th day after the date an independent executor rejects the claim or fails to act with respect to a claim.

Section affected: Probate Code Section 146.

Other Independent Administration Changes

SB 1198 includes the changes to independent administration proposed by the Real Estate, Probate and Trust Law Section of the State Bar of Texas in 2009. REPTL sought to tweak the independent administration statutes in anticipation of their inclusion in the new Estates Code, which becomes effective January 1, 2014. The 2009 changes were not controversial but failed to pass for procedural reasons. Those changes now have been enacted.

The changes about the power of sale and creditors' claims in independent administrations are described above. Here are other changes to the independent administration statutes:

- The court may not appoint an independent administrator of an intestate decedent's estate until a determination of heirship proceeding is completed (Section 145(g)).
- The natural guardians of a minor may consent to an independent administration on the minor's behalf if there is no conflict of interest and no guardian has been appointed (Section 145(i)).
- A trustee may consent to an independent administration on behalf of an incapacitated trust beneficiary if the trustee is not the person proposed to serve as independent administrator (Section 145(j)).

- New Section 145B is a blanket statement that, unless otherwise provided in the Probate Code, an independent administrator may act without court approval.

- Many independent executors choose never to close the administration of the estate. That continues to be permitted under the changes made by SB 1198. Under prior law, Section 151 permitted an independent executor to close the administration by filing a closing affidavit. SB 1198 retained this method of closing an estate, although it changed its name to a "closing report." It added a new option – filing a "notice of closing of the estate." The notice is less extensive than the closing report. The notice must be verified by affidavit and state that all debts known to exist have been paid to the extent permitted by the assets in the independent executor's possession and all remaining estate assets have been distributed. It also must include the names and addresses of the distributees to whom property has been distributed. Before filing the notice, the independent executor must give each distributee a copy of the notice and must included signed receipts or other proof of delivery with the notice when it is filed.

Sections affected: Probate Code Sections 145, 145B and 151.

Disclaimer Statutes Amended to Reflect Extended Time to Disclaim Under 2010 Tax Act

SB 1198 amends Probate Code Section 37A and SB 1197 amends Trust Code Section 112.010 to permit the disclaimer of an interest in property passing by reason of the death of a decedent dying after December 31, 2009, but before December 17, 2010, to be executed and filed no later than 9 months after December 17, 2010. This permits Texans to take advantage of the extended disclaimer period allowed under the Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010.

Sections affected: Probate Code Section 37A, Trust Code Section 112.010.

Other Changes Affecting Decedents' Estates

In 2009 the jurisdiction provisions affecting decedents' estates were rewritten in anticipation of the enactment of the new Estates Code, which becomes effective January 1, 2014. SB 1198 makes a few changes to the jurisdiction provisions and cleans up the venue provisions for decedents' estates. Changes include:

- Section 4D was amended to permit the judge of a constitutional county court to assign a statutory probate judge to hear the entire probate proceeding and not just the contested portion of the proceeding. No equivalent change was made for cases transferred to the district court, so only the contested portion of the proceeding may be transferred to the district court and the constitutional county court retains jurisdiction of the underlying estate administration.

- Sections 4H and 6D were amended at the request of the office of the Attorney General of Texas to make doubly clear that a statutory probate court has concurrent jurisdiction with

the district court in an action involving a charitable trust as defined by Section 123.001 of the Property Code and that venue of charitable trust proceedings is determined under Section 123.005 of the Property Code. Section 123.005 already provided that venue of a breach of fiduciary action brought by the Attorney General is proper in Travis County. SB 587 amended Section 123.005 to confirm that a statutory probate court in Travis County has concurrent jurisdiction of breach of fiduciary actions brought by the Attorney General. All of these changes make it clear that the Attorney General may file breach of fiduciary duty actions involving charitable trusts in either a district court in Travis County or a statutory probate court in Travis County.

- Sections 6, 8 and 8A were amended and Sections 6A, 6B, 6C, 6D and 8B were added in an attempt to get all of the venue provisions affecting decedents' estates in one place in a coordinated fashion. For the most part, these are not substantive changes. For example, under prior law the venue provisions for determination of heirship proceedings were found in Section 48. SB 1198 moves them to Section 6C so that all the venue provisions will be in the same part of the Probate Code. Subsection (c) is added to Section 8 to make clear that a court in which an application for a probate proceeding is filed has jurisdiction to determine venue.

SB 1198 amended Section 49 to give a trustee holding assets for the benefit of a decedent standing to file a determination of heirship proceeding.

Section 64, regarding enforceability of forfeiture provisions in wills, was tweaked by SB 1198 to change "probable" cause to "just" cause. This makes the language consistent with Section 243, which permits recovery of attorney's fees of certain litigants in will contests if they acted in good faith and with "just cause."

What happens when a decedent's will leaves everything to his or her surviving spouse, but there is a pretermitted child who is not also a child of the surviving spouse? This could happen if the decedent had a child out of wedlock while married to the surviving spouse. Prior to being amended, Section 67 created the possibility that the pretermitted child would receive all of the community property and most of the separate property, notwithstanding the decedent's clear intention to leave everything to his or her spouse. SB 1198 adds subsection (e) to Section 67, providing that the share of the surviving spouse in the above situation cannot be reduced by more than one-half.

Section 83 was amended by SB 1198 to provide that, if competing wills are offered for probate, the court may not sever or bifurcate the proceeding on the applications. The Legislature wants both applications to probate a will heard at the same time.

SB 1198 amended Section 84 to make it easier to get a self-proved will executed in accordance with the laws of another state admitted to probate as a self-proved will in Texas. The change specifies the minimal requirements for having a will, including an out-of-state will, considered to be self-proved.

SB 1198 eliminates the need to list other co-owners of property on inventories. (Section 250)

SB 1198 added one definition and amended two definitions in Section 436 to make clear that a charitable organization may be a pay-on-death payee of a multiparty account.

In 2007 Section 69 of the Probate Code was amended to prevent certain relatives of the former spouse from receiving a gift under a will executed prior to the divorce of the decedent and the former spouse. Now SB 1198 makes corresponding changes to Sections 471, 472 and 473, which address the same issue in the case of certain non-testamentary transfers.

SB 748 added new Section 101.1115 to the Business Organizations Code to provide that, upon the death of a member or a member's spouse or on the divorce of a member, the person receiving an ownership interest in a limited liability company is only an assignee, not a full member. Assignees are entitled to economic benefits but not voting rights.

HB 2492 amends 12 sections of the Probate Code to add adult incapacitated children to the list of persons whom may benefit from the family allowance, exempt property and allowance in lieu of exempt property.

SB 543 adds Section 11B to exempt the estates of law enforcement officers and firefighters killed in the line of duty from the requirement to pay probate fees.

Sections affected: Probate Code Sections 4D, 4H, 6, 6A, 6B, 6C, 6D, 8, 8A, 11B, 48, 49, 64, 67, 83, 84, 139, 140, 143, 250, 272, 273, 274, 275, 276, 286, 287, 288, 290, 291, 292, 436, 471, 472 and 473, Business Organizations Code Section 101.1115.

Legislation Affecting Guardianships

Ad Litems, Attorneys' Fees and Costs in Guardianship Proceedings

This was an active session for legislation about attorneys ad litems and the payment of fees and costs in guardianship proceedings, with no fewer than 5 bills proposed on the subject. The following changes were enacted:

- SB 1196 amends Section 646 to provide that an attorney ad litem continues to serve after the court appoints a temporary guardian unless the court otherwise orders.

- Section 646A, added to the Probate Code by SB 220, permits a ward who retains the power to enter into a contract or a proposed ward with the capacity to contract to retain an attorney meeting the ad litem certification requirements of Section 647A to represent him or her instead of being represented by the attorney ad litem. If the court finds that the ward or proposed ward has the capacity to contract, then the court may remove the attorney ad litem.

- SB 220 requires the court to appoint both an attorney ad litem and a guardian ad litem for a ward in a proceeding to remove a guardian, although the court may appoint the same person as both guardian ad litem and attorney ad litem if there is no conflict of interest. (Section 761)

- SB 220 amends Section 670 to permit the guardian for a recipient of governmental medical assistance to treat guardianship compensation not exceed $175 per month and costs not exceeding $1,000 that are directly related to establishing or terminating the guardianship during any three-year period to be deducted as an additional personal needs allowance when computing the recipient's applied income.

- SB 1196 clarifies that an attorney ad litem appointed in a temporary guardianship continues to serve until a permanent guardian is appointed or the guardianship application is denied. (Section 646)

Sections affected: Probate Code Sections 646, 646A, 670 and 761.

Removal of Guardians/Reinstatement/Appointment of Successor Guardians

SB 220 adds engaging in conduct that would be considered to be abuse, neglect, or exploitation under Section 48.002 of the Human Resources Code to the list of actions which permit the court to remove a guardian without notice. It also requires the appointment of both an attorney ad litem and guardian ad litem in a removal proceeding, although it permits the court to appoint one person to serve in both posts if there is no conflict of interest. (Section 761)

If a guardian is removed, SB 481 requires the clerk to give notice to the removed guardian by personal service not later than the seventh day after the date the court signed the order of removal. (Section 761) A removed guardian who wishes to be reappointed must file an application for reinstatement within 30 days of the date the judge signs the order of removal. (Section 762) The court must hold a hearing on the application for reinstatement within 60 days of the date the judge signs the order of removal. (Section 762)

If a guardian is removed and a successor is appointed, SB 220 provides that an interested person still may file an application to be appointed guardian. The court may set aside the appointment of the successor guardian and appoint the applicant if the applicant is not disqualified and after considering the requirements of Sections 676 and 677. (Section 761)

Sections affected: Probate Code Sections 761 and 762.

Jurisdictional Changes

In 2009 the Legislature substantially rewrote the jurisdiction statutes for decedents' estates. These changes were intended to prepare the Probate Code for codification into the Estates Code. Among the key 2009 changes were dropping the term "appertaining to an estate" and "incident to an estate." Rather, certain proceedings were defined as "probate proceedings" (Section 3(bb)) while others were "matters related to a probate proceeding." (Section 4B)

In 2011, SB 1196 made parallel changes to the jurisdiction provisions for guardianships. For example, it amends Section 601(25) to add a definition of "guardianship proceeding" and adds Section 606A to define "matters related to a guardianship proceeding."

Sections affected: Probate Code Sections 601, 605, 606A, 607A, 607B, 607C, 607D, 607E, 608, 609, 611, 622, 629, 632, 650, 653, 666 and 669.

Other Guardianship Changes

In addition to the changes described above, SB 1196 makes multiple changes to the guardianship statutes in the Texas Probate Code. These include:

- Permitting a hearing on a guardianship matter anywhere in the county in which the guardianship matter is pending, so long as the ward or proposed ward does not object. (new Section 652)

- Making it easier for the conservator of an adult disabled child to obtain a guardianship of that child. (Section 682A)

- Fixing some technical problems caused by 2009 changes to the physician's certificate requirements for guardianships. (Section 687)

- Eliminating the need to list other co-owners of property on guardianship inventories. (Sections 729 and 730)

- Clarifying that a guardianship of the estate shall be settled when all of the guardianship assets are transferred to a pooled trust subaccount. (Section 745)

- Changing the maximum age for a guardian of a person to "voluntarily" admit the ward to an inpatient psychiatric facility from 16 to 18. (Section 770)

- Making it possible to apply to the court for permission to transfer a portion of the ward's estate "as necessary to qualify the ward for government benefits." (Section 865)

- Permitting a person with a physical disability only to apply for creation of a guardianship management trust (which may be necessary to qualify for governmental benefits). (Sections 867, 868, 868C, 869 and 870) The court may not require the trustee of a trust created for a person with a physical disability only to file annual or final accountings. (Sections 871 and 873)

- Requiring the trustee of a guardianship management trust to file an "initial accounting" (the equivalent of an inventory) within 30 days after the date a trustee receives property. (Section 870A)

- Clarifying who can apply for the establishment of a pooled trust subaccount and who is eligible for a pooled trust subaccount. (Sections 910 and 911)

In addition to the changes described above, SB 220 requires the citation issued by the clerk when an application for guardianship is filed to contain a clear and conspicuous statement informing those being served of the right under Section 632(j) to be notified of court filings in the guardianship case. It also requires the applicant to mail a copy of the application by certified

mail, return receipt requested, to another relative within the third degree of consanguinity if the proposed ward's spouse and each of the proposed ward's parents, adult siblings and adult children are deceased or there is no spouse, parent, adult sibling or adult child. (Section 633) The bill makes a related change to Section 682, requiring the applicant to list in the application other living relatives of the proposed ward within the third degree of consanguinity if each of the proposed ward's parents and adult siblings are deceased. It also exempts an individual volunteering with DADS from the requirement to be certified under Probate Code Section 697A. (Section 697B)

In a rarity for probate and guardianship legislation, SB1 in the First Called (Special) Session of the 82nd Texas Legislature made some changes to the guardianship portion of the Probate Code. It makes a number of changes to the provisions regarding transfer of guardianship proceedings (Sections 612, 613, 614, 615, 616, 617, 618 and 619), including requiring the guardian of a guardianship that is transferred to give a new bond payable to the court to which the guardianship is transferred or to file a rider to the existing bond noting the court to which the guardianship is transferred. (Section 614) The bill also requires the court to which the guardianship is transferred to conduct a hearing within 90 days to consider modifying the rights, duties, and powers of the guardian. (Section 619) SB1 also alters the procedures for dealing with interstate guardianships (Sections 892, 893, 894 and 895). New Section 895 provides a means for a court in which a guardianship proceeding is pending to determine if it is the most appropriate forum for the guardianship.

Sections affected: Probate Code Sections 612, 613, 614, 615, 616, 617, 618, 619, 633, 652, 682, 682A, 687, 697B, 729, 730, 745, 770, 865, 867, 868, 868C, 869, 870, 870A, 871, 873, 892, 893, 894, 895, 910 and 911.

Legislation Affecting the Trust Code and Property Code

Inherited IRAs are Exempt from Creditors' Claims

SB 1810 amends Section 42.0021 of the Property Code to provide that all IRAs, including inherited IRAs, are exempt from creditors' claims. It provides that the interest of a person in an IRA acquired by reason of the death of another person is exempt to the same extent that the interest of the person from whom the account was acquired was exempt on the date of the person's death. The exempt status of inherited IRAs was called into question by *In re Jarboe,* 2007 WL 987314 (Bankr. S. D. Tex 2007), and by similar cases across the country.

Section affected: Property Code Section 42.0021.

Other Trust Code and Property Code Changes

SB 1197 makes several minor or technical changes to the Texas Trust Code. It:

- Contains a special extension of the disclaimer deadline to match the extension in the 2010 tax law. (Section 112.010) This is similar to the change to Probate Code Section 37A made by SB 1198.

- Makes a slight change in the forfeiture (in terrorem) statute -- "just cause" must have existed for bringing the action, not "probable cause." (Section 112.038) This mirrors the change to Probate Code Section 64 made by SB 1198.

- Allows waiver of notice of nonjudicial divisions and combinations of trusts. (Section 112.057) Under prior law, the trustee had to give 30 days' notice to beneficiaries before the division or combination was effective. If all beneficiaries agree to the trustee's action, they may waive the notice requirement to avoid the 30-day delay.

- Makes clear that a county court at law exercising the jurisdiction over a trust given it by Section 4B of the Probate Code has trust jurisdiction. (Section 115.001) In 2007, Section 4B gave county courts at law limited jurisdiction over trusts. This change to the Trust Code jurisdiction provision mirrors that change.

- Makes venue in a trust case proper in a court in which an estate is pending. (Section 115.002) This makes it easier to address trust issues in the same court where the administration of an estate is pending.

- Removes a beneficiary whose interest has been distributed, extinguished, terminated or paid from the list of necessary parties to trust litigation. (Section 115.011)

- Fixes cross-referencing errors created when a 2005 legislative change modified subsection renumbering. (Section 116.005)

- Changes the income tax allocation rules for trusts to address a problem which may arise when a trust holds in an interest in a pass-through taxation entity such as a partnership. SB 1197 provides for taxes to be paid proportionally from principal and income to the extent that receipts from the entity are allocated to both principal and income and to adjust income or principal receipts to the extent that a trust's taxes are reduced because the trust receives a deduction for distributions to a beneficiary. This is consistent with an amendment to the Uniform Principal and Income Act made by the National Conference of Commissioners on Uniform State Laws in 2008. (Section 116.205)

SB 587 amends Section 123.005 to provide that a statutory probate court in Travis County has concurrent jurisdiction in a breach of fiduciary duty action brought by the Attorney General involving a charitable trust. This is consistent with the changes made to Probate Code Sections 4H and 6D by SB 1198.

Sections affected: Trust Code Sections 112.010, 112.057, 115.001, 115.002, 115.011, 116.005 and 116.205, Property Code Section 123.005.

The Estates Code – Effective January 1, 2014

The Legislative Council is codifying the Probate Code into a new "Estates Code" over three legislative sessions. The Estates Code will become effective January 1, 2014, and will replace the Probate Code. In 2009 most of the decedents' estates provisions were enacted. In 2011, SB

1303 made clean-up changes to the decedents' estates portion of the Estates Code and HB 2759 enacted the guardianship portion of the new code. These changes are too numerous to discuss in detail here.

Sections affected: Too numerous to list here, and they don't become effective until January 1, 2014.

Other Legislation of Interest

Will Unsworn Declarations Invade Probate Practice?

Because of HB 3674, which flew under the radar in 2011, arguably it is no longer necessary to have a notary in most cases were a sworn statement or affidavit is made. The statute amends Section 132.001 of the Civil Practice and Remedies Code – which previously only dealt with unsworn statements by inmates – to provide that an "unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted by law." The unsworn declaration must be in writing and subscribed by the person making the declaration as true under penalty of perjury. A specifc form of non-notarized jurat must be used. There are exceptions for an oath of office or an oath required to be taken before a specified official other than a notary public. The bill becomes effective September 1, 2011, and applies to unsworn declarations made on or after that date.

Is a will containing an unsworn declaration self-proved as required by Section 59 of the Probate Code? Probably not. For one thing, the testator and each witness would have to make an unsworn declaration, not just the testator. For another, a court is likely to find that the use of an unsworn declaration is not "in form and contents substantially" as required by Section 59. Also, since the consequences of a court's refusal to accept an unsworn declaration on a will is that it is not self-proved (rather than that it is not entitled to probate), it is hard to imagine anyone appealing a decision of a court refusing to accept it.

Sworn statements are permitted or required at least 70 times in the decedents' estates portion of the Probate Code. (The author grew tired of counting before getting to guardianships.) With some of these statutes, it may be appropriate to permit someone to make an unsworn declaration under penalty of perjury rather than a notarized statement. In others, it clearly is a bad idea.

Time will tell if probate judges will permit the use of these declarations. In the meantime, the simple, worry-free answer for a probate practitioner is to use notarized sworn statements and affidavits.

Possible Effects of the "Loser Pays" Legislation

The "loser pays" bill signed into law by Governor Perry may impact probate and guardianship practice in Texas. The Legislature stripped many of the more controversial provisions from the final version of HB 274. Earlier versions of the bill could have more significantly (and adversely) impacted Texas probate, guardianship and trust law practice. The biggest problem for

probate and guardianship lawyers in the final version is the potential for new Supreme Court rules that alter the way probate and guardianship actions are handled.

Under amendments to Section 22.004 of the Government Code, the Supreme Court must adopt rules that "apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy does not exceed $100,000." The rules "shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system." While the Court is not permitted to adopt rules which conflict with the Family Code or the Property Code, there is no carve-out for conflicts with the Probate Code. (The Property Code exception should apply in trust law cases since the Trust Code is part of the Property Code.)

The bill itself does not impose these new rules. Rather, it directs the Supreme Court to adopt rules. Hopefully the Court will consider some if the unique aspects of probate and guardianship actions when making its rules. Still, there is a potential problem in these cases:

- *Claims Practice.* The Probate Code already has an expedited way to handle claims against probate estates. Most of those claims are under $100,000. Will the rules provide a different way to handle these claims? Will the rules be mandatory?

- *Administrative Matters Not Involving an Amount in Controversy.* It seems clear that the new rulemaking authority was meant to address litigation seeking damages. The statutory language is not limited, however. There are other statutes addressing specialized procedures in litigation seeking damages, such as Chapter 42 of the Civil Practices and Remedies Code. These statutes expressly limit their application to claims for monetary relief. See, for example, Section 42.002(a) of the Civil Practices and Remedies Code. What happens if a party in an action to remove an independent executor under Section 149C of the Probate Code elects to follow a new procedure enabled by rules implemented under HB 274?

There are other provisions of HB 274 which may impact probate, guardianship and trust practice:

- The bill amends Section 51.014 of the Civil Practices and Remedies Code to make it easier to appeal interlocutory orders.

- The bill amends Section 42.001 of the Civil Practices and Remedies Code to add deposition costs to the list of litigation costs which the loser may be required to pay if a settlement offer is rejected under Section 42.003.

Sections affected: Government Code Section 22.004, Civil Practices and Remedies Code Sections 42.001, 42.002, 42.003, 42.004 and 51.014.

Fraud on the Community in Divorce Cases

HB 908 adds new Section 7.009 to the Family Code and applies only to suits for dissolution of a marriage. It provides additional remedies in cases where fraud on the community occurred. As

originally filed and as passed by the House, the bill defined "fraud on the community" in a way that could have caused problems in the administration of decedents' estates. As finally passed, the definition was removed, making it just about remedies in a divorce.

Section affected: Family Code Section 7.009.

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