

Is There Meat in Those Beans?

The 2019 Texas Estate and Trust Legislative Update

(Including Probate, Guardianships, Trusts,
Powers of Attorney, and Other Related Matters)

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PRELIMINARIES...

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Read the Paper!

- Or at least the main part of the paper (Parts 7 – 16).
- Due to time constraints, we can't cover every change described in the paper.
- Some of the ones we'll skip may be of interest to you.

(For those who care, the color of the titles and horizontal lines is "Living Coral" (Pantone 16-1546), Pantone's 2019 "Color of the Year.")

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Now That the Session is Over...

- You may download a separate supplement containing the actual language of bills marked to show what has been added to or deleted from statutes. Point your browser to:
www.snpalaw.com/resources/2019LegislativeSupplement
- Don't worry about writing this down. It's in Part 1 of the paper. And the last page of the paper.

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The 2019 REPTL “Big” Bills

- Decedents’ Estates
- Guardianships
- Trusts
- Medical Powers of Attorney
- Substantive Code Updates (Maybe Not So “Big”)
 - Updates outdated references in other codes to former Probate Code provisions that couldn’t be “nonsubstantively” updated by Leg. Council with confusion.
 - See example in paper (near end of Part 3) relating to Civ. Prac. & Rem. Code Sec. 71.012.
- Non-REPTL Leg. Council Nonsubstantive Code Update
 - Two minor Estates Code changes.



The 2019 REPTL “Small” Bills

- Both from the “PAADs” Committee
- Both repeats from 2017 session
 - Anatomical Gifts
 - Allows use of one notary in lieu of two witnesses
 - Disposition of Remains
 - Revokes authority of spouse upon divorce
 - Court with jurisdiction of probate proceedings has jurisdiction over disposition dispute (even if probate hasn’t commenced).
 - But dispute over removal of remains is in county where cemetery located.
- But before we move on to the substance of the REPTL Decedents’ Estates bill...



REPTL “Disclaimer”

- REPTL bills are introduced with proposals that have received State Bar Board of Directors’ approval.
- Once introduced, they’re no longer “REPTL bills.”
- REPTL bills end up with provisions that were not originally REPTL proposals.
- Most non-REPTL provisions added to REPTL bills will be noted in the paper.
- For example, provisions relating to both decedents’ estates and guardianships were added from three other bills to the REPTL Guardianship bill.
 - *Unfortunately, one of those additions is the reason the Guardianship bill was vetoed!*

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DECEDENTS’ ESTATES...

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REPTL Decedents' Estates Bill

- Testator may include provisions allowing designation of administrator.
 - Similar to provisions we already include regarding appointment of trustees.
 - Power may be granted to named executor or other person designated by name, office, or function.
 - By default, designees would act only if all named alternates cannot or will not act.
 - But will provision can give powerholder authority to override order of succession in will.

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REPTL Decedents' Estates Bill

- “Probate proceeding” includes will modification or reformation.
- PR entitled to information about nonprobate assets even if estate has no post-death interest.
- Clarifies PR has no duty to pursue nonprobate assets absent written demand by surviving spouse, creditor, or person acting for decedent’s minor child.
- Recorded memorandum of conveyance voids TODD.
- Repeal of statutory TODD forms.
 - The repealed forms are still valid if you want to use them.
 - Check out forms at TexasLawHelp.org.
 - See separate bill requiring Supreme Court to promulgate TODD forms.

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REPTL Decedents' Estates Bill

- Clarifies community property intestacy provisions.
 - Confusion introduced when Estates Code was codified.
 - **THIS IS NOT A CHANGE TO THE ACTUAL INTESTACY LAWS!!!**
- Two disinterested witnesses required in heirship unless court finds only one can be found.
 - Witnesses (e.g., genealogy expert) need not have known decedent.
- Anti-lapse provisions regarding failed devise made inapplicable to charitable gifts. (Non-REPTL)
- Allows removal of will reformation in constitutional county court to statutory county court, or if none, to district court, or assignment of statutory probate judge if no statutory county court.

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REPTL Decedents' Estates Bill

- Allows muniments to be converted if later need for administration arises.
 - Must be filed before original deadline for administration application.
- Clarifies that extension of time to file inventory extends time to file affidavit in lieu. (Non-REPTL)
- Clarifies PR's ability to obtain court order granting access to digital assets. Even if independent.

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REPTL Decedents' Estates Bill

- Clarifies that court approval of contingent fee agreement required **only** for fees in excess of $\frac{1}{3}$ rd of property sought to be recovered.
- Allows (but doesn't require) award of costs (including attorney's fees) to successful will contestant without offer of alternative will.
- Separate \$15,000 limits for Class 1 **funeral expenses** and **expenses of last illness**.
- Clarifies procedures for 2015 requirement that secured creditors act promptly.

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REPTL Decedents' Estates Bill

- Clarifies sales procedures in dependent administrations.
- Public "sales" are now called public "auctions."
 - Auction completed upon bid of highest bidder.
 - Auction held in county where real estate is located, unless probate court orders it held in county of probate.
 - Other procedural changes designed to conform to standard foreclosure provisions.
- Private "sales" refer to contract entered into by PR.
 - "Successful bid or private contract," not "sale," is reported to court.
 - Court "approves," rather than "confirms," sale.

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REPTL Decedents' Estates Bill

- Distributees may waive independent PR's bond if not waived in will.
- Authority of and procedures for public probate administrators.
- Clarifies recusal procedures for presiding judge of statutory probate courts.

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Other Decedents' Estates Bills

- Adoption of Property Code procedures for recovery of unclaimed property from Comptroller.
- Exemption from reporting requirements for pro bono ad litem, etc. (applies to guardianships, too).
- Early termination of residential leases following tenant's death.
- Property tax homestead exemption for "heir property" available to "heir property owner."
- Permitted release of deceased state hospital patient's medical records to descendant after 50 years.

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GUARDIANSHIPS...

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REPTL Guardianship Bill

- The REPTL Guardianship bill contained a number of miscellaneous provisions that are described in the paper.
- By the time it passed, it also incorporated a number of provisions that were originally in other bills.
- Unfortunately, it was vetoed by the Governor on June 15th.
- His veto was based on a non-REPTL provision that would have allowed counties to establish an Office of Public Guardian.
- The paper still describes the vetoed provisions.

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Other Bills Related to Persons With Disabilities

- Compensation of guardians of Medicaid recipients increased from \$175 to \$250/month.
- Delivery of notices in Mental Health Code proceedings by constable or sheriff.
 - Anyone filing copy of original must maintain possession of original and make it available upon request.
- Establishment of electronic database for settlement agreements involving minors and incapacitated persons.
- Guardianship Abuse, Fraud, and Exploitation Deterrence Program.

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Other Bills Related to Persons With Disabilities

- Task force on best practices for detention of persons with disabilities.
- Use of person first respectful language in statutes and resolutions.
- Signature authority of legal guardian over ABLE account.
- Court may order support for child with disability be paid to SNT for child.
- Court may triple actual damages for phishing against elderly.

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Other Bills Related to Persons With Disabilities

- Sexual assault or nurse examiner may, without guardian's consent, provide care to and collect evidence from survivor of sexual assault who is incapacitated and at least 14, or a ward in a guardianship.
- Prompt discharge following admission for voluntary mental health services unless patient meets standards for inpatient mental health services.
- More relatives with actual custody of minor for six months may seek order for temporary inpatient mental health services.
- Authority of peace officer to make emergency detention without warrant applies *regardless of age*.

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Other Bills Related to Persons With Disabilities

- Revised procedures for court-ordered mental health services for criminal defendants.
- Permissive release of person with intellectual or developmental disability to group home or intermediate care facility in lieu of arrest.
- Expanded procedures for early identification or release of defendant suspected of mental illness.
- No death penalty for person with intellectual disability.

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TRUSTS...

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REPTL Trust Bill

- Court's ability to deny or order return of trustee's fees and to make "equitable and just" award of costs and attorney's fees is added to list of mandatory terms.
- Rules relating to (1) construction and interpretation of wills (e.g., pretermitted children, advancements, lapsed gifts, class closing, and more), and (2) abatement of gifts are made applicable to revocable trusts.
- Clarifies that trust **reformations** (as opposed to modifications) are effective as of creation of trust.
- "Clarifies" that assets can be decanted into trust under same instrument.
 - Designed to reduce need to retitle assets and to obtain new TIN.
 - *Does it work?*

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REPTL Trust Bill

- Estates Code rules regarding effect of divorce on spousal provisions in revocable trusts are copied to Trust Code.
 - They'll eventually be repealed from Estates Code.
- Termination provisions for Ch. 142 trusts are conformed to changes in Guardianship bill relating to Ch. 1301 trusts.
 - *Except the Guardianship bill was vetoed!*
- Pooled trust subaccounts (and transfers from Ch. 142 management trust to pooled subaccount) are authorized if initial trustee can no longer serve and no suitable replacement for unpooled trust can be found.

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REPTL Directed Trust Bill

- Clarifies that person with authority to direct, consent to, or disapprove trustee's decisions **is** an "advisor," and **is** a fiduciary.
 - But power solely to remove and appoint trustees, advisors, trust committee members, or other protectors, is exception to fiduciary rule if advisor does not exercise power to appoint self.
 - Nor does fiduciary requirement prohibit exercise of power that must be exercised in nonfiduciary capacity for someone to be treated as owner of trust for income tax purposes.

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DISABILITY DOCUMENTS...

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REPTL Financial Power of Attorney Bill

- Just kidding!
- There is no REPTL bill this session affecting financial powers of attorney.
- Although the Leg. Council nonsubstantive code update bill contains one change to Sec.752.113(c):
 - “an agent may be named a beneficiary under a retirement plan only to the extent the agent was [a] named a beneficiary by the principal under a retirement plan...”

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REPTL Medical Power of Attorney Bill

- Statutory form no longer mandatory.
- Valid medical power must:
 - be in writing;
 - be signed by the principal (or another person at principal's direction) before two witnesses or notary; and
 - contain principal's name, date of execution, and designation of agent.
- In event of disagreement among co-agents, agents have authority to act as sole agent in order in which names are listed.
 - Unless medical power provides a different method of resolving disagreement.

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But REPTL MPOA Bill Did Not Pass

- Texas Medical Association and Texas Hospital Association strongly opposed making form optional.
- Despite fact that **45 states have optional forms**, TMA and THA argue use of any form other than mandatory form would create too much confusion.

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Other REPTL Advance Directive Bills

- Anatomical gift, or revocation of same, may be executed before notary instead of two witnesses.
- Authority of spouse under disposition of remains statement is revoked upon divorce.
 - Court with jurisdiction over decedent's probate has jurisdiction over dispute over disposition of remains (even absent probate proceeding).
 - Dispute over removal of interred remains belongs in county of cemetery.

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Other Disability Document Bills

- Changes designed to facilitate adding persons to organ donor registry.

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NONTESTAMENTARY TRANSFERS

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TODD Forms

- REPTL Decedents' Estates bill repeals statutory TODD forms.
 - Alternative forms (see TexasLawHelp.org) are readily available.
 - The repealed forms are still valid if you want to use them.
- But a non-REPTL bill not only repealed the statutory forms (so they're really, really, repealed) but directs the Supreme Court to promulgate forms for TODDs and revocations.
- In the meantime, use whatever TODD form you prefer.
 - To be effective, Sec. 114.055 has **just** three requirements:
 1. The TODD must "contain the essential elements and formalities of a recordable deed;"
 2. It must state that the transfer is to occur at the transferor's death; and
 3. It must be recorded **before** the transferor's death in the deed records where the property is located.

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Texas Transfer Toolkit

- Texas Access to Justice Commission has recently prepared the “Texas Transfer Toolkit designed to assist low-income persons in transferring a car, a home, and a bank account at death “outside the probate system.”
- The toolkit contains both forms and instructions.
- The toolkit may be found at [TexasLawHelp.org](https://www.texaslawhelp.org).

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EXEMPT PROPERTY

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REPTL Exempt Savings Plan Bill

- No real substantive change.
- Property Code provisions providing creditor exemption for retirement plans are clarified and reorganized to be more readable.
- Provisions in separate section relating to creditor exemption for college savings plans are incorporated (and separate section is repealed).

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OTHER STUFF...

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Other Court Administration Bills

- Increase upper limits for statutory county courts in civil matters from \$200,000 to \$250,000.
- Online posting of notice by “publication.”
- Substituted service through social media.
- Exemption from certain reporting requirements for ad litem, etc.

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Disciplinary Rules Regarding Clients with Diminished Capacity

- Not a legislative matter, but see the discussion in the paper regarding proposed changes to our disciplinary rules regarding our duties with respect to clients with diminished capacity.
- Based on ABA's Model Rule 1.14.
- More to come...

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BONUS SLIDES

(If there's extra time remaining...)

THE REPTL GUARDIANSHIP BILL

(This bill was vetoed by the governor due to the non-REPTL provision added to the bill that authorized counties to create an Office of Public Guardian.)

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Non-REPTL *Decedents' Estates* Provisions Added to REPTL Guardianship Bill

*(The following provisions were added to
the REPTL Guardianship bill from SB 1975.)*

- Personal service by any disinterested person upon absent or nonresident heir.
- Several references to “independent executor” changed to “independent administrator.”
- Proof of notice to heirs of appointment of temporary administrator.
- English translation of non-English portion of foreign wills and probate recorded in deed records.

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REPTL Guardianship Bill

- Clarifies Sec. 1021.001 concerning matters related to guardianship proceeding.
 - Former subsection (a) applied to all counties without statutory probate court.
 - Now, subsection (a) will apply to counties without **either** a statutory probate court or a county court at law.
 - New subsection (a-1) will apply to counties **with** county court at law but **without** statutory probate court.
 - Subsection (b) still applies only to counties with statutory probate court.

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REPTL Guardianship Bill

- Amends ward's bill of rights to conform to actual statutory procedure.
 - Sec. 1202.054 - appointment of court investigator or guardian ad litem to investigate modification or termination of guardianship.
- Publish notice to creditors in newspaper of **general circulation** (same as 2017 decedents' estates change).
- Court may **order** party to reimburse certain attorney's fees, rather than **requiring** reimbursement.
- Costs of guardianship proceeding paid out of estate **if** guardianship of estate created and in ward's best interests.

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REPTL Guardianship Bill

- Ch. 1301 Management Trusts:
 - Application notice provisions made identical for guardianship application. And serving guardian must be served.
 - Termination provisions for minor's trust must require termination on death or 18th birthday, unless court extends trust to 25th birthday.
 - Termination provisions for adult's trust must require termination on death, upon court finding that trust no longer in beneficiary's interests, or when beneficiary regains capacity.
 - Both guardian of estate and guardian of person must receive copy of annual account.

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REPTL Guardianship Bill

- Clarifies that upon sale by nonresident guardian, proceeds held in registry are paid to guardian, not ward.
- Criminal history record of *proposed guardian*, not *applicant*.
 - Required of all nonresident guardians, even if liquid assets ≤ \$50,000.

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Non-REPTL Guardianship Provisions Added to REPTL Guardianship Bill

(The following non-REPTL provisions were added to the REPTL Guardianship bill from SB 1975.)

- Certification required of attorneys representing any party in guardianship proceeding.
- Application must include any former name of applicant, and liquid assets of proposed ward.
- Order waiving training requirement must contain finding waiver is in accordance with Supreme Court rules.

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Non-REPTL Guardianship Provisions Added to REPTL Guardianship Bill

(More non-REPTL provisions that were added to the REPTL Guardianship bill from SB 1975.)

- Clerk may not charge \$10 fee for criminal history check of private professional guardian or employees.
- Guardian may not be excluded from legal proceedings involving ward.
- Court may transfer guardianship to foreign jurisdiction where ward has permanently moved on its own motion.

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Non-REPTL General Provisions Added to REPTL Guardianship Bill

(More non-REPTL provisions that were added to the REPTL Guardianship bill from SB 1975.)

- Extension of “last three digit” requirement to probate and guardianship proceedings, and to statutory probate courts.
- Transfer of clerk’s file in either electronic or paper form.
- Bond coverage of sitting judge extended to visiting judge.

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Non-REPTL Guardianship Provisions Added to REPTL Guardianship Bill

(The following non-REPTL provision was added to the REPTL Guardianship bill from SB 1426.)

- The commissioners court of a county may create an “office of public guardian.”
- SB 1426 was originally introduced at the request of Harris County.
- ***This is the provision that led the Governor to veto the REPTL Guardianship bill!***
 - His veto statement cited the lack of necessity for the “expense of a new bureaucracy” when private attorneys are capable of handling these matters.
 - ***This ignores the fact that the aggregate payments by the county to those private attorneys may be far more than the cost of a new Office of Public Guardian.***
 - The Legislative Budget Board’s fiscal analysis was that there would have been **NO** significant fiscal implications to the state or to local governments.

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Rule Against Perpetuities

- Constitutional RAP can be found in Art. I, Sec. 26:
 - “Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed...”
- Statutory RAP first enacted as Trust Code Sec. 112.036 effective Jan. 1, 1984.
- HB 3744 would have extended statutory RAP period to 300 years from “effective date” of trust.
 - Identical to 2017 bill.
 - Constitutional?
- All prior attempts to repeal or modify statutory RAP – every session since 1999 (except 2007 and 2015) – have failed.
- **Add 2019 to list of unsuccessful attempts.**

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