

2013 Texas Legislative Update

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The 83rd Texas Legislature made significant changes in a few areas and the usual minor changes affecting decedents' estates, guardianships and trusts in 2013. Most of the decedents' estates and guardianship changes become effective January 1, 2014, when the new Estates Code becomes effective. Most of the trust law changes become effective September 1, 2013.

Following is a description of some of the key changes and changes which caught the author's eye. For a more comprehensive update, see William D. Pargaman's legislative update at www.snpalaw.com/resources/2013legislativeupdate. Bill has led the legislative effort of the Real Estate, Probate and Trust Law Section of the State Bar of Texas (REPTL) for three sessions and deserves the thanks of the probate bar.

The Estates Code

The biggest legislative change in probate law in decades is happening, but it is not really much of a change at all. On January 1, 2014, the Estates Code will replace the Probate Code. Yes, the Probate Code, which has been around for 60 years, will be no more. Yes, probate lawyers and courts will have to learn many new chapter and section numbers. But no, the law itself is not changing – at least, not very much.

The Texas Legislative Council, a state agency, is charged with planning and executing a code-based statutory revision program to “clarify and simplify the statutes and to make the statutes more accessible, understandable, and usable.” Tex. Govt. Code Sec. 323.007(a). Since 1963, it has been taking sections of the old Vernon's Annotated Texas Statutes (a proprietary system owned by West Publishing Company) and placing them in a series of codes. Most probate lawyers have worked for years with the Property Code and the Family Code. Now they will have to adjust to the Estates Code.

When revising a statute, the Legislative Council “may not alter the sense, meaning, or effect of the statute.” Tex. Govt. Code Sec. 323.007(b). For this reason, while the location of various provisions is changing and some of the terminology is changing, the law itself is not supposed to be changing. (See below for significant exceptions to this.)

The Estates Code is organized in the familiar chapter and section format of other Texas codes:

Decedents' estates

Chapters 31 – 551

Powers of attorney	Chapters 751 – 752
Guardianships	Chapters 1001 – 1253
Management trusts and other guardianship alternatives	Chapters 1301 -- 1356

Three questions about the new Estates Code:

1. **Q:** I have an estate under administration that will not close before January 1, 2014. Do I follow the Probate Code or the Estates Code? **A:** Both. Each section of the Probate Code is repealed effective January 1, 2014, and the Estates Code becomes effective on the same day. Nothing in the statute says otherwise, so there is no reason to think that the Estates Code will apply only to persons dying on or after that date. Section 21.006 of the Estates Code says that “the procedure prescribed by Title 2 [the Decedents’ Estates portion of the code] governs all probate proceedings.” So, you should cite and follow the Probate Code provisions through December 2013 and cite and follow the Estates Code provisions beginning in January 2014.
2. **Q:** Will I have to re-plead everything with the new section numbers? **A:** Hopefully that is a silly question. Surely the courts will treat a pleading that was proper under the Probate Code as continuing to apply without the need for re-pleading. On the other hand, judges and lawyers have taken different views of other recent legislative changes (don’t get me started), so it is best to check with the court in question. Perhaps judges will enact local rules to clarify this issue.
3. **Q:** Do I need to change all of the statutory references in my will form? **A:** Yes, for wills signed on or after January 1, 2014. While the Estates Code contains a provision that makes statutory references to prior law apply to the new, revised statutes (Tex. Est. Code Sec. 21.003(a)), it does not have a provision that makes references in wills and other instruments to prior statutes apply to new versions of the statutes. The Code Construction Act (which applies to the Estates Code) provides that “[u]nless expressly provided otherwise, a reference to any portion of a statute or rule applies to all reenactments, revisions, or amendments of the statute or rule.” Tex. Gov. Code Sec. 311.007. However, it is likely that this section applies to “references” in other statutes, not references in instruments such as wills. When the Texas Trust Code was enacted in 1983, the Legislature made clear that the Trust Code was considered an amendment to the Texas Trust Act (repealed by the Trust Code) for purposes of references in trust instruments. Tex. Trust Code Sec. 111.002. There is no similar provision in the Estates Code. Of course, the guiding principle in will construction is determining the testator’s intent, so it should not be too hard to prove that a testator who referred to Section 145 of the Probate Code intended a reference to the appropriate corresponding section of Chapters 401 – 405 of the Estates Code. Still, it will be unprofessional to produce documents after January 1, 2014, containing out-of-date statutory references.

Substantive Changes Related to Estates Code Enactment

While the Legislative Council was making its non-substantive codification, REPTL and others were busy making substantive changes. Many of these changes are the ordinary tweaks that REPTL and others have been making every two years for the past 3 decades. (The 2013 crop of these changes is discussed below). However, some are related to the enactment of the Estate Code itself.

REPTL learned in 2006 that the Probate Code codification was coming whether it liked it or not. REPTL leadership appointed a special committee to consider the codification and to offer advice and assistance to the Legislative Council. This committee also noted that there were a few subjects in the Probate Code that needed to be addressed substantively before the existing statutes were swept wholesale into the new code. REPTL pushed for changes in these subjects. Those changes have been enacted into the Probate Code and will be codified into the Estates Code.

For this reason, lawyers should look more carefully at the Estates Code provisions enacted on these subjects:

1. **Probate and Guardianship Jurisdiction and Venue.** The Legislature has amended the statutes governing probate jurisdiction frequently since the 1970s. This has corresponded with the creation of statutory probate courts and the growth of those courts' jurisdiction. In addition to statutory changes, there have been significant appellate cases construing probate jurisdiction. This led to confusion and convoluted statutory provisions. Much of this confusion arose from the meaning of the phrase "appertaining or incident to an estate." REPTL believed that a re-codification of probate jurisdiction statutes should try to eliminate some of this confusion. Therefore, legislation passed during the last three sessions has made significant changes. The most significant changes are:
 - a. Defining a "probate proceeding." Tex. Prob. Code Sec. 3(bb); Tex. Est. Code Sec. 31.001.
 - b. Defining a "matter related to a probate proceeding," which definition varies based on the type of court exercising the jurisdiction. Tex. Prob. Code Sec. 4B; Tex. Est. Code Sec. 31.002.
 - c. Giving county courts at law in counties having no statutory probate court the jurisdiction to hear matters related to testamentary and inter vivos trusts created by a decedent whose will was probated in that county. Tex. Prob. Code Sec. 4B(b); Tex. Est. Code Sec. 31.002(b).

Some practitioners consider these changes constitute an expansion of the exclusive jurisdiction of courts exercising original probate court jurisdiction. However one views these changes, it behooves lawyers working in probate and guardianship cases to review these provisions of the Estates Code carefully.

2. **Independent Administration.** REPTL advocated for and the Legislature responded with several changes affecting independent administrations. Some of these were of a housekeeping nature. Others made significant changes. Here are some of the highlights.

- a. Previously the Probate Code had only vague references to what an independent executor could and could not do without court approval. (See, for example, old Section 145(h): "... further action of any nature shall not be had in the county court except where this Code specifically and explicitly provides for some action in the county court.") The new provision states plainly that:

Unless this title specifically provides otherwise, any action that a personal representative subject to court supervision may take with or without a court order may be taken by an independent executor without a court order. The other provisions of this subtitle are designed to provide additional guidance regarding independent administrations in specified situations, and are not designed to limit by omission or otherwise the application of the general principles set forth in this chapter.

Tex. Est. Code Sec. 402.002; Tex. Prob. Code Sec. 145B (added in 2011).

- b. The power of an independent executor to sell real property is clarified and a new procedure for making the order appointing the independent executor include a power of sale is added. Tex. Est. Code Sec. 402.051 – 402.054; Tex. Prob. Code Sec. 145A and 145C (added in 2011).
- c. The creditors' claims provisions in independent administrations were overhauled. Tex. Est. Code Sec. 403.051 et seq.
- d. Affidavits in lieu of inventory are permitted. Tex. Est. Code Sec. 309.056.

New Statutory Durable Power of Attorney Form

One of the most frequent complaints to REPTL from probate lawyers in the 1990s was "don't keep changing the power of attorney form." Like the wall in the Game of Thrones, REPTL has resisted changes to the statutory durable power of attorney form since 1997. While the 1997 form had a good, long run, as in George R. R. Martin's tomes, every so often the wildings scale the wall. The statutory durable power of attorney form will change effective January 1, 2014. This bill was not a REPTL bill, so do not blame REPTL for its passage.

The new power of attorney form (Tex. Est. Code Sec. 752.051) differs from the former in three principal ways:

- ***Initial, don't cross out.*** It drops the approach of the former form, in which the principal crosses out any specific powers he or she does not wish to give to the agent, for an initialing approach, in which the principal initials powers he or she wishes to give to the agent. This approach is consistent with the 2006 version of the Uniform Power of

Attorney Act. Texas had tried the initialing approach from 1993 to 1997, but dropped it in favor of the crossing-out approach in an attempt to prevent fraud and to reduce errors in self-help execution of powers of attorney.

- ***The form begins with a notice to the principal.*** The principal is warned that he or she should select someone he or she trusts and that the power of attorney will continue until the principal dies, the principal revokes it, the agent resigns or is unable to act or a guardian is appointed for the principal's estate.
- ***The form ends with "Important Information for Agent."*** The form makes extensive statements of the agent's duties, the termination of the agent's authority and the liability of the agent. To a large extent, these statements are consistent with the Durable Power of Attorney Act and fiduciary law. However, to the extent that the statements are *not* identical to current statutory law, does including these statements in the form create additional statutory or contractual duties and liabilities? If there are inconsistencies, which controls – existing law or the disclosure statements in the form?

In addition to increasing the chances of fraud (since it is easier for a bad guy to add initials to a form than to remove a cross-out mark), the new initialing approach creates these two traps for the unwary:

1. ***No automatic general power of attorney.*** The former cross-out form contains this statement:

If no power listed above is crossed out, this document shall be construed and interpreted as a general power of attorney and my agent (attorney in fact) shall have the power and authority to perform or undertake any action I could perform or undertake if I were personally present.

Tex. Prob. Code Sec. 490(a). The new form has no such provision. It permits the principal to initial line "N" – "all of the above powers listed in "A" through "M." However, this does not make the power of attorney a general power of attorney and there is no similar provision stating that it means the agent has the power to perform or undertake any action the principal could perform or undertake if personally present. Rather, the agent's authority apparently will be limited to the enumerated statutory powers even if "N" is initialed. For this reason, it is important for any attorney wishing for his or her client to have a general power of attorney to specifically add language to the form to accomplish this purpose.

2. ***What happens if no powers are initialed?*** Since these forms are used by non-lawyers, it is inevitable that powers of attorney will be signed with no powers initialed. What is the effect of this? Unless the principal adds specific authority in the "special instructions" section of the form, presumably the agent has no authority to act, even though the principal must have intended to give the agent some authority or he or she would not have signed the power of attorney in the first place.

As troublesome as the 2013 changes to the form are, they should present no insurmountable hurdle for attorneys familiar with this area of the law. Here are practice tips about the new form:

1. **Use the form.** Although this is a matter of personal preference, having one's clients sign a form that looks like the statutory form is likely to increase the likelihood of third party acceptance.
2. **Accept the initialing approach.** Use of the statutory form is optional, so there is no reason why an attorney could not continue to use the crossing-out approach. However, in the controlled environment most attorneys create for document signings, it is not difficult to assure that clients initial the form at the appropriate place.
3. **Modify the form.** Modify the form to include those powers which you believe your principal may need to have. For example, the form may expand on the power to make gifts, add the power to create trusts and transfer property to trusts, and clarify the agent's authority to deal with governmental agencies.
4. **Make it a general power of attorney.** Add language to make it clear that it is a general power of attorney.
5. **Specifically provide that it is to be construed as a statutory durable power of attorney.** Even though the use of the statutory form is optional, it probably is advantageous to have the power of attorney construed to be a statutory durable power of attorney. This assures that the powers described in Tex. Est. Code Sections 752.101 – 752.114 are included in the power.

New Medical Power of Attorney Form

The Medical Power of Attorney Form and related disclosure statement were modified to adapt to the 2009 change which permits the medical power of attorney to be signed before a notary rather than two witnesses. Tex. Health and Safety Code Sec. 166.163 and 166.164. The new forms become effective January 1, 2014.

Decanting

The modernization and liberalization of Texas trust law that began with enactment of the two UPIAs (the Uniform Prudent Investor Act and Uniform Principal and Income Act) in 2003 continued in 2013 with enactment of Texas's first default decanting statute. New Subchapter D of Chapter 112 of the Trust Code (Sections 112.071 – 112.087) permits a trustee to distribute trust principal "in further trust" in some cases.

Several states have preceded Texas in permitting trustees to move property from one trust to another even if the first trust does not expressly authorize the move. Since it is always better to use an obscure word when one is available rather than a word that is easy to understand, these statutes are known as "decanting" statutes. They permit the trustee to "decant" (pour) principal from one trust into another if the conditions stated in the statute are met.

Trustees have used decanting statutes in other states to fix problems in irrevocable trusts. For example, the trustee of a trust with archaic administrative provisions may use the statute to move trust property into a new trust with modern administrative provisions. Of course, it is not always clear that the problem is a “problem” at all, nor that the settlor of the trust would want it to be “fixed” in this way.

Under prior law, there was no default statutory decanting provision that applied if the trust instrument was silent, but the settlor could provide for decanting in the trust instrument. Under the new law, the settlor may expressly provide for decanting or expressly prohibit decanting. If the trust instrument is silent, then the new decanting rules apply.

The Texas statute distinguishes between “full discretion trusts” and “limited discretion trusts.” In a full discretion trust, the trustee’s power to distribute is not limited in any manner. In limited discretion trusts, the power to distribute is limited in some way. HEMS trusts – trusts permitting the trustee to distribute property for the beneficiary’s health, education, maintenance and support – are “limited discretion trusts” under the Texas statutes.

Under the decanting statute, the trustee may distribute principal from a full discretion trust to another trust for the benefit of one or more of the current beneficiaries of the first trust. Also, the trustee may give a wholly discretionary beneficiary a broad power of appointment. The justification for these actions is that, if the trustee could distribute the entire principal to a beneficiary, the trustee ought to be able to make that distribution in further trust with new rules for a beneficiary.

In order to decant from a limited discretion trust, the current beneficiaries of both trusts must be the same, the successor and remainder beneficiaries of both trusts must be the same, and the distribution standard of both trusts must be the same. Due to these limitations, it is likely that the decanting power in limited discretion trusts will be useful only for administrative changes.

When decanting, the trustee must act in good faith, in accordance with the terms and purposes of the trust and in the interests of the beneficiaries. In no case is the trustee deemed to have a duty to decant. The power to decant is reduced to the extent it would cause any intended tax benefits to be lost.

When decanting, the trustee may not take away a beneficiary’s mandatory distribution right, materially impair the rights of any beneficiary, materially lessen the trustee’s fiduciary duty, decrease the trustee’s liability or exonerate the trustee, or eliminate another person’s power to remove the trustee.

Significantly, the trustee may not modify the applicable rule against perpetuities period, “unless expressly permitted by the terms of the first trust.” This eliminates one of the key reasons why a trustee may wish to decant. Still, this gives Texas estate planning attorneys a drafting tip: in appropriate cases, include language in the trust instrument making it clear that the perpetuities period may be modified by decanting. In most cases, there is very little downside to doing this, since most clients have not given a lot of thought to the vested remainder beneficiary rights of their unborn remote descendants when they create trusts.

The trustee must give 30 days' written notice to current beneficiaries and presumptive remainder beneficiaries. If a charity is a beneficiary, the notice also must be given to the attorney general. If no one objects during the 30-day notice period, the trustee may decant without judicial approval, although the trustee may seek judicial approval if desired. If a beneficiary other than the attorney general objects, the trustee may seek judicial approval but is not required to do so. If the attorney general objects, the trustee must seek judicial approval before decanting.

The trustee may not decant without judicial approval solely to change the trustee compensation provisions. However, the trustee may change compensation provisions without judicial approval if the change is in conjunction with other changes for which there are valid reasons, so long as the change does not provide for unreasonable compensation under Texas law.

Except as otherwise provided in the trust instrument, the decanting provisions apply to trusts existing or created on or after September 1, 2013. Interestingly, the effective date provision states that the Legislature intends the decanting provisions "to be a codification of the common law of this state in effect before the effective date of this Act." The Legislature does not get to say what the law was before it enacts a statute, but this is an attempt to bolster the argument that there already existed a common law power to decant in Texas.

Texas Law on Nontestamentary Transfers Applies to Out-of-State Accounts

In *McKeehan v. McKeehan*, 355 S.W.3d 282 (Tex. App. – Austin 2011, writ denied), the appellate court applied Michigan law to determine that an account owned by Texans passed by right of survivorship. The account was in a Michigan financial institution. The agreement governing the administrative aspects of the account was governed by Michigan law. The agreement did not have the language required by Texas law to create a right of survivorship, but the court found that it met the Michigan standard.

The Legislature responded with Section 111.054 of the Estates Code. Under the new law, if more than 50 percent of the money or property in an account at a financial institution or in a retirement account is owned by one or more persons domiciled in Texas, or if more than 50 percent of the interest in an insurance contract, annuity contract, beneficiary designation or similar arrangement, is owned by one or more persons domiciled in Texas, then Texas law will be applied to determine if a nontestamentary transfer occurred notwithstanding a choice of law or similar provision in an agreement prepared or provided by the financial institution or other contracting third party.

The new provision does not apply to an obligation owed by the account holder to the financial institution, or vice versa.

To bolster the chances that a court will apply the new Texas law in the case of an out-of-state financial institution, the Legislature specifically provided that the changes "represent the fundamental policy of this state for the protection of its residents and are intended to prevail over the laws of another state or jurisdiction, to the extent those laws are in conflict with Texas law."

Burden of Proof in Will and Trust Forfeiture Cases

Under former law, a provision in a will or trust that would cause a forfeiture of or void a devise or provision in favor of a person for bringing a court action, including a will or trust contest, was “unenforceable if” just cause existed for bringing the action and the action was brought and maintained in good faith. (Tex. Prob. Code Sec. 64; Tex. Trust Code Sec. 112.038). It seemed clear from the Texas Pattern Jury Charges and general practice that, under former law, the party wishing to avoid application of a forfeiture provision had the burden of proof on the just cause and good faith issues. See, for example, PJC 235.8B (2012). However, the proponents of HB 2380 used the burden of proof issue, among others, to advocate for changes to the current statute. As changed, the statutes now read that a forfeiture provision “is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes [just cause and good faith] by a preponderance of the evidence.” Tex. Est. Code Sec. 254.005; Tex. Trust Code Sec. 112.038).

Whether or not it was necessary, this clearly places the burden of proof on the just cause/good faith issues on the party seeking to avoid enforcement of the forfeiture provision. It also means that the party seeking to avoid enforcement probably needs to plead just cause and good faith in the underlying lawsuit to assure that these issues are submitted to the jury in the underlying action. Otherwise, a second trial on the forfeiture issue alone may be necessary. It may seem odd that a party contesting an instrument would affirmatively seek a determination that the party’s action does not result in forfeiture, but failure to do so could cause a huge waste of time and energy if a separate later trial was necessary on the forfeiture issue alone.

Just cause and good faith are not the only reason courts have refused to enforce forfeiture provisions. A recent Texas opinion found 12 types of lawsuits where Texas courts have concluded that an *in terrorem* clause did not trigger forfeiture: (1) to recover an interest in devised property; (2) to compel an executor to perform duties; (3) to ascertain a beneficiary's interest under a will; (4) to compel the probate of a will; (5) to recover damages for conversion of estate assets; (6) to construe a will's provisions; (7) to request an estate accounting or distribution; (8) to contest a deed conveying a beneficiary's interest; (9) to determine the effect of a settlement; (10) to challenge an executor appointment; (11) to seek redress from executors who breach fiduciary duties; and (12) presenting testimony in a will contest brought by other beneficiaries. *DiPortanova v. Monroe*, 2012 WL 5986448 (Tex. App. – Houston [1st Dist.] 2012). For a while it appeared that, by changing “unenforceable if” to “enforceable unless,” HB 2380 unintentionally might have thrown out these other reasons for finding that a forfeiture provision did not result in forfeiture. This flaw was discovered too late in the legislative process for an amendment to HB 2380, so the following was read into the Senate Journal when HB 2380 passed:

House Bill 2380 seeks to clear up the law on forfeiture clauses, which are frequently used provisions in wills and trusts. Legislation that passed in 2009 sought to clear up the inconsistent application of forfeiture clauses by recognizing that a forfeiture clause is invalid if the challenge to a will or trust is brought in good faith and with probable cause. However, questions remain in which party has this burden of proof. House Bill 2380

continues to recognize the good faith and just cause exceptions to the enforcement of forfeiture clauses but clarifies that the burden of proof is on the party seeking to avoid enforcement of the forfeiture clause. ***House Bill 2380 is not intended to and does not repeal Texas law, recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform his duties, to seek redress against a fiduciary for breaches of his duties, or to seek a judicial construction of a will or trust.***

Senate Journal, 83rd Legislature – Regular Session, 61st day (5/17/13), pp. 1962-1963 (emphasis added). With this legislative history, HB 2380 should be construed to have no effect on the other bases for finding that an *in terrorem* provision does not result in forfeiture.

Changes Affecting Ad Litem in Decedents' Estates and Guardianships

Various amendments clarify when an attorney ad litem or guardian ad litem may be appointed, whom the ad litem may represent and how the ad litem is compensated.

1. An attorney ad litem ***in a decedent's estate case*** now may be appointed to represent the interest of "any person," including a person with a disability under state or federal law, a nonresident, an unborn or unascertained person, an unknown heir, a missing heir, or an unknown or missing person for whom cash is deposited into the court's registry. The court is required to tax the ad litem's compensation as costs in the probate proceeding and order the compensation to be paid out of the estate or by any party at any time during the proceeding." If the ad litem is appointed for an unknown or missing person for whom cash is deposited in the court's registry, the court may order that the compensation be paid from the cash on deposit. Tex. Est. Code Sec. 53.104. Prior to this change, some courts had taken the position that the attorney ad litem could not be paid until the conclusion of the case, when the expenses could be taxed as costs. This change also clarifies that the estate or any party may be tagged with paying the ad litem's compensation, permitting the court to assess those costs disproportionately against a deleterious party.
2. In contrast, ***in a guardianship case***, the court is required to appoint an attorney ad litem to represent a proposed ward's interests in a proceeding for the appointment of a guardian, Tex. Est. Code Sec. 1054.001, while the court may appoint an attorney ad litem in any guardianship proceeding to represent the interests of an incapacitated person or another person who has a legal disability, a proposed ward, a nonresident, an unborn or unascertained person or an unknown or missing potential heir. Tex. Est. Code Sec. 1054.007(a). An attorney ad litem appointed under Section 1054.007 (the discretionary appointment section) is entitled to reasonable compensation for services provided in the amount set by the court, "to be taxed as costs in the proceeding." Section 1054.007(b). Tex. Est. Code Sec. 1155.054 and 1155.151 were amended to permit the court to order any party to pay the applicant's fees and the compensation of all court-appointed personnel (including ad litem) upon a finding that the party acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding. Section

1155.151(a) permits the court to set the cost of court-appointed personnel (including ad litem) in an amount the court considers equitable and just, to be paid from the guardianship estate or by the county if the estate is insufficient (unless the court makes the bad faith/without just cause finding and assesses costs against a party).

3. In *heirship proceedings*, the statute now clearly states that the court must appoint an attorney ad litem to represent the interests of heirs whose names or locations are unknown. Tex. Est. Code Sec. 202.009(a). The court is permitted but not required to expand the attorney ad litem's appointment to include representation of an incapacitated heir on a finding that the appointment is necessary to protect the interests of the heir. Sec. 202.009(b).

Miscellaneous Decedents' Estates Changes

1. *Proceedings to Probate Wills*. The application to probate a will no longer must list the residence address of the applicant. Rather, the state of residence and a physical address where service can be had must be stated. Tex. Est. Code Sec. 256.052(a). Only the name of the subscribing witness must be stated – the address no longer is required. Sec. 256.052(a). In 2011, Section 84 of the Probate Code was amended to make it easier to establish that a will executed in another jurisdiction is self-proved if it was eligible to be treated as a self-proved will under the law of the state of execution. In addition, the 2011 change created a safe harbor for self-proved wills meeting the Uniform Probate Code requirements. Tex. Prob. Code Sec. 84(a)(2). That portion of Section 84 was not expressly limited to wills executed outside Texas, making it possible to argue that a Texas-executed will could be made self-proved by complying with Section 84(a)(2) rather than the more orthodox Section 59. The successor to Section 84(a)(2) has been amended to make it clear that the UPC-based safe harbor only applies to wills executed outside Texas. Tex. Est. Code Sec. 256.152(c).
2. *Inventories and Affidavits in Lieu of Inventory*. In 2011, the Legislature began permitting independent executors of estates with no debts (other than secured debts, taxes and administrative expenses) to file an affidavit in lieu of an inventory. This removed a significant disadvantage of will-based plans, since public disclosure of assets is avoided. Some courts refused to allow affidavits if the will contained the language from Probate Code Section 145(a) enabling independent administration because that language referred to the "return of an inventory...." Section 309.056(b) has been amended to permit an affidavit in lieu of inventory if the other requirements are met notwithstanding a contrary provision in the will that does not specifically prohibit the filing of the affidavit. Subsection (d) was added to Section 309.056 to provide that the independent executor is not liable for choosing to file an inventory or an affidavit in lieu of inventory. Section 309.057 was added to permit the court to fine the personal representative up to \$1,000 for failing to file an inventory or affidavit in lieu of inventory after being cited to appear and failing to show good cause. Section 309.103 was amended to clarify that the court retains jurisdiction of a probate estate if an interested person who considered the affidavit in lieu

of inventory filed by an independent executor to be erroneous or unjust files a written complaint.

3. ***Homestead, Exempt Property and Family Allowance.*** An amendment to Section 102.004 of the Estates Code clarifies that the homestead of a decedent is not liable for the payment of the estate's debts (other than mortgage debt or taxes due on the homestead) if the decedent was survived by a spouse or a minor child. Previously there was confusion about whether an unmarried adult child entitled the estate to homestead exemption or if the spouse or minor child had to be occupying the homestead in order for the exemption to arise. Now it is clear that an unmarried adult child does not trigger homestead exemption and that the exemption is not dependent upon the occupancy of the surviving spouse or minor child. The allowance in lieu of a homestead was raised from \$15,000 to \$45,000 and the allowance in lieu of other exempt property was increased from \$5,000 to \$30,000. Tex. Est. Code Sec. 353.053. In 2011, the family allowance was extended to the decedent's adult incapacitated child. This session the Legislature clarified that the family allowance for an adult incapacitated child is not made if, at the time of the decedent's death, the decedent was not supporting the adult incapacitated child. Tex. Est. Code Sec. 353.101(d)(3).
4. ***Heirship Proceedings.*** An heirship proceeding may be brought at any time after the decedent's death. There is no four-year limitations period as in the case of probating a will. Tex. Est. Code Sec. 202.0025. Among other possible applicants, any creditor may bring an heirship proceeding, not just a secured creditor. Tex. Est. Code Sec. 202.004. An attorney ad litem representing the interests of heirs whose names or locations are unknown is required (see the discussion of ad litem above). The applicant for an heirship is required to file an affidavit of service of citation before the court may act on the application. Tex. Est. Code Sec. 202.057. Testimony in an heirship proceeding must be taken in open court or by deposition, and the court may require it to be reduced to writing. Tex. Est. Code Sec. 202.151.
5. ***Section 294(d) Notices (now Section 308.054 Notices).*** The deadline for responding to a permissive notice to an unsecured creditor has changed from "within four months" to "before the 121st day." Tex. Est. Code Sec. 308.054(b). This is a big deal because the form of the notice must contain the 121st day language in order to be effective.
6. ***Accounting and Distribution by Independent Executor.*** There was some question under prior law if Section 149B(b) required the court to order property incapable of division to be sold or if the court could order distribution of the property in undivided interests. The successor to Section 149B (Estates Code Section 405.001(b)) was amended to make it clear that the court may choose to order the sale of property incapable of division or to order it distributed in undivided interests.
7. ***Disclaimers by Child Support Obligors.*** A disclaimer now must state that the disclaimant is not a child support obligor, or if he or she is a child support obligor, that he

or she owes no child support arrearages. Tex. Est. Code Sec. 122.107. If the disclaimant owes child support arrearages, the disclaimer is not effective to avoid that obligation.

8. ***Public Probate Administrators.*** With a county commissioners' court approval (and, therefore, with county funding), a statutory probate judge may appoint a "public probate administrator" who has various rights, duties and standing. Chapter 455 of the Estates Code.

Miscellaneous Guardianship Changes

1. ***Information Letters.*** There was much hubbub in this session about guardianship proceedings resulting from information letters presented to the court by family members or third parties under prior Probate Code Section 683A. After the dust settled, the successor to that section (Estates Code Section 1102.003) was amended to require information letters submitted by family members of the proposed ward to be sworn to before a notary public or include a written declaration under penalty of perjury that the information is true to the best of the person's knowledge. This requirement does not apply to non-family members.
2. ***Management Trusts for Disabled Persons.*** Guardianship management trusts (formerly known as 867 trusts) were overhauled to make it easier for a person suffering a physical disability only to apply for and benefit from a trust. Persons suffering a physical disability only may benefit from a management trust in order to qualify for government benefits. Since they do not lack mental capacity, they do not need the protections built into the management trust statutes. Therefore, while ad litem are permitted (and may be necessary for some government benefits programs, since the applicant for benefits may not be able to apply for creation of his or her own management trust), they are not required. Tex. Est. Code Sec. 1301.054 (c-1). Also, corporate trustees are not required for management trusts for persons suffering a physical disability only (Section 1301.057(b)), a bond is not required, trustee compensation need not be approved by the court (Section 1301.101(a-1)), and accountings need not be filed with the court (Section 1301.154(d)).
3. ***Changes in Orders Appointing Guardians.*** If a guardian of the person is given the right to have physical possession of the ward and to establish the ward's legal domicile, the order appointing the guardian must contain a conspicuous statement addressed to Texas peace officers stating that the officer may use reasonable efforts to enforce the right of the guardian of the person to have physical possession of the ward or to establish the ward's legal domicile. Tex. Est. Code Sec. 1101.151(c) and 1101.152(c).

Miscellaneous Trust Law Changes

1. ***Creditor Protection for Trusts Appointed Back to Settlor.*** Trust Code Section 112.035 was amended to grant spendthrift trust protection in cases where a beneficiary uses a power of appointment to appoint property in trust for the settlor. In those cases, the trust

assets enjoy spendthrift protection from the original settlor's creditors. Section 112.035(d)(2), (g) and (H).

2. ***Corporate Trustees May Purchase Insurance from Affiliates.*** Trust Code Section 113.053(f) was amended to permit a corporate trustee to purchase insurance from an affiliate so long as the insurance product and premium are the same or similar to a product or premium offered by nonaffiliates. The corporate trustee taking this action is expressly subject to fiduciary duties.