

# **2017 Texas Legislative Update**

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“Fixing Broken Trusts (Including 2017 Statutory Changes,” State Bar of Texas Advanced Estate Planning and Probate Course (2017), updated on [texasprobate.com](http://texasprobate.com).

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

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

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

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

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

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

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

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

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

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

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

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

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# 2017 Texas Legislative Update<sup>1</sup>

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## 1. Introduction

The 2017 Texas Legislature made significant changes to durable powers of attorney for property and medical powers of attorney, including changes to the statutory forms. It also added a provision permitting trust reformations, loosened the trust decanting rules, and enacted a uniform act regarding fiduciary access to digital assets. It requires the inclusion of three digits of the applicant's and decedent's social security numbers and driver's license numbers on probate applications. And, of course, it made the usual myriad changes to the Estates Code, the Trust Code and related statutes that we have come to expect.

This update does not attempt to address every change made in 2017. William D. Pargaman's comprehensive update – "Make Probate Great Again" – does that, and it can be accessed at <http://www.snpalaw.com/resources/2017LegislativeUpdate>. Estate planning and probate practitioners owe Bill, Craig Hopper and the Real Estate, Probate and Trust Law Section of the State Bar of Texas ("REPTL") a debt of gratitude for their work.

This update explores in more detail those changes which the author believes are the most significant.

Most of these changes became effective September 1, 2017, although the changes to the medical power of attorney form become effective January 1, 2018.

## 2. Big changes for durable powers of attorney

The Legislature made the most significant changes to the statutes governing durable powers of attorney since 1993.<sup>2</sup> While the most visible changes are to the statutory durable power of attorney form, the really important changes do not show up on the form itself.



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For several sessions REPTL has encouraged the legislature to make significant changes to the statutes governing durable powers of attorney for property. Finally, in 2017, HB 1974 passed, making important changes that are effective September 1, 2017. Many of these changes are derived from the Uniform Power of Attorney Act. Now Texas's power of attorney statutes are much more comprehensive. Practitioners should review Estates Code Chapters 751, 752 and 753 in detail because this update does not describe all of the changes.

Here are key changes:

## 2.1. **Mandatory acceptance of powers of attorney (Sections 751.201 — 751.213)**

### 2.1.1. **Mandatory acceptance**

Even though 30 other states had statutes requiring third parties to accept powers of attorney, interest groups in Texas such as bankers and title companies opposed efforts to enact mandatory acceptance. Due to REPTL's perseverance, Estates Code Section 751.201 now provides that, *unless one or more grounds for refusal exist*, a person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney shall either:

- A. Accept the power of attorney; or
- B. Before accepting the power of attorney, (1) request an agent's certificate or opinion of counsel within 10 business days, or (2) request an English translation within 5 business days.

If the third party asks for an agent's certificate, it must accept the power of attorney within 7 business days of receiving the certificate, *unless one or more grounds for refusal exist*. The third party does not have to accept the power of attorney if the agent does not provide the required certificate.

An agent's certification form is provided in Section 751.203, but use of the form is not mandatory, so long as the requirements of that section are met. It is hard to think of a case where the agent would *not* use the statutory certification form. Word and pdf versions of the statutory certification form may be found on [texasprobate.com](http://texasprobate.com).

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<sup>2</sup> The Durable Power of Attorney Act was enacted in 1993, establishing the statutory form, permitting springing powers, eliminating the requirement of two witnesses, and eliminating the requirement of filing the power of attorney in the real property records. Other changes which old-timers will remember are: (1) requiring cross-outs of specific powers on the statutory form rather than initials (1997); (2) imposing statutory duties to inform and account to the principal (2001); (3) requiring initials by specific powers on the statutory form rather than cross-outs (2013); and (4) adding the "Important Information for Agent" disclosure to the statutory form (2013).

Section 751.209 provides that a person who accepts a power of attorney in good faith without actual knowledge of a problem is entitled to rely on the power of attorney.

#### 2.1.2. **Grounds for refusing acceptance**

REPTL compromised with other interest groups in order to get mandatory acceptance, and most of the compromises are found in Section 751.206. This section states 11 (11!) grounds for refusing acceptance of a power of attorney:

A. The person would not otherwise be required to engage in a transaction with the principal under the same circumstances, including a circumstance in which the agent seeks to establish a commercial relationship when the principal is not already a customer and acquiring a product or service that the person does not offer.

This lets title companies off the hook in most, if not all, cases since a title company may always refuse the principal's business and therefore would not otherwise be required to engage in a transaction with the principal. It also is available to hospitals, nursing homes and home health care services if the principal is not already a customer. It does not let banks off the hook if the principal already has an account at the bank, but it may allow banks to refuse to open new accounts.

B. The person cannot engage in the transaction because it would be illegal or inconsistent with a request from law enforcement or a policy adopted by the person in good faith to comply with law.

C. The person would not engage in a similar transaction with the agent because of a suspicious activity report filed by the person under federal law, because the person believes in good faith that the principal or agent has a prior criminal history involving financial crimes, or because the person had a previous, unsatisfactory business relationship with the agent causing material loss, due to financial mismanagement or due to litigation.

D. The person has actual knowledge of the termination of the agent's authority before the exercise of authority under the power.

E. The agent refuses to comply with a request for an agent's certification or legal opinion or the person requesting a certification or opinion letter in good faith is unable to determine the validity of the power of attorney or the agent's authority to act because the certification or opinion is defective.

F. Even without requesting a certification or opinion letter, the person believes in good faith that the power of attorney is invalid, the agent does not have authority to act, or performing the act would violate the terms of a business entity's governing documents or an agreement affecting the business entity.

G. The person brings an action or is aware of an action construing the power of attorney or reviewing the agent's conduct.

H. The person is aware of a judicial proceeding finding the power of attorney to be invalid or finding that the agent does not have the authority to act.

I. The person files or is aware that another has filed a report to a law enforcement agency, including a report to the Department of Family and Protective Services, stating a good faith belief of physical or financial abuse.

J. The person receives conflicting instructions from co-agents or agents acting under different powers of attorney.

K. The person is not required to accept the power of attorney under the law of the state which governs the power of attorney, or the act the agent is attempting to take is not permitted under the law of the state which governs the power of attorney.

### 2.1.3. Remedies for refusing to accept power of attorney

Section 751.212 permits the principal or agent to bring an action against the person who wrongfully refuses to accept a power of attorney. In that proceeding, the court may order the person to accept the power of attorney and award the plaintiff costs and reasonable and necessary attorney's fees. However, even after the proceeding has commenced, the person may provide a written statement of refusal of acceptance for a justifiable reason, in which case the court may not order the person to accept the power of attorney but still may award attorney's fees and costs to the plaintiff.

### 2.2. Changes to the statutory durable power of attorney form (Section 752.051)

The statutory durable power of attorney form changed. Those attorneys who wish to have their clients sign the statutory form need to update their forms for use beginning September 1, 2017. Changes include:

- Adding a warning that the power of attorney must be signed in a law office or title company if it is to be used for home equity loan transactions.
- Deleting "attorney in fact," so that now the agent is referred to simply as the agent.
- Adding the power to access digital assets.
- Permitting the principal to choose to permit or deny agent compensation.
- Permitting the appointment of co-agents and giving the principal the choice to permit co-agents to act independently or to require co-agents to act jointly.

Word and pdf versions of the new statutory durable power of attorney form may be found on [texasprobate.com](http://texasprobate.com). Use of the statutory form is not mandatory.

Although not a part of the statutory form, Section 752.052 includes suggested language to drop into the statutory form to authorize “hot” powers.

### 2.3. Duty to preserve estate plan (Section 751.122)

An agent has the duty to preserve to the extent possible the principal’s estate plan (to the extent the agent knows of the plan) if “preserving the plan is consistent with the principal’s best interest.” This section does not expressly say that this restriction is a default rule which the principal may override. However, since the power of attorney is part of a principal’s estate plan, if the power of attorney authorizes the agent to take actions which, in effect, change the estate plan, as a practical matter this may relieve the agent of the duty to preserve the plan.

### 2.4. Opt-in “hot” powers (Sections 751.031 and 752.052)

New Section 751.031 permits the principal to give the agent the so-called “hot” powers stated below. None of these hot powers appear on the basic statutory form (except for an opt-in provision permitting gifts not exceeding the annual gift tax inclusion), but Section 752.052 contains statutory provisions which may be added to the form to authorize these hot powers. This approach was used to make it less likely that non-attorneys will ask principals to grant hot powers.

The bare wording of the hot powers in Sections 751.031 and 752.052 would lead one to believe that these give the agent broad, sweeping authority. However, the effect of granting a hot power is limited by other provisions of the Estates Code. The two biggest limitations are (a) Section 751.122 (discussed above), which imposes the duty to preserve the principal’s estate plan and (b) Section 751.031(c), which provides that, even if a hot power is chosen, the agent’s authority to create a property interest in himself or herself is limited unless the durable power of attorney provides otherwise or unless the agent is an ancestor, spouse or descendant of the principal.

Here are the hot powers which the principal may choose:

- **The power to create, amend, revoke, or terminate an inter vivos trust.** The statute does not explain what this means, nor does it expressly place any limits on this power if it is chosen. Still, Section 751.122 imposes a duty to preserve the principal’s estate plan. If the principal chooses the hot power regarding trusts, may the agent create or amend a trust which fundamentally changes the principal’s estate plan? Probably not, unless that authority is granted elsewhere in the power of attorney. In most cases, therefore, the principal should not rely on the bare-bones statutory authority regarding trusts.
- **The power to make a gift.** If chosen, this hot power is subject to the limitations of Section 751.032 and any “special instructions” in the power of attorney. Section 751.032(c) provides that language in a durable power of attorney “granting general

authority to make a gift” authorizes the agent to make gifts limited to the annual federal gift tax exclusion. It also provides that the agent may make a gift only as the agent determines is consistent with the principal’s objectives if they are known to the agent, or, if not known, only as the agent determines is consistent with the principal’s best interest based on all relevant factors, including the duty to preserve the principal’s estate plan and the principal’s history of making gifts. The basic statutory form already gave the principal the option of authorizing gifts limited to the annual exclusion amount. What, then, does initialing this box add? Nothing, it appears, unless the power of attorney also includes special provisions granting broader gifting authority.

- **The power to create or change rights of survivorship.** The statute does not explain what this option means. It is subject to the duty to preserve the principal’s estate plan under Section 751.122 and is limited to the extent it may create a property interest in the agent under Section 751.031(c). This hot power apparently is limited to joint tenancies with rights of survivorship and community property with rights of survivorship, since creating or changing a pay-on-death account is covered under the hot power to create or change a beneficiary designation discussed below.
- **The power to create or change a beneficiary designation.** Section 751.033 states what powers are granted if this hot power is chosen by the principal. First, it is subject to the limitation in Section 751.031(c) described above regarding creating a property interest in the agent. Second, it specifically includes creating or changing a pay-on-death account or creating or changing a nontestamentary payment or transfer under Chapter 111 of the Estates Code. Third, if the principal gives the agent the general authority regarding insurance and annuity transactions and retirement plan transactions (typically by initialing the appropriate boxes or the “all of the above” box on the statutory form), the limitations on changing beneficiary designations stated in Sections 752.108(b) and 752.113(c) do not apply. Also, of course, the power is subject to the agent’s duty to preserve the principal’s estate plan.
- **The power to delegate authority under the power of attorney.** For the first time, the Texas power of attorney statute allows the principal to give the agent the power to delegate his or her authority under the power of attorney. The statute contains no explanation of or limitations on this power (other than the duty to preserve the principal’s estate plan and the limitation on creating property interests in the agent discussed above). This is not the same as the principal’s ability to give the agent the authority to designate successor agents under Section 751.023(b). This allows delegation of authority while the delegating agent continues to be the agent.

Should the principal add the statutory hot powers provisions to the statutory form and the initial the boxes to select them, or should the principal forego the hot powers provisions on the form and instead grant authority to the agent using the precise language the principal wants? Because of the limitations on the hot powers stated above, in most cases a principal wishing to grant these powers will opt for custom provisions. Including the initial-the-box provisions on the statutory

form may make it easier to use the power of attorney (since powers which closely follow the statutory form may be accepted by more third parties), but the principal then will need to include special provisions explaining the extent of the agent's authority with respect to each power selected.

#### **2.5. Defining when and how an agent accepts appointment (Section 751.022)**

Cases beginning with *Vogt v. Warnock*, 107 S.W.3d 778 (Tex App. – El Paso 2003), hold or imply that the mere existence of a power of attorney naming an agent imposes fiduciary duties on the named person even if he or she has not used the power of attorney or otherwise overtly accepted the appointment. Section 751.022 makes clear that a person accepts appointment as agent under the power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance of the appointment.

#### **2.6. Permitting the principal to name successor agents (Section 751.023)**

Under prior law, if the agent and successor agents named in the power of attorney died, resigned or otherwise failed to serve as agent, the power of attorney became ineffective, often resulting in a guardianship of the estate. Now, if the principal expressly grants this authority, the agent (or another person) may designate successor agents.

#### **2.7. Compensation and reimbursement of agents (Section 751.024)**

It was widely believed that an agent was entitled to reasonable compensation and reimbursement under the former law even if the power of attorney did not expressly so state, but now it is clear that the default rule is that an agent is entitled to reasonable compensation and reimbursement of reasonable expenses unless the power of attorney otherwise provides. The statutory form includes provisions allowing the principal to expressly authorize or deny compensation by initialing the appropriate provision. If the principal does not initial either choice, compensation is permitted.

#### **2.8. Standing to bring an action (Section 751.251)**

The new statute expressly authorizes the following persons to bring an action to construe a power of attorney, determine its validity or enforceability or to review an agent's conduct:

- The principal or the agent.
- A guardian, conservator or other fiduciary acting for the principal.
- A person named as a beneficiary to receive property, a benefit or a contractual right on the principal's death.
- A regulatory governmental agency.

- “A person who demonstrates to the court sufficient interest in the principal’s welfare or estate.”
- A third party asked to accept a power of attorney, but the relief is limited to construing the power of attorney or determining its validity or enforceability.

A principal can end any such proceeding by filing a motion to dismiss, unless the court finds that the principal lacks capacity.

## **2.9. Removal of agents (Sections 753.001-753.002)**

Chapter 753 establishes a procedure for judicial removal of an agent and judicial appointment of a successor agent. Notwithstanding the standing provisions in Section 751.251, the only persons who may bring an action to remove an agent are a named successor agent or a person interested in a guardianship proceeding (including an ad litem) if a guardianship proceeding has been commenced. An agent may be removed upon a finding that: he or she has breached his or her fiduciary duties to the principal; he or she has materially violated or attempted to violate the terms of the power of attorney; he or she is incapacitated or otherwise incapable of performing duties; or he or she has failed to make a required accounting.

## **2.10. Effect of guardianship on power of attorney (Sections 751.052 – 751.133)**

Under prior law, the court could appoint a temporary guardian and merely suspend the agent’s powers, but if the court appointed a permanent guardian, then the power of attorney was terminated. Now Sections 751.052 and 751.133 provide that the agent’s power and authority are suspended for the duration of the guardianship unless the court enters an order affirming the effectiveness of the power of attorney and confirms the validity of the appointment of the agent. This is consistent with imposing the least restrictive alternative in guardianships since in appropriate cases financial decisions may continue to be made by the agent.

## **2.11. New power of attorney does not revoke old (Section 751.135)**

Section 751.135 clarifies that the default rule is that a new power of attorney does not revoke a prior power of attorney. The subsequent power of attorney must contain an express provision revoking prior powers of attorney if that is desired.

## **2.12. Adding and clarifying specific authority (Sections 752.102 – 752.1145)**

The statutory durable power of attorney form permits the principal to include certain powers by initialing them on the form. In most cases, the principal initials the “all of the above” option. If a power is chosen by initialing its description on the form, then Sections 752.102 – 752.1145 provide detailed statements of the powers that are incorporated into that power of attorney. Under prior law, this incorporation by reference applied only to powers of attorney on the statutory form. New Section 751.034 permits the principal to incorporate the detailed statements

of specific powers in *any* power of attorney by using the descriptive term, not just on the statutory form.

HB 1974 tweaks many of these statements of specific authority. For example, additional specific powers regarding mineral transactions are added to Section 752.102, so those powers are now incorporated if the principal initials “real property transactions” (or “all of the above”) on the form. Other additions include the power to mortgage and encumber property (Section 752.102 — real property transactions), the power to deal with the post office (Section 752.111 — personal and family maintenance) and the power to handle digital asset transactions (new Section 752.1145).

### **3. New medical power of attorney form – and it’s mandatory**

HB 995 changed the medical power of attorney form to incorporate the required disclosure statement into the form itself. Health and Safety Code Section 166.164. This will eliminate the need to have a client (1) sign the disclosure statement to acknowledge that he or she received it prior to signing the medical power of attorney and then (2) sign the medical power of attorney itself. Now only one signature will be required. This also will prevent the need to keep track of both the disclosure statement and the medical power of attorney.

The statutory medical power of attorney form remains mandatory. REPTL tried for an amendment which would permit alternative medical power of attorney forms. This would be especially helpful for do-it-yourselfers who may start with a different form. Unfortunately, members of the medical community resisted this change, preferring instead to deal only with the familiar form.

Since use of the form is mandatory, the new form **must** be used beginning **January 1, 2018**. Yes, this means that the statutory durable power of attorney form changes on September 1, 2017, while the medical power of attorney form changes four months later. Word and pdf versions of the new medical power of attorney form may be found on [texasprobate.com](http://texasprobate.com).

HB 995 also amended Health and Safety Code Section 166.155 to provide that termination of marriage revokes the ex-spouse’s authority to act as agent under a medical power of attorney but does not revoke the medical power of attorney itself. This means that the medical power of attorney still exists for the alternate agent to use.

### **4. Social security and driver’s license numbers on applications**

Since 2007, Section 30.014 of the Civil Practice and Remedies Code has required each party to include the last three numbers of the party’s social security number and the last three numbers of the party’s driver’s license number on the party’s initial pleading in a civil action filed in a district court, county court or statutory county court. Pleadings in statutory probate courts are not subject to this rule. So, since 2007, a probate application in a court other than a statutory probate court had to include fragments of the applicant’s social security number and driver’s license number, but a probate application filed in a statutory probate court did not.

Now HB 1814 amends Estates Code Sections 256.052(a), 257.051(a) and 301.052 to require applications to probate a will and applications for letters of administration to include the last three digits of the applicant’s social security number and driver’s license number *and, if known, the last three digits of the decedent’s social security number and driver’s license number*. The changes made by HB 1814 apply in all courts, including statutory probate courts.

HB 1814 leaves different rules about requiring fragments of social security numbers and driver’s license numbers in various Estates Code applications. Here are the applications which require, and don’t require, adding the digits:

Application	Are Applicant’s and Decedent’s SSN and DL Digits Required?	Estates Code Section
Application for Probate of Will (with Administration)	Yes	256.052(a)
Application for Probate of Will as Muniment of Title	Yes	257.051(a)
Application for Letters of Administration	Yes	301.052
Application for Proceeding to Declare Heirship	No*	202.005
Small Estate Affidavit	No*	205.002
Application for Appointment of Guardian	No*	1101.001
Application for Temporary Guardianship	No*	1251.003

\* Not required by the Estates Code, but CPRC §30.014 requires digits of the applicant’s (*but not the decedent’s*) social security number and driver’s license number in courts which are not statutory probate courts.

What is the consequence of excluding the digits of the social security number and driver’s license number?

- Under CPRC §30.014(b), the court may, on its own motion or on the motion of a party, order that the pleading be amended to include the digits. This continues to apply to an applicant’s digits (but not a decedent’s digits) in courts other than statutory probate courts.
- Estates Code Sections 256.052(b) and 257.051(b) remain unchanged. These subsections provide that, if an applicant does not state or aver any required matter, the application must state the reasons the matter is not stated. HB 1814 adds subsection (b) to Section 301.052, which states that, if the applicant does not include the required numbers on the application for letters of administration, the application must state the reason the numbers are not stated.

Perhaps the applicant in applications which are subject to the new Estates Code requirement may state that the reason the digits are not included is to prevent identity theft. This should comply with the Estates Code pleading requirement since the application would state the reasons the information is not included. Then the court may require, or not require, the application to be amended to include the information. This is consistent with the consequence of leaving out the

digits under CPRC §30.014(b) – the court may order the pleading to be amended to include the information if the court desires. In fairly short order attorneys will learn which courts will order the digits to be included and which ones will not.

The changes made by HB 1814, which were not proposed or supported by REPTL, apply to applications filed on or after September 1, 2017.

## **5. Trust and will reformation**

SB 617 made key changes to Trust Code Section 112.054 and related statutes regarding modification, reformation or termination of trusts.

### **5.1. Trust reformations are permitted**

When the 2005 changes were made to Section 112.054, Uniform Trust Code Section 415 – “Reformation to Correct Mistakes” – was not picked up. REPTL’s rationale in 2005 was that Texas’s common law regarding reformation of trusts was adequate.

In 2015, Section 255.451 was added to the Estates Code to permit modifications and reformations of wills. Among other grounds, Section 255.451 permits modification or reformation of a will “to correct a scrivener’s error in the terms of the will, even if unambiguous, to conform to the testator’s intent,” so long as the scrivener’s error is established by clear and convincing evidence. REPTL had intended to make a similar change to Trust Code Section 112.054 in 2015, but its Trust Code bill did not pass. The enactment of SB 617 in 2017 makes that change to the Trust Code.

SB 617 adds new Subsection (b-1) to Trust Code Section 112.054, which permits a court to order that the terms of a trust be reformed if:

(1) reformation of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration;

(2) reformation is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or

(3) reformation is necessary to correct a scrivener's error in the governing document, even if unambiguous, to conform the terms to the settlor's intent.

Subsection (e) requires reformation due to scrivener’s error to be established by clear and convincing evidence.

Subsection (f) was added to make clear that Subsection (b-1) is not intended to state the exclusive basis for reformation of trusts, so the bases for reformation of trust in equity or common law are not affected by Section 112.054.

A related change was made to Trust Code Section 111.0035(b)(5)(A) to provide that the terms of a trust may not limit the power of a court to modify, *reform*, or terminate a trust or take other actions under Section 112.054.

## **5.2. Administrative, nondispositive provisions**

Section 112.054(b-1)(1) permits reformation of “administrative, nondispositive” provisions upon a showing that the change is “necessary or appropriate to prevent waste or avoid impairment of the trust’s administration.” Note that this finding is not based on the apparent or supposed intention of the settlor. Rather, it focuses on the efficient administration of the trust regardless of the intent of the settlor.

What is an administrative, nondispositive provision? The author believes this includes most investment restrictions (for example, “don’t sell Blackacre,” “invest only in New York Stock Exchange stocks,” etc.), choice of law provisions and provisions affecting administration and management powers. With respect to provisions requiring the retention of specific assets, one might argue that the provision is “dispositive” and, therefore, not subject to change under Section 112.054(a)(3), if the purpose of the restriction was to assure that the specific asset passed to the remainder beneficiaries. However, in most cases, this is a convenient way for a trustee to seek to free itself of restrictions which make it difficult or impossible to comply with the new prudent investor standard.

Other administrative, nondispositive provisions are the manner of selecting new trustees, the required qualifications of trustees (for example, eliminating the requirement of a corporate trustee) and the governing law of the trust.

## **5.3. Necessary to achieve tax objectives or to qualify distributee for governmental benefits**

Section 112.054(b-1)(2) permits reformation of provisions if necessary or appropriate to achieve the settlor’s tax objectives or to qualify a distributee for governmental benefits in a way which is not contrary to the settlor’s intentions. SB 617 amended Section 112.054(a)(4) to permit modifications and other actions that are necessary or appropriate to qualify a distributee for governmental benefits, so long as the modification is not contrary to the settlor’s intention. Thus, a trust may be modified under Section 112.054(a)(4) or reformed under Section 112.054(b-1)(2) to qualify a distributee for government benefits.

## **5.4. Correct scrivener’s error**

Section 112.054(b-1)(3) permits reformation “if necessary to correct a scrivener’s error in the governing document, even if unambiguous, to conform the terms to the settlor’s intent.” Reformation on this basis is permitted only if supported by clear and convincing evidence of the settlor’s intent.

### **5.5. Reform testamentary trusts under the Estates Code or the Trust Code?**

Since Estates Code Section 255.451 permits reformation of wills and Trust Code Section 112.054(b-1) permits reformation of trusts, and since the bases for reformation are virtually identical, should the Estates Code section or the Trust Code section be used to modify a testamentary trust? The author believes that, in most cases, the Trust Code provision will be used. Here are two reasons:

A. Estates Code Section 255.451 provides that only the personal representative of the estate may bring a reformation action. Trust Code Section 112.054 permits a trustee or a beneficiary to bring the action. Because of fiduciary duties, usually the trustee will prefer for a beneficiary to ask for the reformation. The personal representative of the estate does not have that option.

B. HB 2271 added a provision requiring an action to modify or reform a will to be filed within four years of the admission of the will to probate. Estates Code Section 255.451(a-1). There is no such deadline for modifying or reforming a trust, even one created by will.

### **5.6. 2017 changes apply to new and existing trusts**

The changes made by SB 617 regarding reformation and modification are effective September 1, 2017, and apply to trusts existing on September 1, 2017, as well as to trusts created on or after September 1, 2017.

## **6. Decanting rules loosened**

In 2013, the legislature added Subchapter D to Chapter 112 of the Trust Code, entitled "Distribution of Trust Principal in Further Trust." These 17 sections brought decanting to Texas for trusts with no express decanting provision. Decanting permits the trustee of a trust to transfer ("decant") the property from that trust to another trust under certain circumstances. While this is not a modification of the transferring trust, as a practical matter the terms of the transferring trust are modified since the receiving trust's instrument will thereafter govern the trust.

The Texas statute contains many limitations on the power to decant. Like most of the Trust Code, the decanting statutes establish default rules. A settlor may include specific decanting provisions in the trust instrument which control over the statutory provisions.

Under the Texas statutes as they existed prior to September 1, 2017, it was virtually impossible to use decanting to change dispositive provisions of a trust unless the trust was a "full discretion" trust. A "full discretion" trust was one in which the power to distribute principal was not "limited or modified by the terms of the trust in any way, including by restrictions that limit distributions to purposes such as the best interests, welfare, or happiness of the beneficiaries." Trust Code Section 112.071(5). This meant that virtually all trusts were "limited discretion" trusts under the old law.

SB 617 changed the definitions of “full discretion” and “limited discretion” trusts. “Limited discretion” trusts now are trusts whose distributions are (a) based on a mandatory nondiscretionary standard or (b) limited by an ascertainable standard, including the health, education, maintenance or support (“HEMS”) of the beneficiary. Trust Code Section 112.071(6). All other trusts are “full discretion” trusts. Trust Code Section 112.071(5). Thus, while HEMS trusts and mandatory distribution trusts are stuck with the very limited decanting rules which, as a practical matter, allow changes only to administrative, nondispositive provisions, all other trusts are not. The liberal rules that apply to full discretion trusts permit, for example, the division of a “pot” trust with three beneficiaries into three separate trusts with one beneficiary each. Trust Code Section 112.072.

SB 617 also makes it easier to use the Texas decanting statutes. Prior to 2017, a trustee could not decant if doing so would “materially impair the rights of any beneficiary of the trust,” whether or not the trust was a full discretion or limited discretion trust. Trust Code Section 112.085. SB 617 deletes that restriction.

SB 617 became effective September 1, 2017, and applies to trusts existing on or created after that date.

## **7. Planning opportunities for digital assets**

HB 1193 adds the Texas Revised Uniform Fiduciary Access to Digital Assets Act (TRUFADAA) as Chapter 2001 of the Estates Code.

More and more information is maintained electronically. For example, the typical 30-year-old may have a Twitter account, a Facebook account, an Instagram account, electronic access to financial institution accounts, and electronic access to utilities and services accounts. The providers of these services have terms of services which the user agrees to as a condition of using the service. What happens to this digital information when the person dies or becomes incapacitated? TRUFADAA addresses this issue.

The original Uniform Fiduciary Access to Digital Asset Act gave precedence to provisions in wills, trusts and powers of attorney that authorized the fiduciary to access this information. That act was dead on arrival. It was opposed by the big internet service providers, who preferred to have access rights governed by their terms of service.

The revised act was a compromise acceptable to the service providers. New Estates Code Section 2001.051 states the basic scheme:

- If the service provides the user with an online tool to direct the service to disclose or not disclose some or all of the user’s digital assets, and the user uses that tool to give directions regarding disclosure, the online tool overrides contrary directions in a will, trust or power of attorney.

- If the user has not used an online tool to give direction, or if the service does not provide an online tool, then the user may allow or prohibit disclosure to a fiduciary in a will, trust or power of attorney.
- Directions given using the online tool or in a will, trust or power of attorney override contrary provisions in the services terms-of-service agreement.

If one assumes that a client who has not used an online tool to express his or her wishes regarding access to digital assets would rather give his or her fiduciary access to digital assets than to have the terms of service decide the issue, then wills, trusts and powers of attorney should include express provisions authorizing access.

It is easy to incorporate digital asset planning in a power of attorney. The new statutory durable power of attorney form includes a specific power for digital assets which may be selected individually or will be accepted if the “all of the above” option is selected. Estates Code Section 752.051.

TRUFADAA became effective September 1, 2017, and applies to new and existing wills, trusts and powers of attorney.

## **8. Non-pro-rata distributions permitted in independent administrations**

While virtually every well-drafted will includes a provision permitting the independent executor to make non-pro-rata distributions of estate assets, the default rule has been that non-pro-rata distributions were not permitted unless the will expressly permitted them. The default rule in the Trust Code (Section 113.027) was opposite – non-pro-rata distributions are permitted by default.

HB 2271 added Section 405.0015 to the Estates Code, which permits non-pro-rata distributions of estate property unless the will, if any, or court order provides otherwise. This will make it easier to administer estates with poorly drafted wills. If a testator really, really wants a particular asset to be distributed pro-rata, he or she may say so in the will, thus overriding the default rule.

This change is effective September 1, 2017, and applies to administrations pending or commenced on or after that date.

## **9. Other changes affecting decedents’ estates**

Throughout the Estates Code, references to “will and testament” were changed to “will.”

Estates Code Chapter 252, addressing delivery of a will to the clerk during the lifetime of the testator, was tweaked to permit an attorney or another person in possession of a will to deposit it with the clerk if the attorney or other person is unable to maintain custody and, after a diligent search, the testator cannot be found. Delivery is to the clerk of the county of the testator’s last known address. The changes also address who is notified when a will is deposited. These

changes provide a way out for attorneys who have been holding wills for former clients and now cannot locate those former clients.

HB 1877 added Estates Code Section 309.0575, permitting the court to fine an independent executor up to \$1,000 for misrepresenting in an affidavit in lieu of inventory that all beneficiaries (other than those who are not required to receive a copy) received a copy of the inventory. The new section also provides that the independent executor and his or her sureties, if any, are liable for the fine “and for all damages and costs sustained by the executor’s misrepresentation.” Note that the only misrepresentation that is subject to this section is that all beneficiaries received a copy of the inventory. It does not impose a fine if the independent executor misrepresents that there are no unpaid debts of the decedent. This provision applies to estates of decedents dying on or after September 1, 2017.

HB 2271 amends Estates Code Sections 359.001 and 359.002 to set the deadline for filing an annual account in a dependent administration at 60 days after the anniversary of the personal representative’s appointment, instead of setting the deadline on the anniversary itself – a deadline which was impossible to meet.

Section 256.003 used to provide that letters testamentary could not be issued if a will is admitted to probate after the fourth anniversary of the decedent’s death. Now it permits the court to grant letters testamentary if the will was filed for probate prior to the fourth anniversary but the will is not probated until after the fourth anniversary.

SB 499 added the Uniform Partition of Heirs’ Property Act as Chapter 23A of the Property Code. This act makes it easier for the owner of an undivided interest in real property to force the sale or partition of property or to obtain alternatives to partition.

Estates Code Section 33.001 was amended to define “next of kin” for venue purposes in decedents’ estates.

Estates Code Section 113.252 was amended to provide that a multiple party account is not effective against the estate tax liability attributed to that property. Also, it is no longer necessary for a surviving spouse, creditor or one acting for a minor child to require the personal representative to file a proceeding to impose liability on the assets in the multiple party account.

A number of changes were made to the statutes governing transfer on death deeds (Estates Code Sections 114.103 – 114.151) including changes to the optional statutory form of a transfer on death deed.

New Estates Code Chapter 155 addresses beneficiary designations and rights of survivorship for motor vehicle titles.

## **10. Other changes affecting trusts**

SB 617 amended Trust Code Section 113.018 to permit a trustee to grant an agent the authority to do many actions regarding real property in the trust, including but not limited to signing deeds and closing documents on behalf of the trustee. Prior to this change (which is effective September 1, 2017, and applies to existing and new trusts), title companies may have insisted that the trustee itself sign conveyance documents. This could be a problem if, for example, the trust held lots in a subdivision and frequent sales occurred. This provision expressly allows the trustee to delegate authority to an agent, which hopefully will make the title companies happy.

Estates Code Section 123.056 was added by HB 2271 to provided that, if two married individuals create a revocable trust and the marriage is terminated, the trustee is directed to divide the trust into two trusts on the death of one of the former spouses, each of which shall be composed of the property attributable to the contributions of one of the former spouses.

The provisions regarding forfeiture clauses in wills and trusts were amended in 2013 to place the burden of proof on the person seeking to avoid the application of the clause to prove that just cause existed for bringing the action and that the action was brought and maintained in good faith. (Estates Code Section 254.005 and Trust Code Section 112.038). The legislative history of the bill making the 2013 changes made clear that the section was not intended to repeal any law that forfeiture clauses generally will not be construed to prevent a beneficiary for seeking to compel a fiduciary to perform his or her duties, seeking redress for breach of fiduciary duties or seeking a judicial construction of a will or trust. In 2015, the Legislature added subsection (b) to Estates Code Section 254.005 codifying this concept, and it would have made the same change to the Trust Code, except that REPTL's Trust Code bill did not pass for unrelated reasons. Now SB 617 adds the language to Trust Code Section 112.038, effective September 1, 2017.

## **11. Changes affecting guardianships**

Estates Code Section 1023.003 was amended to permit a court to transfer a guardianship to another county on its own motion.

Estates Code Section 1055.003 was amended to permit any person entitled to receive notice of the guardianship proceeding under Section 1051.104 to intervene in a guardianship proceeding without court approval.

HB 1043 added Chapter 35 to the Family Code to permit certain persons to apply to the district court (not the probate court) for an order permitting the person to have temporary authorization to care for a child.

HB 3921 added Chapter 280 to the Finance Code to require employees of financial institution to report suspected financial exploitation of a vulnerable adult to the Department of Family and Protective Services.

## **12. Other changes affecting disability planning documents**

A declaration of guardian for oneself should the need later arises no longer has to have witnesses so long as (1) it is acknowledged before a notary and (2) it does not expressly disqualify any individual from serving as guardian. (Estates Code Sections 1104.203). The form of acknowledgement that may replace the self-proving affidavit may be found in Section 1104.204. Word and pdf versions of the declaration of guardian form with the acknowledgment replacing the witnesses may be found on [texasprobate.com](http://texasprobate.com).

HB 1787 changed the statutory form of declaration for mental health treatment to permit it to be notarized instead of requiring two witnesses. (Health and Safety Code Section 137.011) Word and pdf versions of revised form may be found on [texasprobate.com](http://texasprobate.com).

The Supported Decision-Making Agreement Act (Estates Code Chapter 1357) was enacted in 2015 to permit an adult with a disability to authorize a “supporter” to help. These agreements are effective only if the adult with a disability has capacity, and they do not authorize the “supporter” to bind the disabled adult as would be the case with a power of attorney, so they are of limited usefulness as a guardianship alternative. SB 39 amended Estates Code Section 1357.052 to provide that the supporter owes the disabled adult fiduciary duties regardless of whether or not the statutory form is used and to state that the relationship between the disabled adult and supporter is one of trust and confidence and does not undermine the decision-making authority of the disabled adult. The bill also made changes to the statutory form in Section 1357.056 and permits the appointment of an alternate supporter in case of conflict of interest (Section 1357.0525).