# Face Masks, Zoom, and Quarantinis: Welcome to...

# The 2021 Texas Estate and Trust Legislative Update

(Including Decedents' Estates, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)

---


Authors:

William D. Pargaman, Austin
Brink Bennett Pargaman Atkins

Meredith N. McIver, Austin
Osborne, Helman, Knebel & Scott

ETLAC Co-Chairs and Principal Presenters:

Craig Hopper, Austin
Hopper Mikeska

Lauren Davis Hunt, Austin
Osborne, Helman, Knebel & Scott


---


This version was updated **July 8, 2021**. You can check for a more recent version at:

www.snpalaw.com/resources/2021LegislativeUpdate

Or go to the Resources page at snpalaw.com and scroll to "2021 Texas Estate and Trust Legislative Update."



(See the note on page 1 about hyperlinking to the online version of this paper.)


---

# WILLIAM D. (BILL) PARGAMAN

**BRINK BENNETT PARGAMAN ATKINS**

7800 N. MoPac Expy., Suite 200
Austin, Texas 78759
512.617.7328 (direct) ∞ 512.407.8588 (fax)
bpargaman@brinkbennett.com ∞ www.brinkbennett.com


## Legal Experience

Bill Pargaman joined the Austin law firm of Brink Bennett Pargaman Atkins in July of 2021. He has been certified as a specialist in Estate Planning and Probate Law by the Texas Board of Legal Specialization (since 1986) and has been a Fellow in the American College of Trust and Estate Counsel (since 1994). He is very active in the Real Estate, Probate and Trust Law Section of the State Bar of Texas, having served as REPTL's Chair for the 2015-2016 bar year, as chair of its Estate and Trust Legislative Affairs Committee for the 2009, 2011, and 2013 legislative sessions, and as a Council member and chair of REPTL's Trusts Committee from 2004 to 2008.

Bill's practice involves the preparation of wills, trusts and other estate planning documents, charitable planning, and estate administration and alternatives to administration. He advises clients on the organization and maintenance of business entities such as corporations, partnerships, and limited liability entities. He represents nonprofit entities with respect to issues involving charitable trusts and endowments. Additionally, he represents clients in contested litigation involving estates, trusts and beneficiaries, and tax issues.

## Education

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

## Professional Licenses

- Attorney at Law, Texas, 1981

## Court Admissions

- United States Tax Court

## Prior Experience

- Saunders, Norval, Pargaman & Atkins, L.L.P., 2012-2021
- Brown McCarroll, L.L.P. (now Husch Blackwell LLP), 1981 – 2012

## Speeches and Publications

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

- State Bar of Texas (TexasBarCLE) – Advanced Estate Planning and Probate Course, Advanced Estate Planning Strategies Course, Estate Planning and Probate Drafting Course, Advanced Guardianship Law Course, Advanced Real Estate Law Course, Advanced Real Estate Drafting Course, Advanced Tax Law Course, State Bar College Summer School, State Bar Annual Meeting, Practice Skills for New Lawyers, Essentials for the General Practitioner, Miscellaneous Webcasts, and more
- Real Estate, Probate and Trust Law Section Annual Meeting
- University of Texas Estate Planning, Guardianship, and Elder Law Conference
- South Texas College of Law Wills and Probate Institute
- Estate Planning & Community Property Law Journal Seminar
- Texas NAELA Summer Conference
- University of Houston Law Foundation General Practice Institute, and Wills and Probate Institute

- Austin Bar Association Estate Planning and Probate Section Annual Probate and Estate Planning Seminar
- Austin Bar Association and Austin Young Lawyers Association Legal Malpractice Seminar
- Dallas Bar Association Probate, Trusts & Estate Section
- Houston Bar Association Probate, Trusts & Estate Section
- Tarrant County Probate Bar Association
- Hidalgo County Bar Association Estate Planning and Probate Section
- Bell County Bench Bar Conference
- Midland College/Midland Memorial Foundation Annual Estate Planning Seminar
- Austin Chapter, Texas Society of Certified Public Accountants, Annual Tax Update
- Texas Bankers Association Advanced Trust Forum
- Texas Credit Union League Compliance, Audit & Human Resources Conference
- Estate Planning Councils in Austin, Amarillo, Corpus Christi, Houston, Lubbock, San Antonio, and Tyler
- Austin Association of Life Underwriters

**Professional Memberships and Activities**

- American College of Trust and Estate Counsel, Fellow, 1994-Present
- State Bar of Texas
  - Real Estate, Probate and Trust Law Section, Member (Chair, 2015-2016)
    - Real Estate, Probate, and Trust Law Council, Member, 2004–2008
    - Estate and Trust Legislative Affairs Committee, Member, 2000–Present (Chair, 2008–2013)
    - Public Service Committee, Chair, 2013–2014
    - Trusts Committee, Member, 2000–2010 (Chair, 2004–2008)
    - Uniform Trust Code Study Project, Articles 7–9 & UPIA, Subcommittee Member, 2000–2003
  - Continuing Legal Education Committee, 2018-Present
  - Texas Board of Legal Specialization (Estate Planning and Probate Law), Examiner, 1995-1997
- Estate Planning Council of Central Texas, Member, 1981-2019 (President, 1991-1992)
- Austin Bar Association, Member
  - Estate Planning and Probate Section, Member (Chair, 1992-1993, Board Member, 1997-1999)

**Honors**

- Recipient, TexasBarCLE STANDING OVATION award, 2014
- Listed in The Best Lawyers in America® (2019 Trusts & Estates "Lawyer of the Year" in Austin, TX)
- Listed in *Texas Super Lawyers* (Texas Monthly)
- Listed in The Best Lawyers in Austin (Austin Monthly)

**Meredith N. McIver**
Osborne, Helman, Knebel & Scott, L.L.P.
301 Congress Avenue, Suite 1910
Austin, Texas 78701
(512) 542-2000 | mnmciver@ohkslaw.com

## Education

- University of Houston Law Center, Houston, Texas (LL.M. in Tax, 2012)
- Samford University Cumberland School of Law, Birmingham, Alabama (J.D., 2011)
- Washington & Lee University, Lexington, Virginia (B.A. in Politics, 2008)

## Certifications and Admissions

- Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
- Admitted to Practice: State Bar of Texas; United States Tax Court

## Professional Memberships

- Member, The College of the State Bar of Texas
- Member, REPTL Leadership Academy Class of 2018-2019
- Member, Real Estate, Probate, and Trust Law Section of the State Bar of Texas
- Member, Tax Section of the State Bar of Texas
- Member, Estate Planning and Probate Section of the Austin Bar Association
- Member, Estate Planning Council of Central Texas

## Publications and Presentations

- Presenter/Co-Author, "Teaching the ABCs to Your Trustees: How to Provide Practical Instructions to New Trustees," State Bar of Texas, Handling Your First (or Next) Trust Course (2021)
- Co-Author, "Language to Include in Your Estate Planning Documents: Suggestions from Trust and Estate Litigators," State Bar of Texas, Estate Planning and Probate Drafting (2020)
- Co-Author, "Transfer Restrictions in Business Entities," State Bar of Texas, Advanced Estate Planning & Probate Course (2020)
- Co-Author, "How to Request (and Get) a PLR," *Texas Tax Lawyer*, Spring 2013, Vol. 40, No. 2

# CRAIG HOPPER

**HOPPER MIKESKA, PLLC**
**BARTON OAKS II**
**901 S. MOPAC EXP.**
**SUITE 570**
**AUSTIN, TEXAS 78746**
**(512) 615-6195**
**chopper@hoppermikeska.com**

## AREAS OF PRACTICE
Probate litigation, probate administration, guardianship administration, trust administration, and estate planning law.

## EDUCATION
Juris Doctor degree, Duke University School of Law, 1995.
Bachelor of Arts degree with high honors, Plan II program, University of Texas at Austin, 1990

## PROFESSIONAL HISTORY
Hopper Mikeska, PLLC, 2012-Present
Hopper & Associates, P.C., 2005 - 2012
Shareholder, Graves, Dougherty, Hearon & Moody, 1998 - 2005
Law Clerk, Honorable Guy Herman, Travis County Probate Court No. 1, 1996-1998

## PROFESSIONAL AFFILIATIONS
Board Certified in Estate Planning and Probate Law, Texas Board of Legal Specialization
Fellow, American College of Trusts and Estates Counsel
Member, Austin Bar Association
Member, State Bar of Texas
Member, SBOT Real Estate, Probate and Trust Law (REPTL) Section Council Member 2010-2014; Chair/Co-Chair of Estate and Trust Legislative Affairs Committee 2014-Present; Section Chair-Elect/Secretary 2020-2021
Member, Estate Planning Council of Central Texas; Director 2008-2014; Chair 2012-2013
Member, Austin Bar Association Probate and Estate Planning Section; Director, 1999- 2004; Chair, 2003

## PUBLICATIONS
O'Connor's Texas Probate Law Handbook, 2018-Present
Texas Guardianship Manual, State Bar of Texas, Manual Committee 2013-Present
O'Connor's Estates Code Plus, co-author, 2012-Present

## SELECT RECENT PRESENTATIONS/PAPERS
- Author/Speaker, "Practical Considerations in Managing a Ward's Business," SBOT Advanced Guardianship Course 2020
- Speaker, 2019 Trusts and Estates Legislative Update, numerous locations in 2019-2020
- Speaker, 2019 Fiduciary Litigation Update, SBOT Fiduciary Litigation Seminar, San Antonio 2019
- Speaker, 2017 Trusts and Estates Legislative Update, numerous locations in 2017-2018
- Panelist, "Peace Treaties: Considerations when Negotiating, Drafting & Enforcing Settlement Agreements and Releases," SBOT Estate Planning and Probate Drafting Course, Houston 2015
- Speaker, 2015 Trusts and Estates Legislative Update, numerous locations in 2015-2016
- Author/Speaker, "Extraordinary Remedies in Probate Proceedings," SBOT Probate and Estate Planning Drafting Course 2014, Dallas
- Author/Speaker, "Whack-a-Mole: Handling Problem Litigants and the Occasional Overzealous Ad Litem," SBOT Advanced Guardianship Course 2014, Dallas;
- Speaker, "Mock Guardianship Hearing—How and When to Put Your Ward on the Stand," SBOT Advanced Guardianship Course 2014, Dallas; Tarrant County Bar Association Probate Litigation Seminar 2014, Ft Worth
- Speaker, "Ask the Experts" panel, Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2012 - 2020
- Course Director, SBOT Advanced Guardianship and Elder Law Courses, Houston, 2013
- Author/Speaker, "Drafting the Estate and Trust Distribution Documents," SBOT Advanced Drafting Course, Dallas 2011
- Speaker, "Contested Guardianships," SBOT Advanced Guardianship Course 2011, Houston; South Texas College of Law 26th Annual Wills and Probate Institute, Houston 2011
- Author/Speaker, "Extraordinary Preparation for Mediation in Guardianship Disputes," SBOT Advanced Guardianship Course 2009, Houston
- Speaker/Panel Member, SBOT Building Blocks of Probate and Estate Planning: Probate Administration, 2004 – 2013, 2018

**LAUREN DAVIS HUNT**
Osborne, Helman, Knebel & Scott, LLP
301 Congress Avenue, Ste. 1910
Austin, TX 78701
(512)542-2000; (512)542-2011 (fax)
ldhunt@ohkslaw.com

Lauren Davis Hunt is a partner at Osborne, Helman, Knebel & Scott, L.L.P., in Austin, Texas. She practices in the area of fiduciary litigation, with a focus on trust, estate, guardianship, and partnership disputes. Lauren represents both fiduciaries and beneficiaries in her practice. In recent years, Lauren has served on the council for the Real Estate, Probate and Trust Law ("REPTL") section of the State Bar of Texas, she served as the Chair of the Fiduciary Litigation Committee of REPTL, and is currently the Co-Chair of the Legislative Affairs Committee for REPTL. Such work involves assisting with the drafting of new legislation and helping usher through the Texas Legislature proposed changes to law impacting Trusts, Estates, Guardianships, powers of attorney, and similar areas of the law.

**EDUCATION**

- Baylor University School of Law, Waco, TX (J.D., 2007)
- Rhodes College, Memphis, TN (B.A. in International Studies, Minor in Spanish, Phi Beta Kappa, cum laude, 2001)

**PROFESSIONAL ACTIVITIES & HONORS**

- Co-Chair, Legislative Affairs Committee, State Bar of Texas, Real Estate, Probate & Trust Law Section, 2019-2021
- Council Member, State Bar of Texas, Real Estate Probate & Trust Law Section, 2016-2020
- Chair, Fiduciary Litigation Committee, State Bar of Texas, Real Estate Probate & Trust Law Section, 2017-2021
- Texas Rising Star, Texas Monthly Magazine and Texas Rising Star Magazine: 2016 - 2018
- Trust Code Committee, State Bar of Texas, Real Estate Probate & Trust Law Section, 2011 - 2013
- Texas Bar Foundation
- Texas Bar College

**CLE PRESENTATIONS AND PAPERS**

- *What Every Planner Needs to Know About Fiduciary Litigation*, State Bar of Texas, Advanced Estate Planning Strategies, Panelist with W. Cameron McCulloch, Jr., Mickey R. Davis and Sarah Patel Pacheco, March 2021
- *Alternatives to Tortious Interference with Inheritance*, Estate Planning & Community Property Law Journal, Texas Tech University School of Law, Co-Author with Christopher T. Hodge and Brian Thompson, March 1, 2021
- *Legislative Update*, Elder Law Section of San Antonio Bar Association, January 2021
- *Alternatives to Tortious Interference with Inheritance,* State Bar of Texas, Advanced Estate Planning & Probate, Panelist with Christopher T. Hodge and Brian Thompson, June 2020
- *Legislative Update*, Corpus Christi Estate Planning Council, September 2019
- *Strategies for Suing and Defending Fiduciary Decision Making,"* State Bar of Texas Fiduciary Litigation Course, December 2018
- *Case Development Strategies*, State Bar of Texas, 11th Annual Fiduciary Litigation Course, December 2016, Panelist with Sarah Patel Pacheco and David Berg
- *Standing and Capacity to Sue in Estate and Trust Litigation*, State Bar of Texas, Tarrant County Probate Litigation Seminar, September 2016, Author and Presenter

- *Standing and Capacity to Sue in Estate and Trust Litigation*, State Bar of Texas, 10th Annual Fiduciary Litigation Course, December 2015, Author and Presenter
- *The Client is Incapacitated – What do you do next?*, State Bar of Texas, 38th Annual Advanced Estate Planning and Probate Course, June 2014, Author and Presenter
- *Decanting with No Sour Grapes*, State Bar of Texas, 24th Annual Estate Planning & Probate Drafting Course, October 2013, Panelist
- *Capacity, Standing and Jurisdiction*, State Bar of Texas, 37th Annual Advanced Estate Planning and Probate Course, June 2013, Author and Presenter
- *Informal Demand or Formal Discovery: The Debate on Obtaining Information from Fiduciaries Under Their Duty to Disclose*, State Bar of Texas, Fiduciary Litigation Beyond the Basics, 2011, Moderator
- *Exculpatory Clauses*, State Bar of Texas, Trial of a Fiduciary Litigation Case, December 2009, Co-Author and Co-Presenter

# Face Masks, Zoom, and Quarantinis: Welcome to... The 2021 Texas Estate and Trust Legislative Update

(Including Decedents' Estates, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)



## TABLE OF CONTENTS


1. The Preliminaries. ..... 1
   - 1.1 Introduction and Scope. ..... 1
   - 1.2 CMA Disclaimers. ..... 1
   - 1.3 If You Want to Skip to the Good Stuff … ..... 1
   - 1.4 A Note About Linking to the Electronic Version. ..... 1
   - 1.5 Where You Can Find the Statutory Language. ..... 2
   - 1.6 Acknowledgments. ..... 2
   - 1.7 Obtaining Copies of Bills. ..... 2
2. The People and Organizations Most Involved in the Process. ..... 2
   - 2.1 REPTL. ..... 3
   - 2.2 The Statutory Probate Judges. ..... 3
   - 2.3 The Bankers. ..... 3
   - 2.4 The Texas Legislative Council. ..... 3
   - 2.5 The Authors and Sponsors. ..... 3
   - 2.6 The Committees. ..... 3
3. The Process. ..... 3
   - 3.1 The Genesis of REPTL's Legislative Package. ..... 3
   - 3.2 Preliminary Approval by the REPTL Council. ..... 4
   - 3.3 Statutory Language is Drafted. ..... 4
   - 3.4 REPTL's Package is Submitted to the Bar. ..... 4
   - 3.5 Legislative Policy Committee Review ..... 4
   - 3.6 State Bar Board of Directors Approval. ..... 4
   - 3.7 REPTL is Ready to Go. ..... 4
   - 3.8 During the Session. ..... 4
   - 3.9 Where You Can Find Information About Filed Bills. ..... 4
   - 3.10 Where You Can Find Information About Previous Versions of Statutes. ..... 4
   - 3.11 Summary of the Legislative Process. ..... 5
   - 3.12 Other Legislative Information and Resources. ..... 5
   - 3.13 The Legislative Council Code Update Bill. ..... 5
   - 3.14 The REPTL Substantive Code Update Bill. ..... 6
4. Key Dates. ..... 6
5. If You Have Suggestions … ..... 7
6. The REPTL Bills ..... 7
   - 6.1 The Original REPTL Legislative Package ..... 7
   - 6.2 Consolidation Into REPTL Bills. ..... 7
7. Decedents' Estates. ..... 7


[1] For those who care and are viewing an electronic version of this paper, the color of the horizontal lines is "Illuminating" (Pantone 13-0647), a Pantone 2021 "Color of the Year." (Pantone's other 2021 Color of the Year is Ultimate Gray.)

7.1 REPTL Decedents' Estates Bill. 7
(a) Qualified Delivery Method (Sec. 22.0295). 7
(b) Community Property Subject to Creditors' Claims (Sec. 101.052) 8
(c) Property Listed in Heirship Application (Sec. 202.005). 8
(d) Service on Minors Who Are At Least 16 Years Old (Secs. 202.056 & 258.002). 8
(e) Affidavit of Heirship as Evidence (Sec. 202.151). 8
(f) Applicant's Last Three Digits (Secs. 256.052, 257.051, & 301.052). 8
(g) Use of Unsworn Declaration for Oaths (Secs. 305.001-305.003, 305.051-305.053, & 305.055). 8
Drafting Tip 8
(h) Sale of Personal Property in Dependent Administration (Sec. 356.105) 8
(i) Removal of References to "Community Debts" (Secs. 453.003 & 453.006-453.007) 8
7.2 Administration of Unclaimed Property (Sec. 551.005; Ins. Code Secs. 1109.013; & Prop. Code Sec. 72.001 & Ch. 74) 8
7.3 Expedited Death Certificate for Religious Purposes (H&S Code Sec. 193.0025) 9
7.4 Required Statement in Disclaimer Regarding Child Support (Prop. Code Sec. 240.009). 9
7.5 Procedural Matters Affecting Decedents' Estates. 9

8. Guardianships and Persons With Disabilities. 9
8.1 The REPTL Guardianship Bill 9
(a) Matters Related to Guardianship Proceeding (Sec. 1021.001). 9
(b) Unsworn Declarations in Lieu of Sworn Oath (Secs. 1052.052, 1103.003, 1105.001-1105.003, 1105.051-1105.052, 1105.103, & 1251.101) 9
Drafting Tip 9
(c) Wards' Bill of Rights (Sec. 1151.351). 9
(d) Notice to Creditors (Sec. 1153.001). 9
(e) Attorney's Fees (Sec. 1155.054). 9
(f) Sale of Personal Property in Guardianship (Sec. 1158.105) 9
(g) Sale of Real Property at Public Auction (Secs. 1158.401-1158.405). 9
(h) Private Sale of Real Estate (Secs. 1158.451 & 1158.502). 10
(i) Sale of Real Property in Guardianship (Secs. 1158.551-1158.554 & 1158.556-1158.558). 10
(j) Agency References (Secs. 1163.005 & 1163.101). 10
(k) Ch. 1301 Management Trusts. 10
(l) Sale of Property by Nonresident Guardian (Secs. 1355.002 & 1355.105). 10
(m) Stay Tuned for Further Updates 10
8.2 The Statutory Probate Judges' Bill. 10
(a) Attorney Certification (Sec. 1054.201 & Gov't Code Sec. 81.114). 10
(b) Applicant's Former Name and Liquid Assets (Sec. 1101.001). 10
(c) Waiver of Guardianship Training (Sec. 1101.153) 10
(d) Attendance at Legal Proceeding (Sec. 1151.005). 10
(e) Citation for Appointment of Temporary Guardian (Sec. 1251.005). 11
(f) Final Report in Temporary Guardianship (Sec. 1251.153) 11
(g) Criminal History of Guardian (Gov't Code Sec. 155.205). 11
8.3 Incapacity of Guardian (Sec. 1203.0521). 11
8.4 Guardianship Abuse, Fraud, and Exploitation Program (Gov't Code Secs. 72.121 & 72.1221). 11
8.5 Professional's Disclosure of Mental Health Information. 11
8.6 Prevention of Abuse of Elderly and Disabled 11
(a) Access to Financial Records by the Guardianship Abuse, Fraud, and Exploitation Program. 11
(b) Financial Abuse of Elderly Persons. 11
(c) Hold on Account of Vulnerable Adult Upon Suspicion of Financial Exploitation. 11
(d) Visitation Rights. 11
(e) Continuous Sexual Abuse of a Disabled Person. 12
(f) Fraudulently Securing Document Execution. 12
8.7 Modification of Order Following Conservator's Death (Fam. Code Sec. 156.106). 12
8.8 Procedural Matters Affecting Guardianships 12

9. Trusts. ..... 12
9.1 The REPTL Trusts Bill. ..... 12
(a) Homesteads Owned by Revocable Trusts (Sec. 41.0021). ..... 12
Drafting Tip ..... 13
(b) Spendthrift Provisions and Testamentary General Powers of Appointment (Sec. 112.035). ..... 13
(c) Attorney Ad Litem for Trust Proceedings (Sec. 112.054). ..... 13
(d) Decanting Into the Same Trust? (Sec. 112.0715) ..... 13
9.2 Rule Against Perpetuities (Sec. 112.036). ..... 13

10. Disability Documents ..... 14
10.1 The REPTL Financial Power of Attorney Bill (Secs. 751.002, 751.00201, 752.001, & 752.107) ..... 14
10.2 The REPTL Medical Power of Attorney Bill (H&S Code Secs. 166.1525, 166.160, 166.163, & 166.164). ..... 14
10.3 The REPTL Anatomical Gift Bill (H&S Code Secs. 692.003, 692.005, & 692A.005-692A007). ..... 14
Drafting Tip ..... 14
10.4 The REPTL Disposition of Remains Bill (H&S Code Secs. 711.002 & 711.004). ..... 15

11. Nontestamentary Transfers. ..... 15

12. Exempt Property. ..... 15

13. Jurisdiction and Venue. ..... 15
13.1 Transfer of Guardianship to Foreign Jurisdiction (Sec. 1253.001) ..... 15
13.2 Notices in Guardianship Transfer and Removal Proceedings (Secs. 1023.004 & 1203.052). ..... 15
13.3 Transfers, Mediation, and Termination of Guardianships (Secs. 1023.005, 1023.008, 1023.011, 1055.151-1055.152, 1202.001, & 1202.231-1202.235; Gov't Code Sec. 155.301). ..... 15

14. Court Administration. ..... 15
14.1 The Statutory Probate Judges' Bill. ..... 15
(a) Electronic Transfer of Clerk's File (Secs. 33.101-33.103 & 1023.006-1023.007) ..... 15
(b) Citation Signed Under Court's Seal (Secs. 51.003 & 1051.003) ..... 15
(c) Personal Service in Heirships (Sec. 202.054). ..... 15
(d) References Changed from Independent Executor to Administrator (Secs. 351.351, 404.0036, & 404.005). ..... 15
(e) Notice of Appointment of Temporary Administrator (Sec. 452.006). ..... 15
(f) Recording of Non-English Foreign Wills (Sec. 503.002) ..... 16
(g) Last Three Digits (CP&R Code Sec. 30.014). ..... 16
(h) Bond Extended to Visiting Judge (Gov't Code Secs. 25.0006, 25.00231, & 26.001). ..... 16
(i) Fewer Jurors in Probate Proceedings (Gov't Code Sec. 25.0027). ..... 16
(j) Defense of Visiting Judge (Gov't Code Sec. 74.141) ..... 16
14.2 Service on Certain Organizations in Will Contest or Construction Suits (Sec. 55.053). ..... 16
14.3 Associate Judges for Guardianship and Protective Services Proceedings (Gov't Code Ch. 54A). ..... 16
14.4 New Courts and Transfer Procedures (Secs. 51.103 & 1051.103; Fam. Code Sec. 155.207; Gov't Code Secs. 25.0172, 25.0173, 25.0631, 51.3071, 51.403 & 72.037) ..... 16
14.5 Consolidation of Filing Fees. ..... 16
14.6 Eligibility to be Justice or Judge. ..... 17
14.7 Recovery of Attorney's Fees (CP&R Code Sec. 38.001). ..... 17
14.8 New Travis County Probate Courthouse. ..... 17
14.9 Speaking of New Digs… ..... 17

15. Selected Family Law Issues. ..... 18
15.1 Modification of Order Following Conservator's Death. ..... 18

16. Stuff That Doesn't Fit Elsewhere ..... 18
16.1 Clients With Diminished Capacity (Proposed Disciplinary Rule 1.16) ..... 18
16.2 Law Firm Trade Names (Amended Part VII of Disciplinary Rules). ..... 18

17. *Special Supplement No. 1* – Is a Statutory Change to Our Rule Against Perpetuities Constitutional? ..... 18
17.1 The Change. ..... 18

17.2 No Position on the Merits of the RAP. ..... 19
17.3 Origins of the Statutory Rule. ..... 19
17.4 The Constitutional Rule. ..... 19
17.5 History Behind the Constitutional Rule. ..... 19
17.6 Court Interpretation of the Constitutional Rule. ..... 19
17.7 A Closer Look at the *ConocoPhillips* Case. ..... 21
(a) "Simplified" Facts. ..... 21
(b) The Supreme Court Opinion. ..... 22
(c) My Conclusions. ..... 24
17.8 My Interpretation of the Court Interpretations ..... 24
17.9 Can the Legislature More Clearly Define the Rule? ..... 24

18. *Special Supplement No. 2* – Some Comments on Affidavits in Lieu of Inventories ..... 25
18.1 Why This Discussion? ..... 25
18.2 2011 Enactment. ..... 25
18.3 2013 Amendment. ..... 25
18.4 2019 Amendment. ..... 25
18.5 Can a Judge Refuse to Accept an Affidavit in Lieu and Require the Filing of an Inventory? ..... 25
(a) Sec. 309.051. ..... 25
(b) Sec. 309.054. ..... 25
(c) Sec. 309.056. ..... 26
(d) Sec. 309.057. ..... 26
(e) Sec. 309.0575. ..... 26
(f) Sec. 404.0035. ..... 26
(g) Tell the Judge to Shove It! ..... 26

19. A Little Lagniappe. ..... 26
19.1 Farewell Barton Springs? ..... 26
19.2 Our Long National Nightmare Is Over. ..... 26
19.3 Big Changes to Presidential Elections. ..... 27
19.4 Texas Bicentennial Commission ..... 27
19.5 License to Hunt Bigfoot (and Reward for Capture!). ..... 27
19.6 Speaking of Hunting… ..... 27
19.7 Here, Hold My Beer! ..... 27
19.8 Don't Bogart That Joint! ..... 27
19.9 How Much is That Doggie in the Window? ..... 28
19.10 Dedicated to Ken Herman ..... 28
(a) Monday Might Be Thursday. ..... 28
(b) Who is a "Native Texan?" ..... 28
(c) What is a "Bicycle?" ..... 28
(d) What Time is It? ..... 28
(e) State District of What? ..... 28
(f) Fort Knox-Leander, Redux. ..... 29
(g) Right to Choose. ..... 29
(h) SXSW Eligible for MERP?. ..... 29
(i) Another Secession Proposal. ..... 29
(j) Van Arsdale's List. ..... 29
(k) City Hall. ..... 30
(l) REPTL's Trusts Bill. ..... 30
(m) Vaya Con Dios, Señor Herman. ..... 30
19.11 Places. ..... 30
19.12 Symbols. ..... 31
19.13 Dates. ..... 31
19.14 Juneteenth! ..... 31
19.15 Mascots. ..... 32

20. The End. ..... 32

Selected Bills that *DID NOT* Pass ..... 33

7. Decedents' Estates. ..... 33
   - 7.1 Electronic Wills Act and Other Online Notarizations ([mostly] Ch. 259). ..... 33
   - 7.2 Persons Disqualified to Serve as Personal Representatives (Sec. 304.003). ..... 33
   - 7.3 Parents Who May Not Inherit From Child (Sec. 201.062). ..... 33
   - 7.4 Actions Without Court Approval (Sec. 351.052). ..... 33
   - 7.5 Claims for Cost of Certain Electrical Service (Secs. 355.102 & 355.103). ..... 33
   - 7.6 State Estate Tax (New Tax Code Ch. 212). ..... 33
   - 7.7 Satisfaction of a Reverse Mortgage after Surviving Borrower's Death (Fin. Code Secs. 343A.001-343A.002). ..... 33

8. Guardianships and Persons With Disabilities. ..... 34
   - 8.1 "Independent Guardianships" for Minor Wards with Profound Intellectual Difficulties (Secs. 1054.001, 1054.151, 1103A.001-1103A.003, 1105.101, 1106.002, 1163.001-1163.0025, 1163.101, & 1201.052). ..... 34
   - 8.2 Examination of Proposed Ward (Secs. 1101.103, 1101.104, 1102.002, 1202.054, & 1202.152). ..... 34
   - 8.3 Pilot Program to Establish Public Guardians (Secs. 1104.326-1104.349). ..... 34
   - 8.4 Criminal Conduct of Proposed Guardian. (Sec. 1104.353; Penal Code Sec. 72.04). ..... 34
   - 8.5 Use of Criminal History Records (Secs. 1104.401-1104.411; Gov't Code Secs. 152.203-152.2035, 155.206-155.207, 411.114, 411.1386-411.13861, & 411.1408-411.1409). ..... 34
   - 8.6 Critical Care Decisions by Private Professional Guardians. (Secs. 1151.051 & 1151.057). ..... 34
   - 8.7 Notice and Filing Requirements in Court Proceeding Involving Person with Mental Illness. ..... 34
   - 8.8 Temporary Guardian for Social Security Benefits (Secs. 1251A.001-1251A.103). ..... 34
   - 8.9 Supported Decision-Making Agreements (Gov't Code Secs. 57A.001-57A.002 & CP&R Code Sec. 21A.002). ..... 35
   - 8.10 Settlement of Claims on Behalf of a Minor (CP&R Code Secs. 150D.001-150D.008 & Prop. Code Sec. 141.008). ..... 35
   - 8.11 Prevention of Abuse of Elderly and Disabled. ..... 35
     - (a) Definition of Exploitation. ..... 35
     - (b) Obtaining Unneeded Medical Treatment by Deception; Continuous Abuse. ..... 35
     - (c) Abandoning or Endangering an Elderly or Disabled Individual. ..... 35
     - (d) Pilot Program to Prevent Financial Exploitation of Elderly. ..... 35

9. Trusts. ..... 35
   - 9.1 Shortened SOL to Review Trust Accounting (Prop. Code Sec. 113.153). ..... 35
   - 9.2 Regulation of State Trust Companies. ..... 35

10. Disability Documents. ..... 35
   - 10.1 Individuals Not Authorized to Dispose of Remains (Sec. 152.102; H&S Code Sec. 711.002; Occ. Code Sec. 651.460). ..... 35
   - 10.2 Durable POAs and Home Equity Loans (Est. Code Sec. 752.051 & Fin. Code Secs. 343.002 & 343.301-343.302). ..... 36
   - 10.3 Release of Unclaimed Property to Agent (Prop. Code Sec. 74.501). ..... 36
   - 10.4 Advance Directives. ..... 36
     - (a) Permissive Forms for Directives and MPOAs (H&S Code Secs. 166.012, 166.013, 166.031, 166.0325, 166.0335, 166.036, 166.102, & 166.163). ..... 36
     - (b) Physicians Refusing to Honor Directive (H&S Code Secs. 166.012, 166.046-166.0465, 166.052, 166.054, 166.202-166.206, 166.209 & 313.004). ..... 36
     - (c) End-of-Life Matters and Hospice Care (H&S Code Secs. 166.012, 166.046-166.0466, 166.052, 166.054, 166.202-166.206, 166.209 & 313.004). ..... 36
     - (d) Directives and DNRs for Pregnant Women (H&S Code Secs. 166.033, 166.049, 166.083, 166.084, & 166.098). ..... 36
     - (e) Restrictions on Refusal to Comply with Directive (H&S Code Secs. 166.002, 166.045-166.046, 166.051-166.052, 166.054, 166.158 & 166.166). ..... 36
     - (f) Execution of DNRs by Nurses and Physician Assistants (H&S Code Secs. 166.081-166.084, 166.087-166.089, 166.092, 166.095, 166.102, 166.203, 166.205 & 193.005). ..... 36

(g) Revocation of DNRs for Admitted Patients (H&S Code Sec. 166.205). ..... 37
10.5 Respecting Texas Patients' Right to Life Act (Gov't Code Sec. 25.0021(b); H&S Code Secs. 166.045, 166.046, 166.051, & 166.052). ..... 37
10.6 Death When Certain Functions Have Ceased (H&S Code Secs. 671.001-671.002). ..... 37
10.7 Disregard of Mental Health Declarations (CP&R Code Sec. 137.008). ..... 37

11. Nontestamentary Transfers. ..... 37
11.1 Disclosure of Insurance Beneficiary to Funeral Director (Ins. Code Secs. 1103.201-1103.202). ..... 37
11.2 Notice to Life Insurance Policy Owner (Ins. Code Sec. 1101.351). ..... 37

12. Exempt Property. ..... 37
12.1 Sale of Non-Homestead Property by Individual to Entity (Prop. Code Sec. 42.0022). ..... 37
12.2 Rules for Expedited Assertion of Exemptions (Gov't Code Sec. 22.0042). ..... 37

13. Jurisdiction and Venue. ..... 37
13.1 Venue for Probate of Wills (Sec. 33.1011). ..... 37
13.2 Jurisdiction of County and Justice Courts. ..... 38

14. Court Administration. ..... 38
14.1 Remote Technology. ..... 38
(a) Probate and Guardianship Proceedings (Secs. 53.108 & 1053.106). ..... 38
(b) All Proceedings (Gov't Code Secs. 21.009 & 21.013). ..... 38
14.2 Qualification of Judges (Gov't Code Secs. 24.001, 25.0014 & 25.0033) ..... 38
14.3 Appointment of Deputy Clerk in Statutory Probate Court (Gov't Code Sec. 25.017). ..... 38
14.4 Eligibility of Former Statutory Probate Judge as Visiting Judge (Gov't Code Sec. 74.055). ..... 38
14.5 Composition of Courts of Appeals. ..... 38
14.6 Creation of New "Texas Court of Appeals." ..... 39
14.7 Effect of Supreme Court Rules on Procedural Statutes (Gov't Code Sec. 22.004(c)) ..... 39
14.8 Recovery of Attorney's Fees. ..... 39
(a) Just "Organizations." ..... 39
(b) "Other Type of Corporate Entity." ..... 39
(c) "Other Legal Entity." ..... 39
(d) "Another Person." ..... 39

15. Selected Family Law Issues. ..... 39
15.1 Who Can (or Can't) Get Married. ..... 39
(a) Minimum Marriage Age (Fam Code Sec. 2.009). ..... 39
(b) Same-Sex Marriages. ..... 39
15.2 Who May Conduct Marriage Ceremonies (Fam. Code Sec. 2.02). ..... 39
(a) Conduct of Marriage Ceremonies by *Any* Judge (Fam. Code Sec. 2.02). ..... 39
(b) Governor, Lt. Governor, or Legislator. ..... 39
(c) A Muslim Imam. ..... 39
15.3 Marriage by Zoom. ..... 40
15.4 How May (or Must) Marriages Be Ended. ..... 40
(a) Date of Marriage in Divorce Decree ..... 40
(b) Concealed Divorce ..... 40
(c) Fraud, Duress, or Force. ..... 40
(d) Impotency as Grounds for Annulment ..... 40

16. Stuff That Doesn't Fit Elsewhere ..... 40
16.1 Pandemic Disaster Legislative Oversight Committee (New Gov't Code Chs. 329 & 418A). ..... 40

# Face Masks, Zoom, and Quarantinis: Welcome to... The 2021 Texas Estate and Trust Legislative Update

(Including Decedents' Estates, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)



## 1. The Preliminaries.

1.1 **Introduction and Scope.** The 87th Regular Session of the Texas Legislature spans the 140 days beginning January 12, 2021, and ending May 31, 2021. This paper presents a summary of the bills that relate to probate (*i.e.*, decedents' estates), guardianships, trusts, powers of attorney, and several other areas of interest to estate and probate practitioners. Issues of interest to elder law practitioners are touched upon, but are not a focus of this paper. (And, to be honest, sometimes I[1] go off on a tangent and discuss a bill of interest to me that has nothing to do with any of the areas mentioned above.)

1.2 **CMA Disclaimers.** While reading this paper, please keep in mind the following:

- We've made every reasonable attempt to provide accurate descriptions of the contents of bills, their effects, and in some cases, their background.
- Despite rumors to the contrary, I am human. And have been known to make mistakes. (I don't think such rumors have started about Meredith.)
- In addition, some of the descriptions in this paper admittedly border on editorial opinion, in which case the opinion is my/our own, and not necessarily that of REPTL, Craig Hopper, Lauren Hunt, or anyone else.
- I often work on this paper late at night, past my normal bedtime, perhaps, even, under the influence of strategic amounts of Johnnie Walker Black (donations of Red, Black, Green, Gold, Blue, Platinum, or even Swing happily accepted!). Craig Hopper has informed me that he's also happy to accept donations of Scotch. (I don't yet know Meredith's adult beverage of choice.)
- As companion bills make their way through the legislative process, we usually base descriptions on the most recently approved version in either chamber. In the case of REPTL bills, we sometimes have access to drafts of substitutes before they are officially posted, in which case the descriptions may be based on what we think the bill will look like, rather than what the currently-online version looks like.
- As a consequence, while the descriptions contained in this paper are hopefully accurate at the time they are written, they may no longer accurately reflect the contents of a bill at a later stage in the legislative process.

Therefore, you'll find directions in Section 1.7 on page 2 for obtaining copies of the actual bills themselves so you may review and analyze them yourself before relying on any information in this paper.

1.3 **If You Want to Skip to the Good Stuff …** If you don't want to read the rest of these preliminary matters and want to skip to the legislation itself, you'll find it beginning with **Part 7 on page 7**.

1.4 **A Note About Linking to the Electronic Version.** Feel free to link to the electronic version of this paper if you'd like. If you do, use the URL found on the cover page to link to the most recent version of the paper:

www.snpalaw.com/resources/2021LegislativeUpdate

Once you click on that link, you'll open a PDF version of this paper. However, **don't** copy the URL that you'll find in your browser's address bar when you open the PDF! That's likely to be a 100+ character web address that will take you to that particular version of the paper only, and only so long as that version remains posted. Trust me – the link I've given you will take you to the right version each time.

You can also bring up my previous legislative updates going back to 2009 by substituting the appropriate odd-numbered year for "2021" in the URL. ***However, see***

[1] In this paper, "I" refers to Bill Pargaman, the author of this legislative update since the 2009 legislative session. However, this year, Meredith McIver has provided invaluable assistance in preparing not only the initial draft of this paper but also many revisions as the status or descriptions of bills change. Therefore, when we use "we," that refers to both of us.

***the note about the upcoming new location of this paper at the end of the next section.***

1.5 **Where You Can Find the Statutory Language.** Beginning with the 2019 update, in an effort to be green (for anyone getting a hard copy), we published an entirely separate supplement containing the actual statutory language that's changing, or being added, rather than adding it as attachments to this paper itself. After the 2021 regular session ended, we posted that supplement containing the changed or added statutory language – or at least the language we deem worthy to include –here:

www.snpalaw.com/resources/2021LegislativeSupplement

***However, keep in mind that I moved to a new law firm in July of 2021. Later this year, this paper and the statutory language supplement will be moved to the website of that firm.***

1.6 **Acknowledgments.** A lot of the effort in every legislative session comes from the Real Estate, Probate & Trust Law Section of the State Bar of Texas ("REPTL"). REPTL, with over 9,000 members, has been active in proposing legislation in this area for more than four decades. During the year and a half preceding a session, the REPTL Council works hard to come up with a package that addresses the needs of its members and the public, and then works to get the package enacted into law. In addition to myself, others who have been deeply involved in this legislative process include:

- Craig Hopper of Austin**,** Co-Chair, Estate and Trust Legislative Affairs Committee; principal presenter of this paper; and Chair-Elect/Secretary of REPTL
- Lauren Hunt of Austin, Co-Chair, Estate and Trust Legislative Affairs Committee; Chair, Fiduciary Litigation Committee
- Reid Wilson, Chair of REPTL
- Eric Reis of Dallas**,** Immediate Past Chair of REPTL
- Greg Kimmel of Tyler, Chair, Decedents' Estates Committee
- Dyann McCully of Fort Worth, Chair, Guardianship Committee
- Gene Wolf of El Paso, Chair, Trusts Committee
- Don Totusek of Dallas, Chair, Powers of Attorney and Advance Directives (PAADs) Committee
- Clint Hackney of Austin, Lobbyist
- Barbara Klitch of Austin, who provides invaluable service tracking legislation for REPTL

REPTL is helped along the way by the State Bar, its Board of Directors, and its staff (in particular, KaLyn Laney, Assistant Deputy Director).

Other groups have an interest in legislation in this area, and REPTL tries to work with them to mutual advantage. These include the statutory probate judges (Judge Guy Herman of Austin, Presiding Statutory Probate Judge) and the Wealth Management and Trust Division of the Texas Bankers Association.

Last, but of course not least, are the legislators and their staffs. You'll note the names of our authors and sponsors.[2] in the parenthetical following the first mention of a bill in this paper. These are the legislators who have volunteered their time and effort to help REPTL get its bills passed. Thanks go to all of these persons, their staffs, and the many others who have helped in the past and will continue to do so in the future.

Hopefully, the effort that goes into the legislative process will become apparent to the reader. In the best of circumstances, this effort results in passing good bills and blocking bad ones. But in the real world of legislating, the best of circumstances is never realized.

1.7 **Obtaining Copies of Bills.** If you want to obtain copies of any of the bills discussed here, go to www.legis.state.tx.us. Near the top of the page, in the middle column, you'll see **Search Legislation**. First, select the legislative session you wish to search (for example, the 2021 regular legislative session that spans from January through May is "87(R) – 2021"). Select the Bill Number button, and then type your bill number in the box below. So, for example, if you wanted to find the House version of the 2021 Decedents' Estates bill prepared by the Real Estate, Probate, and Trust Law Section of the State Bar of Texas ("REPTL"), you'd type "HB 2182" and press Go. (It's fairly forgiving – if you type in lower case, place periods after the H and the B, or include a space before the actual number, it's still likely to find your bill.)

Then click on the Text tab. You'll see multiple versions of bills. The "engrossed" version is the one that passes the chamber where a bill originated. When an engrossed version of a bill passes the other chamber without amendments, it is returned to the originating chamber where it is "enrolled." If the other chamber does make changes, then when it is returned, the originating chamber must concur in those amendments before the bill is enrolled. Either way, it's the "enrolled" version you'd be interested in.

## 2. The People and Organizations Most Involved in the Process.

A number or organizations and individuals get involved in the legislative process:

[2] See Sec. 2.5 on page 3 if you want to learn the difference between an author and a sponsor.

2.1 **REPTL**. REPTL acts through its Council. Many volunteer Section members who are not on the Council give much of their time, energy and intellect in formulating REPTL legislation. REPTL is not allowed to sponsor legislation or oppose legislation without the approval of the Board of Directors of the State Bar. There is no provision to support legislation offered by someone other than REPTL (although the rules do allow REPTL members to act as a resource at the request of legislators), and the ability of REPTL to react during the legislative session is hampered by the necessity for Bar approval. Therefore, REPTL must receive prior permission to carry the proposals discussed in this paper that are identified as REPTL proposals. REPTL has hired Clint Hackney, who has assisted with the passage of REPTL legislation for many sessions.

2.2 **The Statutory Probate Judges**. The vast majority of probate and guardianship cases are heard by the judges of the Statutory Probate Courts (18 of them in 10 counties). Judge Guy Herman of the Probate Court No. 1 of Travis County (Austin) is the Presiding Statutory Probate Judge and has been very active in promoting legislative solutions to problems in our area for many years.

2.3 **The Bankers**. There are two groups of bankers that REPTL deals with. One is the Wealth Management and Trust Division of the Texas Bankers Association ("TBA"), which tends to represent the larger corporate fiduciaries, while the other is the Independent Bankers Association of Texas ("IBAT), which tends to represent the smaller corporate fiduciaries, although the distinctions are by no means hard and fast.

2.4 **The Texas Legislative Council**. Among other duties, the Texas Legislative Council.[3] provides bill drafting and research services to the Texas Legislature and legislative agencies. All proposed legislation must be reviewed (and usually revised) by Leg. Council before a Representative or Senator may introduce it. In addition, as part of its continuing statutory revision program, Leg. Council was the primary drafter of the Texas Estates Code, a nonsubstantive revision of the Texas Probate Code.

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

2.6 **The Committees**. All legislation goes through a committee in each chamber. In the House, most bills in our area go through the House Committee on Judiciary and Civil Jurisprudence, or "Judiciary." In the Senate, in recent sessions, most bills in our area go through the Senate Committee on State Affairs, or "State Affairs," because in 2015, Lt. Gov. Patrick dissolved the Senate Committee on Jurisprudence, or "Jurisprudence," where most of our bills used to go. This session, the Lite Guv has resurrected Jurisprudence, so our bills are mostly split between that committee and State Affairs.

**3. The Process.**

3.1 **The Genesis of REPTL's Legislative Package.** REPTL[4] begins work on its legislative package shortly after the previous legislative session ends. In August or September of odd-numbered years – just weeks after a regular legislative session ends, the chairs of each of the main REPTL legislative committees put together lists of proposals for discussion by their committees. These items are usually gathered from a variety of sources. They may be ideas that REPTL Council or committee members come up with on their own, or they may be suggestions from practitioners around the state, accountants, law professors, legislators, judges – you name it. Most suggestions usually receive at least some review at the committee level. If you have ideas for the 2023 legislative package, you can contact

[3] We usually refer to the Texas Legislative Council as simply "Leg. (pronounced "ledge") Council."

[4] Note that until recently the "RE" or real estate side of REPTL usually did not have a legislative package, but was very active in monitoring legislation filed in its areas of interest. It DID have some clean-up bills in the 2021 session. **HB 3502** (Lambert, *et al.*) (**SB 1939** (Creighton) was its Senate companion) contained nonsubstantive updates relating to electronic voting by members and directors of condominium owners' associations and property owners' associations. **HB 3503** (Lambert | Creighton) (**SB 1938** (Creighton) was its Senate companion) would have cleaned up the Residential Construction Liability Act to eliminate references to the repealed Texas Residential Construction Act, revise Property Code rules regarding representation in justice courts to adopt the clearer Supreme Court rules on the same subject, and correct obsolete references to Vernon's Statutes found throughout the Property Code. Finally, **HB 3504** (Lambert) would have cleaned up outdated provisions in Prop. Code Chs. 92 (Residential Tenancies) and 94 (Manufactured Home Tenancies). Unfortunately, none of them passed this session.

the chairs of the main REPTL legislative committees using the contact information that can be found on the REPTL website sometime in the Fall of 2021 (when new committee chairs will be selected).

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

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

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

3.5 **Legislative Policy Committee Review**. Following a comment period (and sometimes revisions in response to comments received), REPTL representatives appear before the State Bar's Legislative Policy Committee in August to explain and seek approval for REPTL's legislative package. By letter dated August 20, 2020, the Legislative Policy Subcommittee notified REPTL that it would recommend approval of all of REPTL's proposals to the State Bar's Board of Directors.

3.6 **State Bar Board of Directors Approval**. Assuming REPTL's package receives preliminary approval from the State Bar's Legislative Policy Committee, it is submitted to the full Board of Directors of the State Bar for approval in September. At times, REPTL may not receive approval of portions of its package. In these cases, REPTL usually works to satisfy any concerns raised, and then seeks approval from the full Board of Directors through an appeal process. REPTL's 2021 legislative package received approval from the full Board of Directors in the Fall of 2020.

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

3.8 **During the Session**. During the legislative session, the work of REPTL and members of its various committees is not merely limited to working for passage of their respective bills. An equally important part of their roles is monitoring bills introduced by others and working with their sponsors to improve those bills, or, where appropriate, to oppose them (in their individual capacities – not on behalf of REPTL without State Bar approval).

3.9 **Where You Can Find Information About Filed Bills**. You can find information about any of the bills mentioned in this paper (whether or not they passed), including text, lists of witnesses and analyses (if available), and actions on the bill, at the Texas Legislature Online website: www.legis.state.tx.us. The website allows you to perform your own searches for legislation based on your selected search criteria. You can even create a free account and save that search criteria (go to the "My TLO" tab). Additional information on following a bill using this site can be found at:

http://www.legis.state.tx.us/resources/FollowABill.aspx

3.10 **Where You Can Find Information About Previous Versions of Statutes**. I frequently see requests on Glenn Karisch's Texas Probate E-Mail List for older versions of statutes, such as the intestacy laws applicable to a decedent dying many years ago. You can find old law on your own (for free) rather than asking the list, and I'll use our intestacy statutes as an example.

- Former Texas Probate Code Sec. 38 had the rules for non-community property. If you've got a copy of it with the enactment information,[5] you'll see that it came from "Acts 1955, 54th Leg., p. 88, ch. 55, eff.

[5] If you don't have a copy of the Probate Code with enactment information, you can get one! Prof. Gerry Beyer's website (http://professorbeyer.com/) contains a copy of the Probate Code as it existed immediately prior to its repeal effective December 31, 2013, with post-1955 amendment information following each section. Click on Legal Updates | Texas Estates Code, and you'll find the link to the final Probate Code at the upper left.

Jan. 1, 1956." That means it was part of the original Probate Code, and was never amended. The key information you'll need is that it was from the **54th Legislature**, and it's found in **chapter 55**.

- Next, go to the search page of the Legislative Reference Library:

http://www.lrl.state.tx.us/legis/billsearch/lrlhome.cfm

- Since you've got the session and chapter number, use the option to "Search by session law chapter." Click the down arrow and scroll down to "54th R.S. (1955)." Then type "55" as the Chapter number. Click "Search by chapter."
- You'll arrive at a page that has a hyperlink to chapter 55. Click on that and Voilà – you've got a PDF of the entire original Probate Code! Since Sec. 38 was never amended prior to its repeal on December 31, 2013 (and replacement by Estates Code Secs. 201.001 and 201.002), you've got the language of that section as it existed before 1993.
- Former Texas Probate Code Sec. 45 had the rules for community property. The PDF you just downloaded had the version in effect when the Probate Code went into effect in 1956. But if you've got the enactment information, you'll see that it was amended by Acts 1991, 72nd Leg., ch. 895, § 4, eff. Sept. 1, 1991, and by Acts 1993, 73rd Leg., ch. 846, § 33, eff. Sept. 1, 1993.
- If you're researching the law applicable to someone who died before September 1, 1991, look no further – the original version was still the law. But if your decedent happened to die on or after September 1, 1991, but before September 1, 1993, you need to see what the 1991 amendment did. So back to the search page mentioned above. Scroll to 72nd R.S. (1991) (you don't want either of the "called sessions"), type in 895 for the chapter number, and click on the search button. Again, click on the hyperlink to chapter 895, and you'll download all of that chapter. You need to scroll down to Section 4 of the act to find the 1991 amendment to Texas Probate Code Sec. 45.
- The same procedure should work for any bill or amendment.

3.11 **Summary of the Legislative Process**. Watching the process is like being on a roller coaster; one minute a bill is sailing along, and the next it is in dire trouble. And even when a bill has "died," its substance may be resurrected in another bill. The real work is done in committees, and the same legislation must ultimately pass both houses. Thus, even if an identical bill is passed by the Senate as a Senate bill and by the House as a House bill, it cannot be sent to the Governor until either the House has passed the Senate bill or vice-versa. At any point in the process, members can and often do put on amendments which require additional steps and additional shuttling. It is always a race against time, and it is much easier to kill legislation than to pass it. You can find an "official" description of how a bill becomes a law prepared by the Texas Legislative Council at:

https://tlc.texas.gov/docs/legref/legislativeprocess.pdf

3.12 **Other Legislative Information and Resources**. Leg. Council has also prepared a guide designed to help interested persons track the work of current legislatures and research the work of past legislatures. You can download a copy at:

https://tlc.texas.gov/docs/legref/gtli.pdf

3.13 **The Legislative Council Code Update Bill.** As statutes are moved around pursuant to the legislature's continuing statutory revision program, Leg. Council prepares general code update bills for the purposes of (and I quote):

(1) codifying without substantive change or providing for other appropriate disposition of various statutes that were omitted from enacted codes;
(2) conforming codifications enacted by the 83rd Legislature to other Acts of that legislature that amended the laws codified or added new law to subject matter codified;
(3) making necessary corrections to enacted codifications; and
(4) renumbering or otherwise redesignating titles, chapters, and sections of codes that duplicate title, chapter, or section designations.

As an aside, if you're interested in learning more about the creation of the Estates Code as part of this statutory revision, you can download this author's paper, *The Story of the Estates Code*, at:

www.snpalaw.com/resources/EstatesCodeStory

By the end of the 2019 session, Leg. Council had updated most, but not all, references to old Probate Code provisions found outside of the Estates Code.[6] (*see* **HB 4170** (Leach | Kolkhorst). While this year's Leg. Council code update bill (**HB 3607** (Leach)) mentions the Estates Code in two of its amendments, the amendments themselves have nothing to do with the Estates Code, the Probate Code, or references to either of those codes. Given the passage of REPTL's "substantive code update bill" in 2019 (*see below*), I think it's safe to conclude that the codification project is

[6] Previous Leg. Council code update bills relating to the Estates Code are **SB 1303** (2011), **SB 1093** (2013), **SB 1296** (2015), and **SB 1488** (2017).

now done, and there ***probably*** won't be any more mentions of the codification project in future updates.

3.14 **The REPTL Substantive Code Update Bill.** But Leg. Council still couldn't update all references to the Probate Code. Its mandate under Chapter 323, Government Code, only allows it to make **nonsubstantive** changes, and updating certain provisions in an appropriate manner could potentially result in making **substantive** changes. These provisions were identified, and in the 2019 session, we ***think*** that REPTL fixed the remaining references (*see* **HB 2780** (Wray | Rodríguez).

**4. Key Dates.**

Key dates for the enactment of bills in the 2021 legislative session include:[7]

- **Tuesday, November 3, 2020** – General election for federal, state, and county offices on the first Tuesday after the first Monday in November of even-numbered years. *[Election Code, Sec. 41.002, U.S. Statutes at Large, 28th Congress, 2nd Session, p. 721]*
- **Monday, November 9, 2020** – Prefiling of legislation for the 87th Legislature begins.
- **Tuesday, January 12, 2021** (1st day) – 87th Legislature convenes at noon on the second Tuesday in January of each odd-numbered year. *[Government Code, Sec. 301.001]*
- **Friday, March 12, 2021** (60th day) – Deadline for filing most bills and joint resolutions. *[House Rule 8, Sec. 8; Senate Rule 7.07(b); Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills]*
- **Monday, May 10, 2021** (119th day) – Last day for House committees to report House bills and joint resolutions. *[a "soft" deadline that relates to House Rule 6, Sec. 16(a), requiring 36-hour layout of daily calendars prior to consideration, and House Rule 8, Sec. 13(b), the deadline for consideration]*
- **Thursday, May 13, 2021** (122nd day) – Last day for House to consider nonlocal House bills and joint resolutions on **second** reading. *[House Rule 8, Sec. 13(b)]*
- **Friday, May 14, 2021** (123rd day) – Last day for House to consider nonlocal House bills and joint resolutions on **third** reading. *[House Rule 8, Sec. 13(b)]*
- **Saturday, May 22, 2021** (131st day) – Last day for House committees to report Senate bills and joint resolutions. *[relates to House Rule 6, Sec. 16(a), requiring 36-hour layout of daily calendars prior to consideration, and House Rule 8, Sec. 13(c), the deadline for consideration*]
- **Tuesday, May 25, 2021** (134th day) – Last day for House to consider most Senate bills and joint resolutions on **second** reading. *[House Rule 8, Sec. 13(c)]*
- **Wednesday, May 26, 2021** (135th day) – Last day for House to consider most Senate bills or joint resolutions on **third** reading. *[House Rule 8, Sec. 13(c)]*
  Last day for Senate to consider any bills or joint resolutions on third reading. *[Senate Rule 7.25; Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills]*
- **Friday, May 28, 2021** (137th day) – Last day for House to consider Senate amendments. *[House Rule 8, Sec. 13(d)]*
  Last day for Senate committees to report all bills. *[relates to Senate Rule 7.24(b), but note that the 135th day (two days earlier) is the last day for third reading in the senate; practical deadline for senate committees is before the 135th day; Senate Rule 10.01 subjects joint resolutions to the rules governing proceedings on bills]*
- **Sunday, May 30, 2021** (139th day) – Last day for House to adopt conference committee reports. *[House Rule 8, Sec. 13(e)]*
  Last day for Senate to concur in House amendments or adopt conference committee reports. *[relates to Senate Rule 7.25, limiting a vote on the passage of any bill during the last 24 hours of the session to correct an error in the bill]*
- **Monday, May 31, 2021** (140th day) – Last day of 87th Regular Session; corrections only in House and Senate. *[Sec. 24(b), Art. III, Texas Constitution; House Rule 8, Sec. 13(f); Senate Rule 7.25]*
- **Sunday, June 20, 2021** (20th day following final adjournment) – Last day Governor can sign or veto bills passed during the previous legislative session. *[Section 14, Art. IV, Texas Constitution]*[8]

[7] As we pass each deadline, we'll mark it in red.

[8] A few words of further explanation about this deadline. This provision states the general rule that if the Governor doesn't return a vetoed bill to the Legislature within 10 days (*excluding Sundays*) after it's presented to him (*gender specific pronoun in original*), it becomes law as if [s]he'd signed it. Regular sessions of the Legislature always end on a Monday, which means that there are two Sundays included in the 10 calendar days preceding adjournment. Since we don't count those Sundays, this means that for regular sessions, the 10-day period is really a 12-day period. **However**, if the Governor can't return it because the Legislature has adjourned by the end of this 12-day period, the Governor has until 20 days (*no Sunday exclusion*) after adjournment to veto it. Therefore, bills passed in the 2021 regular session must be sent to the Governor by May 19th in order to avoid the 20-day post adjournment deadline.

- **Monday, August 30, 2021** (91st day following final adjournment) – Date that bills without specific effective dates (that could not be effective immediately) become law. *[Sec. 39, Art. III, Texas Constitution]* (Note that most bills in recent years include a standard specific effective date of September 1st of the year of enactment.)

**5. If You Have Suggestions …**

If you have comments or suggestions, you should feel free to contact the chairs of the relevant REPTL committee[s] identified in Section 1.6 on page 2. Their contact information can be found on their respective committee pages at www.reptl.org.

**6. The REPTL Bills.**

6.1 **The Original REPTL Legislative Package.** REPTL's 2021 legislative package consists of a number of bills covering four general areas: (i) decedents' estates; (ii) guardianships; (iii) trusts; and (iv) powers of attorney and advance directives. Sec. 35(a), Article III, of the Texas Constitution contains the "one-subject" rule:

> No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject.

Because of this rule, we (or sometimes Leg. Council) strip out provisions from one or more of the "general" bills that may violate the one-subject rule and place them in separate, smaller bills. In each of the substantive sections of this paper, we will identify any REPTL bills and begin with descriptions of them.

6.2 **Consolidation Into REPTL Bills.** As hearings begin, legislators often ask interested parties to try to consolidate as many of the various bills on similar subjects as possible, in order to reduce the number of bills that would need to move through the legislature. Pursuant to this request, REPTL representatives and the statutory probate judges usually agree to consolidate all or a portion of a number of other bills into one or more of REPTL's bills. For example, this session, the language of **SB 615**, which is the probate judges' bill, was added to REPTL's guardianship bill (even though **SB 615** passed in its own right also). Therefore, keep in mind that not everything that ends up in a REPTL bill by the time it passes was originally a REPTL proposal. Where non-REPTL provisions have been added to REPTL bills, we've attempted to identify the original bill[s] that served as the source of the amendments.

**7. Decedents' Estates.**[9]

7.1 **REPTL Decedents' Estates Bill.** REPTL's Decedents' Estates bill is **HB 2182** (Moody) (its companion was **SB 1937** (Hughes)).

REPTL's Decedents' Estates bill **did not pass**. It was on the Senate's Local & Uncontested Calendar for May 26th, the last day for Senate consideration (*see* Part 4). Had it passed, it would have gone to the Governor since no amendments to the House-passed version were made in the Senate. We have no reason to believe that there were any objections to REPTL's bill. Rather, news reports indicate that Lt. Gov. Patrick was upset that the House had allowed the clock to run on a May 25th deadline for the House to consider Senate bills, effectively killing three of the lieutenant governor's legislative priorities addressing limits on transgender student athletes (**SB 29**), taxpayer-funded lobbying (**SB 10**) and social media policies (**SB 12**). Therefore, in retaliation, he allowed numerous House bills to die by failing to bring them up for consideration by the Senate's May 26th deadline for considering House bills. One of the other bills that died in the Senate that day was **HB 1600**, a safety-net bill that would have authorized continuation of the Texas Commission on Law Enforcement for two years. TCOLE sets licensing and training standards for police, and it is thought that Lt. Gov. Patrick let this bill die so that Gov. Abbott would be forced to call a summer special session to keep this agency alive. Patrick had already asked the governor to call a special session to consider the three bills that were his priorities. When Gov. Abbott was asked on May 27th whether he was considering Lt. Gov. Patrick's request for a special session, the governor responded that it was "pretty goofy." He also warned legislative leaders against trying to sabotage the regular session by withholding action on necessary legislation. As it happened, most or all of the agencies that would have been saved by **HB 1600** ended up being saved by a conference committee report on **SB 713** that was adopted by both chambers three days after the Governor's warning.

REPTL's Trusts bill (**HB 2179**) and Financial Power of Attorney bill (**HB 2183**) also died on the Senate's May 26th Local & Uncontested Calendar. *See* Secs. 9.1 and 10.1.

Since we're likely to see these proposals in 2023, consider this Sec. 7.1 a "legislative preview." If you're not interested in a preview, skip to Sec. 7.2 on page 8.

**(a) Qualified Delivery Method (Sec. 22.0295).** Several Estates Code sections require

[9] In general, section references throughout this paper are to the Texas Estates Code unless otherwise noted.

notices to be sent by certified or registered mail, return receipt requested. However, there has been an ongoing problem getting green cards back to show that the notice was delivered, and this problem was only exacerbated by the COVID-19 pandemic. This change provides a new "qualified delivery method" to address this problem. Newly-permitted delivery methods include hand delivery by courier (with proof of delivery) or a private delivery service designated by the Secretary of the Treasury under IRC Sec. 7502(f)(2). (I believe that IRS Notice 2016-30 contains the current list of designated delivery services.)

**(b) Community Property Subject to Creditors' Claims (Sec. 101.052).** This change clarifies that community property is subject not only to the debts of the deceased spouse, but also the debts of the surviving spouse, by deleting the words "of Deceased Spouse" from the title of Sec. 101.052 (which currently reads "Liability of Community Property for Debts of Deceased Spouse") and clarifying that the survivor's interest in the deceased spouse's sole management community property becomes liable for the survivor's debts, and the deceased spouse's interest in the survivor's sole management community property passes to the beneficiaries subject to the deceased spouse's debt.

**(c) Property Listed in Heirship Application (Sec. 202.005).** Under current law, an application to determine heirship requires "a general description of all property belonging to the decedent's estate or held in trust for the benefit of the decedent." The proposed legislation clarifies that only property that is subject to distribution in the heirship proceeding (real estate located in Texas and all personal property other than non-probate property) must be listed in the application.

**(d) Service on Minors Who Are At Least 16 Years Old (Secs. 202.056 & 258.002).** The age at which a minor could waive citation in an heirship proceeding or a proceeding to probate a lost will would be raised from 12 to 16.

**(e) Affidavit of Heirship as Evidence (Sec. 202.151).** This change clarifies that an affidavit of heirship or judgment complying with Sec. 203.001 may serve as evidence in an heirship proceeding (as an alternative to testimony from two disinterested witnesses).

**(f) Applicant's Last Three Digits (Secs. 256.052, 257.051, & 301.052).** In 2017, the Estates Code was amended to require that applications for probate and for letters testamentary or letters of administration include the last three numbers of the applicant's and the decedent's driver license and social security numbers. This change would eliminate that requirement for the applicant, but not the decedent.

**(g) Use of Unsworn Declaration for Oaths (Secs. 305.001-305.003, 305.051-305.053, & 305.055).** A COVID-inspired change would allow a personal representative to submit an unsworn declaration in order to qualify that would serve the same purpose as an oath signed before a notary.

***Drafting Tip***

A statutory example of what would have been the new form where a will is admitted:

My name is _____ (insert name of "executor of the will" or "administrator with the will annexed" as it appears on the order appointing the person as executor or administrator with the will annexed), my date of birth is _____ (insert date of birth of "executor of the will" or "administrator with the will annexed," as applicable), and my address is _____ (insert street, city, state, zip code, and country of "executor of the will" or "administrator with the will annexed," as applicable). I declare under penalty of perjury that the writing offered for probate is the last will of _____ (insert name of testator), so far as I know or believe. I also solemnly declare that I will well and truly perform all the duties of _____ (insert "executor of will" or "administrator with the will annexed," as applicable) for the estate of _____ (insert name of testator).

**(h) Sale of Personal Property in Dependent Administration (Sec. 356.105).** A 2019 revision to Estates Code Sec. 356.551 required administrators in a dependent administration to report only "successful bids or contracts for the sale" of real property to the court. The proposed legislation would make this change applicable to sales of personal property as well.

**(i) Removal of References to "Community Debts" (Secs. 453.003 & 453.006-453.007).** Several sections of the Estates Code refer to "community debts," much to the chagrin of law school professors throughout the state (here's looking at you, Prof. Featherston). This change replaces references to "community debts" with "debts for which some community property is liable for payment."

7.2 **Administration of Unclaimed Property (Sec. 551.005; Ins. Code Secs. 1109.013; & Prop. Code Sec. 72.001 & Ch. 74).** **HB 1514** (Landgraf | Zaffirini) (**SB 789** (Zaffirini) was its similar Senate companion) requires notice to the comptroller by certified mail or e-mail of an order to deliver funds to the comptroller under Sec. 551.005, rather than requiring that the comptroller be served as a party. Conforming amendments are made to the Insurance and Property Codes regarding the report, delivery, claims process, and disposition of abandoned property.

HB 1514 was signed by the Governor May 18th and is effective immediately.

7.3 **Expedited Death Certificate for Religious Purposes (H&S Code Sec. 193.0025).**[10] If a commissioners court in a county with a medical examiner allows, **HB 1011** (Turner, J., *et al.* | Zaffirini) lets an individual request expediting the completion of a death certificate if (1) the expedited certificate is necessary for religious purposes, (2) the decedent's remains will be interred, entombed, buried, or cremated in a foreign country, and (3) the requestor is authorized to receive a copy of the certificate.

HB 1011 was signed by the Governor on June 4th and is effective September 1st.

7.4 **Required Statement in Disclaimer Regarding Child Support (Prop. Code Sec. 240.009).** Prop. Code Sec. 240.151(g) bars a disclaimer by a child support obligor if the obligor has been determined to be in arrears in those obligations. **SB 286** (West | Neave) (**HB 2952** (Neave) was its House companion) requires all disclaimers to contain a sworn statement regarding whether the disclaimant is a child support obligor whose disclaimer is barred under that section. However, at REPTL's request, a sentence was added clarifying that a failure to include the required statement wouldn't invalidate a disclaimer if the disclaimant wasn't a child support obligor.

SB 286 was signed by the Governor on June 14th and is effective September 1st.

7.5 **Procedural Matters Affecting Decedents' Estates.** Don't forget to check out the matters affecting decedents' estates discussed in Parts 13—Jurisdiction and Venue. and 14--Court Administration.

**8. Guardianships and Persons With Disabilities.**

8.1 **The REPTL Guardianship Bill.** REPTL's Guardianship bill is **SB 626** (Zaffirini | Moody) (its companion was **HB 2178** (Moody)). It is very similar to the 2019 REPTL Guardianship bill (**SB 667** (Zaffirini | Thompson, S.)) that was vetoed by Gov. Abbott.

**(a) Matters Related to Guardianship Proceeding (Sec. 1021.001).** This section has contained two definitions of a matter related to a guardianship proceeding: subsection (a) for counties **without** a statutory probate court, and subsection (b) for counties **with** a statutory probate court. This change leaves subsection (a) to define those matters in counties without **either** a statutory probate court or a county court at law and inserts a new subsection (a-1) applicable to counties without a statutory probate court but with a county court at law (adding the interpretation and administration of a trust in which a ward is a beneficiary).

**(b) Unsworn Declarations in Lieu of Sworn Oath (Secs. 1052.052, 1103.003, 1105.001-1105.003, 1105.051-1105.052, 1105.103, & 1251.101).** Similar to the change in REPTL's Decedents' Estates bill (see Section 7.1(g)), this change allows a guardian to submit an unsworn declaration in order to qualify that would serve the same purpose as an oath signed before a notary.

***Drafting Tip***

A statutory example of the new form where a person is named as guardian:

My name is _____ (insert guardian's name as it appears on the order appointing the person as guardian), my date of birth is _____ (insert the guardian's date of birth), and my address is _____ (insert street, city, state, zip code, and country of the guardian). I declare under penalty of perjury that the information in this declaration is true and correct. I solemnly declare that I will discharge faithfully the duties of guardian of _____ (insert "the person," "the estate," or "the person and estate") of _____ (insert the ward's name), an incapacitated person, according to law, signed on _____ (insert the date of signing).

**(c) Wards' Bill of Rights (Sec. 1151.351).** This change amends the right set forth in subsection (b)(12) to clarify that only a court investigator or guardian ad litem (and not an attorney ad litem) may be appointed to investigate a complaint relating to modification or termination of a guardianship, which is consistent with the procedure set forth in Sec. 1202.054.

**(d) Notice to Creditors (Sec. 1153.001).** This change requires that the general notice to creditors be published in a newspaper of general circulation in the county, rather than one printed in the county. The notice must be posted only if there's no newspaper of general circulation. (This is similar to the 2017 change relating to publication of the notice to creditors in decedents' estates.)

**(e) Attorney's Fees (Sec. 1155.054).** This is a terminology change. Instead of **requiring** a party to reimburse certain attorney's fees, a court may **order** the party to reimburse those fees.

**(f) Sale of Personal Property in Guardianship (Sec. 1158.105).** Guardians are required to report only "successful bids or contracts for the sale" of personal property to the court.

**(g) Sale of Real Property at Public Auction (Secs. 1158.401-1158.405).** This change specifies that a public sale of real estate is required to be made at public

[10] References to "H&S Code" are to the Health & Safety Code.

auction and provides the mandatory terms regarding location and time of the auction.

**(h) Private Sale of Real Estate (Secs. 1158.451 & 1158.502).** This change specifies that the guardian of the estate may enter into a contract for a private sale of real estate. The procedure for the sale of an easement or right of way is the same as the procedure for a private sale.

**(i) Sale of Real Property in Guardianship (Secs. 1158.551-1158.554 & 1158.556-1158.558).** Guardians are required to report only "successful bids or contracts for the sale" of real estate to the court. This change also provides additional terms that must be reported to the court and requires the court to consider the manner in which the auction was held or the contract for which the report was made.

**(j) Agency References (Secs. 1163.005 & 1163.101).** References to the Department of Aging and Disability Services are changed to the Health and Human Services Commission, while references to the Guardianship Certification Board are changed to the Judicial Branch Certification Commission.

**(k) Ch. 1301 Management Trusts.** Several changes are made relating to management trusts under Ch. 1301.

**(i) Notice (Sec. 1301.0511).** The notice provisions for an application to create a management trust are made identical to the provisions applicable to the creation of a guardianship. Plus, any currently serving guardian must also be served.

**(ii) Termination (Secs. 1301.101 & 1301.203).** If a management trust is created for a minor who is also incapacitated for some reason other than minority, the management trust must terminate on the beneficiary's death or when the beneficiary regains capacity.

**(iii) Accounting (Sec. 1301.154).** Both the guardian of the estate and the guardian of the person must receive a copy of the annual account (not either).

**(l) Sale of Property by Nonresident Guardian (Secs. 1355.002 & 1355.105).** These changes clarify that money held in the clerk's registry is to be paid to a nonresident guardian, not the nonresident minor or incapacitated ward.

**(m) Stay Tuned for Further Updates.** When the REPTL Guardianship bill was brought to the House floor on May 19th on second reading, with REPTL's consent, the bill was amended by adding the provisions found in **SB 615** (Zaffirini | Leach) (*see* Sec. 8.2 below). However, in an unfortunate development, the provisions for independent guardianships found in **HB 1675** (Allison) (*see* Sec. 8.1 below in the attachment "Selected Bills That DID NOT Pass") were also added to the bill. Meanwhile, **SB 615** passed on its own when the House approved it on May 26th. After the REPTL Guardianship bill passed the House, it was sent to a conference committee. In the conference committee report, the language incorporated from **SB 615** remained, but the language incorporated from **HB 1675** had been removed.

SB 626 was signed by the Governor on June 14th and will be effective September 1st.

While the language from **SB 615** was incorporated into the REPTL Guardianship bill, we'll describe it as the standalone version in Sec. 8.2 below.

8.2 **The Statutory Probate Judges' Bill. SB 615** (Zaffirini | Leach) is the statutory probate judges' bill. Many of the procedural issues contained in the bill affecting guardianships are discussed in Parts 13—Jurisdiction and Venue. and 14—Court Administration. Here are some other issues addressed in that bill related solely to guardianships, many of which were included in 2019's **SB 1426**, the language of which was eventually added to that session's REPTL Guardianship bill (that passed but was vetoed).

**(a) Attorney Certification (Sec. 1054.201 & Gov't Code Sec. 81.114).** Any attorney representing **any** person in a guardianship proceeding must obtain guardianship education certification, not just the applicant's attorney and any court-appointed attorney. (An attorney who doesn't have the certification may enter an appearance but must complete the course requirements within 14 days and prior to filing any substantive pleading.) A guardianship certification course must be low-cost and available to persons throughout this state, including on the Internet provided through the State Bar.

**(b) Applicant's Former Name and Liquid Assets (Sec. 1101.001).** An application for guardianship must include the applicant's former name, if any, and the approximate value of the proposed ward's liquid assets (instead of "property").

**(c) Waiver of Guardianship Training (Sec. 1101.153).** If an order appointing a guardian waives the training requirement, it must contain a finding that the waiver is in accordance with rules adopted by the Supreme Court.

**(d) Attendance at Legal Proceeding (Sec. 1151.005).** A guardian may not be excluded from attending a legal proceeding in which the ward is a party or participating as a witness.

**(e) Citation for Appointment of Temporary Guardian (Sec. 1251.005).** Citations in a temporary guardianship must include a statement notifying a person interested in the estate or welfare of a ward that they may file a request to be notified of filings.

**(f) Final Report in Temporary Guardianship (Sec. 1251.153).** Requires a temporary guardian to file a final report at the termination of the temporary guardianship.

**(g) Criminal History of Guardian (Gov't Code Sec. 155.205).** Proposed non-resident guardians must provide a ***fingerprint-based*** criminal history record, while proposed Texas resident guardians must provide a ***name-based*** criminal history record.

SB 615 was signed by the Governor on June 14th and is effective September 1st.

8.3 **Incapacity of Guardian (Sec. 1203.0521).** **HB 3394** (Metcalf | Creighton) allows a court, on its own motion or on the application of an interested person, to appoint an AAL and a court investigator or GAL to investigate whether a guardian should be removed due to incapacity. If necessary, the court may appoint physicians to examine the guardian.

HB 3394 was signed by the Governor on June 4th and is effective September 1st.

8.4 **Guardianship Abuse, Fraud, and Exploitation Program (Gov't Code Secs. 72.121 & 72.1221).** Last session, **SB 31** (Zaffirini, *et al.* | Smithee, *et al.*) established a guardianship abuse, fraud, and exploitation deterrence program within the Office of Court Administration. This session, **SB 692** (Zaffirini | Smithee) (**HB 3896** (Smithee) was its House companion) authorizes that program's access to financial records concerning a ward or the ward's estate for purposes of conducting reviews and audits under the program.

SB 692 was signed by the Governor on May 30th and is effective immediately.

8.5 **Professional's Disclosure of Mental Health Information.** **HB 549** (Thompson, S. | Zaffirini, *et al.*) (**SB 1143** (Zaffirini) was its Senate companion) relieves a professional from civil, criminal, or administrative liability for making a permitted disclosure of mental health information under Health and Safety Code Sec. 611.004(a)(2). Any suit against the professional for disclosure of the confidential information must be dismissed with prejudice. (**HB 260** (Thompson, S.) was similar but contained a good faith standard).

HB 549 was signed by the Governor on June 15th and is effective September 1st.

8.6 **Prevention of Abuse of Elderly and Disabled.** A number of bills address the problems arising from fraud and abuse of the elderly and disabled.

**(a) Access to Financial Records by the Guardianship Abuse, Fraud, and Exploitation Program.** *See* Sec. 8.4.

**(b) Financial Abuse of Elderly Persons.** **HB 1156** (Thierry, *et al.*) creates an offense if a person knowingly engages in financial abuse of an elderly individual, including financial exploitation committed by a person who has a relationship of confidence or trust with the elderly individual. This includes breach of fiduciary duties such as the duty owed to the principal by an agent under a financial power of attorney or abuse of guardianship powers that results in unauthorized appropriation, sale, or transfer of another person's property.

HB 1156 was signed by the Governor on June 9th and is effective September 1st.

**(c) Hold on Account of Vulnerable Adult Upon Suspicion of Financial Exploitation.** **HB 4477** (Thompson, S. | Zaffirini) allows a financial institution to place a hold on any transaction in a vulnerable adult's account if there is reason to believe the transaction involves financial exploitation and the institution has submitted a report of the suspected exploitation to DFPS. A "vulnerable adult" is an elderly person, a person with a disability, or an individual receiving protective services.

HB 4477 was signed by the Governor on June 17th and will generally be effective September 1st.

**(d) Visitation Rights.** Several bills grant residents of long-term care facilities (or their guardian or other legally authorized representative) the right to designate an essential caregiver for visitation. These include **SB 25** (Kolkhorst, *et al.* | Frank, *et al.*) and **SJR 19** (Kolkhorst, *et al.* | Frank, *et al.*)[11] Amendments in the House to **SB 25** allow the facility to suspend an individual's designation for up to 14 days if that essential caregiver violates the facility's safety protocols and the resident has the right to immediately appoint a

[11] Similar bills included **HB 892** (Frank), **HB 2324** (Sanford), **HB 2897** (Hernandez), **SB 267** (Kolkhorst), **SB 1195** (Paxton), **HJR 46** (Frank), **SJR 48** (Paxton), and **HJR 110** (Sanford).

replacement. Other bills address the rights of visitors other than "essential caregivers."[12]

SB 25 was signed by the Governor on June 14th and is effective September 1st. SJR 19 was filed with the Secretary of State on June 1st and will appear on the November ballot.

**(e) Continuous Sexual Abuse of a Disabled Person.** **HB 375** (Smith, *et al.* | Zaffirini) creates the offense of continuous sexual abuse of a disabled individual, defined as two or more acts of sexual abuse during a period of 30 or more days in duration, regardless of whether the acts are committed against one or more victims.

HB 375 was signed by the Governor on June 4th and is effective September 1st.

**(f) Fraudulently Securing Document Execution.** **SB 109** (West) makes it a criminal offense to fraudulently secure document execution if a person, with the intent to defraud, causes another person to execute a document affecting property, a service, or the pecuniary interest without that person's effective consent. The offense also includes causing a public servant to file or record a purported judgment of a court or judicial entity that was not expressly created under state or federal law without the public servant's effective consent. Consent is not effective if it is (1) induced by deception or coercion, (2) given by a person who due to youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions, or (3) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property.

SB 109 signed by the Governor on June 16th and is effective September 1st.

8.7 **Modification of Order Following Conservator's Death (Fam. Code Sec. 156.106).** **HB 1849** (Sanford, *et al.* | Paxton) (**SB 733** (Paxton) was its Senate companion) authorizes temporary modification of an existing order relating to the appointment of a conservator or possession of or access to a child upon the conservator's death.

HB 1849 was signed by the Governor on June 15th and is effective September 1st.

8.8 **Procedural Matters Affecting Guardianships.** Don't forget to check out the matters affecting guardianships discussed in Parts 13—Jurisdiction and Venue. and 14—Court Administration.

**9. Trusts.**[13]

9.1 **The REPTL Trusts Bill.** REPTL's Trusts bill is **HB 2179** (Moody).[14] (its companion was **SB 1933** (Hughes)).

REPTL's Trusts bill **did not pass**. If you're interested in the possible reasons it didn't pass, see the discussion of REPTL's Decedents' Estates bill (**HB 2182**), which died for the same reason, in Sec. 7.1. REPTL's Financial Power of Attorney bill (**HB 2183**) also died for the same reason. *See* Sec. 10.1.

Since we're likely to see these proposals in 2023, consider this Sec. 9.1 a "legislative preview." If you're not interested in a preview, skip to Sec. 9.2 on page 13.

**(a) Homesteads Owned by Revocable Trusts (Sec. 41.0021).** Tax Code Sec. 11.13(j) provides a homestead property tax exemption for a residence owned by a trust if the settlor or a beneficiary has the right to use the residence "rent free and without charge except for taxes and other costs and expenses." Meanwhile, Prop. Code Sec. 41.0021 provided homestead creditor protection for a residence owned by a trust if the settlor or a beneficiary has the right to use the residence "at no cost …, other than payment of taxes and other costs and expenses" specified in the trust. A 2019 bankruptcy case out of San Antonio (*In Re Cyr*[15]) held that a trust owning a residence that used the Tax Code phrase – "rent free and without charge" – and not the Property Code phrase – "at no cost" – **did not** qualify for the homestead exemption for creditor purposes. The bankruptcy court's ruling was reversed by the district court in late 2020.[16] The district court found that the bankruptcy court's distinction between the phrases "rent free and without charge" and "at no cost" elevated form over substance.

Nevertheless, REPTL's change seeks to eliminate any future argument by adding "or rent free and without

[12] **SB 1956** (Creighton) would have required hospitals to allow patients to have at least one visitor during periods of disaster. **SB 1201** (Hughes) would have required hospitals and residential facilities to permit seriously ill or dying patients to have in-person visitation with religious counsel. **HB 3998** (Krause) would have prohibited political entities from limiting an individual's access to an imminently dying member of the individual's family.

[13] Section references in this Part 9 are to the Texas Property Code unless otherwise noted.

[14] *See* Sec. 19.10(l) for an anecdote about this bill.

[15] 605 B.R. 784 (Bankr. W.D. Tex. 2019).

[16] Cyr v. SNH NS Mtg Properties 2 Trust, No SA:19-CV-0911-JKP, 2020 WL 7048603 (W.D. Tex. Nov. 30, 2020).

charge" following "at no cost" to the Property Code provision.

> ***Drafting Tip***
>
> Use of the full phrase "at no cost, or rent free and without charge" in your trust agreements should assure qualification for the homestead exemption both for tax and creditor purposes.

**(b) Spendthrift Provisions and Testamentary General Powers of Appointment (Sec. 112.035).** Fairly old Texas caselaw leads to the conclusion that mere possession of a testamentary general power of appointment at death, without exercising the power, does not subject the property covered by the power to the holder's creditors' claims. This agrees with the position found in the Restatement **2nd** of Property, but is contrary to the position currently found in the Restatement **3rd** of Property. This change codifies the position found in the Second Restatement. It also provides that exercising a general power in favor of those who would otherwise receive the property will not expose it to the holder's creditors.

**(c) Attorney Ad Litem for Trust Proceedings (Sec. 112.054).** This change requires the court to make a determination that the appointment of an ***attorney*** ad litem in a trust proceeding is necessary for the adequate representation of a minor or incompetent beneficiary before appointing an attorney ad litem, similar to the existing requirement for appointment of a ***guardian*** ad litem in a trust proceeding.

**(d) Decanting Into the Same Trust? (Sec. 112.0715).** In 2019, REPTL's Trusts bill attempted to "clarify" that the second trust to which trust assets are decanted may be created under the same trust instrument as the first trust in order to avoid the need to retitle assets or obtain a new tax identification number. A number of people (including me) were skeptical that the attempt was successful. This session's change is an attempt at further clarification, expressly stating that the second trust may use the same name as the first trust, and the same TIN "subject to applicable federal law."

9.2 **Rule Against Perpetuities (Sec. 112.036).** **HB 654** (Lucio, III, *et al.* | Johnson, *et al.*) (**SB 1337** (Johnson) was its Senate companion) is the latest attempt to modify the statutory rule against perpetuities. It appears identical to 2019's **HB 3744** (Burrows) and 2017's **HB 2842** (Burrows)[17] and would change the perpetuities period to a fixed 300-year time limit measured from the "effective date" of the trust, *i.e.*, the date the trust becomes irrevocable. It would apply to trusts with an effective date on or after September 1, 2021, and to trusts with an earlier date if the trust instrument provides that interests vest under the statutory provision applicable to trusts on the date the interest vests (which seems a bit circular). ***For the first time ever***, a RAP bill passed both chambers in the same session. In this case, the House bill passed the Senate on May 10th, but not before being amended on the Senate floor. The (in my opinion poorly-worded) amendment adds a new subsection at the end of Sec. 112.036 that provides:

> (f) Under this section, a settlor of a trust may not direct that a real property asset be retained or refuse that a real property asset may be sold for a period longer than 100 years.

Huh? I think I get the gist, but that syntax is really confusing. And isn't that subsection addressing restraints on alienation, which are different than the rule against perpetuities? On May 18th, the House concurred in the Senate amendments.

As with those previous bills, I question whether a statutory change would pass constitutional muster. It's not clear to me that our constitutional prohibition against "perpetuities" would allow the legislature to so dramatically extend the common law perpetuities period. If you're interested, see my discussion of the constitutionality of a statutory change to our RAP in the Special Supplement found in Part 17 on page 18.

HB 654 was signed by the Governor on June 16th and is effective September 1st.

[17] I believe this is a complete list of all previous attempts to modify Sec. 112.036 with a short description of what they did and how far they got:

- 1999's **HB 1553** (repeal of statutory RAP; left pending in House Financial Institutions)
- 2001's **HB 1608** and **SB 698** (RAP doesn't apply to trusts but interests in trusts must vest within 1,000 years; both bills left pending in House Calendars)
- 2003's **HB 2239** and **SB 534** (same as 2001 bills; left pending in both House Financial Institutions and Senate Jurisprudence)
- 2005's **HB 2561** (RAP doesn't apply to trusts; left pending in House Financial Institutions)
- 2009's **HB 990** (200-year RAP; no vote after placement on House General State Calendar)
- 2011's **HB 372** and **SB 261** (same as 2009 bill; left pending in House Judiciary, no action on Senate bill)
- 2013's **HB 2189** (500-year RAP; left pending in House Judiciary subcommittee)
- 2017's **HB 2842** (300-year RAP; left pending in House Judiciary)
- 2019's **HB 3744** (same as 2017 bill; left pending in House Calendars)

**10. Disability Documents.**

10.1 **The REPTL Financial Power of Attorney Bill (Secs. 751.002, 751.00201, 752.001, & 752.107).** REPTL's Financial Power of Attorney bill, **HB 2183** (Moody) (its companion was **SB 1932** (Hughes)), removes a handful of references to an "attorney-in-fact" that were added back by other bills after REPTL removed those references in prior sessions and changes the word "person" to "individual" to make it clear that the power of attorney provisions apply only to a power of attorney signed by an individual. The bill also clarifies that the statutory power regarding business operation transactions applies to limited liability companies. (The original provision was adopted long before LLCs became a widely-used business entity.)

REPTL's Financial Power of Attorney bill **did not pass**. If you're interested in the possible reasons it didn't pass, see the discussion of REPTL's Decedents' Estates bill (**HB 2182**), which died for the same reason, in Sec. 7.1. REPTL's Trusts bill (**HB 2179**) also died for the same reason. *See* Sec. 9.1.

Since we're likely to see these proposals in 2023, consider this Sec. 10.1 a "legislative preview." If you're not interested in a preview of any of the REPTL bills discussed in this Part 10 that didn't pass, there aren't any other bills relating to disability documents that passed. Nor are there any bills related to Nontestamentary Transfers or Exempt property that passed, so you can skip to Part 13 on page 15.

10.2 **The REPTL Medical Power of Attorney Bill (H&S Code Secs. 166.1525, 166.160, 166.163, & 166.164).** REPTL's Medical Power of Attorney bill, **HB 2180** (Moody) and **SB 1934** (Hughes), once again proposed to make the statutory form of medical power of attorney optional so that people can use the Five Wishes document, the ABA's simple form, or some other form as a standalone document. Currently, Texas appears to be one of only five states that mandate use of a state form. Under the proposed legislation, the only requirements are that a medical power must be in writing and contain the principal's name, date of execution, and designation of an agent to be valid.

In order to make this more palatable to the Texas Medical Association and the Texas Hospital Association, both of which opposed this change in 2017 and 2019, an attending physician, health or residential care provider, or agent of either will be protected from an unprofessional conduct claim just because of an assumption that the medical power was valid when made (absent actual knowledge to the contrary). Additionally, new Sec. 166.1525 provides that that if two or more persons are named as co-agents, then unless the medical power provides otherwise, the agents will have authority to act independently of each other. If the co-agents disagree on a treatment decision, a third party may elect whether to follow the treatment decision of any of them, or, instead, follow the treatment decision of the next named alternate agent. The third party will be protected from any civil or criminal liability or disciplinary action for following the treatment decisions of one or more agents as outlined in the medical power or the statute.

Once again, REPTL was unable to overcome opposition to this bill, and neither version even received a hearing.

10.3 **The REPTL Anatomical Gift Bill (H&S Code Secs. 692.003, 692.005, & 692A.005-692A007).** REPTL's Anatomical Gift bill, **HB 2697** (Moody) and **SB 212** (Zaffirini), would allow a statement of anatomical gift, a revocation of same, or a refusal to make an anatomical gift to be acknowledged in the presence of a notary instead of two witnesses.[18] (This is REPTL's third or fourth try at getting this simple change passed.) It also moves the provision providing that an anatomical gift made through an online donor registry does not require any witnesses or the consent of any person from repealed Health and Safety Code Chapter 692 to the replacement Chapter 692A. (Chapter 692 was amended during the same legislative session in which it had already been repealed and replaced by Chapter 692A.)

Once again, for reasons probably unrelated to the bill itself, neither version even received a hearing.

***Drafting Tip***

When my clients bring this up, I usually encourage them to register at the Glenda Dawson Donate Life Texas Registry which allows then to become organ, eye, and tissue donors. That way, the client's wishes will be documented and readily available to health care providers at the time of donation, while access to the anatomical gift form you've prepared may not be. Anyone can register at:

https://www.donatelifetexas.org/

The registry also has partnerships with the Texas DPS and DMV that allow individuals to join the donor registry when applying for or renewing their driver's license, ID, or vehicle registration.

[18] In 2009, when **HB 2027** replaced the Uniform Anatomical Gift Act found in Ch. 692 with the *Revised* Uniform Anatomical Gift Act found in new Ch. 692A, **SB 1803** separately amended Sec. 692.003(d) of the old act. That left subsection (d) in place, but the rest of Sec. 692.003 was repealed, along with the rest of Ch. 692. The REPTL bill repeals the scrap of Ch. 692 that's left.

Should the client want to donate something in addition to organs, eyes, and tissue, then the separate anatomical gift statement may still be warranted.

10.4 **The REPTL Disposition of Remains Bill (H&S Code Secs. 711.002 & 711.004).** The REPTL Disposition of Remains bill, **HB 2181** (Moody) and **SB 1931** (Hughes), amends the provision authorizing removal of an individual's remains (Sec. 711.004) so that the same persons (and in the same order or priority) who control disposition of that individual's remains (under Sec. 711.002) must consent to any subsequent removal of the remains.

Once again, for reasons probably unrelated to the bill itself, the House version made it out of House Judiciary, but failed to be set for a floor vote prior to the May 13th deadline for passage on second reading. (The Senate version never received a hearing.)

**11. Nontestamentary Transfers.**

[None of the bills introduced on this topic passed.]

**12. Exempt Property.**

[None of the bills introduced on this topic passed.]

**13. Jurisdiction and Venue.**

13.1 **Transfer of Guardianship to Foreign Jurisdiction (Sec. 1253.001).** Most of **SB 615** (Zaffirini | Leach), the statutory probate judges' bill, is covered in Sec. 8.2 above. Another provision of the bill allows a court to transfer a guardianship to a foreign jurisdiction to which the ward has permanently moved on its own motion, not just on motion of the guardian.

SB 615 was signed by the Governor on June 14th and is effective September 1st.

13.2 **Notices in Guardianship Transfer and Removal Proceedings (Secs. 1023.004 & 1203.052).** **HB 1296** (Metcalf | Creighton, *et al.*) modifies the method of notice to a guardian on a court's motion to transfer the guardianship to another county from citation by personal service to notice by certified mail, return receipt requested. Further, the method of notice given to a private professional guardian or a guardianship program for removal for failure to maintain required certification is clarified to be by certified mail, return receipt requested.

HB 1296 was signed by the Governor on June 4th and is effective September 1st.

13.3 **Transfers, Mediation, and Termination of Guardianships (Secs. 1023.005, 1023.008, 1023.011, 1055.151-1055.152, 1202.001, & 1202.231-1202.235; Gov't Code Sec. 155.301).** **SB 1129** (Zaffirini | Neave) (**HB 3318** (Neave) was its House companion) modifies rules relating to (i) transfers of guardianships, (ii) mediation of contested guardianships, and (iii) guardianship mediation training. The Office of Court Administration is directed to establish a guardianship mediation course with at least 24 hours of training, but only if the legislature appropriates money for that purpose.

SB 1129 was signed by the Governor on June 7th and is effective September 1st.

**14. Court Administration.**

14.1 **The Statutory Probate Judges' Bill.** **SB 615** (Zaffirini | Leach) covers several procedural issues relating to decedents' estates and guardianship proceedings. All but the last of these changes were included in 2019's **SB 1975** (Zaffirini | Thompson, S.), the language of which was eventually added to REPTL's Guardianship bill, **SB 667** (Zaffirini | Thompson, S.), which in turn was vetoed by the Governor.

**(a) Electronic Transfer of Clerk's File (Secs. 33.101-33.103 & 1023.006-1023.007).** One change authorizes transfer of the clerk's file in **either** electronic or paper form when a case is transferred (i) because venue is proper in another county, (ii) because the transferring court does not have priority of venue, or (iii) for the convenience the estate.

**(b) Citation Signed Under Court's Seal (Secs. 51.003 & 1051.003).** A citation of notice issued by the county clerk must be signed under the ***court's*** seal, not the clerk's seal.

**(c) Personal Service in Heirships (Sec. 202.054).** A court may already require citation on distributees by personal service in an heirship proceeding. This change allows any disinterested person to serve the citation on a distributee who is absent or a nonresident.[19]

**(d) References Changed from Independent Executor to Administrator (Secs. 351.351, 404.0036, & 404.005).** Several references to "independent executor" are changed to "independent administrator." Note that the definition of independent executor includes an independent administrator, but the converse is not true. *See* Estates Code Sec. 22.017.

**(e) Notice of Appointment of Temporary Administrator (Sec. 452.006).** A temporary administrator is already required to notify the decedent's

[19] Keith Branyon, author of *Texas Probate Forms and Procedures*, has pointed out to us that this "change" is already included in Est. Code Sec. 51.051(b)(2), and previously was included in former Probate Code Sec. 33(f)(1) going back to January 1, 1972.

known heirs of the appointment by certified mail. This change requires the administrator to file proof of service in the same manner required for service by mail under Sec. 51.103.

**(f) Recording of Non-English Foreign Wills (Sec. 503.002).** When an authenticated copy of a foreign will and its probate is recorded in the deed records, if any portion is not in English, it must be accompanied by an English translation, the accuracy of which is sworn to.

**(g) Last Three Digits (CP&R Code Sec. 30.014).** Another change extends the Civil Practice & Remedies Code provision requiring a party's initial pleading in a civil action to include the last three numbers of the party's driver's license and social security numbers in district, county, and statutory county courts to specifically include probate and guardianship proceedings, and to specifically apply to statutory probate courts.

**(h) Bond Extended to Visiting Judge (Gov't Code Secs. 25.0006, 25.00231, & 26.001).** The coverage of the bond of the judge of a constitutional county court, statutory county court, or statutory probate court is extended to any visiting judge assigned to the court.

**(i) Fewer Jurors in Probate Proceedings (Gov't Code Sec. 25.0027).** The parties in a trial proceeding in a statutory probate court may agree to try the case with fewer than 12 jurors.

**(j) Defense of Visiting Judge (Gov't Code Sec. 74.141).**[20] Adds a visiting judge in a probate or guardianship matter to the list of judges the AG's office will defend if the judge is sued in his or her capacity as judge.

SB 615 was signed by the Governor on June 14th and is effective September 1st.

14.2 **Service on Certain Organizations in Will Contest or Construction Suits (Sec. 55.053). HB 1297** (Metcalf | Creighton, *et al.*) requires a party (rather than the court) to provide service on an institution of higher education or charitable organization that is a necessary party in a will contest or construction suit.

HB 1297 was signed by the Governor on June 4th and is effective September 1st.

14.3 **Associate Judges for Guardianship and Protective Services Proceedings (Gov't Code Ch. 54A).** Existing Subchapter C of Gov't Code Ch. 54A authorizes associate judges in statutory probate courts. In 2019, **SB 536** (Zaffirini | Murr) would have added a new Subchapter D that would authorize the appointment of associate judges to hear guardianship and protective services proceedings in courts other than statutory probate courts. Despite the fact that the bill passed 29-2 in the Senate and 140-1 in the House, **SB 536** was vetoed by Gov. Abbott based on his claim that this would unnecessarily throw state money and bureaucracy at a perceived problem. This session, **HB 79** (Murr) (**SB 691** (Zaffirini) was its Senate companion) appears to be another attempt to enact similar legislation.

HB 79 was signed by the Governor on June 15th and is effective September 1st.

14.4 **New Courts and Transfer Procedures (Secs. 51.103 & 1051.103; Fam. Code Sec. 155.207; Gov't Code Secs. 25.0172, 25.0173, 25.0631, 51.3071, 51.403 & 72.037). HB 3774** (Leach, *et al.*) (**SB 1530** (Huffman, *et al.*) was its Senate companion) creates new district and statutory county courts in a number of counties and a second statutory probate court in Denton County, and also changes procedures for transferring cases, service of process, and specialty court programs.

HB 3774 was signed by the Governor on June 18th and is generally effective September 1st. (The new Probate Court No. 2 of Denton County is created effective next January 1st.)

14.5 **Consolidation of Filing Fees. SB 41 (**Zaffirini, *et al.* | Leach) aims to simplify the filing fee structure, make sure those fees are used to support the courts, and make sure the collected fees are used for that purpose. Look for changes to filing fees in many courts next year.[21]

---

[20] Note that the only difference we can find in the language of SB 615 (the Statutory Probate Judge's bill) compared with the language from that bill that was incorporated into SB 626 (the REPTL Guardianship bill) is that the latter changes a reference in Sec. 74.141 to a judge whom the AG is obliged to defend from "***his*** office" to "***the judge's*** office."

[21] Professor Beyer suggested I include an explanation of how **SB 41** addresses conflicting versions of a particular statute. Local Gov't Code Sec. 118.052(2) contains a fee schedule for filings with the clerk in probate actions. Back in 1999, subsection (2)(**A**) listed fees for original probate actions, while subsection (2)(**B**) listed fees in pending probate proceedings **HB 2822** increased some of those fees, including the imposition of a new $25 fee for filing an inventory more than 120 days after the probate proceeding was commenced. Also, prior to amendments made by that bill, Local Gov't Code Sec. 118.056(a) provided that the fees listed in Sec. 118.052(2) for services in pending actions were only for filings after the first to occur of the filing of an order approving the inventory or the 90th day after the proceeding commenced. Sec. 118.056(b) provided that the fee for filing a document applied to each page of the document after that same date.

SB 41 was filed without the Governor's signature on June 14th and will be effective January 1st.

14.6 **Eligibility to be Justice or Judge. SJR 47 (**Huffman, *et al.* | Landgraf) is a proposed constitutional amendment that changes the eligibility requirements to be an appellate justice or district court judge. Justices must be at least 35, a U.S. citizen and Texas resident at the time of election, a practicing lawyer in Texas or a judge of a state or county court established by the legislature for a combined total of at least 10 years, and during that time must not have had their license to practice revoked, suspended, or subject to probated suspension. District court judges must be a U.S. citizen and Texas resident at the time of election, a practicing lawyer in Texas or a judge of a state or county court established by the legislature for a combined total of at least 8 years, and during that time must not have had their license to practice revoked, suspended, or subject to probated suspension. In addition, the judge must have resided in the judge's district for the two years prior to the judge's election, and must continue to reside there during the judge's term of office.

SJR 47 was filed with the Secretary of State on May 20th and will appear on the November ballot. If it passes, it will apply to justices and judges first elected for terms beginning on or after January 1, 2025, or appointed on or after that date.

14.7 **Recovery of Attorney's Fees (CP&R Code Sec. 38.001). HB 1578 (**Landgraf, *et al.* | Hughes) (**HB 1358** (Vasut) and **HB 2020** (González, Jessica) were similar) broadens the class of entities against whom the attorney's fees may be recovered in civil actions from corporations to any "organization" defined in Business Organizations Code Sec. 1.002(62),[22] except for "a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust." from the organizations from which attorney's fees may be recovered. (Apparently, Texas courts have held that limited partnerships, limited liability companies, and limited liability partnerships can't be held liable for attorney's fees because Sec. 38.001 hasn't mentioned them.

HB 1578 was signed by the Governor on June 15th and is effective September 1st.

14.8 **New Travis County Probate Courthouse.** Travis County's original courthouse has been busting at the seams for years, and the Commissioners Court has had difficulty getting voter approval for a new courthouse. (Officially the original courthouse is the Heman Marion Sweatt Travis County Courthouse – as in the first black person admitted to the UT School of Law. See *Sweatt v. Painter*, 339 U.S. 629 (1950).) About ten years ago, the Feds built a new United States Courthouse in Austin (with timely help from the 2008-9 stimulus package) and in 2012 vacated the U.S. Courthouse that had been built in 1936.[23] They couldn't find any other federal agencies willing to move in, at the end of 2016, Travis County acquired it (for free) to hold its probate courts and probate clerks. My understanding is that they spent well over $20 million on renovations, and our probate court and clerks moved to the new "Travis County Probate Courthouse," located just a few blocks from the original Travis County Courthouse, in October of 2020. If you're interested, you can view a short video tour at https://youtu.be/frN0GQSDm9M (there's also a link to that video on the Probate Court's website). They appear to have done a very nice job restoring the courthouse, and "snazzy" seems to me to be an appropriate adjective for it.

While one of the reasons for the move to the new probate courthouse was to immediately provide room for a second statutory probate court (and eventually a third and fourth court), due to uncertainties related to (1) 2019's legislative cap on property tax increases and (2) the pandemic's affect on county revenue, the commissioners court decided to punt that decision to 2023.

14.9 **Speaking of New Digs…** On May 17th, The Texas Lawyer posted a story about our State Bar purchasing a funky little historic one-story building just east of the Texas Law Center on the southeast corner of

---

And Sec. 118.056(c) provided that each fee be paid in cash at the time of the filing or rendering of the service. **HB 2822** amended Sec. 118.056 by repealing subsections (a) and (b) and specifying that the cash requirement in what used to be subsection (c) applied to the services listed for filings in pending probate actions. Meanwhile, during the same session **HB 1136** also amended Sec. 118.056 (but not Sec. 118.052) by changing the 90-day limit in subsections (a) and (b) to 120 days. Neither subsection was repealed, and no change was made to subsection (c). This conflict has continued to this day, even though Sec. 118.052 has been amended seven times since 1999 (including by two different bills in both 2007 and 2015), and Sec. 118.056 has been amended twice since 1999 (once each in 2007 and 2015). **SB 41** resolves this conflict by amending subsection (c) of the version of Sec. 118.056 amended by **HB 2822** to delete the cash requirement, and repealing the version of Sec. 118.056 amended by **HB 1136**. Problem solved.

[22] An "organization" includes a corporation, limited or general partnership, limited liability company, business trust, REIT, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign.

[23] This is only included in the paper because I practice in Travis County, and therefore care about it.

15th and Lavaca in Austin for $3.25 million. It will require renovations before being used to expand staff offices and create more meeting spaces for bar committees and sections, and possible future use for CLE's. The Bartholomew-Robinson Building's three small Victorian turrets date back to at least 1887 and remain "as the only example of French second empire architecture in Austin." In the late 1960s, it housed the Capitol Oyster Bar and The Checkered Flag. The Texas Orthopedic Medical Association saved it from threatened demolition when it purchased the building in 1995, but they decided to sell it after learning of structural sewer and draining problems during a 2017 renovation. In August of 2020, Austin's Historic Landmark Commission denied a certificate of appropriateness sought by a developer who wanted to build a 10-story hotel inside and above the building while preserving its façade.

**15. Selected Family Law Issues.**

15.1 **Modification of Order Following Conservator's Death.** See Sec. 8.7 on page 12.

**16. Stuff That Doesn't Fit Elsewhere.**

16.1 **Clients With Diminished Capacity (Proposed Disciplinary Rule 1.16).** We hope that you voted on the proposed amendments to our Disciplinary Rules of Professional Conduct and Rules of Disciplinary Procedure in the referendum that ended March 4th. All of them passed, but we'll first focus on the first proposed change. Current Disciplinary Rule 1.02(g) reads:

> **Rule 1.02. Scope and Objectives of Representation**
>
> * * *
>
> (g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

That rule has been criticized because it gives a lawyer no options short of seeking a guardian or other protective orders. The proposed amendment deletes that subsection and replaces it with new Rule 1.16, which is based on ABA Model Rule 1.14. A summary of the proposed new rule prepared by State Bar staff provides:

> Proposed Rule 1.16 is intended to provide improved guidance when a lawyer represents a client with diminished capacity. Among its provisions, Proposed Rule 1.16 permits a lawyer to take reasonably necessary protective action when the lawyer reasonably believes that a client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest. Proposed Rule 1.16 provides a non-exhaustive list of actions a lawyer may be authorized to take, including informal consultations that may be prohibited under the current Rules.

The next step was for the Texas Supreme Court to consider adoption of the proposal. Those deliberations took place May 4th and may be viewed on the Court's YouTube channel.[24] The recorded deliberations took up the better part of an hour and a half. I skipped to the end when Chief Justice Hecht announced that the Supreme Court would issue an order "soon" reflecting its vote on the proposed rule changes.

The order approving all of the disciplinary rule changes was issued by the Supreme Court on May 25th, effective July 1st. You can read the order here:

iz3.me/7jBJ6zBvXM81

You can read the full text of all of the proposed rule changes, along with background material, on the State Bar's Rules Vote page.

16.2 **Law Firm Trade Names (Amended Part VII of Disciplinary Rules).** The fifth proposed change substantially rewrote Part VII of the Disciplinary Rules dealing with Information About Legal Services, and specifically Lawyer Advertising and Solicitation. Of particular note is an amendment to Rule 7.01(c) that would specifically authorize lawyers to practice under a trade name that is not false or misleading, *e.g.*, "Capitol Estate Planning Group." Along the same lines was **HB 4543** (Cain) which would have effectively made the rule change regarding trade names a statutory rule. (It failed to emerge from the Judiciary Committee.)

As noted at the end of Sec. 16.1, the Supreme Court has approved all of the disciplinary rule changes effective July 1st.

**17. *Special Supplement No. 1* – Is a Statutory Change to Our Rule Against Perpetuities Constitutional?**

17.1 **The Change.** This session, **HB 654** (Lucio, III, *et al.* | Johnson, *et al.*) purports to modify our statutory rule against perpetuities (Trust Code Sec. 112.036) by extending the time within which interests in a trust must vest to a flat 300 years for trusts that become irrevocable on or after September 1, 2021. Will that change be constitutional?

[24] While the Court solicited public comments, none were received prior to the May 4th deliberations.

17.2 **No Position on the Merits of the RAP.** Please keep in mind as you read the rest of this Part 17 that I'm not trying to express an opinion on the relative merits or demerits of our rule against perpetuities.[25] I'm just expressing my personal opinion that, as explained below, if you want to change it, you probably need a constitutional amendment.[26]

17.3 **Origins of the Statutory Rule.** Our statutory rule against perpetuities is relatively new (compared to the constitutional rule discussed below). When our Trust Code was enacted effective January 1, 1984, it contained our first **statutory** rule against perpetuities:

> **Sec. 112.036. RULE AGAINST PERPETUITIES**. The rule against perpetuities applies to trusts other than charitable trusts. Accordingly, an interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a period of gestation. Any interest in a trust may, however, be reformed or construed to the extent and as provided by Section 5.043.[27]

I think we can agree that this is pretty much an expression of the traditional Rule.

17.4 **The Constitutional Rule.** Article 1 of the Texas Constitution, containing our Texas Bill of Rights, provides as follows:

> That the general, great and essential principles of liberty and free government may be recognized and established, we declare:
>
> * * *
>
> **Sec. 26. PERPETUITIES AND MONOPOLIES; PRIMOGENITURE OR ENTAILMENTS**. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

The argument in favor of the constitutional validity of HB 654 is that it does not repeal the constitutional rule. It is merely an attempt by the legislature to more clearly define the length of the perpetuities period since it's not defined (or even mentioned) in the Constitution. This would be similar to the legislature's ability to pass laws "more clearly defining the rights of the spouses, in relation to separate and community property." See Texas Constitution Art. XVI, Sec. 15. Could this work?

17.5 **History Behind the Constitutional Rule.** Our current constitutional rule against perpetuities was part of the current Texas Constitution when it was adopted in 1876. However, its origins go back even further than that. The initial 1845 Constitution of the State of Texas, adopted just before Texas' admission to the union, contained its Bill of Rights in Article 1. Sec. 18 of the Bill of Rights contained a prohibition of perpetuities worded identically to our current constitutional prohibition. Nine years before that, the original 1836 Constitution of the Republic of Texas contains a "Declaration of Rights" at the end. The seventeenth (and last) declaration was also identical to our current constitutional prohibition. But we can go back even further. Three years earlier, Texas was still part of the Mexican state of Coahuila y Tejas. Delegates to the Convention of 1833 wanted Texas to break off from the state of Coahuila and become an independent Mexican state. They went so far as to draft a proposed "Constitution or Form of Government of the State of Texas" to present to the Mexican Congress. Article 19 (out of 31) of that proposed constitution provided:

> Art. 19. Perpetuities and monopolies are contrary to the genius of a free government, and shall not be allowed.

Aside from omitting the prohibition against the law of primogeniture or entailments, this language is also identical to our current constitutional prohibition.

17.6 **Court Interpretation of the Constitutional Rule.** As noted above, the only rule against perpetuities we had prior to 1984 was our constitutional rule, and that rule has been worded the same ever since Texas became Texas. It's not like that rule didn't have a well-understood meaning prior to 1984. Let's review some cases.

- In *Anderson v. Menefee*, 174 S.W. 904 (Tex.Civ.App - Ft. Worth 1915), the Court quoted an out-of-state case for its definition of the Rule:

  > Perpetuity is a limitation, taking the subject-matter of the perpetuity out of commerce for a period of time greater than a life or lives in being and 21 years thereafter. If, by any possibility, a devise violates the rule against perpetuity, it cannot stand. If there is possibility that a violation

[25] Further references to "the Rule" may be to either the traditional common law rule against perpetuities or to our Constitutional rule against perpetuities, as the context requires.

[26] *Maybe* you could get away with a statutory fixed 110-year period like some states have adopted, but only on the theory that 110 years is not likely to be longer than 21 years after the death of everyone on the planet who is alive at the time the original interest is created.

[27] Sec. 5.043, authorizing reformation of interests that violate the rule against perpetuities, was added at the same time as part of the initial codification of the Property Code.

of this rule can happen, then the devise must be held void.

* * *

As indicated, the rule deals with the vesting of the title, and not with the actual receiving of the profits of the estate, and though the person who is to take may not be known at the testator's death, or be entitled to the actual enjoyment, or have the right of possession of the property within the period, the rule is satisfied if he must become certain and his title vested within the period.

- *Anderson* wasn't a Supreme Court decision, but seven years later, a Commission of Appeals case, which has the same standing as a Supreme Court decision, cited *Anderson* for the same definition. In *Neely v. Brogden*, 239 S.W. 192 (Tex.Comm.App. 1922), the Court noted that:

  A perpetuity has been defined as a limitation which takes the subject-matter of the perpetuity out of commerce for a period of time greater than a life or lives in being, and 21 years thereafter, plus the ordinary period of gestation. In determining whether this period of time is transcended, the situation must be viewed as of the date the instrument becomes effective, that date being, in case of a will, the death of the testator; and when so viewed, if by any possible contingency a devise violates the rule, it cannot stand, and must be held void. *Anderson v. Menefee (Tex. Civ. App.)* 174 S.W. 904, and cases there cited.

So by 1922, our courts had recognized that our constitutional prohibition against perpetuities included the concepts of vesting, restraints on alienation, and ***lives in being plus 21 years***. And all of these concepts were interpreted in the traditional manner.

- In *Clarke v. Clarke*, 121 Tex. 165, 46 S.W.2d 658 (Tex.Comm.App. 1932), the Court stated the constitutional prohibition as follows:

  The rule against perpetuities is that no interest within its scope is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest, to which is added in a case like this the period of gestation. *Neely v. Brogden (Tex. Com. App.)* 239 S.W. 192; 48 C.J. p. 937, par. 4.

- An extended quote from *Norman v. Jenkins*, 73 S.W.2d 1051 (Tex.Civ.App. 1934):

  In this state the term "perpetuity" has been defined "as a limitation which takes the subject-matter of the perpetuity out of commerce for a period of time greater than a life or lives in being, and 21 years thereafter, plus the ordinary period of gestation." *Neely v. Brogden et al.* (Tex. Com. App.) 239 S.W. 192, 193; *West Texas Bank & Trust Co. v. Matlock et al.* (Tex. Com. App.) 212 S.W. 937. The essential principle is that the law allows the grant or devise of property wherein the vesting of an estate or interest or the power of alienation is postponed for the period of lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting, that may suspend it beyond that period, are treated as perpetual restraints, and therefore as void. The rule relates only to the vesting of estates and interests, and not with their duration or the receiving of the profits of the estate. *Anderson v. Menefee* (Tex. Civ. App.) 174 S.W. 904; 48 C.J. p. 948. The rule applies equally to legal and equitable estates. 48 C.J. § 72, p. 983.

- A later Texas case cited the New Jersey case of *Camden Safe Deposit and Trust Company v. Scott*, 121 N.J.Eq. 366, 189 A. 653 (1937), which included language similar to the Texas decisions quoted above, and the following language:

  "In powers, questions of remoteness are governed by three rules. 1. If a power can be exercised at a time beyond the limits of the rule against perpetuities, it is bad. 2. A power which cannot be exercised beyond the limits of the rule against perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote. 3. The remoteness of an appointment depends on its distance from the creation and not from the exercise of the power. The first two rules relate to the creation of powers, the third rule to their execution." Gray, supra, § 473 p. 397. "A power given to the unborn child of a living person is void; that is, if it is a power to be exercised by will only, or a special power to be exercised by deed." Gray, supra, § 477 p. 400.

- In *Brooker v. Brooker*, 130 Tex. 27, 106 S.W.2d 247 (Tex. 1937), Item Third of the testator's will provided that the residue of the estate:

  Shall be held together and not partitioned during the life of my last surviving legatee, and twenty-one (21) years thereafter. But if my heirs should wish to hold by Estate together for longer period, if they continue the management herein provided; then it is my wish and desire that they should have the right to do so, by a majority vote of my legal heirs that are over Twenty-One (21) years of age, at the time of such vote.

In other words, while the initial term of the trust was twenty-one years after the death of the last surviving legatee (the testator's sister and niece), a majority of the testator's adult heirs could vote to extend the trust. Not exactly a power of appointment, but close enough. In no uncertain terms, the Court held:

> "that this will, as regards the trust estate, attempts to create a perpetuity in violation and contravention of section 26 of article 1 of our State Constitution. Such constitutional provision is a part of the 'Bill of Rights' as contained in our State Constitution, and, so far as applicable here, reads as follows: 'Perpetuities * * * are contrary to the genius of a free government, and shall never be allowed.'"

Further, the opinion states:

> Our Constitution declares that perpetuities are contrary to the genius of a free government and shall never be allowed. This constitutional provision expresses one of the cardinal and basic principles of our system of government. It is not a mere rule of construction. It goes further than that and constitutes a peremptory command of constitutional law that must be relentlessly enforced.

The Court acknowledged that had the language of the residuary gift ended with the first sentence quoted from the will, "all would be well," but that's not what the will did:

> It then expressly provides that the trust estate may be held together, and partition thus postponed, by a majority vote of the heirs who are over twenty-one years of age at the time of such vote. This item then provides for an extension of an extension. There is no limitation on these extensions, and under the will they may go on forever. It must follow that 'Item Third,' of this will constitutes its trust properties a perpetuity.

- In *Hunt v. Carroll*, 157 S.W.2d 429 (Tex.Civ.App--Beaumont 1941), the Beaumont Court of Civil Appeals attempted to squarely define what "vesting" means for purposes of the Rule:

  > We take the following definition of the term "vest" as used in defining perpetuities, from the authorities cited in *Anderson v. Menefee*, Tex.Civ.App., 174 S.W. 904, 908, and in the words of the authorities cited. The word "vest" means to give an immediate, fixed right of present or future enjoyment: a vested estate is an interest clothed with a present, legal, and existing right of alienation: estates are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate; they are contingent while the person to whom, or the event upon which they are limited to take effect remains uncertain.

- Finally, *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858 (Tex. 2018), is a recent case involving the Rule, decided after the enactment of Sec. 112.036, but that did not involve a trust. In that case, the Supreme Court explicitly stated:

  > To enforce this prohibition, we have adopted the common law version of the Rule to govern conveyances of real property, which provides that "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance." 547 S.W.3d 858, at 867.

  The *ConocoPhillips* case is interesting enough that it deserves further discussion in Sec. 17.7.

17.7 **A Closer Look at the *ConocoPhillips* Case.** The reasoning of the Supreme Court in the *ConocoPhillips* case can be followed, but it'll take some concentration on the reader's part. The opinion contains the kind of extended analysis of future interests in property that you don't expect to find in most opinions. You might want to download and read the opinion for yourself, rather than rely on my summary. For example, the opinion cites a number of authorities that I'm not going to repeat here but that you might find helpful. You can download the official version here:

www.txcourts.gov/media/1441141/160662.pdf

However, if you want to follow the exact portions of the opinion I cite by page number, you should download a version with the South Western Reporter pagination from the free *fastcase*® or *Casemaker*® library available from your "*My Bar Page*" on TexasBar.com.

**(a) "Simplified" Facts.** Here's a version of the facts that I've simplified, leaving out (or modifying) facts that I don't think are critical to understanding the opinion as it relates to the Rule.

**(i) Conveyance and Reservation.** On December 27, 1996, Streiber conveyed fee simple title to a tract of land to Koopman with the following reservation:

> RESERVATIONS FROM AND EXCEPTIONS TO CONVEYANCE AND WARRANTY:
>
> 1. There is EXCEPTED from this conveyance and RESERVED to the Grantor and her heirs and assigns for the term hereinafter set forth one-half (½) of the royalties from the

> production of oil, gas … and all other minerals … which reserved royalty interest is a non-participating interest and is reserved for the limited term of 15 years from the date of this Deed and as long thereafter as there is production in paying or commercial quantities of oil, gas, or said other minerals from said land or lands pooled therewith. If at the expiration of 15 years from the date of this Deed, oil, gas, or said other minerals are not being produced or mined from said land … this reserved royalty interest shall be null and void and the Grantor's rights in such reserved royalty shall terminate. It is expressly understood, however, that if any oil, gas, or mineral or mining lease covering said land … is maintained in force and effect by payment of shut-in royalties or any other similar payments made to the lessors or royalty holder in lieu of actual production while there is located on the lease or land pooled therewith a well or mine capable of producing oil, gas, or other minerals in paying or commercial quantities but shut-in for lack of market or any other reason, then … it will be considered that production in paying or commercial quantities is being obtained from the land herein conveyed.

**(ii) Lease.** In 2007, Koopman executed an oil and gas lease for an initial three-year term that was later assigned to a subsidiary of ConocoPhillips. The initial term was later extended to October 22, 2012.

**(iii) Shut-In Royalties.** By August of 2011, only four months remained before Streiber's reserved 15-year royalty interest would expire due to lack of production. Therefore, in order to incentivize ConocoPhillips to drill, Streiber conveyed 60% of her reserved royalty to ConocoPhillips. In early December, ConocoPhillips sent Koopman a letter stating that it had identified a well site and production was anticipated in the first quarter of 2012. Since Streiber's reserved royalty interest required the payment of shut-in royalties to maintain it following the expiration of the initial 15-year reservation, ConocoPhillips included what it called shut-in royalty payments "to ensure that all parties'interest, if any, in the well is maintained." Production did not commence until February, two months after the expiration of the initial term of the reserved royalty interest. Koopman returned the shut-in royalty payment and sued ConocoPhillips and Streiber for a declaratory judgment that Koopman was now the sole owner of all royalties due to the expiration of the reserved royalty interest.

**(iv) Koopman Wins in Trial Court.** After the parties filed competing motions for summary judgment, the trial court granted Koopman's motion, ruling that Streiber's (and ConocoPhillips') reserved royalty interest had expired December 27, 2011.

**(v) The "Two-Grant Theory."** ConocoPhillips appealed, claiming Koopman's future interest was void under the Rule. The Court of Appeals affirmed in part, ruling that Koopman's interest did not violate the Rule under the "two-grant theory." To understand this theory, you first have to remember that the Rule only applies to ***transferred*** interests, not ***retained*** interests, because the latter are already vested. The two-grant theory relies on a historical common law distinction between "exceptions" and "reservations." With an exception, a grantor was considered to have held something back. On the other hand, a reservation was considered a transfer to the grantee, followed by a regrant back to the original grantor. Therefore, the grantee becomes a "grantor" with respect to the reserved interest, and the Rule doesn't apply to retained interests. Voilà! No violation of the rule!

**(vi) Appeal to the Supremes.** ConocoPhillips then appealed to the Supreme Court, arguing that the two-grant theory shouldn't have been applied.

**(b) The Supreme Court Opinion.** The Supreme Court affirmed the validity of Koopman's interest (and therefore the expiration of Streiber's reserved royalty interest), but on grounds different from those found in the Court of Appeals opinion.

**(i) The Parties' Theories.** The Supreme Court recognized that under the language of the original deed, if there was no production on December 27, 2011, and the savings clause was not satisfied, the reserved royalty would "transfer" to Koopman. ConocoPhillips argued that transfer was a future interest that violated the Rule. Specifically, it argued that Koopman's interest was a "springing executory interest" that was not certain to vest within the required 21-years-plus-lives-in-being. Koopman, on the other hand, argued that its future interest was a "vested possibility of reverter" that was vested at the time of creation for purposes of the rule against perpetuities. Koopman pointed out that there's a difference between "vesting in interest" and "vesting in possession." The two-grant theory wasn't needed because Streiber's reservation "carved out" a new fee simple determinable, creating a ***vested*** future interest in Koopman. Don't worry too much about understanding these competing arguments. What's probably most significant is this quote from the opinion following its summary of the parties' arguments:

> Finally, the Koopmanns note that the public policy underlying the Rule—preventing the long-term isolation of property from commerce and

> development and the creation of bloodline dynasties over property—is not implicated here.

**(ii) The Traditional Rule.** The opinion then refers to our constitutional prohibition of "perpetuities" and the interpretive commentary on that prohibition and the Black's Law Dictionary definition of the term. It notes that Texas courts have adopted the common law Rule, including the 21-years-plus-lives-in-being time limit. The courts have also held that a typical oil and gas lease that grants the lessee the right to explore and develop for a fixed term and as long thereafter as minerals are produced creates a "fee simple determinable" in the minerals that does not violate the Rule.

**(iii) Helpful Definitions.** Next, the opinion provides a number of helpful definitions (found at 547 S.W.3d 858, at 867). The word "vest" for purposes of the Rule refers to an immediate, fixed right of present or future enjoyment of the interest. The Rule does **not** apply to present or future interests that vest at their creation. An "executory interest" is a future interest, held by a third person, that either cuts off another's interest or begins after the natural termination of a preceding estate. A "springing executory interest" is one that operates to end an interest left in the transferor. It doesn't vest at creation, but rather "executory interests vest an estate in the holder of the interest upon the happening of a condition or event." Until that event, they are nonvested future interests subject to the Rule. On the other hand, a possibility of reverter is a future interest held by the grantor and is not subject to the Rule because it vests at the moment of creation. It is "the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs." It is a "claim[ ] to property that the grantor never gave away."

**(iv) Common Law Analysis.** The court admitted that at common law, Koopman received an executory interest that would become a possessory interest only after Strieber's interest was divested. That interest would continue as long after the initial 15-year period following execution of the deed as long as minerals were produced in paying quantities. Because this was an indeterminable length of time, it was uncertain whether Koopman's future interest would vest within the period required by the Rule. That meant Koopman's interest was a springing executory interest that violated the Rule, at least under a traditional common law analysis. In that case, Koopman's interest would be void:

> We have stated that our constitutional provision prohibiting perpetuities "expresses one of the cardinal and basic principles of our system of government" and must be "relentlessly enforced." 547 S.W.3d 858, at 868 (citations omitted)

**(v) Not So Fast!** But then the Court expressed its hesitancy to apply the Rule since it wouldn't serve the Rule's purpose. If an instrument is equally open to two constructions, it should be construed in a manner that would uphold its validity, if possible. The legislature requires courts to reform an interest that violates the Rule "to effect the ascertainable general intent of the creator of the interest," citing Prop. Code Sec. 5.043(a). Further, there were other cases where the Supreme Court declined to void an interest when it did not violate the purpose of the Rule.

**(vi) The Purpose of the Rule.** According to the Court, one purpose of the Rule is to prevent landowners from using remote contingencies to preclude alienability of land for generations. However, restraint on alienability and promoting the productivity of land is not an issue in the oil and gas context. A term interest in minerals may remove title complications when the mineral production ceases. This simplification of title promotes, rather than hinders, alienability. Given this purpose, if Koopmann's future interest could be considered "vested" when it was created for purposes of transferability and inheritability, it would be appropriate for the Court to refrain from applying the Rule to invalidate the interest.

**(vii) Remainders vs. Executory Interests.** Koopmann's future interest in the reserved royalty shared many characteristics with a vested remainder, which isn't subject to the Rule. Historically, future interests created in someone other than the grantor were classified as either "remainders" or "executory interests." A remainder is a future interest created in the transferee that is capable of becoming a possessory estate upon the natural termination of a prior estate created by the same instrument (such as a life tenant's death). But historically, a remainder could not follow a fee simple estate— whether absolute or defeasible— because fee simple estates were thought to have no natural termination point and could potentially endure forever. An executory interest, on the other hand, is any future interest created in a grantee other than a remainder that cuts short or divests another estate or interest in order to become possessory. Because it doesn't "vest" until it becomes possessory, it's subject to the Rule.

**(viii) Should It Make a Difference?** While acknowledging the historical distinction between remainders and executory interests, the Court noted that latest version of the Restatement dispenses with this distinction, recognizing only reversions and remainders. Many commentators take the position that because executory interests may share many of the same

characteristics as vested remainders and therefore should be considered "vested" within the meaning of the Rule.

**(ix) The Court Thinks Not.** Koopmann's future interest in the reserved royalty could be deemed "vested" when it was created if "vesting" is taken to mean that the holder of the interest was at all times ascertainable and the preceding estate was certain to terminate. Strieber's reserved royalty was certain to terminate at some point, either because production in paying quantities ceased, or because the minerals were exhausted. Just because we don't know when that will occur doesn't mean it isn't certain to occur at some point. For these reasons, Koopmann's future interest was more like a vested remainder when it was created because it was capable of becoming possessory upon the natural termination of a prior estate. Koopman could easily have avoided application of the Rule by having Strieber convey a fee simple in the land to Koopman, with Koopman then conveying back to Strieber the royalty interest (*i.e.*, the reasoning behind the two-grant theory). The Court saw no persuasive reason to treat Koopmann's future interest as uncertain and subject to invalidation by the Rule simply because it was created through a reservation rather than a grant, when the event upon which the interest will vest was certain to occur. Therefore, the Court rejected the two-grant theory because it eliminated the distinction between a reservation and a grant in this context.

**(x) The Holding.** The Court's specific holding was (emphasis added):

> For the reasons stated above, it is appropriate to hold that ***in this oil and gas context***, where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the Rule does not invalidate the grantee's future interest. As noted above, ***the Texas Constitution does not define "perpetuities," and without a statute on the subject, the common law on the matter is the law of the state***. … ***Our holding does not run afoul of the constitution's prohibition of perpetuities because the future oil and gas interest at issue here does not restrain alienability indefinitely***— to the contrary, giving effect to a future interest that is certain to vest in a known grantee actually promotes alienability. … ***We limit our holding to future interests in the oil and gas context in which the holder of the interest is ascertainable and the preceding estate is certain to terminate***.

**(c) My Conclusions.** The *ConocoPhillips* case clearly evidences our Supreme Court's willingness to stray, at least to a limited extent, from the common law rules relating to the Rule. However, they didn't mess with the Rule directly. Rather, they revised the common law interpretation of "vesting" (which admittedly is a key element of the Rule). The Court left open the possibility that the legislature could modify the Rule by statute when it stated:

> [T]he Texas Constitution does not define 'perpetuities,' and without a statute on the subject, the common law on the matter is the law of the state. … Our holding does not run afoul of the constitution's prohibition of perpetuities because the future oil and gas interest at issue here does not restrain alienability indefinitely.

Does the quoted language mean that the legislature can do what it wants with the Rule? Could it mean that the only test for violating our constitutional perpetuities prohibition is whether a provision restrains alienability indefinitely? I don't think the quoted language necessarily leads to either conclusion. Everything else in the paragraph containing these quotes expressly limits the Court's holding to a narrow type of oil and gas transaction. But if the Court wants to go farther in a future case, this language could be the proverbial camel sticking its nose inside the tent cited in a future opinion.

17.8 **My Interpretation of the Court Interpretations.** Admittedly, our constitutional language prohibiting "perpetuities" is about as vague as it gets. However, this doesn't mean that anyone is free to adopt their own interpretation of the rule. Interpretation of our constitutional provisions is usually left to our courts. Every one of the cases I've cited (other than the *ConocoPhillips* case[28]) was decided when the only rule against perpetuities we had was the constitutional rule. Every one of those cases interprets the constitutional language as adopting the tradition Rule, including the traditional concepts of vesting and lives-in-being-plus-21-years.

17.9 **Can the Legislature More Clearly Define the Rule?** As noted above in Sec. 17.4, our legislature can pass laws more clearly defining separate and community property. Why can't it do the same by redefining what vesting means, or the length of the perpetuities period? Because the constitutional language doesn't say it can. The constitutional provision defining separate property (nowhere does it define community property) specifically says that "laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property."[29] But the constitutional provision prohibiting perpetuities doesn't even define what perpetuities are, let alone expressly

[28] And because the *ConocoPhillips* case didn't involve a trust, the statutory rule was irrelevant.

[29] And even then, there are plenty of cases striking down the legislature's attempts to redefine community and separate

grant the legislature authority to more clearly define them.

**18. *Special Supplement No. 2* – Some Comments on Affidavits in Lieu of Inventories**

18.1 **Why This Discussion?** There is no legislative proposal this session that even remotely touches upon to subject of affidavits in lieu of inventories, so why am I including a supplement discussing them? Because I still get asked questions about them, primarily from lawyers having to deal with judges who don't like them (the affidavits, not the lawyers). Recently, I was asked if a judge could refuse to accept and affidavit in lieu and require the filing of any inventory.[30] The short answer (a type I rarely provide) is no. Because I've repeatedly seen judicial hostility towards affidavits in lieu, I decided to provide the longer answer here.

18.2 **2011 Enactment.** As I recall the discussions, back in 2010, there was some concern within the REPTL Council about privacy issues related to the use of a will as the primary testamentary vehicle when compared with the use of fully-funded revocable trust. Assets already in a revocable trust at the decedent's death would never be listed on a publicly-filed inventory. This resulted in REPTL's 2011 Decedents' Estates bill (**SB 1198** (Rodriguez | Hartnett)) amending Texas Probate Code Sec. 250[31] to authorize an independent executor to file an affidavit in lieu of an inventory if there were "no unpaid debts, except for secured debts, taxes, and administration expenses, at the time the inventory was due, including any extensions," and the executor had provided all beneficiaries a copy of the sworn inventory. So far, so good.

18.3 **2013 Amendment.** Most wills contain a provision authorizing independent administration that reads something like the following: "I direct that no action be had in any court other than the probating of this will and the filing of an inventory." REPTL learned that after the 2011 enactment of the affidavit in lieu alternative, some judges were taking the position that any will containing language like this directing that an inventory precluded to option of filing an affidavit in lieu. Therefore, REPTL's 2013 Decedents' Estates bill (**HB 2912** (Thompson, S. | Rodríguez)) amended Estates Code Sec. 309.056 to require language in the will specifically prohibiting the filing of an affidavit in lieu if a testator wanted to require the filing of an inventory. So we're good now, right?

18.4 **2019 Amendment.** Not quite. By 2019, Glenn Karisch's Texas Probate e-mail list had been burning up with attorneys complaining about judges who wouldn't let them file an affidavit in lieu once the initial deadline for filing an inventory had been extended. Apparently, some judges took the position that while Sec. 309.056 referred to the deadline for filing an inventory, including extensions, the Estates Code provisions authorizing extensions of the inventory deadline made no reference to extending the affidavit in lieu deadline. Or something like that. Therefore, a mid-session amendment was made to REPTL's 2019 Decedents' Estates bill (**HB 2782** (Wray | Rodríguez)) to add a new subsection (e) to Sec. 309.056 that read:

> (e) Any extension granted by a court of the period in which to file an inventory, appraisement, and list of claims prescribed by Section 309.051 is considered an extension of the filing period for an affidavit under this section.

The transitional provisions of the bill described this as a clarification of, not a change to, existing law, and had this "clarification" apply to pending estates, not just those commenced after the effective date of the act. I thought at the time that we had finally resolved all problems related to affidavits in lieu. I was wrong.

18.5 **Can a Judge Refuse to Accept an Affidavit in Lieu and Require the Filing of an Inventory?** As I mentioned in Sec. 18.1, if you meet all of the prerequisites for filing an affidavit in lieu and your inventory deadline hasn't passed, I think the answer to this question is no. Here's the longer explanation, and why I don't think this particular problem calls for another amendment.

**(a) Sec. 309.051.** Estates Code Sec. 309.051(a) is the section that requires a personal representive to file an inventory within 90 days of qualification "unless a longer period is granted by the court." Subsection (d) provides that once approved by the court and filed with the clerk, it's the inventory and appraisement for all purposes under Title 2 of the Estates Code (Estates of Decedents; Durable Powers of Attorney).

**(b) Sec. 309.054.** After Sec. 309.052 requires that the inventory include a list of claims owed to the estate, and Sec. 309.053 requires the PR to attach an

property. *See, e.g., Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925) (striking down a 1917 statute that purported to keep the income from the wife's separate property (but not the husband's) her separate property)

[30] While I know which lawyer asked the question, I can't say I know which judge the lawyer was talking about.

[31] The bill also made corresponding amendments to Texas Estates Code Sec. 309.056, enacted two years earlier as part of the Probate Code codification process, although none of the Estates Code provisions would go into effect until 2014.

affidavit to the inventory and list of claims swearing that it's true and complete, Estates Code Sec. 309.054(a) says the judge is required to examine and approve or disapprove the inventory and list of claims. If the judge approves it, the judge should enter an order to that effect.

**(c) Sec. 309.056.** As noted above, Sec. 309.056(b) then says that under the right conditions, an independent executor can file an affidavit in lieu instead of an inventory. If the IE does so, a "person interested in the estate" is entitled to receive a copy of the inventory from the IE upon written request. The section also includes procedures to compel the IE to provide a requested copy to that interested person, **but there's no procedure to compel filing the inventory**. Sec. 309.056 contains no equivalent to Sec. 309.054 authorizing or directing a court to approve or disapprove an affidavit in lieu. Once filed, you're done.

**(d) Sec. 309.057.** This section contains procedures to initiate a show cause hearing and to fine the PR up to $1,000 if the PR "does not file an inventory, appraisement, and list of claims or affidavit in lieu of the inventory, appraisement, and list of claims, as applicable, within the [90-day deadline] or any extension granted by the court." In other words, you can have a hearing and fine the PR if he/she/it files neither, but not if the PR files either (assuming, in the case of an affidavit in lieu, that the PR has met its prerequisites).

**(e) Sec. 309.0575.** Further, this section, added in 2017, authorizes a court to fine an independent executor up to $1,000 if the executor misrepresented in the affidavit that all beneficiaries required to receive a copy of the inventory had received it. There's nothing here about requiring that an inventory be filed.

**(f) Sec. 404.0035.** Jump ahead to the independent administration provisions in Subtitle I. Sec. 404.0035(a)(2) authorizes removal of an independent executor who fails to timely file an inventory or an affidavit in lieu. Like the fine in Sec. 309.057, grounds for removal only exist if the executor files neither an inventory nor an affidavit in lieu. If the executor has filed the affidavit, I can't find any ground for removal.

**(g) Tell the Judge to Shove It!.** Well, maybe not in those exact words. My point is that while a judge might not like the fact that an independent executor who has filed an affidavit in lieu after meeting all of its requirements has not filed an actual inventory, I don't see how the judge can do anything about it. Of course, that may make things a bit uncomfortable in other cases you bring before that judge in the future, but dealing with that issue is way above my pay grade.

### 19. A Little Lagniappe.

We are [mostly] happy to report the following developments critical to the future of Texas:

19.1 **Farewell Barton Springs? HB 1683** (Landgraf, *et al.*) (**SB 1734** (Springer) was its Senate companion) would prohibit state agencies and political subdivisions from contracting with or providing assistance to any federal agency or official attempting to enforce a federal oil and gas statute, rule, or regulation relating to oil and gas production that imposes as restriction or prohibition that doesn't exist under state law. (Wouldn't this raise a Supremacy Clause issue?) Regardless of the merits of this legislation, what the heck does it have to do with Barton Springs, you ask? Well, Barton Springs is the home of two federally designated endangered species, the Austin blind salamander and the Barton Springs salamander. Because of their presence, Austin must hold a permit from the U.S. Department of Fish and Wildlife to keep the pool open to the public. That permit requires the city to protect the salamanders' habitat, which in turn requires the city to participate in legal and regulatory actions to protect local water quality. That sometimes puts the city at odds with oil and gas companies. For example, Austin recently sued Kinder Morgan alleging the company had violated the Endangered Species Act while building its Permian Highway Pipeline. The city believes these types of actions would be prohibited if the bill passes, leading to a loss of an operating permit for the Springs.

19.2 **Our Long National Nightmare Is Over.** Well, maybe it's not been that long. Or that nightmarish. Or related in any way to estates, trusts, legislative matters, etc. In other words, this doesn't really belong here. But you're going to get the story anyway because I get to write the paper.

Earlier this year, I was in the mood for some Grape-Nuts cereal (a Post-brand cereal some of you may recognize that contains neither grapes nor nuts), something I hadn't had in years. My daughter, who was temporarily living with us, asked if I wanted anything from the grocery store. I asked for Grape-Nuts. When she came home, she told me how hard they were to find, but that she eventually found them. She didn't. She brought home Grape-Nuts ***Flakes***. Similar taste, but lacking that crunchy texture. She didn't know the difference.

Turns out I couldn't find Grape-Nuts either. After worrying whether they'd been discontinued, I learned from a Google search that there's been a national shortage of both varieties due to production difficulties late last year that may or may not have been pandemic-related.

In a March 24th press release titled "*It's Official: The Great Grape-Nuts Cereal Shortage Is Over*," Post announced that the cereal was once again shipping at full capacity. Post also offered to reimburse those who paid inflated prices during the shortage (reaching as much as $110/box!). Those who paid $10 or more for a box could submit a receipt and be partially refunded up to $115. There's a catch, though. Receipts had to be received by April 15th, and the ***total*** amount refunded by the company would not exceed $10,000. Now you can rest easy.

19.3 **Big Changes to Presidential Elections.** **HB 1425** (Goodwin) and **SB 130** (Johnson | Miles) would have enacted the National Popular Vote Interstate Compact. As I understand it, that compact is designed to make the votes of every voter in every state, not just those of voters in battleground states, count in presidential elections. Each state enacting the compact would agree to award **all** of its electors to the winner of the national popular vote. It would go into effect once states with 270 electoral votes (the minimum required to win the presidency) had adopted it. This compact would avoid the need for an amendment to the U.S. Constitution. According to the website behind the proposal, it has already been enacted in 15 states plus the District of Columbia with 195 electoral votes. That number may be out-of-date given the reallocation of House districts as a result of the 2020 census.

I wouldn't hold your breath on this one. Neither has been scheduled for a committee hearing. It was previously introduced in 2011 (**HB 1498** (Raymond) and **SB 919** (Ellis)) and 2017 (**HB 496** (Minjarez | Israel)). Of those, only one (the 2011 House bill) even got a hearing.

19.4 **Texas Bicentennial Commission.** Some of you are too young to remember the Texas Sesquicentennial celebration in 1986 (I think I still have a framed sesquicentennial poster by Amado Peña stored somewhere in my garage). Well, it's already time to get ready for the Texas Bicentennial. Texas will be 200 years old on March 2, 2036. However, **HB 4056** (Meza, *et al.* | Hughes) ***doesn't*** establish a Texas Bicentennial Commission. Rather, it creates a 77-member committee designed to study the ***formation*** of a Texas Bicentennial Commission to plan the state's celebration of its bicentennial. Nothing like planning to make plans.

HB 4056 was signed by the Governor on June 15th and is effective September 1st.

19.5 **License to Hunt Bigfoot (and Reward for Capture!).** On February 1st, in an effort to increase tourism [dollars spent] near the Ouachita Mountains, an Oklahoma legislator introduced **HB 1648** (Humphrey) directing the Oklahoma Wildlife Conservation Commission to promulgate rules establishing a big foot hunting season. (Yes, the legislation spells Bigfoot as two words. I don't.) Those rules would set annual season dates and create any needed special hunting licenses and fees. While not included in the introduced version of the bill, Rep. Humphrey said he didn't want Bigfoot killed, so he would work with the state wildlife and tourism departments to craft final language that specifies only the trapping of Bigfoot. He also hopes to secure at least $25,000 that can be used as a bounty for the first person to trap the creature. (Note that the representative's press release, unlike the legislation, spells Bigfoot the way I do.) Note that Honobia, Oklahoma, holds an annual Bigfoot Festival and Conference. Are the anticipated attendees people interested in Bigfoot, or the Bigfoots (Bigfeet?) themselves?

19.6 **Speaking of Hunting…** The April 21st episode of *The Late Show With Stephen Colbert* brought this bill to my attention. I'm not a hunter, but apparently breeding bigger deer for game hunting is a thing. According to HuffPost, Jason Abraham of Canadian, Texas, has cloned somewhere between 35 and 40 deer over the past decade. Last November, the Texas Parks and Wildlife Department issued a regulation forbidding deer cloning based on a fear that it could introduce unknown biological variables into wildlife populations and make it harder to track chronic wasting disease. TPWD officials had apparently thought their rules already barred cloning, but issued the clarifying rule when it learned that breeders interpreted the rules as permitting cloning. To Abraham's rescue came **HB 1781** (Krause | Martinez) which would have made two small statutory changes explicitly permitting the propagation of breeder deer by cloning. I feel like I should add some editorial comment here, but I'm not sure what it would be. Regardless, the bill died when it failed to pass the House on second reading by May 13th.

19.7 **Here, Hold My Beer!** **HB 1024** (Geren, *et a lot of al.* | Hancock) passed the House on March 25th, passed the Senate on April 28th, was sent to the Governor on May 4th (Star Wars Day), and was signed by him on May 12th. Because it received 144 Yeas, 1 Nay, and 1 present, not voting, in the House, and 30 Yeas and 1 Nay in the Senate, it went into effect immediately. What does it do? Well, nothing less earth-shattering than making permanent Gov. Abbott's pandemic-related emergency waiver allowing restaurants with a mixed beverage permit and a food and beverage permit to sell beer, wine, and cocktails with food orders purchased for pick-up or delivery.

19.8 **Don't Bogart That Joint!** Medical use of low-THC cannabis (*i.e.*, marijuana) is already authorized for patients diagnosed with (i) epilepsy; (ii) a seizure disorder; (iii) multiple sclerosis; (iv) spasticity;

(v) amyotrophic lateral sclerosis (also known as "Lou Gehrig's disease"); (vi) autism; (vii) terminal cancer; or (viii) an incurable neurodegenerative disease. In a development that is presumably unrelated to **SCR 11** (*see* Sec. 19.10(m)), **HB 1535** (Klick, *et a lot of al.* | Schwertner, *et a lot of al.*) expands the medical use of marijuana by eliminating the requirement that a patient's cancer be terminal and adding PTSD as an authorized condition. It also authorizes medical use by a patient receiving treatment for a medical condition through a compassion-use research program authorized by a new "compassionate-use institutional review board."

HB 1535 was signed by the Governor on June 15th and is effective September 1st.

19.9 **How Much is That Doggie in the Window?** Possibly 8.25% or so less after October 1st if you adopt or purchase the pet from a nonprofit animal welfare organization. Sales and adoptions from nonprofit animal **shelters**, as defined by Health & Safety Code Sec. 823.001, are already exempt from sales taxes under Tax Code Sec. 151.343. **SB 197** (Nelson, *et al.* | Noble, *et al.*) amends the Tax Code provision to also exempt sales and adoptions from nonprofit animal **welfare organizations**, as defined by Health & Safety Code Sec. 821.021.

SB 197 was signed by the Governor on June 4th and is effective October 1st.

19.10 **Dedicated to Ken Herman.** Ken Herman has been a political reporter and columnist for the Austin American-Statesman for decades, and his columns often provide material for the Lagniappe portion of this paper. This time, I'm compiling them all in one section. (Note that some bills described elsewhere in this Lagniappe portion may have been the subject of a Ken Herman column, but I'm only listing here the ones I first learned of from him.)

**(a) Monday Might Be Thursday.** The Texas Senate adjourned Thursday, March 11th, until Tuesday, March 16th, but decided to reconvene Monday, March 15th and initially call it the previous Thursday in order to file **SB 2142** (Hughes), refer it to Senate Jurisprudence, vote it out of committee, send it to the floor, pass it there, and send it to the House, all in that same calendar day. What was so important about this bill? It would have directed the PUC to order ERCOT to correct the reported $16 billion in overcharges for wholesale electricity costs during a 30+ hour period in the middle of Freeze Week in February. (The bill never received a hearing.)

**(b) Who is a "Native Texan?"** **SCR 28** (Springer) would have defined a "native Texan" as someone born in Texas, or born outside Texas to Texas residents in military service who return to Texas within 30 days of the child's birth for the purpose of taxation. (I didn't move to Texas until I was 10, and I didn't need no stinkin' resolution to tell me that I wasn't a "native Texan.") Herman points out you can be a native Texan if born here, even if your parents aren't United States citizens, and whether or not their presence in the U.S. is documented. In a subsequent column, Herman pointed out that the author of the resolution, Drew Springer, R-Muenster, is **not** a native Texan. He's a native Oklahoman! Herman quotes a tweet by Ray Harwick noting that Springer's campaign website describes him as "a firm believer that life begins at conception." If that's the case, Harwick asks why Texas citizenship doesn't begin then? "I wasn't born there, but the deal went down in Floydada and got moved to Oklahoma for the big arrival."

**(c) What is a "Bicycle?"** **HB 3665** (Ordaz Perez) helpfully defines a bicycle as anything "generally recognized as a bicycle, regardless of the number of wheels."

HB 3665 was signed by the Governor on June 15th and is effective September 1st.

**(d) What Time is It?** Here are bills and resolutions relating to daylight savings time, some of which I found on my own, and none of which ever received a hearing:

- **HB 1405** (Larson) and **SB 471** (Menéndez), along with proposed constitutional amendments **HJR 78** (Larson) and **SJR 30** (Menéndez), would have required a statewide referendum asking voters whether they prefer observing standard time year-round, or daylight saving time year-round. The voters' choice would then become law. Note that no provision is included authorizing the current practice of switching back and forth. (These are retreads from 2019.)
- **SJR 13** (Zaffirini) and **SJR 68** (Bettencourt | Menéndez) are proposed constitutional amendments that would have **exempted** the state from observing daylight saving time.
- **HB 1896** (Schofield, *et al.*) and **HJR 94** (Schofield, *et al.*) would have **observed** daylight saving time year-round.

**(e) State District of What?** **HB 2289** (Schofield) and **HJR 105** (Schofield) would have pulled a "State District" that would serve as the seat of state government out of the middle of central Austin. The initial boundaries would be MLK Blvd. on the north, Trinity St. on the east, 10th Street on the south, and Lavaca St. on the west. (The district wouldn't include

those streets themselves, so the state wouldn't be responsible for maintaining them.) The State District would have the powers of a home-rule municipality and would be governed by five directors selected by the Governor.

**HB 4521** (Cain) and **HJR 162** (Cain) would have gone waaaay farther. They would convert the entire City of Austin into the District of Austin. The governing body of the district would have to submit notice of each of its actions to the lieutenant governor and speaker of the house. The state legislature could amend or repeal local laws, or enact its own local laws.

None of these bills or resolutions received a hearing.

**(f) Fort Knox-Leander, Redux.** Back in 2013, I first reported on **HB 3505** (Capriglione) that would have established the Texas Bullion Depository to hold all of the precious metals acquired by Texas, its agencies, political subdivisions, etc. One of its goals was to bring the 6,643 gold bars – worth around $1 billion at the time – stored by UTIMCO[32] in a New York bank, and the depository fees it paid, back to Texas. approximately to "bring Texas' gold back home" (from New York). (UTIMCO was the only state entity with a significant amount of gold). The bill never made it out of committee. However, the proposal came back again in 2015 in the form of **HB 483** (Capriglione), which expanded its scope to allow the depository to accept bullion deposits from many other private sources. It passed. By 2017, no ground had yet been broken on the depository, but that session's **HB 3169** (Capriglione | Kolkhorst) would have changed the Texas Bullion Depository from **an agency** in the comptroller's office to **a program** in the comptroller's office, and **HJR 113** (Capriglione, *et al.* | Kolkhorst) would have exempted precious metal held in the depository from property taxes. Neither of them made it. Nevertheless, I reported at that time that in June of 2014, the Comptroller's office announced the selection of Lone Star Tangible Assets as the winning bidder to build and operate the depository, later announced to be located in Leander (northwest of Austin). There was nothing to report in 2019, but in his May 19th column this year, Ken Herman reported on **SB 2230** (Schwertner) (its similar House companion was **HB 4670** (Capriglione)). By then, the depository had been built by Lone Star Tangible Assets on a 10-acre site in Leander, which by then held approximately $100 million in gold assets. This bill would authorize the sale state bonds to finance the purchase of the depository, which would then be leased back to Lone Star as long as it retained the state contract to operate the depository. At a Senate committee hearing on the bill, a representative from the Comptroller's office admitted the UTIMCO bullion still remained in New York. In fact, it turns out that UTIMCO hadn't had any bullion holdings since August of 2020. When the bill hit the Senate floor, Sen. Kel Seliger, who had opposed the creation of the depository in 2015, asked the bill's author, Sen. Schwertner, how much bullion the state had in the state depository. None. Nevertheless, the bill passed out of the Senate 28-2 on May 14th.

SB 2230 was signed by the Governor on June 18th and is effective immediately.

**(g) Right to Choose.** No, not **that** right to choose. The right to choose a lane. **HJR 98** (Schaefer) would have enshrined in our constitution a person's "right to travel in a vehicle using human decision-making." Apparently, Rep. Schaefer is concerned about the day when the technology in autonomous driving vehicles becomes so advanced that some government agency might try to prevent a person from driving the car on their own. I'm guessing he'll give you his steering wheel when you pry it from his cold, dead hands. The bill never received a hearing

**(h) SXSW Eligible for MERP?.** No, Austin's famous South By Southwest Conference and Festivals would not, in some manner, become eligible for the Medicaid Estate Recovery Program, a development that might legitimately fall within the areas covered by this paper. Rather, **HB 2420** (Howard | Israel) would have added SXSW to the list of events eligible for the state's Major Events Reimbursement Program under Gov't Code Ch. 478. You've probably heard of this program. It allows the state and a local governmental to use a portion of state and local sales tax gains generated over a 12-month period from certain major championships or events to reimburse the event organizers for certain event-related costs.

**(i) Another Secession Proposal.** **HB 1359** (Biedermann, *et al.*) would have conducted a referendum on whether Texas should secede from the United States and establish an independent republic. As I've asked in descriptions of similar proposals in previous legislative updates, didn't we settle this issue about 160 years ago? The bill never received a hearing

**(j) Van Arsdale's List.** Several years ago, I learned about Corbin Van Arsdale's bill list from one of Ken Herman's columns. Van Arsdale is a former member of the Texas House (2003-2009), was elected to the Cedar Park City Council in 2014, and has served as Cedar Park's Mayor since 2018. Every other year, after the legislature's bill-filing deadline, he creates a list of

[32] The University of Texas/Texas A&M Investment Management Company.

interesting bill captions (you know, the part at the beginning of a bill that begins "An Act relating to …") and picks a winner. Herman then devotes a column to the list. This year's column begins with several of Herman's favorite previous winners: 2019's act "relating to operating a motor vehicle while a person is occupying the trunk of the vehicle," and 2017's co-winner, "relating to the regulation of men's health and safety; creating a civil penalty for unregulated masturbatory emissions." Here are a few of Herman's favorite captions from this year's list:[33]

- AN ACT relating to requiring trauma training for certain attorneys (**HB 566** (Lopez) and **SB 904** (Perry | Lopez)). SB 904 was signed by the Governor on June 8th and is effective September 1st.
- AN ACT relating to an exemption from sales tax for certain malt beverages on July 4 (**HB 940** (Raymond | Guillen)).
- AN ACT relating to fraudulent medical priority boarding of ferries operated by TXDOT (**HB 1182** (Middleton)).
- AN ACT relating to preserving religious liberty from nativist jurisprudence (**HB 2401** (Middleton)).
- AN ACT relating to requiring public schools to use the wet bulb globe temperature to determine whether conditions are unsatisfactory for student outdoor activities due to severe heat (**HB 2876** (Howard)).
- AN ACT relating to pedestrian use of a sidewalk (**HB 3925** (Collier)). (Note that this is identical to 2017's **HB 1350**, which had six authors or co-authors. That attempt didn't even receive a hearing.)
- AN ACT relating to drug testing members of the legislature to establish or maintain eligibility for membership in the elected class of the Employees Retirement System of Texas (**HB 4171** (Middleton)).
- AN ACT relating to prohibiting certain contracts or agreements between a public institution of higher education and a Confucius Institute (**SB 1779** (Creighton)).

**(k) City Hall.** In a nonlegislative item, Herman drew our attention to a book published earlier this year called *City Hall: Masterpieces of American Civic Architecture*. In this book, writer/photographer Arthur Drooker celebrates the architecture of 15 U. S. city halls, including Austin's. Drooker calls it the most unconventional city hall in the country. If you come to Austin to see it, don't miss the armadillo tail extending 49' over 2nd Street several stories up on the north side of the building. Keep Austin Weird.

**(l) REPTL's Trusts Bill.** Even one of REPTL's bills made it into a Herman column. His column appearing in the May 15th edition discussed the deadline for House bills to pass the House on second reading by the end of Thursday, May 13th. An excerpt:

> By 9:42 p.m., the House was on a roll, churning through bills, many with little explanation and no discussion. Rep. Joe Moody, D-El Paso, with a facial expression indicating that perhaps he didn't know every last detail of his HB 2179, won approval with this sort-of explanation:
>
> "Members, this bill is a cleanup bill prepared by the real estate, trust and probate section [*sic*] of the Texas Bar. It's about trusts, and I move passage."
>
> In the House, it's often about trust. Good enough. No questions. OK'd on voice vote by members who might have known, but probably didn't, what they were voting on.

**(m) Vaya Con Dios, Señor Herman.** In his May 30th Statesman column, Mr. Herman announced that it was his final column for the paper. We wish him well in his future endeavors and will miss reading his columns.

19.11 **Places.** Here are some official place designations:

- **Pie Capital**. **HCR 12** (Zwiener) and **SCR 22** (Campbell) designate Kyle as the official Pie Capital of Texas. SCR 22 was signed by the Governor on June 8th.
- **Mermaid Capital**. **HCR 13** (Zwiener) and **SCR 9** (Zaffirini | Zwiener) designate San Marcos as the official Mermaid Capital of Texas. SCR 9 was signed by the Governor on May 24th.
- **Barrel Racing Capital**. **HCR 23** (Murr) would have designated Llano as the official Barrel Racing Capital of Texas. While this didn't pass during the regular session, efforts are ongoing. **HCR 9** (Murr), which makes the same designation, was prefiled just prior to the beginning of the first called session.
- **Hip-Hop Capital**. **HCR 32** (Reynolds) would have designated Missouri City as the official Hip-Hop Capital of Texas.

[33] Note that several of Van Arsdale's 2021 list already appear elsewhere in this Part 19.

- **Highest Town**. **HCR 33** (Morales, E.) and **SCR 11** (Blanco | Morales, E.) designate Fort Davis as the official Highest Town in Texas. (I assume this refers to its elevation of 4,892 feet, and not a different meaning of "highest.") SCR 11 was signed by the Governor on May 28th.

- **Oldest Community**. **HCR 101** (Wilson) would have designated Florence, home of the Gault Archaeological Site, as the oldest community in Texas.

- **Halloween Capital (of North Texas)**. **HCR 103** (Sanford) and **SCR 49** (Springer) would have designated Celina as the official Halloween Capital of North Texas.

- **Texas Chili Parlor**. **HCR 90** (Rodriguez | Hughes) doesn't name the Texas Chili Parlor, located a couple of blocks from the Capitol, as an official anything, but does pay tribute to it after 45 years of existence. HCR 90 was signed by the Governor on May 15th.

19.12 **Symbols.** Here are some official designations of state symbols:

- **State Handgun**. **HCR 15** (Leman) and **SCR 20** (Schwertner | Leman) recognize the 1847 Colt Walker pistol as the official handgun of the State of Texas. SCR 20 was signed by the Governor on May 24th.

- **State Mushroom**. **HCR 61** (Leman) and **SCR 38** (Campbell) designate the Texas star mushroom as the official State Mushroom of Texas. HCR 61 was signed by the Governor on June 18th.

- **State Knife**. **SCR 7** (Springer, *et al.* | Spiller) designates the Bowie knife as the official State Knife of Texas. Last session, **HCR 86** (Springer | Fallon) made the same designation, but it was vetoed by the Governor. His veto statement provided:

  > "This is the kind of resolution that a Texas Governor would sign without thinking. Fortunately, with a little thinking and study, it was learned that a statement contained in the resolution is factually incorrect: it identifies the location of Jim Bowie's "Sandbar Fight" as "near Natchez, Louisiana," when in fact the fight occurred near Natchez, Mississippi. So, as a thinking Governor, I think it best not to sign a factually incorrect resolution and instead to allow the Legislature to consider this next session."

  This time, **SCR 7** corrects that embarrassing error. SCR 7 was signed by the Governor on May 30th.

- **State Moustache**. In heralding the facial hair of Rep. Andrew Murr as "truly a Murr-stache for the ages, a magnificent, two-fisted soup-strainer that will haunt the dreams of Representative Murr's colleagues and constituents and echo through the annals of Texas lore for as long as the Lone Star flag waves over the rugged bluffs and canyons of the Hill Country;" **HR 871** (Patterson) designates Rep. Murr's moustache as the Official Moustache of the House of Representatives of the 87th Legislature.

- **State Soft Drink**. **HB 4554** (Cain, *et al.*) would have designated Dr Pepper as the State Soft Drink. Note that this is a bill, not a resolution. It would be enshrined (if enacted) as Gov't Code Sec. 3101.014. It has no high-falutin' recitals like resolutions. It just puts Dr Pepper in the statute. Ken Herman suggests adding civil penalties for anyone who inserts a nonexistent period in Dr Pepper. And prevent anyone who violates that rule from being considered a native Texan. (This bill didn't pass.)

19.13 **Dates.** Here are some official date designations:

- **The Day After the Super Bowl**. **HB 371** (Fierro | Guillen) would have designated the day after the Super Bowl as a state holiday.

- **El Día de las Madres**. **HR 697** (Morales, Christina) commemorates May 10th as Mexican Mother's Day. I only mention this because it's the day after most of us north of the border celebrate Mother's Day on Sunday, May 9th. According to the resolution, in "some Mexican cities, it is customary for children to begin the day by serenading their mothers at their bedside, and some even engage mariachi bands to accompany them."

- **Texas Pie Fest Day**. **HR 1053** (Holland) recognizes June 12, 2021, as Texas Pie Fest Day. (If you're interested, you can attend the festival at Tate Farms in Rockwall on that day.)

- **Bison Herd of Texas Day**. **SR 336** (Seliger) encourages all Texans to celebrate both September 11, 2021, and September 10, 2022, as an Official State Bison Herd of Texas Day.

19.14 **Juneteenth!** Here's another date for you: June 19th. That's the date in 1865 that a Union general arrived in Galveston to inform enslaved African-Americans of the end of the Civil War and the beginning of their freedom. This was about two months after Gen. Lee surrendered at Appomattox and more than two and a half years after President Lincoln had issued the Emancipation Proclamation on the first day of 1863. African-Americans started celebrating it in the late 1800s, nicknaming it Juneteenth, and the celebration

spread to other states over time. In 1980, Texas became the first state to name it an official state holiday, and by 2021, almost every state plus the District of Columbia recognized it as an official holiday (although not all of those states made it a ***paid*** state holiday). After being stalled for quite some time, on June 15th of this year, the Senate passed (by unanimous consent, no less) S. 475 designating June 19th a federal holiday, officially titled "Juneteenth National Independence Day." The next day, the House passed the bill by a margin of 415-14, and President Biden signed the bill on June 17th, effective immediately. The U. S. Office of Personnel Management then tweeted that most federal employees would observe the holiday on Friday, June 18th, since this year's Juneteenth falls on a Saturday. Congratulations to the many people who worked so hard for many years (*e.g.*, Ms. Opal Lee) to make this happen.

19.15 **Mascots.** **HR 885** (Metcalf) elects the children of House members to the office of mascot, and **HR 886** (Metcalf) designates the grandchildren of House members as honorary mascots. (Each of the children and grandchildren is named in the respective resolution, and an official copy of the resolution is to be delivered to them.)

**20. The End.**

It's been fun. Let's do it again sometime. Maybe in two years.

**Selected Bills that *DID NOT* Pass**

**7. Decedents' Estates.**

7.1 **Electronic Wills Act and Other Online Notarizations ([mostly] Ch. 259). HB 2662** (Krause) was a lengthy bill with the caption: "An act relating to the elimination of certain regulations waived during the coronavirus disease (COVID-19) pandemic." Buried halfway through it is the same version of the Electronic Wills Act that was introduced last session (**HB 3848** (Longoria)) prior to the final adoption of the uniform act by the Uniform Laws Commission in July of 2019. The ULC provides this description of the uniform act:

> "The Uniform Electronic Wills Act permits testators to execute an electronic will and allows probate courts to give electronic wills legal effect. Most documents that were traditionally printed on paper can now be created, transferred, signed, and recorded in electronic form. Since 2000 the Uniform Electronic Transactions Act (UETA) and a similar federal law, E-SIGN have provided that a transaction is not invalid solely because the terms of the contract are in an electronic format. But UETA and E-SIGN both contain an express exception for wills, which, because the testator is deceased at the time the document must be interpreted, are subject to special execution requirements to ensure validity and must still be executed on paper in most states. Under the new Electronic Wills Act, the testator's electronic signature must be witnessed contemporaneously (or notarized contemporaneously in states that allow notarized wills). States will have the option to include language that allows remote witnessing. The act will also address recognition of electronic wills executed under the law of another state. For a generation that is used to banking, communicating, and transacting business online, the Uniform Electronic Wills Act will allow online estate planning while maintaining safeguards to help prevent fraud and coercion."

A complete description of the details of the Uniform Act is beyond the scope of this paper, but you can read up on the uniform act here.

But before we leave this bill, it would also have permanently permitted the remote notarization of the oath of a personal representative, and permit electronic signatures on financial powers of attorney and medical directives with online notarization through two-way audio-video conference technology.

7.2 **Persons Disqualified to Serve as Personal Representatives (Sec. 304.003). HB 2923** (Dutton) would have added the decedent's spouse to the list of individuals who are disqualified from serving as personal representative if a suit (i) for dissolution of the marriage, (ii) affecting the parent-child relationship, or (iii) involving DFPS[35] was pending at the decedent's death.

7.3 **Parents Who May Not Inherit From Child (Sec. 201.062). HB 3110** (Meyer, *et al.*) would have amended Sec. 201.062, which authorizes a probate court to prevent a parent from inheriting by intestacy from a child under certain conditions set forth in the statute. It changes the words "child pornography" to "child sexual abuse material" to track with amended language in the Penal Code.

7.4 **Actions Without Court Approval (Sec. 351.052). HB 151** (Landgraf) is a reprise of 2019's **HB 2762** (Landgraf). It would have added additional actions that may be taken by a dependent administrator without court approval, including hiring an accountant, bookkeeper, or other tax professional; a real estate agent; or an appraiser to assist with valuations. In addition, the administrator would have authority to pay all reasonable costs necessary to exercise their duty of care or related to any of the other powers listed in Sec. 351.052. These last two provisions go a long way towards gutting the court's supervisory role in dependent administrations.

7.5 **Claims for Cost of Certain Electrical Service (Secs. 355.102 & 355.103). HB 1337** (Krause) resurrects 2019's **HB 3777** (Krause). It would have added claims for the cost of electrical service provided to a decedent who had been designated as a critical care residential customer to funeral expenses and expenses of last illness as Class 1 claims.

7.6 **State Estate Tax (New Tax Code Ch. 212). HB 4453** (Talarico) would have enacted a new 5% tax on the taxable estate of Texas residents, as determined under the Internal Revenue Code without the deduction of any Texas estate tax. (Tax proceeds would be used to provide one-time $1,000 payments (adjusted for inflation) to a person who adopts or gives birth to a child in Texas.)

7.7 **Satisfaction of a Reverse Mortgage after Surviving Borrower's Death (Fin. Code Secs. 343A.001-343A.002). SB 362** (Miles) would have delayed foreclosure on a decedent's residence that served as security for a reverse mortgage for six months from the decedent's death if the residence is inherited by an immediate family member.

[35] The Department of Family and Protective Services.

**8. Guardianships and Persons With Disabilities.**

8.1 **"Independent Guardianships" for Minor Wards with Profound Intellectual Difficulties (Secs. 1054.001, 1054.151, 1103A.001-1103A.003, 1105.101, 1106.002, 1163.001-1163.0025, 1163.101, & 1201.052).** **HB 1675** (Allison, *et al.* | Kolkhorst), which would have been known as "Caleb's law," allowed a caregiver parent to be appointed as "independent guardian of the person" for a proposed minor ward who will still require a guardianship after reaching majority due to a "profound intellectual disability" without the need for the appointment of a court investigator. The guardianship application must include an affidavit showing that the proposed guardian meets certain qualification requirements and a doctor letter making the determination of profound disability. Unless the court finds that it is not in the best interest of the ward, an independent guardian is not required to file an annual account or annual report. The only required probate court action is a review at the discretion of the court, no more than once every five years (unless the guardian of the person is also the guardian of the ward's estate), to determine whether the guardianship should be continued, modified or terminated. However, if at any time the court receives a claim that the guardianship is no longer in the ward's best interest, the court may take any action it determines necessary.

When this bill received a hearing in Senate Jurisprudence on May 13th, there were four witnesses who testified in favor of the bill. Meanwhile, there were about 25 witnesses testifying against the bill, including four statutory probate judges, a county court at law judge, several other court staffers, and representatives from the Texas Guardianship Association, The ARC of Texas, and Disability Rights Texas. In addition, representatives from Coalition of Texans with Disabilities, Easter Seals Central Texas, Texas Advocates, and the Texas chapter of the National Association of Social Workers either registered against the bill without testifying or provided written testimony against it. No action had been taken by the committee when the primary author attempted to add its provisions to REPTL's Guardianship bill on the House floor on May 19th. *See* Sec. (m) above.

8.2 **Examination of Proposed Ward (Secs. 1101.103, 1101.104, 1102.002, 1202.054, & 1202.152).** **HB 3126** (VanDeaver) would have permitted an incapacity determination to be made by an APRN (advanced practice registered nurse).

8.3 **Pilot Program to Establish Public Guardians (Secs. 1104.326-1104.349).** In 2019, **SB 1426** (Zaffirini | Thompson, S.) appeared to be a second attempt to pass 2017's **SB 1325** (Zaffirini | Thompson, S.). This non-REPTL bill was added to **SB 667** on the House floor. It authorized a commissioners court to establish an "office of public guardian." This addition was cited by Gov. Abbott as the reason he vetoed the REPTL bill. This session, **SB 960** (Zaffirini) would have directed the Office of Court Administration to develop a pilot program under which the OCA can assist one or more counties that elect to establish an office of public guardian.

8.4 **Criminal Conduct of Proposed Guardian. (Sec. 1104.353; Penal Code Sec. 72.04).** Under **HB 3599** (Leach), a proposed guardian's "final conviction of threatened terroristic violence" triggers a presumption that it would not be in the best interests of the proposed ward to appoint that person as guardian.

8.5 **Use of Criminal History Records (Secs. 1104.401-1104.411; Gov't Code Secs. 152.203-152.2035, 155.206-155.207, 411.114, 411.1386-411.13861, & 411.1408-411.1409).** **SB 1411** (Zaffirini) contained provisions similar to those Sen. Zaffirini added to REPTL's 2019 Guardianship bill (that was vetoed) relating to criminal history record information for certification, registration, and licensing for certain court positions and other judicial purposes, including for the appointment of a private professional guardian.

8.6 **Critical Care Decisions by Private Professional Guardians. (Secs. 1151.051 & 1151.057).** **HB 3063** (Smithee) would have directed a private professional guardian who has been appointed as guardian of the person to contact the ward's closest relative immediately after discovering a need for a critical care or end-of-life decision. After meeting certain requirements, that guardian can submit documentation of the contact efforts to the probate court and is then authorized to make the decision. If contact with the relative is successful, the relative is in charge of the decision, unless the relative provides written authorization for the guardian to make the decision.

8.7 **Notice and Filing Requirements in Court Proceeding Involving Person with Mental Illness.** **HB 3469** (Hinojosa) (**SB 213** (Zaffirini) was its Senate companion) would have revised the notice and filing requirements in a proceeding involving a person with mental illness. Personal delivery of a copy of the notice must be made by a constable or sheriff of the county. Additionally, if a person files a copy of an original signed document with the clerk, that person must maintain possession of the original signed copy and make it available for inspection by the parties or the court.

8.8 **Temporary Guardian for Social Security Benefits (Secs. 1251A.001-1251A.103).** **HB 2439** (White) would have permitted the appointment of a

temporary guardian with the limited power to receive social security benefits including SSI and SSDI benefits if the court is presented with sufficient evidence that a person may be incapacitated and probable cause exists for the need for the immediate appointment of a guardian.

8.9 **Supported Decision-Making Agreements (Gov't Code Secs. 57A.001-57A.002 & CP&R Code Sec. 21A.002). SB 824** (Zaffirini) would have permitted a supporter under a supported decision-making agreement to be present at the arraignment, hearing, examining trial, or other criminal proceeding in which the supported person is a defendant and to provide support at a civil proceeding or deposition in which the supported person is a party or a witness.

8.10 **Settlement of Claims on Behalf of a Minor (CP&R Code Secs. 150D.001-150D.008 & Prop. Code Sec. 141.008). HB 903** (Oliverson) permits a person having legal custody of a minor to enter into a settlement agreement on the minor's behalf if (1) a guardian ad litem has not been appointed, (2) the value of the claim does not exceed $25,000, (3) the money is paid in the manner as provided in new Chapter 150D, and (4) the person entering into the settlement agreement on the minor's behalf attests that to the best of the person's knowledge, the minor will be fully compensated by the settlement, or there is no practical way to obtain additional amounts from the party entering into the settlement agreement. The attorney representing the minor's custodian must keep the affidavit in the attorney's file until the minor's 23rd birthday. The settlement funds may not be withdrawn except pursuant to a court order, the minor's reaching age 18, or on the minor's death.

8.11 **Prevention of Abuse of Elderly and Disabled.** A number of bills would have addressed problems arising from fraud and abuse of the elderly and disabled.

**(a) Definition of Exploitation. SB 2037** (Menéndez) would have prohibited the definition of "exploitation" in investigations of abuse, neglect, or exploitation by certain care providers against an individual receiving care from excluding loans made to a care provider by the person receiving care.

**(b) Obtaining Unneeded Medical Treatment by Deception; Continuous Abuse. HB 1773** (Cook) would have created the offense of knowingly providing false medical history to a health care provider to obtain unneeded medical treatment for a child, elderly individual, or disabled individual. The bill also creates the offense of continuous abuse of a child, elderly individual or disabled individual, defined as two or more acts of abuse during a period of 30 or more days but less than 5 years in duration, regardless of whether the acts are committed against one or more victims.

**(c) Abandoning or Endangering an Elderly or Disabled Individual. HB 1581** (Davis) would have expanded the scope of the felony of abandoning or endangering a child to include the same actions against an elderly or disabled individual. Conforming amendments are made to Estates Code Sec. 201.062(a) (basis for an order declaring a parent may not inherit from or through a child) and Sec. 1104.353(b) (adding a presumption that it is not in the best interest of a ward to appoint as guardian a person who has been finally convicted of abandoning or endangering a child, elderly individual, or disabled individual).

**(d) Pilot Program to Prevent Financial Exploitation of Elderly. HB 1800** (Lopez) would have directed DFPS to create a "pilot program to establish community collaboratives under which entities with an interest in preventing financial exploitation of elderly persons collaborate to help prevent, protect against, and prosecute that exploitation and otherwise improve the financial security of elderly persons."

**9. Trusts.**

9.1 **Shortened SOL to Review Trust Accounting (Prop. Code Sec. 113.153). HB 653** (Lucio, III) would have required a trust beneficiary to object to a trustee's accounting within 180 days after a copy of the accounting has been delivered to the last known address of the beneficiary. Failure to object would constitute approval of the accounting. Absent fraud, intentional misrepresentation, or material omission, the trustee is released from liability relating to all matters in the accounting.

9.2 **Regulation of State Trust Companies. HB 3849** (Slawson | Paxton) would have mades some minor changes to the rules for converting a trust institution into a state trust company. Officers and directors are required to have sufficient ***fiduciary*** experience, as opposed to ***banking*** experience, and a cross reference to another section is corrected.

**10. Disability Documents.**

10.1 **Individuals Not Authorized to Dispose of Remains (Sec. 152.102; H&S Code Sec. 711.002; Occ. Code Sec. 651.460). SB 1139** (Zaffirini) would have removed a person detained, arrested, or indicted for certain offenses under Penal Code Title 5 relating to the decedent's death from the default list of persons authorized to dispose of a decedent's remains under Health and Safety Code Sec. 711.002. Examples of those offenses include homicide, kidnapping, unlawful restraint, etc.

10.2 **Durable POAs and Home Equity Loans (Est. Code Sec. 752.051 & Fin. Code Secs. 343.002 & 343.301-343.302).** **HB 2284** (Toth) would have remove the requirement that a borrower be physically present at the closing of a home equity loan if the borrower (1) is located outside of Texas and a member of the U.S. armed forces, (2) has a disability that prohibits travel or is quarantined, or (3) is incarcerated. In those cases, the borrower may close the loan from a remote location using online notarization or through an agent under a durable power of attorney that expressly grants the agent the authority to engage in a home equity loan transaction on behalf of the borrower and who must appear in person at the closing. The requirement that a durable power of attorney used to sign home equity loan documents be signed at the office of the lender, an attorney, or a title company is eliminated if the principal meets one of the exceptions set forth above. That last part actually requires a constitutional amendment, found in **HJR 104** (Toth). For a history of the use of powers of attorney in home equity loan transactions, see Special Supplement No. 1 in my 2015 Legislative Update. Note that the proposed constitutional amendment modifies the requirement that the power of attorney be signed at the office of the lender, an attorney, or a title company by adding "except as otherwise provided by statute," opening the door for further revisions to this requirement by future legislatures without the need for further constitutional amendments.

10.3 **Release of Unclaimed Property to Agent (Prop. Code Sec. 74.501).** **HB 1981** (Craddick) would have permitted the comptroller to release unclaimed property to an agent under a limited power of attorney from the owner or the owner's heirs that authorizes the agent to receive the unclaimed property. The execution of that power must be in the presence of two witnesses who are at least 14 years old.

10.4 **Advance Directives.** Here are a number of bills related to advance directives that didn't pass:

**(a) Permissive Forms for Directives and MPOAs (H&S Code Secs. 166.012, 166.013, 166.031, 166.0325, 166.0335, 166.036, 166.102, & 166.163).** **HB 936** (Raymond) bore some similarity to 2019's **HB 1082** (Raymond) and **SB 1786** (Zaffirini). It would have created a presumption of validity of advance directives under Ch. 166 in the absence of actual knowledge to the contrary and directs the executive commissioner of the Department of State Health Services to review and designate alternate allowable forms. A designated alternate form must:

1 be promulgated by a state or national nonprofit;
2 be written in plain language;
3 include fields for the declarant's name and the date of execution;
4 to be used as a directive, allow a declarant to provide health care instructions;
5 to be used as a medical power, allow a declarant to name an agent and specify or limit decisions the agent may make, meet the requirements for a medical power other than use of the statutory form, and ***prohibit the appointment of two or more co-agents with concurrent authority***; and
6 require the declarant to sign and date the directive before two witnesses or one notary.

**(b) Physicians Refusing to Honor Directive (H&S Code Secs. 166.012, 166.046-166.0465, 166.052, 166.054, 166.202-166.206, 166.209 & 313.004).** **HB 3099** (Coleman) would have amended the procedure for when an attending physician refuses to honor a patient's advance directive or health care or treatment decision including the requirements and time-period for notice to a patient or surrogate for ethics or medical committee meetings.

**(c) End-of-Life Matters and Hospice Care (H&S Code Secs. 166.012, 166.046-166.0466, 166.052, 166.054, 166.202-166.206, 166.209 & 313.004).** **SB 1944** (Lucio, *et al.*) would have provided for end-of-life and hospice care matters including patient and provider autonomy, ethics or medical committee policies, physician's refusal to honor an advance directive, reporting requirements regarding ethics or medical committee processes, and DNR orders.

**(d) Directives and DNRs for Pregnant Women (H&S Code Secs. 166.033, 166.049, 166.083, 166.084, & 166.098).** **HB 102** (Hinojosa) appeared similar to 2019's **HB 1071** (Hinojosa) and would have allowed a woman of child-bearing age to make her own decision regarding the effect of pregnancy on a decision regarding life-sustaining treatment. Conforming amendments are made to the statutory forms.

**(e) Restrictions on Refusal to Comply with Directive (H&S Code Secs. 166.002, 166.045-166.046, 166.051-166.052, 166.054, 166.158 & 166.166).** **SB 1381** (Creighton) would have restricted the refusal to comply with an advance directive or treatment decision by providing that a health care professional, facility, or ethics or medical committee cannot override or refuse to honor a patient's advance directive or treatment decision directing life-sustaining treatment because the patient is elderly, disabled, or terminally ill.

**(f) Execution of DNRs by Nurses and Physician Assistants (H&S Code Secs. 166.081-166.084, 166.087-166.089, 166.092, 166.095, 166.102, 166.203, 166.205 & 193.005).** **SB 1752** (Johnson, N.) would have authorized an advanced practice registered

nurse or a physician assistant to sign an out-of-hospital DNR order.

**(g) Revocation of DNRs for Admitted Patients (H&S Code Sec. 166.205).** **HB 2943** (Frank, *et al.*) would have required a physician to revoke a DNR if an individual "whose direction or treatment decision was the basis for issuing the DNR" expresses that intent. Currently, the patient's agent under a MPOA or legal guardian must express that intent.

10.5 **Respecting Texas Patients' Right to Life Act (Gov't Code Sec. 25.0021(b); H&S Code Secs. 166.045, 166.046, 166.051, & 166.052).** **SB 917** (Hughes, *et al.*) (**HB 2609** (Parker) was its House companion) would have enacted the Respecting Texas Patients' Right to Life Act of 2021 and is similar to the introduced versions of 2019's **HB 3158** (Raymond) and **SB 2089** (Hughes), which appeared to be another attempt to pass 2017 legislation called the Texas Patient Autonomy Restoration Act (**HB 4090** (Klick) and **SB 1213** (Hughes, *et al.*)). This year's attempt provides that if an attending physician refuses to comply with a patient's advance directive or a patient's or family's decision to choose treatment necessary to prevent the patient's death, life-sustaining medical treatment must be provided for 90 days after an ethics or medical committee's review so that the patient can be transferred to a health care provider willing to honor the patient's directive or treatment decision.

10.6 **Death When Certain Functions Have Ceased (H&S Code Secs. 671.001-671.002).** **HB 4329** (Canales) would have provided procedures to determine death has occurred when artificial means of life support preclude a determination that spontaneous respiratory and circulatory functions have ceased.

10.7 **Disregard of Mental Health Declarations (CP&R Code Sec. 137.008).** **HB 4208** (Murr) would have required a judicial determination that a principal was incompetent when he or she executed a declaration for mental health treatment in order for a health care provider to act contrary to the principal's wishes.

**11. Nontestamentary Transfers.**

11.1 **Disclosure of Insurance Beneficiary to Funeral Director (Ins. Code Secs. 1103.201-1103.202).** **HB 643** (Raymond) would have required a life insurance company to disclose a policy's beneficiary to a funeral director conducting the insured's funeral upon request, but only if the death benefit is $30,000 or less and issued by a Texas company. The request must be made by a funeral director handling a funeral in Texas, and the director must be provided information by (and written consent from) the family leading to a reasonable belief that the decedent was insured, but no one knows who the beneficiary is.

11.2 **Notice to Life Insurance Policy Owner (Ins. Code Sec. 1101.351).** When a life insurance policy owner requests a change affecting the policy, **HB 1745** (Bailes) would have required an insurer to provide the owner written notice stating that the owner should consult with a licensed insurance agent or financial advisor before making the change, that the owner may contact the Texas Department of Insurance for more information, and the department's contact information.

**12. Exempt Property.**

12.1 **Sale of Non-Homestead Property by Individual to Entity (Prop. Code Sec. 42.0022).** **HB 2424** (Murr, *et al.*) would have added new Prop. Code Sec. 41.0022 to provide that a conveyance of a parcel not meeting the definition of an urban homestead by an individual (or the individual's spouse) to an entity in which the individual or the individual's spouse has a direct or indirect ownership interest estops the individual from later claiming the conveyance was a "pretended sale" of a homestead under Texas Const. Art. XVI, Sec. 50(c) (a transaction used with the intention to subvert constitutional limitations on permitted liens against a homestead) so long as certain procedural requirements and criteria regarding the parcel and conveyance are met, including the contemporaneous recording of the individual's "Affidavit Regarding Conveyance To An Entity."

12.2 **Rules for Expedited Assertion of Exemptions (Gov't Code Sec. 22.0042).** As introduced, **HB 3613** (Leach) and **SB 644** (Zaffirini) would have added an amount on deposit (in one or more accounts) equal to the monthly equivalent of 250% of the federal poverty guidelines for a family of four to the list of exempt property. The exemption would not apply to court-ordered alimony, child support, or spousal maintenance payments. However, when the House bill emerged from Judiciary, it was replaced with language that directed the Texas Supreme Court to adopt rules that (1) establish a simple, expedited procedure for judgment debtors to assert an exemption to the seizure of personal property by judgment creditors or court-appointed receivers, (2) require a stay for a reasonable period in a proceeding to allow the assertion of an exemption, and (3) require a court to promptly set a hearing and stay proceedings pending that hearing if a judgment debtor timely asserts an exemption.

**13. Jurisdiction and Venue.**

13.1 **Venue for Probate of Wills (Sec. 33.1011).** **SB 156** (Perry) (**HB 2427** (Murr) was its House companion) would have authorized transfer of a probate

proceeding to the county of the executor's residence after issuance of letters if no immediate family member resides in the county of the decedent's residence. (This is in addition to the current grounds for transfer for the convenience of the estate under Sec. 33.103.) This was the same as the final version of 2019's **SB 192** (Perry | Murr) and somewhat similar to 2017's **SB 1056** (Perry | Murr). However, House Judiciary amended this year's bill to provide that the transferee court will not have jurisdiction over any personal injury, wrongful death, or survival action otherwise related to the transferred proceeding.

13.2 **Jurisdiction of County and Justice Courts.** **SB 419** (Miles) would have increased the maximum amount in controversy to determine (i) concurrent jurisdiction of the county and justice courts in civil matters and (ii) original jurisdiction of a justice court in civil matters in which exclusive jurisdiction is not in the district or county court from $20,000 to $50,000.

**14. Court Administration.**

14.1 **Remote Technology.** Several bills would have permanently authorized "Zoom hearings."

**(a) Probate and Guardianship Proceedings (Secs. 53.108 & 1053.106).** **HB 1447** (Minjarez) (**SB 759** (Menéndez) was its Senate companion) would have permitted decedents' estates and guardianship proceedings to be conducted remotely using teleconference and videoconference technology. The remote proceedings would be considered conducted in open court.

**(b) All Proceedings (Gov't Code Secs. 21.009 & 21.013).** **HB 3611** (Leach), **HB 4081** (Crockett), and **SB 690** (Zaffirini) would have permanently authorized all Texas courts to conduct a hearing or other proceeding as a remote proceeding in which one or more of the participants, including a judge, party, attorney, witness, court reporter, juror, or other individual, attends the proceeding remotely through the use of technology and the Internet. On March 23rd, Chief Justice Nathan Hecht urged the legislature to pass either of the first two bills in his biennial State of the Judiciary address, noting that online access is efficient, saving time formerly spent driving to court and waiting, sometimes hours, for a case to be called. It has vastly improved public participation in legal proceedings, particularly by people limited by income, child care, transportation, or job needs. For example, Justice Hecht noted that "participation rates in high-volume dockets like child custody and traffic cases [have] flip[ped] from 80% no-shows to 80% appearances."

14.2 **Qualification of Judges (Gov't Code Secs. 24.001, 25.0014 & 25.0033).** **HB 3053** (Rodriguez) would have disqualified a person found to be a vexatious litigant from serving as district judge, statutory county judge, or statutory probate judge.[36] **HB 1839** (Stephenson) would have prohibited the election or appointment of a person as a district judge who is older than 74 on the date of election or appointment.

14.3 **Appointment of Deputy Clerk in Statutory Probate Court (Gov't Code Sec. 25.017).** **HB 3908** (Pacheco) would have changed the effective date of a deputy clerk's appointment by eliminating the need for written confirmation by the statutory probate judge.

14.4 **Eligibility of Former Statutory Probate Judge as Visiting Judge (Gov't Code Sec. 74.055).** **HB 3966** (Morales, E.) would have prohibited the assignment of a former statutory probate judge as a visiting judge if that judge resigned or retired in lieu of discipline by the State Commission on Judicial Conduct.

14.5 **Composition of Courts of Appeals.** Hunt County is currently within the jurisdiction of the Fifth and Sixth Courts of Appeals. Gregg, Rusk, Upshur, and Wood Counties are currently within the jurisdiction of the Sixth and Twelfth Courts of Appeals. **HB 339** (King), **HB 2613** (Murr), and **SB 11** (Huffman) would have put Hunt, Upshur, and Wood Counties solely within the jurisdiction of the Sixth Court of Appeals and Gregg and Rusk Counties solely within the jurisdiction of the Twelfth Court of Appeals. However, a committee substitute for **SB 11** was reportedly approved at an April 1st Senate Jurisprudence committee hearing that, according to news reports, would consolidate the 14 courts of appeal into 7. According the Dallas Morning News, Sen. Huffman claimed that, "The current system creates inefficiency and confusion for litigants. … It is so important to the jurisprudence and judicial economy of our state that we address these issues." However, justices from across Texas criticized the proposal, warning that it would knock Black and Hispanic justices off those courts and refocus attention on nettlesome administrative matters, just as the courts are facing a deluge of cases delayed by the pandemic. The district that currently includes Dallas County would expand from six counties to 21, reaching south to Austin and west to Llano and San Saba. Tarrant County would end

[36] In 2020, just such a person defeated a 10-year incumbent district judge in the Travis County Democratic primary, and, given that this was in Travis County, won the general election in an uncontested race. On March 5, 2021, the 3rd Court of Appeals in Austin rejected that judge's appeal of the vexatious litigant ruling.

up in a district extending to Waco, Wichita Falls and Texarkana.

14.6 **Creation of New "Texas Court of Appeals."** **SB 1529** (Huffman) would have created a new statewide "Texas Court of Appeals," composed of six elected justices sitting in Austin, with exclusive appellate jurisdiction over "all cases or any matters arising out of or related to a civil case brought by or against the state or a state agency, board, or commission or by or against an officer of the state or a state agency, board, or commission."

14.7 **Effect of Supreme Court Rules on Procedural Statutes (Gov't Code Sec. 22.004(c)).** **SB 2226** (Hughes) wasn't introduced until April 26th.[37] It would have done one thing – repeal Gov't Code Sec. 22.004(c). Sec. 22.004 gives the Supreme Court "full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify [a litigant's] substantive rights." Subsection (c) states that a rule adopted by the Supremes repeals all conflicting laws (or parts of laws) governing practice and procedure. I guess that this means that a rule of procedure set forth in a statute **couldn't** be changed by the Supreme Court. The bill, as introduced, contains no effective date.

14.8 **Recovery of Attorney's Fees.** Several bills would have amended Civil Practice and Remedies Code Sec. 38.001, which authorizes the recovery of attorney fees in certain civil actions. Currently, that section authorizes recovery from an individual or corporation for eight different civil claims, including a claim on an oral or written contract.

**(a) Just "Organizations."** **HB 2917** (Schofield) just broadens the class of entities against whom the attorney's fees may be recovered to any "organization" defined in Business Organizations Code Sec. 1.002.[38]

**(b) "Other Type of Corporate Entity."** **HB 3695** (Johnson, Julie) includes limited liability companies, limited partnerships, and "any other type of corporate entity" as sources for recovering attorney's fees.

**(c) "Other Legal Entity."** **HB 3349** (Rosenthal) authorizes recovery of attorney's fees from an individual, corporation, "or other legal entity," but specifically excludes recovery from the state.

**(d) "Another Person."** **HB 3377** (Krause) and **SB 808** (Hughes) changes the entities against whom attorney's fees may be recovered from "an individual or corporation" to "an individual or organization." For this purpose, "organization" has the very broad meaning contained in BOC Sec. 1.002.

**15. Selected Family Law Issues.**

15.1 **Who Can (or Can't) Get Married.** Several bills would have addressed who can and cannot get married. (Or is it who may or may not get married?)

**(a) Minimum Marriage Age (Fam Code Sec. 2.009).** The Family Code requires both applicants for a marriage license to be at least 18, or to have their disabilities of minority removed by a court. **HB 1590** (Rosenthal) requires both applicants to be at least 18. Period.

**(b) Same-Sex Marriages.** **HB 1037** (Beckley | Johnson, Ann) and **SB 129** (Johnson) update terminology in a number of statutes to recognize that the parties to a marriage may be of the same sex. **HB 1038** (Beckley | Johnson, Ann) and **SB 261** (Menéndez | Johnson) also repeal statutes relating to the criminality of homosexual conduct. **HJR 58** (Beckley) is a constitutional amendment that would repeal the constitutional prohibition against same-sex marriages or the creation or recognition of any legal status similar to marriage. **HJR 159** (González, Mary) does the same thing.

15.2 **Who May Conduct Marriage Ceremonies (Fam. Code Sec. 2.02).** Several bills would have addressed who may conduct marriage ceremonies.

**(a) Conduct of Marriage Ceremonies by *Any* Judge (Fam. Code Sec. 2.02).** **HB 451** (Moody | Blanco) would have allowed any current, former, or retired federal or state judge to conduct a marriage ceremony, rather than listing a whole bunch of different types of judges.

**(b) Governor, Lt. Governor, or Legislator.** **HB 2479** (Pacheco) would have added the current governor, lieutenant governor, or member of the state legislature to the list of people authorized to conduct a marriage ceremony. However, those officials may not use the services of a state employee during normal working hours nor postage or stationery purchased with state funds. Further, they can't receive any remuneration, nor any gift worth more than $50.

**(c) A Muslim Imam.** **HB 2039** (Talarico, *et al.*) would have specifically added a Muslim imam to the list of persons authorized to conduct a marriage

[37] Senate Rule 7.07(b) requires a four-fifths vote to introduce a bill after the first 60 days of the session. In this case, permission to introduce the bill was granted without objection.

[38] See footnote 22.

ceremony. (They're already authorized to do so as "an officer of a religious organization and who is authorized by the organization to conduct a marriage ceremony," but the only specific religious figures currently expressly listed are Christian ministers and priests and Jewish rabbis.)

15.3 **Marriage by Zoom.** **HB 675** (Ramos | Cook) would have allowed a spouse-to-be to participate in his or her marriage ceremony through the use of video conference technology if that person is a member of our armed forces stationed in another country in support of a military operation who is unable to attend the marriage ceremony in person.

15.4 **How May (or Must) Marriages Be Ended.** Several bills would have addressed the end of the marriage relationship.

**(a) Date of Marriage in Divorce Decree.** **HB 1013** (Dutton | Zaffirini) would have required divorce decrees to include the date of the marriage (except in the case of common law marriages).

**(b) Concealed Divorce.** Concealment of a prior divorce can be a ground for annulment of a marriage if the party seeking the annulment hasn't cohabited with the other party since the former party discovered (or reasonably should have discovered) the divorce. **HB 3005** (Ramos) requires the cohabitation to end within a year of the discovery, rather than immediately. Further, the bill would change the statute of limitations for this annulment proceeding from the first anniversary of the marriage to the first anniversary of discovery of the divorce.

**(c) Fraud, Duress, or Force.** A party may seek an annulment if the other party induced the marriage by fraud, duress or force, and the first party ceased cohabitation since learning of the fraud or being freed of the duress or force. **HB 3007** (Ramos) requires the cohabitation to end within a year after learning of the fraud or being freed of the duress or force, rather than immediately.

**(d) Impotency as Grounds for Annulment.** A party may seek an annulment if that party did not know that the other party was permanently impotent at the time of the marriage, and the first party ceased cohabitation upon learning of the impotency (Ouch!). **HB 3008** (Ramos) would have required the cohabitation to end within a year after learning of the impotency, rather than immediately.

**16. Stuff That Doesn't Fit Elsewhere.**

16.1 **Pandemic Disaster Legislative Oversight Committee (New Gov't Code Chs. 329 & 418A).** **HB 3** (Burrows) isn't really within the scope of this legislative update, but since at least one of Gov. Abbott's emergency orders as a result of his COVID-19 disaster declaration temporarily allows remote notarization of certain estate planning documents and oaths, this bill at least deserves a mention. A detailed description won't be found here, but essentially the bill would have created a 16-member committee consisting of the lieutenant governor, the speaker of the house, the chairs of the Senate Finance, State Affairs, Health and Human Services, Education, and Criminal Justice committees, the chairs of the corresponding House committees, and four additional member (two appointed by the lite guv and two appointed by the speaker) to "ensure minority representation … from the respective ethnic communities." In addition, any member of the House or Senate may submit a written request to participate in the committee's proceedings to the extent practical.

While the legislature is not in session, the committee may review any pandemic disaster declaration that is renewed after its initial 30-day period and any orders issued by the governor, counties, or municipalities as a result of that disaster declaration, or terminate the disaster declaration or individual orders.

I'll leave an explanation of additional details to others, but I would note that the golf course lobby must be pretty powerful since the bill includes an express statutory prohibition of any order that would require a golf course (public or private) to close.

The conference committee on HB 3 missed the May 29th deadline to distribute a committee report.