MAKE PROBATE GREAT AGAIN

The 2017 Texas Estate and Trust Legislative Update

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

Legislative Liaison and Principal Presenter:

CRAIG HOPPER
HOPPER MIKESKA, PLLC

(See Contact Info and Bio on Page i.)

Author and Alternate Presenter:

WILLIAM D. PARGAMAN
SAUNDERS, NORVAL, PARGAMAN & ATKINS, LLP

(See Contact Info and Bio on Page iii.)

This version was updated **May 30, 2017**. You can check for a more recent version at:

www.snpalaw.com/resources/2017LegislativeUpdate

Or go to the Resources page at snpalaw.com and scroll to "2017 Texas Estate and Trust Legislative Update."
(See the note on page 1 about hyperlinking to the online version of this paper.)

State Bar of Texas
41ST ANNUAL
ADVANCED ESTATE PLANNING & PROBATE COURSE
June 7-9, 2017
Houston

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Legislative Liaison and Principal Presenter:
Craig Hopper
Hopper Mikeska, pllc
Chair, REPTL Estate and Trust Legislative Affairs Committee
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CHAPTER 3

CRAIG HOPPER

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AUSTIN, TEXAS 78701
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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
Member, Austin Bar Association
Member, State Bar of Texas
Member, SBOT Real Estate, Probate and Trust Law (REPTL) Section Council Member 2010-2014; Chair of Estate and Trust Legislative Affairs Committee 2014-Present
Member, Estate Planning Council of Central Texas; Director 2008-2014; Chair 2012-2013
Member, Travis County Bar Association Probate and Estate Planning Section; Director, 1999- 2004; Chair, 2003

RECENT PRESENTATIONS/PAPERS
- 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, "Basic Guardianship," Docket Call in Probate Court, San Antonio, Texas 2014
- Speaker, "Ask the Experts" panel 15th Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2013
- Author/Speaker, "Creating a Travis County Guardianship," Austin Advisors Forum, Austin 2013
- Course Director, SBOT Advanced Guardianship and Elder Law Courses, Houston, 2013
- Speaker, "Alternatives to Guardianship" and "Ask the Experts" panel 14th Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2012
- 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, "The Role of the Guardian," 13th Annual University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2011
- Speaker, "Call in the Sheriff: Handling Overzealous Ad Litems and Other Outlaws," SBOT Advanced Guardianship Course 2010, Houston
- Author/Speaker, "Extraordinary Preparation for Mediation in Guardianship Disputes," SBOT Advanced Guardianship Course 2009, Houston
- Author/Speaker, "Extraordinary Remedies in Probate Proceedings," SBOT Advanced Estate Planning and Probate Course 2008, Dallas
- Panel Member, "Ask the Experts," and "Former Statutory Probate Court Staff Attorneys Panel" 9th Annual Intermediate Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 2007
- Speaker, "Attorney Ad Litem Duties" and Panel Member, "Ask the Experts," 8th Annual Intermediate Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 2006

CRAIG HOPPER (cont.)

- Speaker/Panel Member, SBOT Building Blocks of Probate and Estate Planning: Probate Administration, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013
- Author/Speaker, "Using Independent Facilitators to Resolve Probate Disputes," Guardianship and Elder Law Conference, Galveston, Texas, August 2004

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Legal Experience

Bill Pargaman has been a partner in the Austin law firm of Saunders, Norval, Pargaman & Atkins since July of 2012. 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

- 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

- 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
- 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, Lubbock, San Antonio, and Tyler
- Austin Association of Life Underwriters

Professional Memberships and Activities

- American College of Trust and Estate Counsel, Fellow
- 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
  - Texas Board of Legal Specialization (Estate Planning and Probate Law), Examiner, 1995-1997
- Estate Planning Council of Central Texas, Member (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®
- Listed in *Texas Super Lawyers* (Texas Monthly)
- Listed in The Best Lawyers in Austin (Austin Monthly)

Community Involvement

- St. Stephen's Episcopal School Professional Advisory Council, Past Member
- City of Austin, XERISCAPE Advisory Board, Past Member
- Volunteer Guardianship Program of Family Eldercare, Inc. of Austin, Past Member, Advisory Board

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1. The Preliminaries.

1.1 **Introduction and Scope.** The 85th Regular Session of the Texas Legislature spans the 140 days beginning January 10, 2017, and ending May 29, 2017. 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 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:

- I'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.
- In addition, some of the descriptions in this paper admittedly border on editorial opinion, in which case the opinion is my own, and not necessarily that of REPTL, Craig Hopper, 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![1]).
- As companion bills make their way through the legislative process, I usually base descriptions on the most recently approved version in either chamber. In the case of REPTL bills, I 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 1.6 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 6 on page 6**.

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/2017LegislativeUpdate

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.

And note that you can bring up my previous legislative updates going back to 2009 by substituting the appropriate odd-numbered year for "2017" in the URL.

1.5 **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 approximately 9,000 members, has been active in proposing legislation in this area for more than three decades. During the year

[1] I checked with Craig Hopper, and he says Scotch donations are okay with him, too.

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**,** Chair, Estate and Trust Legislative Affairs Committee; and principal presenter of this paper
- Tina Green of Texarkana**,** Chair-Elect/Secretary of REPTL (and Chair beginning in July of 2017)
- Melissa Willms of Houston, Chair, Decedents' Estates Committee
- Catherine Goodman of Fort Worth, Chair, Guardianship Committee
- Laura Upchurch of Brenham, Chair, Immediate Past Chair, Guardianship Committee
- Jeffrey Myers of Fort Worth, Chair, Trusts Committee
- Lora Davis of Dallas, Chair, Powers of Attorney and Advance Directives (PAADs) Committee
- Gerry Beyer of Lubbock, Chair, Digital Assets 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. In the 2017 session, sponsors of REPTL legislation include Rep. Jessica Farrar (D- Houston), Rep. Tan Parker (R-Flower Mound), Rep. John Wray (R-Waxahachie), Sen. José Rodríguez (D-El Paso), Sen. Van Taylor (R-Plano), and Sen. Judith Zaffirini (D-Laredo).

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.

1.6**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 2017 regular legislative session that spans from January through May is "85(R) - 2017). Select the Bill Number button, and then type your bill number in the box below. So, for example, if you wanted to find the Decedents' Estates bill prepared by the Real Estate, Probate, and Trust Law Section of the State Bar of Texas ("REPTL"), you'd type "HB_____" 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:

2.1**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, 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[2] 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, much of the legislative success of this session would not have been 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." The chair of Judiciary is Rep. John Smithee (R-Amarillo) and its vice chair is Rep. Jessica Farrar (D-Houston).

In the Senate, most bills in our go through the Senate Committee on State Affairs, or "State Affairs." The chair of State Affairs is Sen. Joan Huffman (R-Houston) and its vice chair is Sen. Bryan Hughes (R-Mineola).

3. The Process.

3.1**The Genesis of REPTL's Package.** REPTL[3] 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 (Decedents' Estates, Guardianship, Trust Code, and Powers of Attorney) 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.

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**Actual Language is Drafted by the Committees, With Council Input and Approval**. 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

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

[3] Note that the "RE" or real estate side of REPTL usually does not have a legislative package, but is very active in monitoring legislation filed in its areas of interest.

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.

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 2017 legislative package received approval from the full Board of Directors at its September, 2016, meeting.

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 the Academy 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.

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, you'll see that it came from "Acts 1955, 54th Leg., p. 88, ch. 55, eff. 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:

http://www.tlc.state.tx.us/pubslegref/gtli.pdf#page=7

3.12 **The Legislative Council Code Update Bill.** As statutes are moved around pursuant to the legislature's continuing statutory revision program, Legislative 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

After the 2015 legislative session, this author discovered numerous references to Probate Code provisions that still remained in other codes and forwarded those references to Leg. Council (they are too numerous to list in this paper). This year's Leg. Council code update bill **SB 1488** (West | Landgraf) updates most of those references. The code update bill is not limited to changes relating to the codification of the Probate Code, but those changes can be found in Art. 22 of the bill. The statutes amended due to the Probate Code codification can be found in the following codes: Business Organizations, Civil Practice and Remedies, Election, Family, Government, Health and Safety, Insurance, Local Government, Occupations, Penal, and Property, and Articles 6243h and 6243o, Vernon's Texas Civil Statutes.

SB 1488 was sent to the Governor on May 19th.

4. Key Dates.

Key dates for the enactment of bills in the 2017 legislative session include:

- **Monday, November 14, 2016** – Prefiling of legislation for the 85th Legislature begins.
- **Tuesday, January 10, 2017** (1st day) – 85th Legislature convenes at noon. *[Government Code, Sec. 301.001]*
- **Friday, March 10, 2017** (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 8, 2017** (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 11, 2017** (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 12, 2017** (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 20, 2017** (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 23, 2017** (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 24, 2017** (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 26, 2017** (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 28, 2017** (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 29, 2017** (140th day) – Last day of 85th 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 18, 2017** (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]*[4]
- **Monday, August 28, 2017** (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 1.4 on page 1. 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.** The original REPTL 2017 legislative package consisted of a number of bills covering four general areas: (i) decedents' estates; (ii) guardianships; (iii) trusts; and (iv) powers of attorney and advance directives. In addition, REPTL's legislative package includes a Texas version of the revised Uniform Fiduciary Access to Digital Assets Act. However, 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 the REPTL bills. 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.[5]

7.1 **The REPTL Decedents' Estates Bill.** The REPTL 2017 Decedents' Estates bill is **HB 2271** (Wray | Rodriguez). As usual, many of the changes fall into the "tinkering" category.[6]

(a) Proof of CP Survivorship Agreement (Sec. 112.103). This change conforms the provisions regarding proof of a community property survivorship agreement by deposition on written questions with the 2013 Estates Code changes regarding proof of wills.

(b) Allocation of Estate – NOT GST – Taxes (Sec. 124.001). This change clarifies that GST taxes are not covered by the allocation provisions of Ch. 124 applicable to estate taxes.

[4] 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 Legislative 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 2017 regular session must be sent to the Governor by May 17th in order to avoid the 20-day post adjournment deadline.

[5] Section references are to the Texas Estates Code unless otherwise noted.

[6] "Tinkering" is my personal term of art for primarily technical provisions.

Drafting Tip

Remember, you can allocate any transfer tax anyway you want if you're specific enough in your documents. See Sec. 124.005(b).

(c) Adoption by Estoppel (Secs. 22.004 & 201.054). This change clarifies children adopted equitably or by estoppel are consider adopted children.

Drafting Tip

Remember, you can define who is, and is not, considered a child or descendant in your documents.

(d) Minor's Waiver of Citation in Heirship (Sec. 202.057). This change clarifies that if someone is waiving service on behalf of a minor younger than 12, both the minor's name and the person waiving, and that person's relationship to the minor, should be included in the required affidavit or certificate of service on heirs.

(e) Increased Value for Small Estate Affidavits (Sec. 205.001). This change increases the availability of small estate affidavits to estates with nonexempt property (as of the date of the affidavit) not exceeding $75,000 (it's been $50,000 for almost 40 years).

(f) Determining Beneficiaries of Class Gifts (Sec. 255.401). This change clarifies that members of a class include persons born before, or in gestation at, the death of the person or persons who are the measuring lives for the class. (The 2015 change, designed to deal with who is considered to be "in gestation," mistakenly referred to persons born before, or in gestation at, the testator's death.) See Section 9.2(b) on page 14 for a similar Trust Code change.

(g) Time Limit to Modify or Reform Will (Sec. 255.451). This change limits the period during which a will may be modified or reformed (a remedy added in 2015) to four years following the admission of the will to probate.

Drafting Tip

The time limit for modifying or reforming a will does **not** limit the time for modifying or reforming a trust created in the will under the Trust Code. See Sec. 9.1(a) on page 13.

(h) Time Limit to Open Administration (Sec. 256.003). This change authorizes the opening of an estate administration more than four years after the decedent's death if the application was filed before the fourth anniversary.

(i) Availability of Muniment Proceeding (Secs. 257.051 & 257.054). Sec. 257.001 authorizes a muniment proceeding if there are no unpaid debts, other than those secured by real estate, or if the court "finds for another reason that there is no necessity for administration of the estate." However, the second basis for a muniment proceeding isn't listed in the required contents of the application or the required proof. This change fixes that.

(j) Citation on Application for Letters (Sec. 303.003). Probate Code Ch. V dealt with probate and the grant of administrations. It included former Secs. 72 through 129A. That last section provided that if an attempt to make service under Part 4 of the chapter (which deals solely with citations and notices) is unsuccessful, service may be made as provided by TRCP Rules 109 or 109A. When the Probate Code was codified, that section made its way into Ch. 303. This change repeals the section to make clear that the issuance and service of citation as provided in Sec. 303.001 ***cannot*** be unsuccessful. (Remember, when Leg. Council was drafting the Estates Code, it was not allowed to make **any** substantive changes, even to clarify a confusing provision.)

(k) County for Publishing Notice to Creditors (Sec. 308.051). Many of you have had to deal with the relatively recently-discovered problem of the standard notice to creditors being required to be published in a newspaper ***printed*** in the county in which the letters are issued. *Por ejemplo*, in Travis County, the Austin American-Statesman is printed in either Bexar or Harris Counties, and the Austin Business Journal is printed in Dallas County. That leaves us with the Austin Chronicle. Many smaller counties have **no** newspaper printed in the county. To remedy this unnecessary problem, the notice must now be published in a newspaper of ***general circulation*** in the county, regardless of where it's actually printed.

(l) *Distributees*, not *Beneficiaries*. Several amendments change the term *beneficiaries* to *distributees* of an estate:

(i) Frequency and Method of Distributions (Sec. 310.006). The executor has sole discretion to determine the frequency and method of distributions to the *distributees* of an estate, rather than the *beneficiaries*.

(ii) Consent to Power of Sale (Sec. 401.006). The *distributees* of an estate, rather than the *beneficiaries*, must consent to granting a power of sale in independent administrations.

(iii) Judicial Discharge of Independent Executor (Sec. 405.003). The *distributees* of an estate,

rather than the *beneficiaries*, must be personally served with an action for declaratory judgment seeking a judicial discharge.

(m) Deadline for Annual Accounts (Secs. 359.001 & 359.002). This change clarifies that annual accounts of executors and administrators are due 60 days after each anniversary of qualification, rather than on each anniversary (before there's any time to prepare them). This is similar to the deadline in guardianships.

(n) No Need to Pay Texas Inheritance Taxes (Sec. 362.010). Since we took our inheritance tax off the books in 2015 (even though we've effectively had no inheritance tax since 2005), we're repealing the requirement that a final account show, and that the court find, that all inheritance taxes have been paid.

(o) Non Pro Rata Distributions (Sec. 405.0015). This new section authorizes an independent executor with a power of sale to make non pro rata distributions of property unless the will or a court order prohibit them. This lessens potential adverse income tax consequences of non pro rata distributions.

(p) Lawyer Trust Accounts (Secs. 456.003 & 456.0045). This change requires eligible institutions holding a deceased lawyer's trust account to comply with appropriate instructions within 7 days (rather than a "reasonable time") and provides remedies if the institution fails to comply.

(q) ~~Last~~ Will ~~and Testament~~. Numerous references to "last will and testament" throughout the Estates Code are shortened to just "will," including references in the self-proving affidavit.

Drafting Tip

Why not change your will forms? I revised mine decades ago to just call them wills. First, you never know if it's really going to be someone's "last" will until after the person dies without executing another will. (Perhaps "Latest Will" would be acceptable.") Second, how many of you actually know the difference between a will and a testament?[7]

HB 2271 passed the Senate on May 19th without amendment, so it should've been sent to the Governor shortly afterwards. When it hadn't moved 9 days later, we checked. It was being held up to correct a technical error. Both chambers adopted HCR 158 on May 28th. That concurrent resolution directed the enrolling clerk to change "Subsection (4)" to "Subdivision (4)" in amended Est. Code Sec. 205.001(3).

I think we could've lived with "subdivision." The bill should now be sent to the Governor.

7.2 **The REPTL Guardianship Bill – Failure to File Affidavit or Certificate of Notice to Beneficiaries (Secs. 361.052 & 404.0035).** Currently, an executor or administrator may be removed for failing to file the affidavit or certificate that notice of the probate proceeding was provided to beneficiaries only after citation by personal service. **SB 38** (Zaffirini, *et al.* | Murr), a non-REPTL bill, would have moved this ground for removal to the portion of the removal statutes requiring only 30-days' notice by certified mail. **SB 39** (Zaffirini | Farrar), the REPTL Guardianship bill, was amended on the House floor to include the substance of **SB 38**.

SB 39 was sent to the Governor on May 28th.

7.3 **The REPTL Digital Assets Bill.** See Part 13 on page 23 for provisions applicable to executors and administrators.

7.4 **DLs and SSNs in Probate Applications (Secs. 256.052, 257.051, and 301.052). HB 1814** (Murr | Zaffirini) requires applications to probate wills or for letters of administration to include the last three digits of the applicants' driver's license and social security numbers, and the same information for the decedent, if known.

HB 1814 was sent to the Governor on May 27th.

Please don't blame REPTL for this – it wasn't our idea!

Drafting Tip

You'll need to revise your probate applications to include the required numbers, even in statutory probate courts.

7.5 **Penalty for Inaccurate Affidavit in Lieu (Sec. 309.0575). HB 1877** (Murr | Zaffirini) authorizes the court, on its own motion or on motion of an interested person, to fine an independent executor up to $1,000 if the executor misrepresents in an affidavit in lieu of inventory that all required beneficiaries have received a copy of the inventory. The executor is also liable for any damages caused by the misrepresentation.

HB 1877 passed the Senate on May 22nd and will be sent to the Governor.

[7] According to Black's Law Dictionary (10th Ed. 2009), citing an 1866 commentary on American law, a will is the disposition of real and personal property taking effect at a testator's death. The term *testament* may be used when the will operates on personal property and the term *devise* may be used when it operates on real property. So if you insist on using "testament," maybe you should call it the testator's "latest will, including a testament and devise."

7.6 **Uniform Partition of Heirs Property Act (Prop. Code Ch. 23A).** **SB 499** (West | Wray) adopts the Uniform Partition of Heirs Property Act, first promulgated in 2010 by the Uniform Law Commission. It was intended to address problems faced by many low to middle-income families who inherit property with relatives as tenants-in-common. The assumption is that many of these families lose their real property-related wealth as a result of court-ordered partition sales, while wealthier families are able to address the problems associated with TIC's through co-ownership agreements or placing the property in entities. Essentially, the act places limits on the ability of any tenant-in-common to seek a partition of family-owned real estate. "UPHPA provides a series of simple due process protections: notice, appraisal, right of first refusal, and if the other co-tenants choose not to exercise their right and a sale is required, a commercially reasonable sale supervised by the court to ensure all parties receive their fair share of the proceeds." More information on the uniform act can be found here:

http://www.uniformlaws.org/Act.aspx?title=Partition of Heirs Property Act

SB 499 was signed by the Governor on May 29th and will generally be effective September 1st.

7.7 **Adverse Possession by Co-Tenant Heirs (Civ. Prac. & Rem. Code[8] Sec. 16.0265).** We learn in law school that it is very difficult to adversely possess property against co-tenants, since all tenants have an equal right to possession of the property, and therefore, possession by any of them is not "adverse" to the others. In 2011, **SB 473** (West), in 2013, **SB 108** (West), and in 2015, **HB 2544** (Lozano), tried to change this rule for co-tenancies created by intestacies. None of these bills was enacted. This session, **SB 1249** (West | Schofield), which appears similar to the 2013 and 2015 bills, takes another crack at it.

(a) Required Conditions. New Civil Practice and Remedies Code Sec. 16.0265 provides that a cotenant heir may acquire the interests of other cotenant heirs who simultaneously acquired their interests by intestacy (or successors to those persons) if for an uninterrupted 10-year period:

- the possessing cotenant holds the property in peaceable and exclusive possession;
- that cotenant:
  - cultivates, uses, or enjoys the property; and
  - pays all property taxes within two years of their due date; and
- no other cotenant has:
  - contributed to the property's taxes or maintenance;
  - challenged the possessing cotenant's exclusive possession of the property;
  - asserted any other claim to the property;
  - acted to preserve the cotenant's interest by filing notice of the cotenant's claimed interest in the deed records; or
  - entered into a written agreement with the possessing cotenant regarding use of the property

(b) How to Claim. After the 10-year period, the possessing cotenant must:

- file an affidavit of heirship (in the form prescribed by Estates Code Sec. 203.002) **and** an affidavit of adverse possession that meets the requirements of the statute in the deed records (the two affidavits may be combined into a single affidavit) (see also Sec. 15.2 on page 62);
- publish notice of the claim in a county-wide newspaper (in the county where the property is located) for four consecutive weeks immediately following the filing of the affidavits; and
- provide written notice of the claim to the last known addresses of all other cotenant heirs by certified mail.

(c) How to Object. Other cotenants must file a controverting affidavit or bring suit to recover their interests within five years after the first affidavit of adverse possession is filed.

(d) When Title Vests. If no controverting affidavit is filed by that 5-year deadline (*i.e.*, at least 15 years after the uninterrupted use commenced), then title vests in the possessing cotenant.

(e) Lender Protection. Once that 5-year period has passed without the filing of a controverting affidavit, a "bona fide lender for value without notice" receiving a voluntary lien on the property to secure indebtedness of either the possessing cotenant or a bona fide purchaser for value without notice may conclusively rely on the possessing cotenant's affidavits.

(f) Acreage Limits. Without an instrument of title, peaceable and adverse possession under this section is limited to the greater of 160 acres or the number of acres actually enclosed. If the peaceable possession is held under a recorded deed or other memorandum of title that fixes the boundaries of the claim, those boundaries will control.

SB 1249 was sent to the Governor on May 28th.

[8] Future references are to the "CP&R Code."

8. Guardianships and Persons With Disabilities.[9]

8.1 **The REPTL Guardianship Bill. SB 39** (Zaffirini | Farrar) constitutes the REPTL Guardianship bill. The following description is based on the Senate version of bill as it emerged from the House.

(a) Intervention by Interested Person (Sec. 1055.003). Last session, **HB 4058** (Naishtat) added this provision requiring an interested person wishing to intervene in a guardianship proceeding to file a motion, serve parties, state grounds, etc. The court could grant or deny the motion. This year's REPTL Guardianship bill clarifies that the new requirements do not apply to any person entitled to notice of the filing of the guardianship application.

(b) Omission of Address (Sec. 1102.002). This section allows the address of a person named in the application for guardianship to be omitted if the application states that the person is protected by a protective order under the Family Code. This amendment extends the allowed omission if the person **was previously** protected by such an order.

(c) Notice of Transport of Ward to Inpatient Medical Facility (Sec. 1151.051). A non-REPTL amendment to the bill requires the guardian of the person of a ward who files an application for transport of a ward to an inpatient mental health facility for preliminary examination pursuant to an emergency detention to immediately provide written notice of the application to the court supervising the guardianship.

(d) Removal of Guardian (Sec. 1203.052). **SB 38** (Zaffirini, *et al.* | Murr), a non-REPTL bill, would have authorized notice to a guardian by certified mail instead of personal service if a court attempts to remove the guardian on its own motion. (Personal service is still required if removal is on the motion of anyone else.) **SB 39** (Zaffirini | Farrar), the REPTL Guardianship bill, was amended on the House floor to include the substance of **SB 38**.

(e) Fiduciary Duties of Supporter in SDMA (Secs. 1357.052 & 1357.056). This amendment adds a notice of the fiduciary duties the supporter owes to the principal and clarifies that the supporter owes those duties whether or not the statutory form is used.

(f) Designation of Alternate Supporter (Sec. 1357.0525). A non-REPTL amendment allows the principal may designate an alternate supporter to assist with determining the provisions of an SDMA that provides for compensation to the primary supporter.

(g) Termination of SDMA (Sec. 1357.053). Qualification of a guardian of the person or estate of the principal subject to an SDMA terminates the agreement.

SB 39 was sent to the Governor on May 28th.

8.2 **The REPTL Digital Assets Bill.** See Part 13 on page 23 for provisions applicable to guardians.

8.3 **Election to Receive Information About Ward (Sec. 1151.056).** Last session, **HB 2665** (Moody) added provisions providing access to the ward for certain relatives and requiring the guardian to provide notice of certain events (*e.g.*, death, admission to acute care facility for more than three days, change of residence). In considering a motion for notice, the court was to consider whether a protective order had been issued against the relative to protect the ward, or whether a court or state agency found that the relative had abused, neglected or exploited the ward. **SB 1709** (Zaffirini | Moody) limits a guardian's duty to inform relatives about health or residence changes to those relatives who have elected in writing to receive that notice about the ward (and who do not have a protective order issued against them to protect the ward and who have not been found guilty of abuse, neglect, or exploitation of the ward). The initial citation or notice to relatives upon filing a guardianship application must notify them of the requirement that they elect to receive notice of health or residence changes.

SB 1709 was sent to the Governor on May 24th.

Drafting Tip

In addition to modifying the citation issued and notice sent upon filing a guardianship application, current guardians (or ones appointed pursuant to applications filed before the change in the notice requirement)are required to notify each relative of the need to elect to continue to receive health or residence change notices. The deadline to fulfill this requirement is "as soon as possible but not later than September 1, 2019."

8.4 **Redetermination of Capacity Ward (Secs. 1202.051 & 1202.054). SB 1710** (Zaffirini | Neave) makes the restrictions on intervention of an interested person inapplicable to an application to find (1) that the ward is no longer incapacitate, (2) that the ward lacks the capacity to do some or all of the necessary tasks of daily life, or (3) that the ward has sufficient capacity to do some or all of the necessary tasks of daily life. If such an application is filed and the guardian has resigned, was removed, or has died, the court may not appoint a successor before considering the application. The bill also clarifies that

[9] Again, section references are to the Texas Estates Code unless otherwise noted.

if the ward makes a request for such a determination by informal letter, a physician's certificate or letter is **not** required before appointing a court investigator or guardian ad litem. The court is required to send a letter to the ward by certified mail within 30 days of receipt of that informal letter acknowledging receipt and notifying the ward of the date the investigator or ad litem was appointed, and his or her contact information. In addition to filing a report with the court, the investigator or ad litem is required to provide a copy to the ward.

SB 1710 was sent to the Governor on May 24th.

8.5 **Termination of Guardianship on Creation of ABLE Account (Secs. 1161.003 & 1202.003; Prop. Code Sec. 142.004). SB 1764** (Zaffirini, *et al.* | Burkett) adds an ABLE account for the ward under the Texas Achieving a Better Life Experience (ABLE) Program (see Subchapter J, Chapter 54, Education Code) as an authorized investment (without court authority) for a ward's assets. If the guardian places all of the ward's assets in an ABLE account, the court may terminate the guardianship of the estate if the ward no longer needs that guardian. ABLE accounts are also added as an authorized investment for money recovered by a minor or incapacitated person in a suit where that person is represented by a next friend or guardian ad litem.

SB 1764 was sent to the Governor on May 28th.

8.6 **Guardianship Fee Exemption for Military and First Responders (Secs. 1053.053 & 1053.054). SB 1559** (Taylor, L., *et al.* | Bonnen, G.) exempts a ward or proposed ward from filing fees and fees for any service rendered by the court regarding the administration of the guardianship if the incapacity arose as a result of a personal injury sustained while in active service as a member of the armed forces in a combat zone. A similar exemption would apply to certain law enforcement officers, firefighters, and other first responders injured in the line of duty.

SB 1559 was sent to the Governor on May 24th.

8.7 **Appointment and Duties of Court Investigators (Secs. 1002.009, 1054.152, and 1054.156) . SB 1016** (Creighton | Bell) authorizes the judge of a court exercising probate jurisdiction over guardianships (other than statutory probate courts) to appoint a court investigator if authorized by the commissioners court.

SB 1016 was sent to the Governor on May 26th.

8.8 **Changes Related to Notice of Ward's Detention and Training of Guardians. SB 1096** (Zaffirini | Smithee) makes a number of changes related to guardianships:

(a) Notification of Ward's Detention (Code Crim. Proc. Secs. 14.055 & 15.171; Fam. Code Sec. 52.011; Gov't. Code Sec. 573.0021). A peace officer who detains or arrests a ward (including a child who is a ward) must notify the court with jurisdiction over the ward within one working day.

(b) Training of Guardian; Criminal History Check (Est. Code Secs. 1104.003, 1104.004, & 1253.0515; Gov't. Code Ch. 155, Sec. 411.1386). A court may not appoint an individual as a guardian until the individual has been trained, unless the training is waived by the court pursuant to rules to be established by the Supreme Court. The Supreme Court is also directed to establish a process by which the Judicial Branch Certification Commission will provide training and conduct criminal background checks for persons (other than private professional guardians and attorneys) seeking to become a guardian. The training must be made available for free on the commission's website and designed to educate proposed guardians about their responsibilities, alternatives to guardianships, supports and services available to the proposed ward, and the ward's bill of rights. The proposed guardian must complete the training at least ten days prior to any hearing appointing the guardian. The training requirement does not apply to the initial appointment of a temporary guardian, but does apply to any term extension. (A clerk need not obtain a criminal history check on the proposed guardian if the Judicial Branch Certification Commission has already conducted the check.)

(c) Guardianship Registration and Database (Gov't. Code Ch. 155, Secs. 411.1386, 573.0021). The Supreme Court is directed to establish a mandatory registration program for all guardianships in the state and maintain a central database of those guardianships. Certain information from the database is to be made available to law enforcement personnel. This information includes the name, sex, and date of birth of a ward; the name, telephone number, and address of the guardian; and the name of the court with jurisdiction over the guardianship. The information in the database remains confidential and is not subject to an open records request.

SB 1096 was signed by the Governor on May 29th and will generally be effective September 1st.

8.9 **Registration of Guardianship Programs (Sec. 1104.359 & Gov't. Code Ch. 155). SB 36** (Zaffirini | Thompson, S.) requires the Judicial Branch Certification Commission, in consultation with the Health and Human Services Commission, to establish

standards to monitor and ensure the quality of guardianship programs. Those programs may not provide services to incapacitated persons unless registered with the Judicial Branch Certification Commission. (Note that these provisions do not apply to services provided by a guardianship program under a contract with the Health and Human Services Commission.) A guardianship program may not be appointed as guardian unless its registration is current and not suspended. The commission must make available on its website a list of all registered guardianship programs. A guardianship program may not employ an individual to provide guardianship services on its behalf if that individual's certification is not current or is suspended.

SB 36 was sent to the Governor on May 28th.

8.10 **Order Authorizing Temporary Care for Minor Child (Fam. Code Ch. 35).** **HB 1043** (Blanco | Zaffirini) allows a person who is eligible to consent to treatment of a child under Fam. Code Ch. 32 or enter an authorization agreement under Ch. 34 to seek a court order for temporary authorization for care of the child. Prior to filing the petition, the child must have resided with the person without an authorization agreement or other document enabling the person to provide necessary care. The court must award temporary authorization for care if it's necessary for the child's welfare and no objection is made by the child's parent, conservator or guardian. The court must dismiss a petition if there is an objection. The petitioner, parent, conservator or guardian may request the court to terminate the order at any time.

HB 1043 was sent to the Governor on May 25th.

8.11 **Reporting Financial Exploitation of Vulnerable Adults (Fin. Code Ch. 280; Securities Act, VTCS Art. 581-1, Sec. 45; Hum. Res. Code Ch. 48).** **HB 3921** (Parker *et al.* | Hancock, *et al.*) requires a financial institution employee or securities professional to notify the institution, dealer, or investment adviser of suspected financial exploitation of a vulnerable adult who is an account holder. A "vulnerable adult" is an elderly person (≥65 years old), a disabled individual (under Hum. Res. Code Sec. 48.002), or an individual receiving services defined by rule under Hum. Res. Code Sec. 48.251(b). After receiving this notice, a financial institution must assess the suspected exploitation and submit a report to the Department of Family and Adult Protective Services, while a dealer or investment adviser must investigate and submit a report to the Securities Commissioner and DFAPS. They must also notify a third-party reasonably associated with the vulnerable adult, unless the third party is suspected of the exploitation.

HB 3921 was sent to the Governor on May 26th.

8.12 **Guardianship Compliance Program.** **SB 667** (Zaffirini, *et al.* | Smithee) directs the Office of Court Administration to establish a guardianship compliance program designed to provide additional resources and assistance to courts handling guardianship proceedings by:

- engaging guardianship compliance specialists to review guardianships and identify reporting deficiencies, audit annual accounts and report their findings, work with courts to develop best practices, and report any concerns relating to a ward's well-being or potential financial exploitation discovered as a result of this work; and
- maintaining a database to monitor filings of inventories, annual reports, and other accounts.

Courts are required to participate in the program if selected by the OCA to participate in the program, or may voluntarily apply to the OCA for participation in the program. A judge's actions or failure to act with respect to a specialist's report indicating a concern may constitute judicial misconduct. The OCA is directed to submit an annual report to the legislature regarding the performance of the program.

SB 667 was sent to the Governor on May 19th.

8.13 **Temporary and Emergency Detention (Health & Saf. Code Secs. 573.001, 573.002, 573.005, 573.012, 573.013, 573.021, & 573.022).** Instead of transporting a person subject to temporary detention to a mental health facility, **SB 344** (West, *et al.* | Sheffield) authorizes a peace officer to request EMS personnel to transport the person to an appropriate facility if (1) the EMS provider has executed a memorandum of understanding under Health & Saf. Code Sec. 573.005 and (2) the officer determines the transfer is safe for the person and the EMS personnel. The memo of understanding must address responsibility for the transport cost and be approved by the county and the local mental health authority.

SB 344 was sent to the Governor on May 28th.

8.14 **Notice of Right to Use Public Transportation (Trans. Code Sec. 461.009).** **SB 402** (Zaffirini *et al.* | Allen) requires a public transportation provider, to the extent practicable within available resources, to notify eligible individuals that they are entitled to use another provider's services for up to 21 days without further application.

SB 402 was sent to the Governor on May 28th.

9. Trusts.[10]

9.1 **The REPTL Trusts Bill. SB 617** (Rodríguez | Wray) is the REPTL Trusts bill. Many of its provisions are derived from the 2015 bill that didn't pass.

(a) Reformation (Secs. 111.0035(b) & 112.054). Reformation, as opposed to modification, of trusts is expressly authorized.[11] Additional grounds for modification or reformation include qualifying a distributee for governmental benefits and correcting a scrivener's error (even if the document is unambiguous). However, correcting a scrivener's error requires clear and convincing evidence of the settlor's intent. The amendment also makes clear that the new statutory reformation procedure is not intended to replace any equitable or common law grounds for reformation. They remain unaffected.

(b) Spendthrift Provisions (Sec. 112.035(e)). The withdrawal power that may lapse each year without treating a beneficiary as a settlor would have been clarified to be the greater of a "5-or-5" power or the annual gift tax exclusion **with respect to each donor**.

(c) Forfeiture Clauses (Sec. 112.038(b)). When a floor vote was taken on revisions to this statute in the 2013 session, the author of the bill read into the official proceedings a statement [that REPTL suggested] recognizing that forfeiture provisions do not apply to suits by beneficiaries to compel a fiduciary to perform his duties, seek redress for a breach of duty, or seek a judicial construction, and that the revisions were not meant to change that rule. Not satisfied with legislative history, new Subsection (b) enacts this recognition into law. (The same change was made to the Estates Code forfeiture provision in 2015.)

(d) Decanting (Secs. 112.071, 112.072, 112.078, and 112.085). Several changes are made to the decanting subchapter, making the technique more available than as originally enacted in 2013.

(i) Definitions (Sec. 112.071). Three definitions have changed:

- "Full discretion" now means any power to distribute principal that is not limited discretion.
- "Limited discretion" now means a power to distribute principal that is either mandatory with no trustee discretion or limited by an **ascertainable** standard, such as health, education, support, or maintenance.
- "Presumptive remainder beneficiary," now means a beneficiary who would be eligible to receive a distribution if either the trust terminated on that date or the interests of all **current** beneficiaries ended on that date without causing termination.

(ii) Full Discretion (Sec. 112.072(a)). A trustee with full discretion may make distributions to a second trust for the benefit of any or more current, successor, or presumptive remainder beneficiaries of the first trust (whether or not they are eligible to receive distributions from the first trust).

(iii) Beneficiary Notice (Sec. 112.074). The statute already authorizes beneficiaries entitled to notice of decanting to waive that notice. In addition, the trustee must notify the attorney general if a charitable interest is involved. The amendment authorizes the attorney general to waive that notice. Further, notice to an authorized person on behalf of an incapacitated beneficiary is considered notice to that beneficiary.

(iv) Beneficiary's Right to Sue for Breach of Trust (Sec. 112.078). This section already allows a trustee to petition a court to order a distribution to a different trust. But remember, a decanting power is just like a power of sale. The trustee may be fully authorized to exercise the power, but "authority" does not protect the trustee from liability if the trustee exercises the power in a manner that constitutes a breach of the trustee's fiduciary duties. New Subsection (f) provides that this section does not limit a beneficiary's right to sue for breach of trust.

(v) Exceptions to Distribution Powers (Sec. 112.085). The limitation preventing any exercise of a decanting power that would materially impair the rights of any beneficiary is repealed, while a prohibition against adding a trustee exoneration provision is added.

Drafting Tip

Don't forget that these rules apply to statutory decanting in the absence of decanting provisions in a trust agreement. You can always include whatever decanting provisions you want in a trust. But be careful that you don't inadvertently introduce any tax problems with those powers.

[10] Section references are to the Texas Property Code unless otherwise noted.

[11] Reformation and modification are sometimes confused as being the same, but they are not. Reformation is the appropriate remedy when there is a mistake in the original instrument that did not conform to the settlor's intent. Modification is the appropriate remedy when there was nothing originally wrong with the instrument, but something subsequent to the creation of the trust makes a change appropriate or desirable. And neither of these terms apply to ambiguities. Those involve interpreting language already in the instrument that is unclear.

(e) Delegation of Real Property Powers to Agent (Sec. 113.018). The statutory authority of a trustee to employ agents is expanded to expressly recognize a trustee's ability to delegate authority to engage in a laundry list of powers related to real property transactions. The trustee remains liable for the actions of the agent, and the delegation terminates in six months unless earlier terminated by the death, incapacity, resignation or removal of the trustee, or the delegation specifies an earlier date.

(f) Application of Trust Code to TUPMIFA (Sec. 163.011). The Texas Uniform Prudent Management of Institutional Funds Act (Prop. Code Ch. 163) contains provisions applicable to charitable endowments that are in many ways similar to the prudent investor, principal and income, and modification provisions applicable to trusts.

(i) Background. TUPMIFA was enacted in 2007 to replace the prior Texas Uniform Management of Institutional Funds Act, which was originally adopted in Texas in 1989. While both were based on uniform acts, both also included a provision making the entire Trust Code, not just parts of the Trust Code, inapplicable to a fund governed by TUMIFA (from 1989 to 2007) or TUPMIFA (from 2007 to the present). This causes problems. As just one example, if a trustee of a charitable trust needs to be replaced, the provisions of Trust Code Sec. 113.083 don't apply, and there is no other statute providing guidance on what such a petition should look like, who are necessary parties, etc.

(ii) Why is the Trust Code Inapplicable? This was drawn to this author's attention several years ago. The comments to the uniform acts don't help for the simple reason that there is no corresponding provision in either of the uniform acts making a state's trust laws inapplicable to a fund governed by the institutional funds act. I have been unable to determine a definitive answer as to why these provisions were added to the Texas versions of the uniform acts,[12] but I do have an educated guess.

(iii) Educated Guess. In 1989, when the original TUMIFA was adopted, we had not yet adopted the two UPIAs – the Uniform Principal and Income Act (Ch. 116) and the Uniform Prudent Investor Act (Ch. 117). We had modification provisions in Sec. 112.054 (although much less liberal than our current version), principal and income provisions in Secs. 113.101-113.111 (although much less detailed than current Ch. 116), and a modified "prudent person" standard for asset management in Sec. 113.056 (although much less detailed and significantly different than current Ch. 117) It is my belief that when the exclusion of Trust Code application was included in TUMIFA when it was adopted, it was merely to eliminate the need to identify the specific sections of the Trust Code that were in essence being replaced by TUMIFA with respect to charitable funds. And when TUPMIFA was enacted, that provision was carried on, without considering that the two UPIAs had now been isolated into two easily identifiable chapters, and that the modification provisions in the Trust Code might not be harmful if also applicable to charitable funds.

(iv) The Amendment. The amendment contained in the REPTL Trust bill when it emerged from Judiciary limits the "inapplicability" of the Trust Code to funds subject to TUPMIFA to Chs. 116 and 117 (the two UPIAs). Presumably, this leaves the rest of the Trust Code available for application to charitable funds that are held in trust form.

(g) Notice of Trustee's Disclaimer (Sec. 240.0081). The 2015 disclaimer changes authorized a trustee to disclaim property otherwise passing to the trust without going to court, but required the trustee to provide written notice to certain beneficiaries. The statute already authorizes beneficiaries entitled to notice to waive that notice. In addition, the trustee must notify the attorney general if a charitable interest is involved. The amendment authorizes the attorney general to waive that notice, Further, notice to an authorized person on behalf of an incapacitated beneficiary is considered notice to that beneficiary.

SB 617 was signed by the Governor on May 22nd and will generally be effective September 1st.

9.2 **The REPTL Decedents' Estates Bill –Trust Changes.** The REPTL 2017 Decedents' Estates bill (**HB 2271** (Wray | Rodriguez)) makes several changes involvingtrusts.

(a) Divorced Trust Beneficiaries (Est. Code Secs. 123.052 & 123.056). One change clarifies that the divorce of a person who is **not** a settlor of a trust does not automatically revoke provisions for the benefit of the person's former spouse or relatives. Further, if spouses are settlors of a joint revocable trust, divorce, and fail to divide the trust prior to one's death, the trust is divided into shares allocable to each settlor, and the deceased settlor's share omits provisions in favor of the surviving settlor and relatives.

(b) Determining Beneficiaries of Class Gifts (Prop. Code Sec. 112.011). Another change adds to

[12] If anyone out there was involved in the adoption of TUMIFA, where this uniquely Texas provision was born, and has knowledge of the real reason for it, please be a lamb and let me know why.

the Trust Code the 2015 Estates Code amendment regarding who is considered "in gestation," as that provision is being amended this session. (See Section 7.1(f) on page 7.)

A technical error in HB 2271 was corrected by HCR 158, adopted by both chambers on May 28th, so the bill will be sent to the Governor. (See note following Sec. 7.1 for more details.)

9.3 **The REPTL Digital Assets Bill.** See Part 13 on page 23 for provisions applicable to trustees.

9.4 **Perpetual Care Cemetery Trusts (Health & Saf. Code Secs. 712.0351, *et seq*).** **HB 1948** (Elkins | Creighton) establishes the default rule that permissible distributions from a perpetual care cemetery trust fund should be determined based on the traditional net income method, but allows the cemetery and the trustee to modify the trust to use the total return method by providing 60-days' notice to the Banking Commissioner. It can be converted back to the net income method also.

HB 1948 was sent to the Governor on May 27th.

10. The REPTL Financial Power of Attorney Bill.

10.1 **The REPTL Financial Power of Attorney Bill.** The REPTL Financial Power of Attorney bill (**HB 1974** (Wray | Rodríguez)) is big enough that it deserves a "Part" all to itself. In 2011, REPTL unsuccessfully proposed a Texified version of the 2006 Uniform Power of Attorney Act. (Our power of attorney statutes are based on the 1987 version of the uniform act.) In 2015, REPTL tried again by sticking with our current act, but proposing a number of changes, many of which came from the new version of the uniform act. During the course of the 2015 session, at least two alternative committee substitutes were prepared to alleviate concerns raised by other stakeholders (*e.g.*, TLTA, the Texas Business Law Foundation, the Texas Medical Association, the Texas Hospital Association, and others). Nevertheless, those concerns slowed up the bill to the point where it ran out of time to pass. This session's bill takes up where the 2015 proposal left off, with additional modifications being made to address stakeholder concerns.

A "style" change was that most of the references throughout the act to the "attorney in fact or agent" are shortened to just the "agent." In the interest of saving paper, we won't list all of those stylistic changes here. Other, more substantive changes include the following:

Chapter 751 – General Provisions Regarding Durable Powers of Attorney

10.2 **Changes to Subchapter A – General Provisions.**

(a) Applicability (Sec. 751.0015). Chapters 751 and 752 (the statutory power) apply to all powers of attorney ***except***:

- powers of attorney coupled with an interest (including a power given to or for a creditor in connection with a credit transaction),
- medical powers,
- proxies to exercise voting or management rights, or
- powers created on a form prescribed by a governmental entity for a governmental purpose.

(b) Definitions (Sec. 751.002). Several definitions are added.

- "Actual knowledge" means actual knowledge ***without due inquiry*** and ***without any imputed knowledge*** (except as provided in Sec. 751.211).
- "Affiliate" means a business entity that directly or indirectly controls, is controlled by, or is under common control with, another business entity.
- "Agent" includes an attorney-in-fact, co-agent, successor agent, or successor co-agent.
- "Durable power of attorney" means a power of attorney that complies with new Sec. 751.0021(a) or is described in Sec. 751.0021(b).
- "Principal" means a person who signs (or directs another to sign) a power of attorney designating an agent.
- "Record" means information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form.

(c) Incapacity (Sec. 751.00201). Unless otherwise defined in the power, a person is considered "disabled or incapacitated" if a physician certifies in writing (after execution of the power of attorney) that, based on a medical examination, the person is mentally incapable of managing his or her financial affairs.

(d) Requirements for Durability (Sec. 751.0021). The requirements for a durable power of attorney remain the same, except that the instrument may be "a writing or other record" and it may be signed by another individual in the conscious presence of and at the direction of the principal. If the law of the jurisdiction that determines the meaning and effect of the power (under Sec. 751.0024 below) provides that the authority conferred on the agent is exercisable despite the principal's subsequent incapacity, the power is considered a durable power of attorney under Texas law – regardless of whether the term "power of attorney" is used.

(e) Presumption of Genuine Signature (Sec. 751.0022). If the power of attorney is properly acknowledged, then the signature of the principal (or

the person signing on behalf of the principal) is presumed to be genuine.

(f) Validity of Non-Texas Powers (Sec. 751.0023). A power executed outside Texas is valid if executed in accord with the law of the jurisdiction that determines the meaning and effect of the power or military law (10 U.S.C. Sec. 1044b). Further, a photocopy or electronically transmitted copy of an original has the same effect as the original and may be relied on, without liability, as if it is an original.

(g) Governing Law (Sec. 751.0024). The meaning and effect of a power of attorney is governed by the law of the jurisdiction specified in the power, or if none, the principal's domicile (if indicated in the power), or the jurisdiction where executed.

(h) Uniformity (Sec. 751.003). Since our power of attorney statute will now be somewhat different than the current or previous uniform acts, the standard provision regarding promotion of uniform interpretation is modified so that it is a goal "*to the fullest extent possible*."

(i) Other Remedies (Sec. 751.006). Any remedies under Ch. 751 are not exclusive, and do not abrogate any other lawful right or remedy.

(j) Other Laws Control; No Validation of Void Instruments (Sec. 751.007). To the extent this chapter is inconsistent with another law applicable to financial institutions or entities, the other law controls. In addition, this chapter will not have the effect of validating a void (not voidable) real property conveyance (*i.e.*, a forgery).

10.3 **New Subchapter A-1 – Appointment of Agents.**

(a) Co-Agents (Sec. 751.021). A principal may name two or more co-agents, each of whom may act independently of the other unless the power provides otherwise.

(b) Acceptance of Appointment (Sec. 751.022). Unless the power provides otherwise, a person accepts appointment as agent by exercising authority or performing duties as agent, or by any other conduct indicating acceptance. See also Sec. 751.101 below that provides an agent's fiduciary duties commence when the agent "accepts" his or her appointment.

Background: In *Vogt v. Warnock*, 107 S.W.3d 778 (Tex. App.—El Paso 2003, *no pet.*), after the principal designated an agent in a power of attorney, the principal made many gifts to the agent and paid her to manage his affairs. The agent knew about her appointment but never exercised any authority under the power. Nevertheless, after the executor of the principal's estate sued the agent for breach of fiduciary duty under the power, the appellate court held as a matter of law that the agent stood in a fiduciary capacity to the principal, and had the burden of proving that all transactions were fair.

(c) Successor Agents (Sec. 751.023). A principal may name one or more successor agents, and may delegate authority to name successor agents to an agent or another person designated by name, office, or function. However, unless the power provides otherwise, a successor is not considered an agent, and may not act as such, until none of the predecessors can or will act.

(d) Reimbursement and Compensation (Sec. 751.024). Unless the power provides otherwise, an agent is entitled to (1) reimbursement of reasonable expenses and (2) reasonable compensation.

10.4 **New Subchapter A-2 – Authority of Agent Under Durable Power of Attorney.**

(a) General Authority of the Agent and Limitations (Sec. 751.031).

(i) General Extent (Sec. 751.031(a)). If an agent is given the power to perform all acts the principal could perform, then the agent has the authority described in all the defined powers in a statutory durable power of attorney.

(ii) "Hot" Powers (Sec. 751.031(b)). An agent may take the following actions only if the power expressly grants them (note that they're not included in the statutory form):

(1) create, amend, or revoke a trust;
(2) make a gift;
(3) create or change survivorship rights;
(4) create or change beneficiary designations; or
(5) delegate authority under the power.

(iii) Creation of Interest in Agent (Sec. 751.031(c)). Even then, unless the power provides otherwise, an agent who isn't an ancestor, spouse, or descendant of the principal may not create in the agent (or in a person to whom the agent owes an obligation of support) an interest in the principal's property.

(iv) Overlapping Authority (Sec. 751.031(d)). If subjects over which authority is granted overlap, the broadest authority controls. The agent's authority isn't limited to property located in Texas.

(v) Authority Outside Texas (Sec. 751.031(e)). The agent's authority over the principal's property is exercisable whether or not the

property is in Texas, and whether or not it is exercised, or the power is executed, in Texas.

(b) Gift Authority (Sec. 751.032). Gifts for the benefit of a person include gifts in trust, to a TUTMA or similar account, and to a Sec. 529 plan. Unless the power provides otherwise, a power to make gifts is limited to amounts within the annual gift tax exclusion, or twice that amount if the principal's spouse agrees to split gifts. It also includes the power to consent to split annual exclusion gifts made by the spouse.

An agent may make gifts only if consistent with the principal's objectives, if the agent actually knows them, or if not, if consistent with the principal's best interest based on all relevant factors, including the factors in Sec. 751.122 and the principal's personal gift history.

(c) Beneficiary Designation Authority (Sec. 751.033). Unless the power expressly provides otherwise, a specific grant of a "hot" power regarding beneficiary designations authorizes the agent to create or change beneficiary designations, create or change a P.O.D. or trust account, and create or change a nontestamentary transfer under Estates Code Chapter 111, and in most cases will not be subject to the limitations relating to an agent naming himself or herself. Absent the grant of this "hot" power, the general grant of these powers as defined in a statutory durable power will remain subject to the limitations.

(d) Incorporation of Statutory Powers by Reference (Sec. 751.034). A grant of authority using one of the terms used in a statutory durable power will incorporate the statutory definition by reference, unless modified by the principal.[13]

10.5 **Subchapter B – Effect of Certain Acts on Exercise of Durable Power of Attorney (Sec. 751.051).** An act performed by an agent has the same effect as if the principal had performed the act. (The current language only applies to acts performed while the principal is incapacitated, even if the power is effective immediately.)

10.6 **Subchapter C – Duty to Inform and Account (Sec. 751.101).** The amendment to Sec. 751.101 provides that an agent who accepts appointment under a power of attorney becomes a fiduciary as to the principal only when acting as an agent under the power. See the discussion of Sec. 751.022 in Section 10.3(b) above.

10.7 **New Subchapter C-1 – Other Duties of Agent.**

(a) Duty to Notify Principal of Breach by Co-Agent (Sec. 751.121). An agent with actual knowledge of a breach (or imminent breach) of duty by another agent must notify the principal, or, if the latter is incapacitated, take reasonable action to safeguard the principal's best interest. Failure to do so can result in liability for the reasonably foreseeable damages that could have been avoided. A co-agent who doesn't participate in or conceal a breach of fiduciary duty by a co-agent or predecessor agent is not liable for those actions.

(b) Duty to Preserve Estate Plan (Sec. 751.122). An agent has a statutory duty to preserve the principal's estate plan, to the extent actually known by the agent, if preservation is consistent with the principal's best interest, after considering all relevant factors, including the value and nature of the principal's property; the principal's foreseeable obligations and need for maintenance; minimization of taxes; and eligibility for governmental assistance.

10.8 **New Subchapter C-2 – Duration of Durable Power of Attorney and Agent's Authority.**

(a) Termination of Entire Power (Sec. 751.131). A power of attorney terminates when:

(1) the principal dies,
(2) the principal revokes the power,
(3) the power provides that it terminates,
(4) the purpose of the power is accomplished,
(5) the principal revokes the agent's authority (without revoking the entire power), or the agent dies, becomes incapacitated, or resigns, and no other agent is named, or
(6) a permanent guardian of the estate has qualified.

(b) Termination of Agent's Authority (Sec. 751.132). On the other hand, an agent's authority (as opposed to the power itself) terminates when:

(1) the principal revokes the authority,
(2) the agent dies, becomes incapacitated, or resigns,
(3) the agent's marriage to the principal is dissolved (unless the power provides otherwise), or
(4) the power terminates.

Unless the power provides otherwise, an agent's authority continues until terminated, despite the fact that it may be an "old" power of attorney.

(c) Effect of Termination (Sec. 751.134). An agent or another without actual knowledge of termination is protected from actions taken in good

[13] To a large extent, this eliminates concerns over whether or not a statutory power form has been modified to such an extent that it would no longer be considered a statutory power of attorney.

faith or in reliance on the power, unless the action is otherwise invalid or unenforceable.

(d) Previous Powers Continue (Sec. 751.135). The execution of a subsequent power of attorney **does not** revoke any prior power unless the subsequent power says so.

10.9 **Subchapter D – Recording Durable Power of Attorney for Certain Real Property Transactions (Sec. 751.151).** Last session, the legislature added a new provision requiring that a power of attorney used in any real property transaction be filed with the county clerk within 30 days of the filing of the real property transaction. This amendment adds home equity liens and reverse mortgages to the laundry list of applicable real estate transactions.[14]

10.10 **New Subchapter E – Acceptance of and Reliance on Durable Power of Attorney.**

(a) Acceptance of Power Required (Sec. 751.201). This is the subchapter that has generated the most concern (and the most negotiation) among stakeholders. While at first glance, the new provisions appear to require ***mandatory acceptance*** by third parties, because of the numerous exceptions allowing a third party to refuse acceptance of a power of attorney, a more accurate description of these new provisions would be that they require ***reasonable acceptance***. Or perhaps that they require to third party to ***reasonably*** refuse acceptance.

(a) Unless one or more grounds for refusal exist (see Sec. 751.206), a person presented with and asked to accept a power of attorney must either:
- accept the power;
- request a certification (under Sec. 751.203) within 10 days;
- request an attorney's opinion (under Sec. 751.204) within 10 days; **or**
- request an English translation (under Sec. 751.205) within 5 days

(b) If the person requests a certification or attorney's opinion, they must accept the power within 7 days after the certification or the opinion is received.
(c) These time periods may be extended by agreement.
(d) If a translation is requested, the power is not considered "presented" until the translation is provided.
(e) A person need not accept a power if the agent refuses to or does not provide a requested certification, attorney's opinion, or translation.

(b) Other Form Not Required (Sec. 751.202). A person may not require an additional or different form of power or that the power be recorded unless recordation is otherwise required by law.

(c) Agent's Certification (Sec. 751.203). If a certification is requested, the agent must provide a certification under penalties of perjury of any factual matter concerning the principal, the agent, or the power. If it's a springing power, the person may request a written statement from a physician stating that the principal is incapacitated An optional form of certification is included in the statute (see Attachment 2). A certification made in compliance with this section is conclusive proof of the factual matters subject to the certification.

(d) Attorney's Opinion (Sec. 751.204). If an attorney's opinion is requested, the agent must provide the opinion regarding any matter of law as long as the person requesting the opinion provides the reason for the request in writing or other record. An attorney's opinion must be provided at the principal's expense unless requested more than 7 days after the power is presented for acceptance. If requested after that period, the principal or agent may, but is not required to, provide the opinion at the requestor's expense.

(e) English Translation (Sec. 751.205). An English translation of any portion of a power that is not in English must be provided at the principal's expense unless requested more than 5 days after the power is presented for acceptance. If requested after that period, the principal or agent may, but is not required to, provide the translation at the requestor's expense.

(f) Grounds for Refusing Acceptance (Sec. 751.206). A person is ***not*** required to accept a power under the following circumstances:

(1) The person is not otherwise required to engage in a transaction with the principal under the same circumstances (*e.g.*, the agent seeks to open a new account and the principal isn't a current customer), or the agent seeks a product or service the person doesn't offer.
(2) Engaging in a transaction with the agent or principal would be inconsistent with a state or federal law, rule, or regulation, a request from a law enforcement agency, or a policy adopted by the person in good faith necessary to comply with a state or federal law, rule, regulation, regulatory directive, guidance, or executive order applicable to the person.
(3) The person would not engage in a similar transaction because the person has filed a suspicious activity report (SAR) with respect to the

[14] Note that the statute already referred to powers used to execute a deed of trust, which would include home equity liens and reverse mortgages. This addition is apparently for those people who don't realize that.

principal or agent, the person believes in good faith that the principal or agent has a prior criminal financial history, or the person has had a previous unsatisfactory relationship with the agent involving substantial loss to the person, financial mismanagement by the agent, litigation between the person and the agent alleging substantial damages, or multiple nuisance lawsuits filed by the agent.

(4) The person has actual knowledge of the termination of the agent's authority or the power.

(5) A request for a certification, attorney's opinion, or translation is refused, or if provided, the person in good faith is still unable to determine the validity of the power or authority of the agent.

(6) The person in good faith believes the power isn't valid, that the agent doesn't have authority, or that the requested act would violate governing business documents of an entity or an agreement affecting the entity.

(7) The person brought, or has actual knowledge another person has brought, an action to construe the power or review the agent's conduct.

(8) The person brought, or has actual knowledge another person has brought, an action making a final determination that the power is invalid with respect to the purpose for which it is being presented or the agent lacks authority to act in the attempted manner.

(9) The person makes, has made, or has actual knowledge that another person has made, a report to a law enforcement other federal or state agency, stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting on behalf of the agent;

10) The person has received conflicting instructions or communications from co-agents; or

11) The person isn't required to accept the power by the law governing the meaning and effect of the power, or the powers conferred on the agent by that law don't include the power the agent is attempting to exercise.

(g) Written Refusal (Sec. 751.207). A person refusing to accept a power must provide the agent a written statement advising the agent of the reason, or a statement signed under penalty of perjury that the reason is described in Secs. 751.206(2) or (3) above. The statement must be provided by the date the person would otherwise be required to accept the power.

(h) Date of Acceptance (Sec. 751.208). A power is considered accepted by a person to whom it was presented on the first day the person agrees to act at the agent's direction under the power.

(i) Reliance by Third Party on Certain Facts (Sec. 751.209). A person accepting a power in good faith without actual knowledge that the principal's signature (or the signature of a person signing on behalf of the principal) is not genuine is entitled to rely on the presumption in Sec. 751.022 that the signature is genuine and the power was properly executed. A person accepting a power in good faith without actual knowledge that the power is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the power of attorney as if the power of attorney were genuine, valid, and still in effect; the agent's authority were genuine, valid, and still in effect; and the agent had not exceeded and had properly exercised the authority.

(j) Reliance by Third Party on Requested Information (Sec. 751.210). A person requesting an agent's certification, an attorney's opinion, or a translation may rely on it without further investigation or liability.

(k) Actual Knowledge Through Employees (Sec. 751.211). A "person" conducting activities through employees is without actual knowledge if the employee conducting the transaction involving the power is without actual knowledge.

(l) Cause of Action for Refusal to Accept (Sec. 751.212). The principal or agent may bring an action against a person refusing to accept a power in violation of these provisions. If the court finds that a violation has occurred, it shall order the person to accept the power and award the plaintiff costs and reasonable attorney's fees. The court must dismiss an action commenced after a person provides a statement signed under penalty of perjury that the reason for refusal is described in Secs. 751.206(2) or (3) above. However, if such a statement is provided after the action is timely commenced, the person won't be forced to accept the power, but will still be liable for costs and fees.

(m) Liability of Principal (Sec. 751.213). On the other hand, if an enforcement action is brought and the court finds that a refusal described in Secs. 751.206(2) or (3) has been provided, the person's refusal to accept was permitted under Sec. 751.206, or, if the court does not order the person to accept the power (and the reason for the lack of order isn't that the person provided a late refusal described in Secs. 751.206(2) or (3)), the principal may be liable for the person's costs and attorney's fees.

10.11 **New Subchapter F – Civil Remedies (Sec. 751.251).** The following persons may bring an

action to construe a power of attorney or review the agent's conduct:

(1) the principal or the agent,
(2) a guardian, conservator, or other fiduciary for the principal,
(3) a person named as a beneficiary to receive property on the principal's death,
(4) a governmental agency with authority to protect the principal's welfare,
(5) another person who demonstrates to the court sufficient interest in the principal's welfare or estate.

Further, a person asked to accept a power may bring an action to construe it. However, on the principal's motion, the court must dismiss an action brought by another unless the court finds the principal lacks authority to revoke the agent's authority or the power of attorney.

Chapter 752 – Statutory Durable Power of Attorney

10.12 **Subchapter B – Form of Statutory Durable Power of Attorney.**

(a) Statutory Form (Sec. 752.051). The statutory form contains several modifications. First, the notice at the beginning of the form advises the principal that if he or she wants the agent to have authority to sign home equity loan documents, the power must be signed at the office of the lender, an attorney, or a title company. This is intended to address the *Norwood* problem discussed at length in my 2015 legislative update. Second, following the initial appointment of the agent is a new notice to the principal that he or she may appoint co-agents who, unless otherwise provided, may act independently of each other. Optional provisions regarding reimbursement and compensation of agents, or whether co-agents should act jointly or independently, are added to the special provisions. References in the form to "revocation" are changed to "termination." A sentence is added stating that the meaning and effect of the power is determined by Texas law. Finally a clause is added to the appointment of alternate agents triggering that appointment if the principal's marriage to an agent is dissolved. See Attachment 3.

(b) Modification of Statutory Form to Include "Hot" Powers (Sec. 752.052). The "hot" powers mentioned in Section 10.10 are **not** part of the basic statutory form. A new but separate section contains additional language that may be added to the statutory form to grant those powers. And it will still be considered a statutory power.

10.13 **Subchapter C – Construction of Powers Related to Statutory Durable Power of Attorney.** Several of the provisions setting out the extent of a particular grant of authority in a statutory power are modified.

(a) Real Property Transactions (Sec. 752.102). Much more extensive language dealing with mineral transactions is added to the statutory definition of authority related to real property transactions. In addition, the power to designate the principal's homestead is added.

(b) Insurance and Annuity Transactions (Sec. 752.108). Reference is made to the ability of a principal to grant a "hot" power regarding beneficiary designations.

(c) Estate, Trust, and Other Beneficiary Transactions (Sec. 752.109). Authority with respect to life estates is added.

(d) Personal and Family Maintenance (Sec. 752.111). Authority with respect to the principal's mail and to provide for the care of the principal's pets is added.

(e) Retirement Plan Transactions (Sec. 752.113). Reference is made to the ability of a principal to grant a "hot" power regarding beneficiary designations. Also, the agent's ability to name himself or herself only to the extent already named in the plan is extended to plans (such as a rollover) where the agent was named in a predecessor plan.

10.14 **Repealers.** Because of the changes described above, the following current sections are repealed:

(1) Section 751.004;
(2) Section 751.053;
(3) Section 751.054;
(4) Section 751.055;
(5) Section 751.056; and
(6) Section 751.058.

HB 1974 will be sent to the Governor after the House concurred in Senate amendments on May 26th.

Drafting Tip

Really? You expect me to summarize the last 5+ pages in a "Drafting Tip?" This whole darn Part 10 is one big drafting tip!

11. Other Bills Relating to Disability Documents.

11.1 **The REPTL Guardianship Bill – Financial Powers of Attorney.** The REPTL Guardianship bill (**SB 39** (Zaffirini | Farrar)) makes a few changes to our financial power of attorney provisions.

(a) Effect of Guardianship of Estate (Sec. 751.052). The powers of an agent under a financial power of attorney automatically terminate upon qualification of a permanent guardian of the principal's estate. This amendment revokes the agent's powers upon qualification of a permanent guardian of the estate, and suspends those powers on the qualification of a temporary guardian of the estate. However, in the case of a temporary guardian, the court has the option to affirm the power of attorney and confirm the validity of the agent's appointment.

(b) Removal of Agent (Secs. 751.054, 751.055, & 752.051 & Ch. 753). New Ch. 753 authorizes a named successor agent in a power of attorney or an interested person (including an ad litem) in a guardianship proceeding with respect to the principal to file a petition to remove the current agent under a power of attorney. The court may remove the agent (and deny compensation) if the court finds that the agent (i) has breached fiduciary duties to the principal, (ii) materially violated (or attempted to violate) the terms of the power of attorney resulting in a material financial loss to the principal, (iii) is incapacitated or otherwise incapable of performing the agent's duties, or (iv) fails to make a required accounting. In the event of removal, the court may authorize the appointment of a named successor if the successor is willing to accept the authority. In that event, the successor must provide notice of the order to each third party whom the agent believes relied on (or may rely on) the power of attorney within 21 days of the order. The statutory form is also revised to add judicial removal of an agent as one of the grounds for authorizing a successor agent to act (see Attachment 3).

SB 39 was sent to the Governor on May 28th.

11.2 **The REPTL Medical Power of Attorney Bill (Health & Saf. Code Secs. 166.155 & 166.162-164). HB 995** (Wray, *et al.* | Rodriguez) is a REPTL bill that revokes the authority of a spouse under a medical power of attorney if the marriage is dissolved. It moves the separate disclosure statement to the medical power form itself, rather than it being a separate document. As originally filed, it made the statutory form permissive, rather than mandatory. However, an amendment left the form mandatory. See Attachment 4.

HB 995 passed the Senate on May 24th and will be sent to the Governor.

Drafting Tip

Time to change your medical power of attorney forms?

11.3 **The REPTL Guardianship Declaration Bill (Est. Code Secs. 1104.203-204). SB 511** (Rodríguez) is a REPTL bill that allows the declaration of guardian for oneself (not for children) to be executed before a notary in lieu of two witnesses **if** the declaration does not expressly disqualify anyone from serving as guardian. Such a declaration is considered self-proved merely with the principal's acknowledgement. See Attachment 5.

SB 511 was signed by the Governor on May 29th and will generally be effective September 1st.

Drafting Tip

Time to change your guardianship declaration forms? My preference (since 2009) has always been to use one notary in lieu of two witnesses where allowable because it speeds up the execution ceremony. I can notarize all documents that don't require witnesses, and then ask for witnesses to come into the ceremony for just the remaining documents (which may be just the wills after September 1st).

11.4 **The REPTL Declaration of Mental Health Treatment Bill (Civ. Prac. & Rem. Code Secs. 137.003 & 137.011). HB 1787** (Wray | Rodriguez) is a REPTL bill that authorizes the use of one notary in lieu of two witnesses on a declaration of mental health treatment (see Attachment 6).

HB 1787 was sent to the Governor on May 26th.

Drafting Tip

Time to change any declaration of mental health treatment forms? See the Drafting Tip following Section 11.1(a)

11.5 **The REPTL Digital Assets Bill.** See Part 13 on page 23 for provisions applicable to agents under financial powers of attorney. They include minor revisions to the statutory durable power of attorney form (see Attachment 3).

11.6 **Display of Information on Bone Marrow Donation (Trans. Code Sec. 521.012). HB 3359** (Cosper) directs the DPS to make informational material and videos on bone marrow donation available in a publicly accessible area of each driver's license office.

HB 3359 passed the Senate on May 24th and will be sent to the Governor.

11.7 **Authority to Sign Medical Certification for Death Certificates (Health & Saf. Code Secs. 193.005, 671.001 & 671.002). SB 919** (Rodríguez | Coleman) authorizes a physician's assistant or advanced practice registered nurse to sign a

medical certification for a death certificate if the patient has elected to receive hospice or palliative care. . (Currently, only the attending physician may sign a medical certification.)

SB 919 was sent to the Governor on May 26th.

11.8 **Designation of Caregiver for Aftercare Instructions (Health & Saf. Code Ch. 317). HB 2425** (Price, *et al.* | Taylor, V.) requires a hospital to allow a patient, the patient's guardian, or the patient's surrogate decision-maker the opportunity to designate a caregiver upon the patient's admission or before discharge. The hospital must consult with the patient and designated caregiver regarding the caregiver's capabilities and limitations, and issue a discharge plan to meet the patient's aftercare needs.

HB 2425 was signed by the Governor on May 26th and is effective immediately.

12. Nontestamentary Transfers.

12.1 **The REPTL Decedents' Estates Bill – Multi-Party Accounts.** The REPTL 2017 Decedents' Estates bill (**HB 2271** (Wray | Rodriguez)) contains several provisions relating to multi-party accounts

(a) Liability of Multi-Party Accounts for Taxes and Administration Expenses (Est. Code Sec. 113.252). One change clarifies that multiparty accounts are liable for their share of estate taxes charged under Ch. 124, and, if other estate assets are insufficient, amounts needed to pay debts, other taxes, and administration expenses.

(b) Divorce of Parties (Est. Code Sec. 113.252 & 123.151). If spouses who have a joint account with survivorship rights divorce, this change clarifies that rights in favor of a former spouse or relatives are revoked.

A technical error in HB 2271 was corrected by HCR 158, adopted by both chambers on May 28th, so the bill will be sent to the Governor. (See note following Sec. 7.1 for more details.)

12.2 **Multi-Party and POD Accounts (Secs. 113.052, 113.053, & 113.0531). SB 714** (Seliger | Geren) modifies the optional statutory account form to include an acknowledgment by the customer that he or she has read each paragraph, received a disclosure of the ownership rights to each type of account, and has placed his or her initials next to the type of account desired. (This replaces the current requirement that the customer place initials to the right of each paragraph.) If the financial institution does not use the statutory form, it must either make the required disclosures separately from other account information (current law), or if included in other account documentation, the disclosures must be the first item of the documentation (new law). A financial institution is not required to provide disclosures about any type of account it does not offer. Finally, the disclosure obligations won't apply to credit unions or to a customer who is a legal entity or is acting as a legal representative for another person.

SB 714 was signed by the Governor on May 29th and will generally be effective September 1st.

12.3 **Transfer on Death Deeds (Secs. 114.103 & 114.151). SB 2150** (Huffman | Farrar) clarifies that the lapsed share of a designated beneficiary of a TODD who fails to survive the transferor by 120 hours passes in accordance with the rules applicable to failure of devises under a will (Sec. 255.151, *et seq.*). A number of options are added to the statutory form of TODD to deal with the shares of predeceasing beneficiaries.

- If at least one primary beneficiary survives the transferor, the transferor may elect (1) to have the share of a deceased beneficiary who was a descendant of the transferor's parents pass to the descendants of the deceased beneficiary, or (2) to have the share of any deceased beneficiary pass to the surviving primary beneficiaries only.
- On the other hand, if no primary beneficiary survives the transferor, the transferor may elect (1) to have the share of a deceased primary beneficiary who was a descendant of the transferor's parents pass to the descendants of the deceased primary beneficiary, or (2) to have the share of any deceased primary beneficiary pass to the alternate beneficiaries.
- To make things even more confusing, if an alternate beneficiary does not survive the transferor, the transferor may elect (1) to have the share of the deceased alternate beneficiary who was a descendant of the transferor's parents to pass to the descendants of the deceased alternate beneficiary, or (2) to have the share of any deceased alternate beneficiary pass to the other alternate beneficiaries.
- And if none of them are alive, then the deed is considered cancelled.

SB 2150 was sent to the Governor on May 23rd.

12.4 **Beneficiary Designation for Motor Vehicles (Ch. 115 & Trans. Code Sec. 501.0315). SB 869** (Huffman | Farrar, *et al.*) directs the creation of a motor vehicle title that includes a beneficiary designation in the event of the owner's death. The beneficiary's legal name must be on the title, and if the vehicle is owned by joint owners with right of survivorship, the designation must be made by all the owners. The beneficiary designation creates no interest

in the vehicle during the lives of the owners and may be changed by submitting a new application for title. Following the death of the last owner, the beneficiary must apply for transfer of title to the beneficiary within 180 days.

SB 869 was sent to the Governor on May 24th.

13. The REPTL Digital Assets Bill.

13.1 **The REPTL Digital Assets Bill (Est. Code Ch. 2001 (New), Secs. 752.051, 752.1145, 752.115, 1151.101, Prop. Code Sec. 113.031).** The REPTL Digital Assets bill (**SB 1193** (Taylor, V.)) enacts the Texas Uniform Fiduciary Access to Digital Assets Act, based on RUFADAA.[15]

13.2 **Background.** Here's the background behind this uniform act. The growth of digital assets has been accompanied by the growth in the difficulties faced by fiduciaries trying to access a principal's digital assets. What are digital assets, you ask? Here are some examples:

- Airline Rewards
- Hotel Points
- Email Accounts
- Social Networking Accounts
- Voicemail Accounts
- Online Photographs and Videos
- Image Sharing Accounts
- iTunes
- Web pages
- Online Purchasing Accounts
- Bitcoins

Until recently, a fiduciary's access to these assets has been determined by individual service agreements (*i.e.*, the fine print we all agree to without reading) and a hodgepodge of federal and state laws. In 2014, the Uniform Laws Commission adopted the Uniform Fiduciary Access to Digital Assets Act (UFADAA, pronounced like "you father," except with a Brooklyn accent) to try to address this lack of uniformity.

13.3 **The *Revised* Uniform Act.** While UFADAA was introduced in numerous states, due to early industry opposition (think Google, Facebook, Yahoo, etc.), it only passed in Delaware, and that was a preliminary version before final adoption by the ULC. So the ULC went back to the drawing board and in 2015 adopted a **Revised** Uniform Fiduciary Access to Digital Assets Act (**R**UFADAA, pronounced like a Kangaroo's parent -- "Roo father," again with a Brooklyn accent) that was drafted with industry participation and blessing. RUFADAA addresses access by four common types of fiduciaries: (1) executors or administrators of decedents' estates; (2) court-appointed guardians or conservators of estates; (3) agents under financial powers of attorney; and (4) trustees.

13.4 **ULC Description.** Here's a description of what RUFADAA does from the ULC:

> Revised UFADAA gives Internet users the power to plan for the management and disposition of their digital assets in a similar way as they can make plans for their tangible property. In case of conflicting instructions, the act provides a three-tiered system of priorities:
>
> 1. If the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user's digital assets or to direct the custodian to delete the user's digital assets, Revised UFADAA makes the user's online instructions legally enforceable.
> 2. If the custodian does not provide an online planning option, or if the user declines to use the online tool provided, the user may give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record.
> 3. If the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of Revised UFADAA will apply.
>
> Revised UFADAA's default rules attempt to balance the user's privacy interest with the fiduciary's need for access by making a distinction between the "content of electronic communications," the "catalogue of electronic communications", and other types of digital assets.

SB 1193 was sent to the Governor on May 23rd.

[Very Long] Drafting Tip

Let's be on the lookout for some bright attorney to present a paper with suggested language to include in traditional estate planning documents to deal with the disposition of, or access to, digital assets in light of TRUFADAA. ACTEC has a Digital Task Force that is working on compiling suggested provisions for wills, trusts, and financial powers of attorney. In the meantime:

[15] Already, 32 states have enacted RUFADAA, and another 12 (including D.C. and Texas) have pending legislation.

- Here is language for inclusion in a will provided by ACTEC Fellow James Lamm, a Minnesota attorney:

The personal representative may exercise all powers that an absolute owner would have and any other powers appropriate to achieve the proper investment, management, and distribution of: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine;(4) any user account of mine; and (5) any domain name of mine. The personal representative may obtain copies of any electronically stored information of mine from any person or entity that possesses, custodies, or controls that information. I hereby authorize any person or entity that possesses, custodies, or controls any electronically stored information of mine or that provides to me an electronic communication service or remote computing service, whether public or private, to divulge to the personal representative: (1) any electronically stored information of mine; (2) the contents of any communication that is in electronic storage by that service or that is carried or maintained on that service; (3) any record or other information pertaining to me with respect to that service. This authorization is to be construed to be my lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. The personal representative may employ any consultants or agents to advise or assist the personal representative in decrypting any encrypted electronically stored information of mine or in bypassing, resetting, or recovering any password or other kind of authentication or authorization, and I hereby authorize the personal representative to take any of these actions to access: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; and (4) any user account of mine. The terms used in this paragraph are to be construed as broadly as possible, and the term "user account" includes without limitation an established relationship between a user and a computing device or between a user and a provider of Internet or other network access, electronic communication services, or remote computing services, whether public or private.

- Here is language for inclusion in a power of attorney suggested by Keith Huffman, an Indiana attorney:

Digital Assets. My Attorney-In-Fact shall have (i) the power to access, use, and control my digital device, including, but not limited to, desktops, laptops, peripherals, storage devices, mobile telephones, smart phones, and any similar device which currently exists or exists in the future as technology develops for the purpose of accessing, modifying, deleting, controlling or transferring my digital assets, and (ii) the power to access, modify, delete, control, and transfer my digital assets, including, but not limited to, any emails, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, web hosting accounts, tax preparation service accounts, on-line stores, affiliate programs, other on line programs, including frequent flyer and other bonus programs, and similar digital items which currently exist or exist in the future as technology develops.

- If that's a bit too cumbersome, here's language Texas attorney Michael Koenecke passed along to me (that he borrowed from someone else) for inclusion in the powers granted to an executor:

Digital Assets. My Executor shall have the power to access, handle, distribute, and dispose of my digital assets, and the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets.

To go along with this authority, he includes the following definition in the back of the will:

Digital Assets. The term "digital assets" includes the following:

(1) Files stored on my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops; and

(2) Emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, regardless of the ownership of the physical device upon which the digital item is stored.

- Also, with respect to definitions of digital assets, note that TRUFADAA Sec. 2001.002 contains the following definitions:

(8) "Digital asset" means an electronic record in which an individual has a right or interest. The term

does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

* * *

(20) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

- **And**, in 2013, we amended the Trust Code definition of "property" found in Sec. 111.004 by adding the underlined language:

(12) "Property" means any type of property, whether real, tangible or intangible, legal, or equitable, including property held in any digital or electronic medium. The term also includes choses in action, claims, and contract rights, including a contractual right to receive death benefits as designated beneficiary under a policy of insurance, contract, employees' trust, retirement account, or other arrangement.

14. Exempt Property *[No bills in this area passed.]*.

15. Jurisdiction and Venue.

15.1 **The REPTL Decedents' Estates Bill – Nearest or Next of Kin (Est. Code Sec. 33.001.** If a decedent isn't a Texas resident and didn't die here, venue is proper in any county where the decedent's nearest of kin resides The REPTL 2017 Decedents' Estates bill (**HB 2271** (Wray | Rodriguez)) define nearest or next of kin as the spouse, or if none, other relatives in order of descent within the third degree by consanguinity (including a person legally adopted by the decedent and that person's descendants).

A technical error in HB 2271 was corrected by HCR 158, adopted by both chambers on May 28th, so the bill will be sent to the Governor. (See note following Sec. 7.1 for more details.)

15.2 **The REPTL Guardianship Bill – Transfer of Guardianship (Sec. 1023.003-1023.005).** **SB 38** (Zaffirini, *et al.* | Murr), a non-REPTL bill, would have authorized a court, on its own motion, to transfer a guardianship proceeding to another county if the ward is residing in that other county. **SB 39** (Zaffirini | Farrar), the REPTL Guardianship bill, was amended on the House floor to include the substance of **SB 38**.

SB 39 was sent to the Governor on May 28th.

15.3 **The REPTL Trusts Bill – Venue Clarification – Again (Trust Code Sec. 115.002).** The 2013 REPTL Trusts bill was designed to clarify proper venue where there are multiple noncorporate trustees, and no corporate trustee. But the language that was introduced didn't quite accomplish that. The REPTL Trusts bill (**SB 617** (Rodríguez | Wray)) **re-**clarifies it. As revised, Sec. 115.002 provides the following venue rules:

(b) Single, noncorporate trustee – either a county where the trustee has resided or the trust has been administered at any time during the preceding four-year period. (No change.)

(b-1) Multiple trustees, **none of whom is a corporate trustee**, who maintain a principal office in Texas – either a county where the trust has been administered at any time during the preceding four-year period or the county where the principal office is located.

(b-2) Multiple trustees, **none of whom is a corporate trustee**, who **do not** maintain a principal office in Texas – a county where either the trust has been administered or any trustee has resided at any time during the preceding four-year period.

(c) One or more corporate trustees – either a county where the trust has been administered at any time during the preceding four-year period or the county where any corporate trustee maintains its principal office. (No change.)

SB 617 was signed by the Governor on May 22nd and will generally be effective September 1st.

16. Court Administration.

16.1 **Sunset Review of State Bar and Board of Law Examiners.** I'm sure that there will be many other resources that will inform you about these changes in more depth, but this is the year for sunset review of both the State Bar of Texas and the Texas Board of Law Examiners.

(a) State Bar. **SB 302** (Watson, *et al.* | Thompson, S.) reauthorizes the State Bar. Changes (description courtesy of REPTL's research assistant, Barbara Klitch) include increasing SBOT board of director training; allowing Supreme Court to change membership fees without membership vote; requiring fingerprinting and criminal history checks for all members; permitting voluntary mediation and dispute resolution for "minor grievances" referred for mediation; authorizing subpoenas for investigation of grievances; mandating guidelines for self-reporting by attorneys of a criminal offense or a disciplinary action by another state bar; mandating a new grievance tracking system and a process for regular online searches by the SBOT for members' disciplinary actions in other states; revamping the disciplinary rule proposal process; creating an ombudsman for attorney discipline; requiring attorney's profile to include link to text of any disciplinary judgments; and permitting access by the SBOT to criminal history records obtained by Board of Law Examiners.

SB 302 was sent to the Governor on May 30th.

(b) Board of Directors. Related bills, **SB 416** (Watson, *et al.* | Smithee) revises the composition of the State Bar's Board of Directors to replace the current four "minority member" directors to four "outreach" directors, meaning "directors who demonstrate the sensitivity and knowledge gained from experiences in the legal profession and community necessary to ensure the board represents the interests of attorneys from the varied backgrounds that compose the membership of the state bar, including members of historically underrepresented groups."

SB 416 was sent to the Governor on May 30th.

(c) Board of Law Examiners. SB 303 (Watson, *et al.* | Thompson, S.) reauthorizes the Board of Law Examiners. Changes include allowing the board to delegate routine decisions to the executive director; increasing board training; revising notification dates for decisions on declarations of intent to study law; permitting an increase of late fee amounts; revising procedure for professional evaluation of an applicant whom the board has determined may suffer from a chemical dependency; and mandating development of licensing guidelines related to applicants' moral character and fitness.

SB 303 was sent to the Governor on May 30th.

16.2 **Deposit of Wills with Clerk and Fees for Probate Matters (Est. Code Ch. 252). HB 2207** (Kuempel | Zaffirini) authorizes an attorney, business, or other person in possession of a testator's will to deposit the will with the clerk of the county of the testator's last known residence if unable to maintain custody or locate the testator (for a $5 fee). Certain notices to be sent by the clerk in connection with a will deposit no longer need be sent by certified mail.

HB 2207 was sent to the Governor on May 25th.

16.3 **Notice of Self-Help Resources (Gov't. Code Sec. 51.808). SB 1911** (Zaffirini, *et al.* | Farrar) requires the clerk of each court to post on its website a link to the self-help resources website designated by the OCA in consultation with the Texas Access to Justice Commission, and a link to the State Law Library. The designated website must contain information about lawyer referral services, local Legal Aid offices, and court affiliated self-help centers serving the county. The main difference is that the Senate version does not require the OCA to establish its own self-help website. For example, TexasLawHelp.org, which is a program of the Texas Legal Services Center that is also supported by the Texas Access to Justice Foundation, the Travis County Law Library, and Pro Bono Net, might suffice.

SB 1911 was sent to the Governor on May 28th.

16.4 **Judges' Bond (Gov't. Code Secs. 25.006 & 26.001). SB 40** (Zaffirini) sets uniform bond requirements for constitutional and statutory county judges that vary only by the size of the county, overriding any specific provision for a particular court or county. The bond requirements are increased for judges presiding over guardianship or probate proceedings. The bill does not apply to statutory probate judges who provide their bond under Gov't. Code Sec. 25.00231.

SB 40 was sent to the Governor on May 28th.

17. Selected Marital Issues.

17.1 **Rules Relating to Application of Foreign Law to Marriages and Parent-Child Relationships (Gov'd. Code Secs. 22.0041 & 22.022). HB 45** (Flynn) directs the Supreme Court to adopt rules to limit the recognition of foreign judgments or arbitration awards involving a marriage or parent-child relationship that violate constitutional rights or public policy. In addition, the court is to provide a course of instruction relating to these issues for judges involved in those actions.

HB 45 was sent to the Governor on May 26th.

17.2 **Marriage by Minors. SB 1705** (Taylor, V. | Thompson, S.) eliminates parental consent or dissolution of a prior marriage as grounds for authorizing the marriage of a person under 18. Instead, anyone under 18 must have their disabilities of minority removed for general purposes by a court in Texas or elsewhere.

SB 1705 was sent to the Governor on May 23rd.

17.3 **Clerk's Name on Marriage Licences. SB 911** (Huffman, *et al.* | Springer) would have required a marriage license to identify the county in which it is issued, but would have prohibited specifying the name of the county clerk. (I assume this is related to objections of some clerks issuing marriage licenses to same-sex couples.) That bill didn't pass. However, on the next to last day of the session, both chambers adopted a conference committee report on **HB 555** (Springer, *et al.* | Hughes), a bill that originally set an additional fee for marriage licenses to nonresident licenses. That report added much of the language of **SB 911**, except that it allows, but may not require, specifying the clerk's name.

HB 555 will be sent to the Governor after both chambers adopted resolutions suspending limitations on the conference committee's jurisdiction (allowing the committee's report to go beyond the scope of the

original bill), and adopted the conference committee report on the next-to-last day of the session.

18. Stuff That Doesn't Fit Elsewhere.

18.1 **Diacritical Marks (Health & Saf. Code Sec. 191.009; Trans. Code Secs. 521.127 and 522.030).** **HB 1823** (Canales) directs the state registrar in the vital statistics unit of the Department of State Health Services and the Department of Transportation to ensure that vital statistics records, driver's licenses, and personal identification certificates include appropriate diacritical marks (accents, tildes, graves, umlauts, and cedillas, such as á, é, í, ó, ú, ü, and ñ). A conference committee report made these requirements to documents issued or renewed **beginning January 1, 2019**.

HB 1823 will be sent to the Governor after both chambers adopted the conference committee report on the last weekend of the session.

Drafting Tip

If you want to start including them yourself, you can do so by holding down the Alt key while typing a specific number combination. For example, here are the "Alt-key" codes for common Spanish characters (and one German character) with diacritical marks:

á	[Alt] + 0225	ü	[Alt] + 0252
é	[Alt] + 0223	ñ	[Alt] + 0241
í	[Alt] + 0237		
ó	[Alt] + 0243	¡	[Alt] + 0161
ú	[Alt] + 0250	¿	[Alt] + 0191

18.2 **Online Notarizations (Civ. Prac. & Rem. Code Secs. 121.006 & 121.016; Gov't. Code Secs. 406.101-111).** First, some background. The Texas Uniform Electronic Transactions Act (Bus. & Comm. Code Ch. 322) in effect provides that certain documents signed through electronic means may also be notarized electronically. But the Secretary of State's office makes clear that the person signing the document electronically must still appear in person before the notary. **HB 1217** (Parker) provides that a person may "personally appear" before an officer authorized to take acknowledgments by **either** "physically appearing before the officer" **or** "appearing by an interactive two-way audio and video communication that meets the online notarization requirements" of new Subchapter C to Chapter 406 of the Government Code. The details remain to be worked out because the Secretary of State is directed to develop standard for electronic notarizations. Online notaries could perform all acts of traditional notaries under Sec. 406.016, *i.e.*, authority to:

1. take acknowledgments or proofs of written instruments;
2. protest instruments permitted by law to be protested;
3. administer oaths;
4. take depositions; and
5. certify copies of documents not recordable in the public records.

HB 1217 was sent to the Governor on May 26th.

Drafting Tip

It is unclear whether online notarizations would be available for typical estate planning documents. But keep in mind that even if online notarizations were available for self-proving affidavits to wills, that does not eliminate the requirement that the **witnesses** be physically present.

19. *Special Supplement No. 1* – The Missing Delaware Tax Trap Provision.

19.1 **Original Proposal.** As introduced, the REPTL Trust bill added new Subsections (c) and (d) to Prop. Code Sec. 181.083. Those provisions would allow an instrument granting a power of appointment to specify that an interest created through the exercise of that power is deemed to be created when exercised, not when the power was originally granted, **if** the instrument exercising the power specifically (1) referred to Sec. 181.083(c), (2) asserted an intent to create another power of appointment described in IRC Secs. 2041(a)(3) or 2514(d), or asserted an intent to postpone the vesting of an interest for a period ascertainable without regard to the date of the creation of the donee's power. Why? This was an attempt to allow triggering the "Delaware tax trap" to cause inclusion of trust assets in the donee's estate for estate tax purposes if that would be desirable to obtain a new basis for the trust assets at the donee's death. This proposal was also in the 2015 REPTL Trust bill that didn't pass. But REPTL pulled this proposal from the 2017 bill in mid-session. Why?

19.2 **What is the Delaware Tax Trap?** Under traditional common law applicable to powers of appointment, any interest in property created through the exercise of a power is considered created when the original power being exercised was created. The measuring period for determining the maximum length of time an interest could remain in trust without violating the rule against perpetuities was always measured from the creation of the original power. However, in 1933, Delaware amended its rule against perpetuities to provide that each time a power of appointment was exercised, the new interest created as a result of the exercise would be considered created at

the time of the exercise, restarting the maximum time period under the rule against perpetuities. You could effectively get around the rule through successive exercises of powers of appointment. Since the trust assets could remain in trust practically forever, they would be forever removed from the transfer tax system.

In response (a mere 18 years later), Congress amended our estate and gift tax provisions to provide that if someone exercised a power of appointment to postpone the vesting of an interest for a period ascertainable without regard to the date of creation of the power of appointment, the assets would be included in the powerholder's estate for estate or gift tax purposes. So much for avoiding estate taxes by keeping assets in trust! These provisions are now found in IRC Secs. 2041(a)(3) and 2514(d).

19.3 **Why Can Estate Inclusion Be a Good Thing?** Just as compressed trust income tax rates in 1986 caused people to "rethink" the advantages of a "defective" grantor trust, the increased tax-free amounts for transfer tax purposes ($5.49 million in 2017) have caused people to rethink the advantages of the Delaware Tax Trap. IRC Sec. 1014 provides that the basis of property acquired from a decedent is the fair market value of the property at the decedent's death. The general rule is that property is only "acquired from a decedent" if it was taxable for estate tax purposes at the decedent's death. If a trust beneficiary wouldn't be subject to estate taxes anyway, why not try to cause trust assets to be included in the beneficiary's estate for estate tax purposes so that the assets would receive a new basis for income tax purposes at the beneficiary's death?

19.4 **The 2015 and 2017 REPTL Proposal.** Prop. Code Ch. 181, which is not officially part of the Texas Trust Code , deals solely with powers of appointment, The REPTL Trust bills in 2015 and 2017 original proposed adding the following to Sec. 181.083 (emphasis added):

> (c) To the extent specified in an instrument in which a donee exercises a power, ***any estate or interest*** in real or personal property ***created through the exercise of the power by the donee is considered to have been created at the time of the exercise of the donee's power and not at the time of the creation of the donee's power***, provided that in the instrument the donee:
>
> (1) specifically refers to Section 181.083(c), Property Code;
>
> (2) specifically asserts an intention to exercise a power of appointment by creating another power of appointment described by Section 2041(a)(3) or 2514(d), Internal Revenue Code of 1986; or
>
> (3) specifically asserts an intention to postpone the vesting of any estate or interest in the property that is subject to the power, or suspend the absolute ownership or power of alienation of that property, for a period ascertainable without regard to the date of the creation of the donee's power.
>
> (d) Subsection (c) applies regardless of whether the donee's power may be exercised in favor of the donee, the donee's creditors, the donee's estate, or the creditors of the donee's estate.

19.5 **Perpetuities Objections Are Raised.** Everyone thought this beneficiary income tax provision was very helpful until some people actually focused on its implications in mid-April of 2017. The reader should know that REPTL has remained steadfastly neutral on any changes to our rule against perpetuities because the REPTL leadership believes there is significant (reasonable) disagreement among its membership as to whether it should remain the same or be amended. But some people who had previously skimmed the Delaware Tax Trap provision took a closer look at it. It expressly does the same thing that the Delaware amendment did over 80 years ago – it allows the perpetuities provision to be restarted (multiple times) through successive exercises of powers of appointment, without the interest ever vesting. This would violate the traditional formulation of the rule against perpetuities.

19.6 **Argument in Favor of Constitutionality.** Our Texas constitutional prohibition of perpetuities[16] is remarkably vague:

> 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.

An almost identically worded provision has been contained in every previous version of the Texas Constitution going back to a proposed **1833** "Constitution or Form of Government of the State of Texas." Nowhere does this constitutional provision say anything about vesting, restraints on alienation, lives in being plus 21 years, etc. When our Trust Code was enacted effective January 1, 1984, Sec. 112.036 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

[16] Texas Constitution, Art. 1, Sec. 26.

> 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.

Since our constitutional prohibition doesn't contain any of the details of the rule against perpetuities, why couldn't the legislature "implement" the rule by defining "vesting" to include having a right to income combined with a broad special power of appointment? Therefore, the interest of the first beneficiary could be considered to have "vested," thus satisfying our perpetuities prohibition.

19.7 **Two Problems.** There are two potential problems with that argument.

(a) Is the Interest Vested, or Has Vesting Been Postponed? You might argue that first donee's interest has essentially vested under state law in order to avoid our rule against perpetuities. But the federal tax provision causing inclusion of the interest for estate tax purposes **requires** that under **local** law, the power must be validly exercisable to **postpone vesting** for a period ascertainable without regard to the date of the creation of the power. So it seems one would have to argue that an interest has vested for state law purposes but not for federal purposes, even though the latter looks back to state law.

(b) Cases Interpreting Our Constitutional Prohibition. The argument that the legislature could redefine vesting might be fine in a vacuum, but we didn't have a statutory prohibition until 1984, and there were many years of case law interpreting the constitutional prohibition prior to then. The courts had fairly well defined the parameters of our constitutional rule against perpetuities in its traditional sense by 1984, including traditional concepts of vesting. I will not go into the details of these cases, but for anyone who cares to review them on his or her own, here's a partial list:

- *Anderson v. Menefee*, 174 S.W. 904 (Tex.Civ.App - Ft. Worth 1915)
- *Neely v. Brogden*, 239 S.W. 192 (Tex.Comm.App. 1922)
- *Clarke v. Clarke*, 121 Tex. 165, 46 S.W.2d 658 (Tex.Comm.App. 1932)
- *Norman v. Jenkins*, 73 S.W.2d 1051 (Tex.Civ.App. 1934)
- *Brooker v. Brooker*, 130 Tex. 27, 106 S.W.2d 247 (Tex. 1937)
- *Hunt v. Carroll*, 157 S.W.2d 429 (Tex.Civ.App--Beaumont 1941)

19.8 **Conclusion.** The aggregation of the cases interpreting our constitutional rule likely constrain the legislature's ability to redefine "vesting." Whether you agree with the arguments outlined above or not, it appears that our little Delaware Tax Trap provision, while extremely handy, might not have been as "uncontroversial" as REPTL has thought. That alone makes it a questionable provision for REPTL to propose, so it was withdrawn.

20. *Special Supplement No. 2* – The University vs. the Golf Course.

20.1 **Austin's Muny Golf Course. SB 822** (Estes, *et al.* | Larson, *et al.*) would have required the UT System to transfer the property described in the bill (known to Austinites as the Muny Golf Course) to the Parks and Wildlife Department.[17] As consideration, the Parks and Wildlife Department must use the property for a public golf course. If it ever fails to do so, the property will revert back to the UT System. Apparently a committee substitute for the Senate bill in the House may amend this to keep the property with UT, but require the University to maintain it as a golf course. Why is this bill mentioned here? Because I feel like writing about it. But also because it raises interesting questions about charitable gifts, donor intent, and the ability (or lack thereof) of a legislature to change that intent.[18]

20.2 **Current Suggested Donation Language.** If you go to the University of Texas' website, you can find its planned giving page with suggested language for making gifts to the university. Part of that suggested language reads:

Such endowment *shall never become a part of the Permanent University Fund, the Available University Fund, or the General Fund of the State of Texas, and* ***shall never be subject to appropriation by the Legislature of the State of Texas.*** *These funds and all future gift additions to the endowment, reinvestments, and required matching funds referenced in this agreement, including those made by the Board of Regents or University administration, shall be subject to the provisions of this agreement and shall be*

[17] A proposed committee substitute would have left the property with UT so long as it operated the property as a golf course. If it failed to do so, the property would have been transferred to Parks & Wildlife.

[18] Sources for this discussion include the original gift deed from Col. Brackenridge to UT recorded at Book 244, Page 77, Deed Records of Travis County; the Wikipedia entry for Col. Brackenridge; Regent Frank Ewin's 1973 Review of the History of the Brackenridge Tract prepared for the Board of Regents; a 2005 History of the Brackenridge Tract Presentation to the Board; the UT System Real Estate Office's 2006 Brackenridge Tract FAQ; and the UT System's 2007 Brackenridge Tract Task Force Report.

classified as permanent endowment funds. (emphasis added)

However, UT didn't have that suggested language posted on its website back in 1910. Hence the reason for the rest of this Part 20.

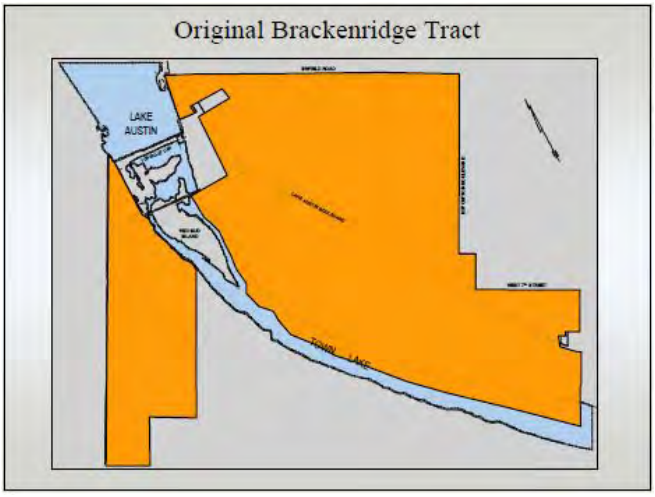
20.3 **Acquisition of the Brackenridge Tract.**

(a) Col. Brackenridge. Col. George W. Brackenridge (1832-1920) made his initial wealth as a profiteer during the Civil War. He organized two banks in San Antonio and was president of the San Antonio Water Works Company. He lived in Alamo Heights (which he named), and he donated the land where Brackenridge Park, the San Antonio Japanese Tea Garden, and Mahncke Park now sit.

(b) Regent Brackenridge. Col. Brackenridge also served on The University of Texas System Board of Regents for over 25 years (before and after the turn of the last century), longer than any other individual. He devoted much of his personal fortune towards creating the Constitutionally mandated "University of the first class," including personally pledging (along with Maj. George Littlefield) to fund the University's budget when the Governor attempted to veto the University's entire appropriation. (The veto was ruled unconstitutional so the pledges were never needed.)

(c) Col. Brackenridge's Dream. By 1900, the Regents realized that the original "forty acres" would not be large enough to meet the University's future needs. In response, Brackenridge acquired over 500 acres west of Austin to be used as a future home for the University. The heirs of Gov. Pease owned more than 1,000 acres between the Pease Mansion on the east and Col. Brackenridge's tract on the west. It was Col. Brackenridge's dream that he and the Pease heirs would each give 500 acres to the University and that the new 1,000 acre campus would be connected to the original "forty acres" by a 400-foot wide boulevard running down the current route of 24th Street from the Pease Mansion to Guadalupe Street. He even offered to purchase the Pease house and land donate them to the university in Gov. Pease's name. However, the heirs ultimately concluded that they could not afford to donate 500 acres, and their pride would not permit them to let Col. Brackenridge purchase the property and donate it in their ancestor's name.

(d) Plan B. Col. Brackenridge decided to proceed alone and wrote University President Mezes of his willingness to donate his 500 acres if "it could be occupied for University purposes advantageously." However, he was "unwilling to give it to [the University] to be sold or exchanged for other property. Soon afterward, in 1910, "for the purpose of advancing and promoting University education," he deeded his 500 acres "in trust for the benefit of the University of Texas … to the State of Texas for the benefit of the University of Texas … with the request merely on my part that it be never disposed of but be held permanently for such educational purposes" for generations of future students. The deed included a possible reversion to Jackson County in the event the property was not used for educational purposes, but that reversion appeared to expire upon the death of the last survivor of six named persons between the ages of one and nine years.



Brackenridge left the Board the following year, and the new Board, especially Maj. Littlefield, was reluctant to move the main campus. While the Board considered the move, Maj. Littlefield rented the larger tract on the east side of the Colorado River for $500, and the smaller tract on the west side for $10.

(e) Attempted Move to the Brackenridge Tract. In 1920, Brackenridge and Littlefield died within a month of each other.[19] The following year, the Regents sought permission to move the campus to the Brackenridge Tract. This set off an unexpected tumult in the Legislature, including one proposal to move the main campus from Austin. A compromise had the University remaining on the original campus, with a $1.35 million appropriation to acquire 135 acres east of the campus. The University never again proposed moving the main campus. Col. Brackenridge's original dream of moving the campus died forever three months after he died.

[19] Col. Brackenridge's will gave the bulk of his estate to the George W. Brackenridge Foundation for educational purposes, but not before a will contest involving a purported holographic will that revoked prior wills, the remaining contents of which were unknown. *See Brackenridge v. Roberts*, 114 Tex. 418, 267 S.W. 244 (Tex. 1924).

20.4 **Clearing Title to the Brackenridge Tract.** Col. Brackenridge's deed of gift was not a model of clear draftsmanship. Because of language creating a possible reversionary interest in Jackson County and a mention of the permanent university fund, it was virtually impossible to issue bonds secured by the tract to build student housing and other facilities on the tract. The Regents and, the Attorney General filed an action in Travis County resulting in a 1964 judgment that the Brackenridge Tract was not (and never had been) part of the Permanent University Fund," allowing use of the tract to secure revenue bonds. The following year, the legislature authorized the Board to acquire any interests claimed by others in the Brackenridge Tract, and in 1966, the University paid Jackson County $50,000 in exchange for its possible reversionary interest. A 1967 Travis County judgment confirmed that the Board of Regents held fee simple title to the Brackenridge Tract, including the contingent reversion previously held by Jackson County. That year, the legislature also authorized the Board to sell or lease any portion of the Brackenridge Tract in order to generate funds used for the purpose of acquiring lands for expansion of the main campus. The legislature also authorized the acquisition of additional land adjacent to the main campus, resulting in an almost 400-acre campus by 1973.

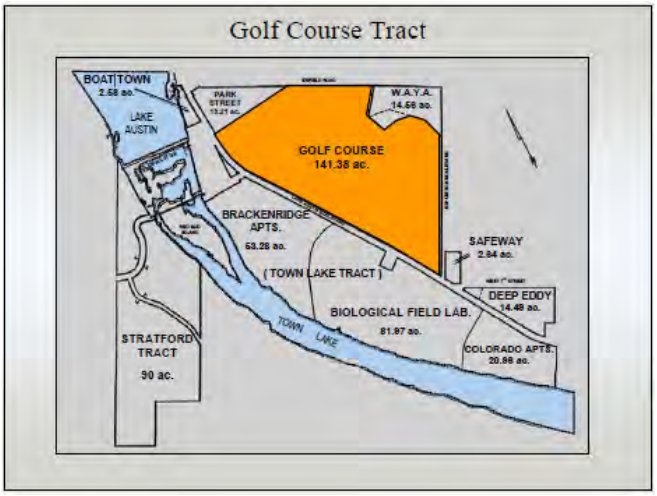
20.5 **Uses of the Brackenridge Tract.**

(a) University Uses of the Brackenridge Tract. Over the years, the University has used portions of the tract for married student housing, the Brackenridge Field Laboratory, and the U.T. Rowing Center.

(b) Commercial Uses of the Brackenridge Tract. In 1939, the University leased waterfront property for a marina. That property is now the site of a commercial development most famous for the Hula Hut restaurant. Another portion is leased as the site of a grocery store. Other leases include sites for a small strip center, a convenience store, a drug store, and apartments. In the 1990s, the Board determined that the 90 acres west of the river (known as the Stratford Tract) should be sold, and the Board eventually received over $6 million in proceeds.

(c) Governmental and Civic Uses of the Brackenridge Tract. Beginning in 1953, portions of the tract were leased to the Lower Colorado River Authority. The agency's headquarters is now located on that site. In 1961, at the Board's request, the city released 11.6 acres of the golf course site (see the following paragraph) so the regents could use it as a site for a residence for the U.T. President. However, that project was later abandoned, and in 1980, about 15 acres (including the 11.6-acre site) at the northeast corner of the tract was leased to the West Austin Youth Association for the development of neighborhood youth sports activities.

(d) Muny. But the most visible use of any portion of the Brackenridge Tract is the golf course. In 1924, the Board leased about 140 acres to the Austin Municipal Golf and Amusement Association, an affiliate of the Lions Club, for the creation of a golf course. The University received $60/year in rent and had the right to terminate the lease upon a year's written notice if they desired to devote the tract to some direct University activity. In 1937, the lease was assigned to the City of Austin, and the term was extended for 50 years. In the interim, the city renegotiated the lease for a term running to 2019, with extensions that may be cancelled by either party.



(e) Civil Rights Significance. The future of Muny is further complicated by the fact that it's not just a green space that perhaps could generate more revenue for UT. In June of 1950, in the case of *Sweatt v. Painter*, the U.S. Supreme Court held that the separate law school created by UT for blacks was not sufficient, and ordered the university to admit Heman Sweatt to the main UT law school. Less than a year later, in March of 1951, the Austin Statesman reported that African Americans had been playing at Muny for several months. The desegregation occurred peacefully and quietly when two black youths walked onto the course to play golf, and no one stopped them. The following month, Austin Councilwoman Emma Long objected to a plan to build a separate course in East Austin for African Americans and the plan was dropped. In a public hearing on SB 822 on March 21st, Volma Overton, Jr., the son of an Austin civil rights icon, recalled going to the course with his father as a child when a large number of other African Americans showed up. He asked his father who these people were, and his father replied that he guessed word had gotten

out about desegregation of the course. These people were from Houston, Dallas, and other cities around the state.

Four years after Muny's desegregation, the U.S. Supreme Court ordered desegregation of all public golf courses. It is widely believed that Muny was the first public golf course in the South to be desegregated.

(f) Austin Grew Out to the Brack Tract. While the Brackenridge Tract was "out in the boonies" when it was acquired over 100 years ago, as anyone familiar with Austin can clearly see, it is now situated smack dab in the middle of some high-dollar real estate.

(g) The Development Agreement. In 1989, the Board and the City of Austin executed the Brackenridge Development Agreement establishing rights for the non-university development of portions of the tract. The Board has since indicated its desire to redevelop portions of the tract in ways that generate higher revenue. One of those redevelopment proposals would involve eliminating Muny, raising the hackles of many in Austin – especially West Austin.

20.6 **Dwindling State Educational Funding.** In the mid-1980s, UT Austin had a budget of about 500 million. Almost half of that was funded by general state revenue; only 5% by tuition and fees. By 2015, that annual budget had increased 5½ times to $2.8 billion. The portion of that budget funded by general revenue had dropped to 13%, while the portion funded by tuition and fees had increased to 21%. The trend is likely to continue. While UT remains a premier state institution, to a large extent, it is no longer a state-**funded** institution. And the Regents have a fiduciary duty to look out for the best interests of the University.

20.7 **Possible Development of the Golf Course Land.** One of the resources that the Regents have looked to in order to generate the revenue necessary to fund a "university of the first class" is the Brackenridge Tract. Personally, I would prefer the tract to stay largely as it is. However, no one claims that the golf course is generating "fair market rental value" for the University. Is it appropriate for the University to continue subsidizing Austin's use of a large part of the tract as a golf course when the terms of the original gift deed provided that the land be used "for the purpose of advancing and promoting University education," on the condition that the land be held "in trust for the benefit of the University of Texas" to be used "for educational purposes" for generations of future students.

20.8 **The Legislature's Authority.** More interestingly (to me, at least) is whether the legislature may legally take away property given to the University without any financial compensation in contravention of the terms of the deed originally giving the property to the University.

(a) Supporters' Argument. In a March 13, 2017 article by Austin American-Statesman reporter Ralph K.M. Haurwitz, Sen. Craig Estes (R-Wichita Falls), the author of the bill, believes that "the Legislature has a perfect right to transfer one asset from one state agency to another. … I don't know that any compensation is needed or justified. I think people that bequeath things to institutions of higher education can rest easy. I don't think this would be a trend at all." The article points out the previous disposition of portions of the tract by the Board of Regents as evidence that even UT has not upheld the donor's intent.

(b) Back to Donor Intent. But do those previous dispositions really support the proposed legislation? Let's look at Col. Brackenridge's intent, as expressed in the original gift deed:

- The purpose of the gift was "advancing and promoting University education."
- While he deeded the property to the State of Texas, it was deeded "in trust for the benefit of the University of Texas"
- He made a "request merely … that it be never disposed of but be held permanently for such educational purposes."
- But while the educational use of the land was a merely a request, there is nothing optional about the land being held for the benefit of UT.

(c) Prior Dispositions. And when we look at the prior dispositions of portions of the tract by sale or lease, all of them were for valuable consideration (presumably at market value). The proceeds of those sales were added to the University's permanent endowment that continue to benefit the University. There is no consideration that would benefit UT in the proposed legislation.

20.9 **Compare "The Spirit of the Alamo Lives On."** **HB 1644** (Springer | Birdwell) is a one-sentence bill that directs the Texas Veterans Commission to transfer the painting "The Spirit of the Alamo Lives On" by artist George Skypeck to the General Land Office by December 1st. Why this transfer requires actual legislation is unclear to me, but the background behind the bill is provided by a March 13th column by Austin American-Statesman reporter and columnist Ken Herman. According to the column, Mr. Skypeck "is a noted military artist [who] has dedicated his life and his art to helping and honoring vets." He donated the painting, which depicts Texas military history, to

the State of Texas in 2009, admittedly without restrictions. The painting ended up in an eighth floor office of the Texas Veterans Board where there's little opportunity for the public to see it. The plan behind the bill is to transfer control of the painting to the General Land Office. The GLO would lend the painting to the State Preservation Board, which could hand the painting in the publicly-accessible Medal of Honor hallway in the Capitol. In addition, the GLO hopes to sell print editions of the painting in the Capitol Gift Shop with proceeds benefiting the Texas Veterans Land Board. The artist/donor thinks this is a grand idea!

HB 1644 was sent to the Governor on May 26th.

20.10 **And What About the French Legation.** The French Legation in Austin (which actually never served as a French legation) is currently under the control and custody of the Daughters of the Republic of Texas. However, **HB 3810** (Cyrier, *et al.* | Watson) transfers jurisdiction over the French Legation, along with responsibility for its preservation, maintenance, restoration, and protection, to the Texas Historical Commission. The Commission **may** enter into an agreement with the DRT regarding management, staffing, operation, and financial support of the French Legation. How can the Legislature do this? It turns out that current Gov't. Code Sec. 2165.257 already makes clear that the French Legation (called the French Embassy in the existing statute) is the property of the state, and title remains in the commission's custody. It just gives the Daughters the use of the French Legation for its purposes. The Legislature giveth, and the Legislature taketh away.[20] There's no "donor intent" involved in this bill, one way or the other.

HB 3810 will be sent to the Governor after the House concurred in Senate amendments on May 26th.

20.11 **Conclusion?** We'll have to wait to see how this discussion plays out. **SB 822** died when it failed to emerge from a House committee on time, but it is clear that it could be back in 2019. Clearly, Muny is a valuable asset that could be exploited in a manner that would provide more financial benefit for higher education. But it also plays a significant historical role in the history of civil rights not just in Texas, but the nation. Hopefully, an appropriate balance of those competing interests can be found.

[20] The property was purchased by Dr. Joseph Robertson in 1848 and served as the home for him, his wife, eleven children, and nine slaves. One of those children, Lillie Robertson, lived in the home her entire life (almost 84 years), and following her death, the property was sold to the state. The state, in turn, appointed the Daughters of the Republic of Texas as custodian of the property.

21. A Little Lagniappe.

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

21.1 **Remember the Alamo (Again)!** We all remember last session's unsuccessful **SB 191** (Campbell) that would have prohibited the General Land Office from entering into an agreement transferring any ownership, control, or management of the Alamo to an entity formed under the laws of another country. (Okay, so maybe I'm the only one who remembers it.) This session, **HB 724** (Villalba) and **SB 759** (Menéndez) would have added March 6th to the list of official state holidays as "'Remember the Alamo Day' in honor of Davy Crockett, Gregorio Esparza, James Bowie, Toribio Losoya, William B. Travis, and all who fought and died at the battle of the Alamo for the independence of the great State of Texas." Note that if March 2nd (Texas Independence Day) falls on a Monday, we'd have had two state holidays in the same work week! (**SR 340** (Bettencourt | Rodríguez) merely commemorates Texas Independence Day without making it a state holiday.)

21.2 **Ban on Texting While ~~Driving~~ Watching a Movie on a Date.** Okay, this isn't really a legislative item. It's probably suited more for Prof. Gerry Beyer's case law update. But I wanted to include it in this paper, and tying it to **HB 62** (Craddick, *et al.* | Zaffirini),[21] which bans most uses of wireless communication devices while operating a motor vehicle, is as close as I could get to a legislative item.

In its May 17th print edition, the Austin American-Statesman reported on a case filed the previous Thursday. A 37-year-old Austin man (whose name is being withheld from this description in order to avoid providing him with additional publicity) met a 35-year-old Round Rock woman online. They went to see "Guardians of the Galaxy, Vol. 2" (in 3D, no less) on their first date on May 6th. (Author's first note: I've been out of the dating scene for over a quarter century, but is it really appropriate to take a woman to "Guardians of the Galaxy, Vol. 2" in 3D on a first date?) The man filed a claim against her in small claims court for $17.31 (the price of the movie ticket) because she allegedly pulled out her phone about 15 minutes after the movie began and started texting. She "activated her phone at least 10-20 times in 15 minutes to read and send text messages." He says he asked her to stop. When she refused, he suggested that maybe she could go outside to continue texting. She took him up on that offer, leaving the theater and never returning. By the way, did I mention that they came to the theater

[21] On May 21st, the House concurred in Senate amendments to HB 62, so it will be sent to the Governor.

in her car, so he was left without a ride? The man says he texted her a few days later asking her to reimburse him for the ticket. She refused.

The Statesman reporter contacted the woman (who asked that her name not be used in the original article) on May 16th. She hadn't heard about the claim. Her response: "Oh my God, this is crazy!" She said she was texting a friend who was in the middle of a fight with her boyfriend, and only texted two or three times. (Author's second note: Her claim that she only texted two or three times is not inconsistent with the man's claim that she "activated" her phone 10-20 times to read and send texts.) "I had my phone low and I wasn't bothering anybody, … "It wasn't like constant texting." She admitted refusing to repay the price of the ticket because "he took me out on a date." She also planned to file for a protective order because the man had contacted her little sister to try to get paid.

Meanwhile, the petition claimed that the woman's behavior violated the theater's policy and adversely affected the man's viewing experience and that of other patrons. "While damages sought are modest, the principle is important as defendant's behavior is a threat to civilized society." I think that just about sums it up.

Update: When Alamo Drafthouse founder and CEO Tim League learned about the lawsuit later on the day the story was published, he was conflicted. He emailed the newspaper: "On one hand, I am concerned about our courts being clogged with superfluous lawsuits, but as [the plaintiff] states, 'this is a threat to civilized society,'" League said that if the plaintiff would drop the case Alamo Drafthouse would provide him a gift certificate for the $17.31 cost of his movie ticket.

The next day, the plaintiff said he would drop the lawsuit because his erstwhile date paid him back for the ticket. She did so after the producers of Inside Edition asked her to meet him outside the theater. This wasn't "the outcome he hoped for. … I felt ambushed because Inside Edition put me in a spot where I was forced to let the media steal the narrative as opposed to making the decision in my own time."

21.3 **BBQ, Beer, Wine, and Other Certificates.** I'm always searching for BBQ bills. Last session, the only one I came across was **HB 302** (Vo). This bill would have directed the Department of Transportation to create a "travel certificate program" to issue to visitors to various locations certificates such as "BBQ Boss," "Beer Hall Visitor," "Historic Courthouse Visitor," "Vineyard/Winery Visitor," "Beachcomber," "Traveler," "Museum Visitor," and "Rodeo Visitor." A "Basic" certificate would be issued for visiting locations in at least three regions of the state, an "Advanced" certificate for visiting five regions, and a "Master" certificate for visiting seven regions. The bill made it through the House but reached the Senate too late in the session for any action. This session, it was back for another try in the form of **HB 1447** (Wu). It didn't make it out of the House.

21.4 **Fort Knox, Redux.** Last session, **HB 483** (Capriglione) established the Texas Bullion Depository to hold precious metals acquired by Texas, its agencies, political subdivisions, etc., to "bring Texas' gold back home" (from New York). In 2013, when the proposal was first introduced, the University of Texas Investment Management Company[22] (the only state entity with a significant amount of gold) paid to store its 6,643 gold bars – worth around $1 billion at the time – in a New York bank. (Since then, the gold holdings have apparently decreased significantly.) Reportedly, UTIMCO pays an annual storage fee of one-tenth of 1%. As Gov. Abbott stated when he signed the bill, we need to keep this taxpayer money in Texas. A UTIMCO spokesperson has indicated that moving the gold to Texas would be seriously considered if it were cheaper (the bill does not **require** any state agency to move its gold back to Texas). Apparently, another UTIMCO requirement is that the depository be a member of COMEX (Commodities Exchange, Inc.). Currently, all COMEX rated facilities are located within 150 miles of New York City and earning a COMEX membership out of this region may be difficult.

To this author's knowledge, no ground has yet been broken on the depository. Nevertheless, this session, **HB 3169** (Capriglione | Kolkhorst) changes the Texas Bullion Depository from **an agency** in the comptroller's office to **a program** in the comptroller's office. **HJR 113** (Capriglione, *et al.* | Kolkhorst) is an accompanying constitutional amendment to exempt precious metal held in the Depository from property taxes. Neither of them made it.

21.5 **A Rose by Any Other Name ….** This is not a legislative matter, but interesting to some readers nonetheless. Last June, in an effort to "bring increased awareness to the law school's distinctive location in downtown Houston and better represent the law school's diversity and global impact, thereby bolstering our regional and national profile," South Texas College of Law changed its name to Houston College of Law. Its brand went from this:

[22] Which voted on April 20th to change its name to the University of Texas/***Texas A&M*** Investment Management Company, but kept the same acronym.

SOUTH TEXAS COLLEGE OF LAW

To this:

HOUSTON COLLEGE OF LAW EST. 1923

Well, the University of Houston Law Center wasn't too happy about this. Less than a week later, the University of Houston System filed a trademark infringement suit claiming that the new name and the logo's use of UH's red and white color scheme infringed on UH's intellectual property. Its logo:

UNIVERSITY of HOUSTON LAW CENTER

In September, UH successfully convinced the U.S. Patent and Trademark Office to officially suspend STCL's application for its new logo and name, and the following month, UH obtained an injunction preventing STCL to use the new name or logo. At the end of October, STCL agreed to change its name back, except that it would add the word "Houston" to the end of its name, *i.e.*, South Texas College of Law Houston, and in early November, STCLH agreed to use navy rather than red in its marketing efforts (although its official colors since the 1960s had been and would remain crimson and gold):

It still wasn't over. In February, a preliminary settlement of all issues fell apart, and the parties asked the federal judge to send them to mediation. On March 2nd (Texas Independence Day, by the way), the parties announced they had reached an undisclosed settlement subject to approval by the UH Chancellor and the STCLH Board. On March 10th, the parties announce that the necessary approvals had been obtained. South Texas will be allowed to use the word "Houston" in its name, "while ensuring its use of 'Houston' will not cause confusion between the two schools." UH agreed to dismiss its lawsuit, and STCLH agreed not to challenge UH's trademark application for the use of "Houston" related to education services and related goods and services.

So after all this, I expect we'll still refer to the downtown law school as "South Texas."

21.6 **It's All in the [~~Name~~] Caption.** Some interesting bill captions:

- **HB 812** (Wu) – "An Act relating to standing in a roadway …" watchin' all the girls go by. (Okay, so I added that last part.)
- **HB 888** (Raymond) – "An Act relating to honesty in state taxation." Who could oppose that? (Identical to last session's **HB 436** (Raymond).) And to make sure it sticks, **HJR 22** (Raymond) – "Proposing a constitutional amendment providing honesty in state taxation." Neither passed.
- **HB 1087** (Alvarado) – "An Act relating to the creation of the offense of bestiality." No further comment. (Although many comments, some humorous, some not, and all in poor taste, come to mind.) While this didn't pass, **SB 1232** (Huffman, *et al.* | Alvarado) – "An Act relating to inappropriate conduct between a person and an animal; creating a criminal offense" may.
- **HB 1350** (Cain, *et al.*) – "An Act relating to pedestrian use of a sidewalk." Isn't that what its for? (Actually, the bill repeals Trans. Code Sec. 552.006(b). Subsection (a) says a pedestrian may not walk along and on a roadway if an accessible sidewalk is provided. Subsection (c) says drivers emerging from or entering an alley, private road, driveway, etc., must yield to a pedestrian. The portion repealed by the bill says that if there isn't a sidewalk, the pedestrian should walk on the left side of the roadway or the shoulder of the highway facing oncoming traffic.) Didn't pass.
- **HB 3061** (Alvarado) – "An Act relating to operating a motor vehicle while another person is occupying the trunk; creating a criminal offense." But what if there are seatbelts in the trunk? Didn't pass.
- **HB 3392** (Keough) – "An Act relating to the taking of certain feral hogs using a hot air balloon." Apparently, hogs weren't enough, so we subsequently got **HB 3535** (Keough) – "An act relating to the taking of certain feral hogs and coyotes using a hot air balloon." I'm sure all those feral hogs and coyotes will appreciate taking a pleasant hot air balloon ride. (The latter bill passed.)
- **HB 4260** (Farrar) – This is the bill discussed at Section 21.14 below. Out of modesty, I really don't want to reproduce the entire caption here, but you can click on the link if you want to read it. (It never got a hearing.)

- **HCR 75** (Oliverson | Raymond) – "A Resolution urging Texans not to use the flag emoji of the Republic of Chile when referring to the Texas flag." Here are the two flags side-by-side:


CHILEAN FLAG


TEXAN FLAG

(I don't use emojis, but I've been told there isn't one for the Texas flag.) The resolution got out of the House but not the Senate.

- **SB 1372** (Menéndez) – "An Act relating to the operation of an electric unicycle." Didn't pass.
- **SB 1620** (Taylor, V.) – "An Act relating to the regulation of raising or keeping six or fewer chickens by a political subdivision." Didn't pass, so I guess political subdivisions may continue raising six or fewer chickens. (Or perhaps they'll remain subject to regulation?)
- **SCR 16** (Menéndez) – "A Resolution encouraging the President of the United States to refrain from threatening elected officials." Who thought this might ever be needed? Didn't pass.

Most, if not all, of these bills and resolutions were included on former Rep. Corbin Van Arsdale's biennial list of the 50 best captions. This year, he had two winners. The winner of the *popular vote* was **HB 4260** (Farrar), discussed at Section 21.14 below. The winner of the *electoral college* vote was **HB 3535** (Keough), discussed above.

21.7 **Did You Hear that Big "Woo Hoo!" Coming Out of the Treasury Operations Division?** **SR 432** (Kolkhorst) was filed, adopted, and enrolled on March 15th. The Senate resolution commends all associated with the Treasury Operations division of the Comptroller's Office (the separate Texas State Treasury Department prior to September 1, 1996) and extends to them the Senate's best wishes for the years ahead. I'm sure the app. 50 full-time employees of the division were thrilled with the recognition.

21.8 **When an Insurance Building Isn't an Insurance Building.** **HCR 141** (Murphy) recognizes the accomplishments of former Pres. George H. W. Bush and directs the Texas Facilities Commission to rename the State Insurance Building in the Capitol Complex (at the corner of San Jacinto St. and 11th St.) as the George H. W. Bush State Office Building in his honor. Nothing unusual in that, except to note that the Texas Department of Insurance is located nowhere near the State Insurance Building. The department is located in the William P. Hobby Building at 333 Guadalupe St., about a mile away. (The Governor's staff uses the State Insurance Building.) This resolution was signed by the Governor on May 18th.

21.9 **The Texas Balance of Powers Act.** **HB 74** (Flynn) seeks to deny the federal government the power to take any action that violates the U.S. Constitution, specifically including those that undermine the balance of powers between the states and the federal government. The federal government is put on notice from Texas to cease and desist any of those unconstitutional activities, and calls on all state and local officials to honor their oath to preserve, protect, and defend the Constitution and to stop unconstitutional federal actions. So there! Didn't pass.

21.10 **The Texas Sovereignty Act.** **HB 2338** (Bell) and **SB 2015** (Creighton) are another attempt to resist Article VI, Clause 2, of the U.S. Constitution (what is commonly known as the "Supremacy Clause"). It is, to put it mildly, "interesting." The bill creates the Joint Legislative Committee on Constitutional Enforcement, made up of six members from the House and six from the Senate. No more than four members of each group of six may be from the same party. The committee may review any federal action (whether law, rule, executive order, court decision, or treaty) to determine whether it is unconstitutional based on "the plain reading and reasoning of the text of the United States Constitution and the understood definitions at the time of the framing and construction of the Constitution by our forefathers." If it makes that determination, it's submitted to a vote of each chamber, and then sent to the Governor. Once the determination successfully makes it through these steps, it is sent to the President, the Speaker of the House, the President of the Senate (*i.e.*, the Vice President), and all members of the Texas delegation to Congress with the request that the declaration be entered in the Congressional Record.

But wait, there's more! A federal action declared unconstitutional has no legal effect in Texas and may not be recognized by the state or any of its political subdivisions. No one may spend public money to enforce it. A law enforcement officer may enforce these laws against anyone attempting to implement the offending federal action (this includes authorizing the Attorney General to prosecute the implementer). **Any** Texas court has original jurisdiction over a declaratory judgment to declare that a federal action is unconstitutional. (I'm looking at you, Mr. Justice of the Peace!) That court must rely on the plain meaning of the text of the U.S. Constitution, and **may not** rely

solely on the decisions of other courts interpreting the Constitution. And to clarify, public officials who have sworn an oath to defend the U.S. Constitution may interpose themselves to stop federal actions which, "in the officer's best understanding and judgment, violate the United States Constitution." Neither passed.

21.11 **The State Flag.** **SB 1968** (Zaffirini | Gutierrez) deals with appropriate behavior around our state flag. Did you know we have a state flag code? No, not the Pledge to the Texas Flag, the state flag code. (I was clueless about this code until I ran across this bill.) We apparently have an entire chapter of the Gov't. Code (ch. 3100) dealing with proper procedures for displaying our state flag, carrying it, hoisting and lowering it, pledging allegiance to it, retiring it, and so on. The bill grants permission to members of the military (including veterans) who are present but not in uniform to make the military salute, rather than placing their right hand over their heart, which is the general rule for persons not in uniform, in the following situations:

- When the flag is hoisted or lowered, or when the flag is passing in a parade or review (Sec. 3100.068(b)(3)).
- When the pledge to the flag is recited (Sec. 3100.104(2)).
- During a flag retirement ceremony (Sec. 3100.152(b)(3)).
- When the flag is hoisted or lowered, or when the flag is passing in a parade or review (Sec. 3100.068(b)).
- During the performance of the state song (Sec. 3101.006(a)(1)(C). (This last one is actually in a separate chapter devoted to state symbols, including our state song, *Texas, Our Texas*.)

In addition, the bill corrects the 410-word first-person statement recited on the flag's behalf at the retirement ceremony to state that "I am **at the Johnson Space Center** in Houston (rather than **in the space station** at Houston) and atop the oil wells of West Texas."

SB 1968 passed in the House on May 24th and will be sent to the Governor.

21.12 **Abolition of the Federal Income Tax.** **HCR 38** (Stephenson, *et al.*) notes that income taxes give government too much power over citizens, are unfair and inequitable, unnecessarily intrude on privacy and civil rights, hinder economic growth, lower productivity, penalizes marriage and upward social mobility, and more. Payroll taxes destroy jobs and have a disproportionately adverse impact on lower-income Americans. Estate and gift taxes impose unacceptably high tax-planning costs on family-owned business and foarms, forcing families to sell their holdings and discouraging capital formation and entrepreneurship, favoring large enterprises over small. Meanwhile, in all respects, a national retail sales tax is more equitable and advantageous than the current income tax system. Therefore, the 84th Legislature of the State of Texas urges the U.S. Congress to abolish the income tax (no mention of payroll, estate, or gift taxes here), enact a national retail sales tax, and propose an amendment repealing the Sixteenth Amendment to the Constitution (which authorizes income taxes). Interesting thing about that. We're currently in the middle of the **85th** Legislative session. Doesn't matter. It didn't pass.

21.13 **"Gentlemen, [Don't Re-] Set Your Watches!.** **HB 95** (Flynn), **HB 2400** (Isaac), and **SB 238** (Menéndez) would exempt Texas from the provisions of federal law establishing daylight savings time, effective this November 5th, when daylight savings time is otherwise scheduled to end this year.[23] None passed.

21.14 **The Man's Right to Know Act.** **HB 4260** (Farrar) is a response to a state law that requires doctors to a booklet titled "A Woman's Right to Know" to women considering an abortion. Women must wait at least 24 hours after receiving the booklet and must undergo an ultrasound before the procedure. It adds new Ch. 173 to the Health & Safety Code:

> Sec. 173.002. PURPOSE. The purpose of this chapter is to express the state's interest in promoting men's health; ensure Texas men experience safe and healthy elective vasectomies, Viagra utilizations, colonoscopies procedures, and men's health experiences; ensure a doctor's right to invoke their personal, moralistic, or religious beliefs in refusing to perform an elective vasectomy or prescribe Viagra; and promote fully abstinent sexual relations or occasional masturbatory emissions inside health care and medical facilities, as a means of the healthiest way to ensure men's health.

[23] This is not an end run around the Supremacy Clause. The Uniform Time Act of 1966 (15 U.S.C. Section 260a(a)) sets daylight savings time as running from 2 a.m. on the second Sunday of March until 2 a.m. on the first Sunday of November. However, it expressly allows any state lying entirely within one time zone to exempt the entire state (but not just part of the state) from the advancement of time, and any state with parts in more than one time zone to exempt either the entire state, or the entire area of the state lying within any time zone. HB 2400 would exempt both the majority of the state lying in the central time zone and the portion around El Paso lying in the mountain time zone from DST.

I believe I've written enough, so I'll let you read the rest of the bill, including its caption, in the comfort of your own home should you want.

21.15 **Just Add Water! HB 133** (Alvarado) designates powdered alcohol as an alcoholic beverage. I didn't even know there was such a thing! Didn't pass.

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

- **Official State Knife**. **HCR 32** (Springer) designates the Bowie knife as the official State Knife of Texas. (You mean it wasn't already?) Didn't pass.
- **Official State Gun**. **SCR 8** (Huffines) designates the cannon as the official State Gun of Texas. Didn't pass.
- **Official State *Hand*gun**. **HCR 51** (Lang | *et al.*) designates the 1847 Colt Walker pistol as the official State *Hand*gun of Texas. Didn't pass.
- **Official State Breakfast Item**. **HCR 92** (Klick) designates the breakfast taco as the official State Breakfast Item of Texas. Didn't pass.
- **Official State Food**. **HCR 110** (Hinojosa, G.) designates tacos as the official State **Food** of Texas. (My understanding is that this might tick off aficionados of chili, the official State **Dish** of Texas. See **HCR 18** of the 65th Legislature 40 years ago.) This year's bill didn't pass.

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

- **Knife Capital**. **HCR 27** (White) designates Spurger as the Knife Capital of Texas (for 10 years).
- **Live Music Capital of [North] Texas**. **HCR 42** (Holland) and **SCR 5** (Hall) designate Rockwall as the Live Music Capital of **North** Texas (for 10 years). The House version was sent to the Governor on May 22nd.
- **Wedding Capital of Texas**. **HCR 70** (Isaac | Campbell) designates Dripping Springs as the Wedding Capital of Texas (for 10 years).
- **Lighted Poinsettia Capital of Texas**. **HCR 72** (Darby | Seliger) designates Big Spring as the Lighted Poinsettia Capital of Texas.
- **Western Art Show Capital of Texas**. **HCR 83** (Lambert | Perry) designates Stamford as the Western Art Show Capital of Texas (for 10 years).
- **Wine Capital of Texas**. **HCR 123** (Biedermann) designates Fredericksburg as the Wine Capital of Texas. Didn't pass.

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

- **Oyster Day**. **SR 36** (Taylor, L.) recognizes January 24th as Oyster Day.
- **Homemade Pie Day**. **HR 374** (Cain) commemorates February 16th as Texas Homemade Pie day (designated as such by the legislature in 2013). Not to be confused with **Pi Day** on March 14th.
- **Space Day**. **SR 36** (Taylor, L. | Garcia) recognizes March 7th as Space Day.
- **Moonlight Tower Day**. **HR 1183** (Howard) and **SR 407** (Watson) declare May 3rd Moonlight Tower Day. (Trust me – it's an Austin thing.)
- **Absolutely Incredible Kid Day**. **SR 412** (Estes) celebrates March 16th as Absolutely Incredible Kid Day. (This is a Camp Fire Council event.)

21.19 **Mascots. HR 1620** (Geren) elects the children of House members to the office of mascot, and **HR 1621** (Geren) 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.) The kids got their title. The grandkids didn't get their designation.

22. Conclusion.

See ya next time. Unless I win the lottery!

Attachment 2 – New Optional Certification of Power of Attorney Form

(Enacted by H.B. 1974. Additions are indicated in *green italics*, and deletions are indicated in ~~red strikethrough~~.)

CERTIFICATION OF DURABLE POWER OF ATTORNEY BY AGENT

I, _____ (agent), certify under penalty of perjury that:

1. I am the agent named in the power of attorney validly executed by _____ (principal) ("principal") on _____ (date), and the power of attorney is now in full force and effect.

2. The principal is not deceased and is presently domiciled in _____ (city and state/territory or foreign country).

3. To the best of my knowledge after diligent search and inquiry:

a. The power of attorney has not been revoked by the principal or suspended or terminated by the occurrence of any event, whether or not referenced in the power of attorney;

b. At the time the power of attorney was executed, the principal was mentally competent to transact legal matters and was not acting under the undue influence of any other person;

c. A permanent guardian of the estate of the principal has not qualified to serve in that capacity;

d. My powers under the power of attorney have not been suspended by a court in a temporary guardianship or other proceeding;

e. If I am (or was) the principal's spouse, my marriage to the principal has not been dissolved by court decree of divorce or annulment or declared void by a court, or the power of attorney provides specifically that my appointment as the agent for the principal does not terminate if my marriage to the principal has been dissolved by court decree of divorce or annulment or declared void by a court;

f. No proceeding has been commenced for a temporary or permanent guardianship of the person or estate, or both, of the principal; and

g. The exercise of my authority is not prohibited by another agreement or instrument.

4. If under its terms the power of attorney becomes effective on the disability or incapacity of the principal or at a future time or on the occurrence of a contingency, the principal now has a disability or is incapacitated or the specified future time or contingency has occurred.

5. I am acting within the scope of my authority under the power of attorney, and my authority has not been altered or terminated.

6. If applicable, I am the successor to _____ (predecessor agent), who has resigned, died, or become incapacitated, is not qualified to serve or has declined to serve as agent, or is otherwise unable to act. There are no unsatisfied conditions remaining under the power of attorney that preclude my acting as successor agent.

7. I agree not to:

a. Exercise any powers granted by the power of attorney if I attain knowledge that the power of attorney has been revoked, suspended, or terminated; or

b. Exercise any specific powers that have been revoked, suspended, or terminated.

8. A true and correct copy of the power of attorney is attached to this document.

9. If used in connection with an extension of credit under Section 50(a)(6), Article XVI, Texas Constitution, the power of attorney was executed in the office of the lender, the office of a title company, or the law office of _____.

Date: _____, 20__.

_____ (signature of agent)

Attachment 3 – Changes to Statutory Power of Attorney Form

(Enacted by H.B. 1974, S.B. 39, and S.B. 1193. Additions are indicated in *green italics*, and deletions are indicated in ~~red strikethrough~~.)

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO. *IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.*

You should select someone you trust to serve as your agent [~~(attorney in fact)~~]. Unless you specify otherwise, generally the agent's [~~(attorney in fact's)~~] authority will continue until:

(1) you die or revoke the power of attorney;

(2) your agent [~~(attorney in fact)~~] resigns*, is removed by court order,* or is unable to act for you; or

(3) a guardian is appointed for your estate.

I, _____ (insert your name and address), appoint _____ (insert the name and address of the person appointed) as my agent [~~(attorney in fact)~~] to act for me in any lawful way with respect to all of the following powers that I have initialed below. *(YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)*

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (M).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

____ (A) Real property transactions;

____ (B) Tangible personal property transactions;

____ (C) Stock and bond transactions;

____ (D) Commodity and option transactions;

____ (E) Banking and other financial institution transactions;

____ (F) Business operating transactions;

____ (G) Insurance and annuity transactions;

____ (H) Estate, trust, and other beneficiary transactions;

____ (I) Claims and litigation;

____ (J) Personal and family maintenance;

____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;

____ (L) Retirement plan transactions;

____ (M) Tax matters;

____ *(N) Digital assets and the content of an electronic communication;*

____ *(O)* [~~(N)~~] ALL OF THE POWERS LISTED IN (A) THROUGH *(N)* [~~(M)~~]. YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE *(O)* [~~(N)~~].

SPECIAL INSTRUCTIONS:

Special instructions applicable to agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

____ *My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.*

____ *My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.*

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

____ *Each of my co-agents may act independently for me.*

____ *My co-agents may act for me only if the co-agents act jointly.*

____ *My co-agents may act for me only if a majority of the co-agents act jointly.*

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

____ I grant my agent [~~(attorney in fact)~~] the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

[The following provisions are not part of the statutory form itself, but are a permissible modification to the statutory form under Sec. 752.052 to grant specific authority described by Sec. 751.031(b).]

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. If you DO NOT want to grant your agent one or more of the following powers, you may also CROSS OUT a power you DO NOT want to grant.)

____ *Create, amend, revoke, or terminate an inter vivos trust*

____ *Make a gift, subject to the limitations of Section 751.032 of the Durable Power of Attorney Act (Section 751.032, Estates Code) and any special instructions in this power of attorney*

____ *Create or change rights of survivorship*

____ *Create or change a beneficiary designation*

____ *Authorize another person to exercise the authority granted under this power of attorney.*

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

_____

_____

_____

_____

_____

_____

UNLESS YOU DIRECT OTHERWISE *BELOW* [~~ABOVE~~], THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT *TERMINATES* [~~IS REVOKED~~].

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.

(B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. *Termination* [~~Revocation~~] of *this* [~~the~~] durable power of attorney is not effective as to a third party until the third party *has actual knowledge* [~~receives actual notice~~] of the *termination* [~~revocation~~]. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. *The meaning and effect of this durable power of attorney is determined by Texas law.*

If any agent named by me dies, becomes *incapacitated* [~~legally disabled~~], resigns, or refuses to act, *or is removed by court order, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent's authority to act under this power of attorney),* I name the following (each to act alone and successively, in the order named) as successor(s) to that agent: _____.

Signed this _____ day of _____, _____

_____
(your signature)

State of _____

County of _____

This document was acknowledged before me on _____(date) by _____

(name of principal)

_____
(signature of notarial officer)

(Seal, if any, of notary) _____

(printed name)

My commission expires: _____

IMPORTANT INFORMATION FOR AGENT [~~(ATTORNEY IN FACT)~~]

Agent's Duties

When you accept the authority granted under this power of attorney, you establish a "fiduciary" relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated*, suspended,* or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

(1) act in good faith;

(2) do nothing beyond the authority granted in this power of attorney;

(3) act loyally for the principal's benefit;

(4) avoid conflicts that would impair your ability to act in the principal's best interest; and

(5) disclose your identity as an agent [~~or attorney in fact~~] when you act for the principal by writing or printing the name of the principal and signing your own name as "agent" [~~or "attorney in fact"~~] in the following manner:

(Principal's Name) by (Your Signature) as Agent [~~(or as Attorney in Fact)~~]

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

(1) maintain records of each action taken or decision made on behalf of the principal;

(2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and

(3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:

(A) the property belonging to the principal that has come to your knowledge or into your possession;

(B) each action taken or decision made by you as agent [~~or attorney in fact~~];

(C) a complete account of receipts, disbursements, and other actions of you as agent [~~or attorney in fact~~] that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;

(D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset's current value, if known to you;

(E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;

(F) each known liability;

(G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and

(H) all documentation regarding the principal's property.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates *or suspends* this power of attorney or your authority under this power of attorney. An event that terminates this power of attorney or your authority to act under this power of attorney includes:

(1) the principal's death;

(2) the principal's revocation of this power of attorney or your authority;

(3) the occurrence of a termination event stated in this power of attorney;

(4) if you are married to the principal, the dissolution of your marriage by *a* court decree of divorce or annulment *or declaration that your marriage is void, unless otherwise provided in this power of attorney*;

(5) the appointment and qualification of a permanent guardian of the principal's estate *unless a court order provides otherwise*; or

(6) *if ordered by a court, your removal as agent (attorney in fact) under this power of attorney. An event that suspends this power of attorney or your authority to act under this power of attorney is the appointment and qualification of a temporary guardian unless a court order provides otherwise* [~~if ordered by a court, the~~

~~suspension of this power of attorney on the appointment and qualification of a temporary guardian until the date the term of the temporary guardian expires~~].

Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE [~~ATTORNEY IN FACT OR~~] AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Attachment 4 – Changes to Medical Power of Attorney Form

(Enacted by H.B. 995. Additions are indicated in *green italics*, and deletions are indicated in ~~red strikethrough~~.)

[Note that there is no longer a separate disclosure statement.]

MEDICAL POWER OF ATTORNEY DESIGNATION OF HEALTH CARE AGENT.

I, _____ (insert your name) appoint:

Name:_____

Address:_____

Phone_____

as my agent to make any and all health care decisions for me, except to the extent I state otherwise in this document. This medical power of attorney takes effect if I become unable to make my own health care decisions and this fact is certified in writing by my physician.

LIMITATIONS ON THE DECISION-MAKING AUTHORITY OF MY AGENT ARE AS FOLLOWS:_____

_____

DESIGNATION OF ALTERNATE AGENT.

(You are not required to designate an alternate agent but you may do so. An alternate agent may make the same health care decisions as the designated agent if the designated agent is unable or unwilling to act as your agent. If the agent designated is your spouse, the designation is automatically revoked by law if your marriage is dissolved*, annulled, or declared void unless this document provides otherwise*.)

If the person designated as my agent is unable or unwilling to make health care decisions for me, I designate the following persons to serve as my agent to make health care decisions for me as authorized by this document, who serve in the following order:

A. First Alternate Agent

Name:_____

Address:_____

Phone _____

B. Second Alternate Agent

Name:_____

Address:_____

Phone _____

The original of this document is kept at:

_____

_____

_____

The following individuals or institutions have signed copies:

Name:_____

Address:_____

_____

Name:_____

Address:_____

_____

DURATION.

I understand that this power of attorney exists indefinitely from the date I execute this document unless I establish a shorter time or revoke the power of attorney. If I am unable to make health care decisions for myself when this power of attorney expires, the authority I have granted my agent continues to exist until the time I become able to make health care decisions for myself.

(IF APPLICABLE) This power of attorney ends on the following date: _____

PRIOR DESIGNATIONS REVOKED.

I revoke any prior medical power of attorney.

[~~ACKNOWLEDGMENT OF~~] DISCLOSURE STATEMENT.

THIS MEDICAL POWER OF ATTORNEY IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

Except to the extent you state otherwise, this document gives the person you name as your agent the authority to make any and all health care decisions for you in accordance with your wishes, including your religious and moral beliefs, when you are unable to make the decisions for yourself. Because "health care" means any treatment, service, or procedure to maintain, diagnose, or treat your physical or mental condition, your agent has the power to make a broad range of health care decisions for you. Your agent may consent, refuse to consent, or withdraw consent to medical treatment and may make decisions about withdrawing or withholding life-sustaining treatment. Your agent may not consent to voluntary inpatient mental health services, convulsive treatment, psychosurgery, or abortion. A physician must comply with your agent's instructions or allow you to be transferred to another physician.

Your agent's authority is effective when your doctor certifies that you lack the competence to make health care decisions.

Your agent is obligated to follow your instructions when making decisions on your behalf. Unless you state otherwise, your agent has the same authority to make decisions about your health care as you would have if you were able to make health care decisions for yourself.

It is important that you discuss this document with your physician or other health care provider before you sign the document to ensure that you understand the nature and range of decisions that may be made on your behalf. If you do not have a physician, you should talk with someone else who is knowledgeable about these issues and can answer your questions. You do not need a lawyer's assistance to complete this document, but if there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

The person you appoint as agent should be someone you know and trust. The person must be 18 years of age or older or a person under 18 years of age who has had the disabilities of minority removed. If you appoint your health or residential care provider (e.g., your physician or an employee of a home health agency, hospital, nursing facility, or residential care facility, other than a relative), that person has to choose between acting as your agent or as your health or residential care provider; the law does not allow a person to serve as both at the same time.

You should inform the person you appoint that you want the person to be your health care agent. You should discuss this document with your agent and your physician and give each a signed copy. You should indicate on the document itself the people and institutions that you intend to have signed copies. Your agent is not liable for health care decisions made in good faith on your behalf.

Once you have signed this document, you have the right to make health care decisions for yourself as long as you are able to make those decisions, and treatment cannot be given to you or stopped over your objection. You have the right to revoke the authority granted to your agent by informing your agent or your health or residential care provider orally or in writing or by your execution of a subsequent medical power of attorney. Unless you state otherwise in this document, your appointment of a spouse is revoked if your marriage is dissolved, annulled, or declared void.

This document may not be changed or modified. If you want to make changes in this document, you must execute a new medical power of attorney.

You may wish to designate an alternate agent in the event that your agent is unwilling, unable, or ineligible to act as your agent. If you designate an alternate agent, the alternate agent has the same authority as the agent to make health care decisions for you.

THIS POWER OF ATTORNEY IS NOT VALID UNLESS:

(1) YOU SIGN IT AND HAVE YOUR SIGNATURE ACKNOWLEDGED BEFORE A NOTARY PUBLIC; OR

(2) YOU SIGN IT IN THE PRESENCE OF TWO COMPETENT ADULT WITNESSES.

THE FOLLOWING PERSONS MAY NOT ACT AS ONE OF THE WITNESSES:

(1) the person you have designated as your agent;

(2) a person related to you by blood or marriage;

(3) a person entitled to any part of your estate after your death under a will or codicil executed by you or by operation of law;

(4) your attending physician;

(5) an employee of your attending physician;

(6) an employee of a health care facility in which you are a patient if the employee is providing direct patient care to you or is an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility; or

(7) a person who, at the time this medical power of attorney is executed, has a claim against any part of your estate after your death.

By signing below, I acknowledge that [~~I have been provided with a disclosure statement explaining the effect of this document.~~] I have read and understand *the* [~~that~~] information contained in the *above* disclosure statement.

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY. YOU MAY SIGN IT AND HAVE YOUR SIGNATURE ACKNOWLEDGED BEFORE A NOTARY PUBLIC OR YOU MAY SIGN IT IN THE PRESENCE OF TWO COMPETENT ADULT WITNESSES.)

SIGNATURE ACKNOWLEDGED BEFORE NOTARY

I sign my name to this medical power of attorney on _____ day of _____ (month, year) at

_____
(City and State)

_____
(Signature)

_____
(Print Name)

State of Texas

County of _____

This instrument was acknowledged before me on _____ (date) by _____ (name of person acknowledging).

_____
NOTARY PUBLIC, State of Texas

Notary's printed name:

_____

My commission expires:

_____

OR

SIGNATURE IN PRESENCE OF TWO COMPETENT ADULT WITNESSES

I sign my name to this medical power of attorney on _____ day of _____ (month, year) at

_____
(City and State)

_____
(Signature)

_____
(Print Name)

STATEMENT OF FIRST WITNESS.

I am not the person appointed as agent by this document. I am not related to the principal by blood or marriage. I would not be entitled to any portion of the principal's estate on the principal's death. I am not the attending physician of the principal or an employee of the attending physician. I have no claim against any portion of the principal's estate on the principal's death. Furthermore, if I am an employee of a health care facility in which the principal is a patient, I am not involved in providing direct patient care to the principal and am not an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility.

Signature:_____

Print Name:_____ Date:_____

Address:_____

SIGNATURE OF SECOND WITNESS.

Signature:_____

Print Name:_____ Date:_____

Address:_____

Attachment 5 – Changes to Statutory Declaration of Guardian in the Event of Later Incapacity or Need of Guardian Form

(Enacted by S.B. 511. Additions are indicated in *green italics*.)

[Note that there are no changes to the form for Declaration of Guardian in the Event of Later Incapacity or Need of Guardian set forth in Sec. 1104.204. Rather, Sec. 1104.203 is amended so that, if the declaration is not being used to disqualify anyone, then it need not be witnessed, and will be considered self-proved if the following acknowledgement by the Declarant is attached rather than a self-proving affidavit.]

STATE OF _____

COUNTY OF _____

This instrument was acknowledged before me on the ___ day of _____, 20_____, by _____ (Declarant).

_____

Notary Public, in and for the State of Texas

Notary's printed name:

_____

My commission expires:

_____

Attachment 6 – Changes to Statutory Declaration for Mental Health Treatment Form

(Enacted by H.B. 1787. Additions are indicated in *green italics*.)

DECLARATION FOR MENTAL HEALTH TREATMENT

I, _____, being an adult of sound mind, wilfully and voluntarily make this declaration for mental health treatment to be followed if it is determined by a court that my ability to understand the nature and consequences of a proposed treatment, including the benefits, risks, and alternatives to the proposed treatment, is impaired to such an extent that I lack the capacity to make mental health treatment decisions. "Mental health treatment" means electroconvulsive or other convulsive treatment, treatment of mental illness with psychoactive medication, and preferences regarding emergency mental health treatment.

(OPTIONAL PARAGRAPH) I understand that I may become incapable of giving or withholding informed consent for mental health treatment due to the symptoms of a diagnosed mental disorder. These symptoms may include:

_____

PSYCHOACTIVE MEDICATIONS

If I become incapable of giving or withholding informed consent for mental health treatment, my wishes regarding psychoactive medications are as follows:

_____ I consent to the administration of the following medications:

_____

_____ I do not consent to the administration of the following medications:

_____

_____ I consent to the administration of a federal Food and Drug Administration approved medication that was only approved and in existence after my declaration and that is considered in the same class of psychoactive medications as stated below:

_____

Conditions or limitations: _____

CONVULSIVE TREATMENT

If I become incapable of giving or withholding informed consent for mental health treatment, my wishes regarding convulsive treatment are as follows:

_____ I consent to the administration of convulsive treatment.

_____ I do not consent to the administration of convulsive treatment.

Conditions or limitations: _____

PREFERENCES FOR EMERGENCY TREATMENT

In an emergency, I prefer the following treatment FIRST (circle one) Restraint/Seclusion/Medication.

In an emergency, I prefer the following treatment SECOND (circle one) Restraint/Seclusion/Medication.

In an emergency, I prefer the following treatment THIRD (circle one) Restraint/Seclusion/Medication.

_____ I prefer a male/female to administer restraint, seclusion, and/or medications.

Options for treatment prior to use of restraint, seclusion, and/or medications:

_____

Conditions or limitations: _____

ADDITIONAL PREFERENCES OR INSTRUCTIONS

_____

Conditions or limitations: _____

Signature of Principal/Date: _____

SIGNATURE ACKNOWLEDGED BEFORE NOTARY PUBLIC

State of Texas

County of_____

This instrument was acknowledged before me on _____(date) by _____(name of notary public).

_____

Notary Public, State of Texas

Printed name of Notary Public:

_____

My commission expires:

_____

SIGNATURE IN PRESENCE OF TWO WITNESSES

STATEMENT OF WITNESSES

I declare under penalty of perjury that the principal's name has been represented to me by the principal, that the principal signed or acknowledged this declaration in my presence, that I believe the principal to be of sound mind, that the principal has affirmed that the principal is aware of the nature of the document and is signing it voluntarily and free from duress, that the principal requested that I serve as witness to the principal's execution of this document, and that I am not a provider of health or residential care to the principal, an employee of a provider of health or residential care to the principal, an operator of a community health care facility providing care to the principal, or an employee of an operator of a community health care facility providing care to the principal.

I declare that I am not related to the principal by blood, marriage, or adoption and that to the best of my knowledge I am not entitled to and do not have a claim against any part of the estate of the principal on the death of the principal under a will or by operation of law.

Witness Signature: _____

Print Name: _____

Date: _____

Address: _____

Witness Signature: _____

Print Name: _____

Date: _____

Address: _____

NOTICE TO PERSON MAKING A DECLARATION FOR MENTAL HEALTH TREATMENT

This is an important legal document. It creates a declaration for mental health treatment. Before signing this document, you should know these important facts:

This document allows you to make decisions in advance about mental health treatment and specifically three types of mental health treatment: psychoactive medication, convulsive therapy, and emergency mental health treatment. The instructions that you include in this declaration will be followed only if a court believes that you are incapacitated to make treatment decisions. Otherwise, you will be considered able to give or withhold consent for the treatments.

This document will continue in effect for a period of three years unless you become incapacitated to participate in mental health treatment decisions. If this occurs, the directive will continue in effect until you are no longer incapacitated.

You have the right to revoke this document in whole or in part at any time you have not been determined to be incapacitated. YOU MAY NOT REVOKE THIS DECLARATION WHEN YOU ARE CONSIDERED BY A COURT TO BE INCAPACITATED. A revocation is effective when it is communicated to your attending physician or other health care provider.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you. This declaration is not valid unless it is *either acknowledged before a notary public or* signed by two qualified witnesses who are personally known to you and who are present when you sign or acknowledge your signature.

Attachment 7 – Selected Bills that *DID NOT* Pass

7. Decedents' Estates.[1]

7.1 **Limit on Increase in Life Insurance Premiums and Other Costs (Ins. Code Sec. 1101.157).** **HB 3370** (Craddick | Hancock) would have prohibited an insurer from increasing any premium or other costs associated with a life insurance policy by more than 10% in any year unless the schedule and amount of the increase is disclosed at the time the policy is issued.

8. Guardianships and Persons With Disabilities.

8.1 **Attorney Certification in Guardianship Proceedings (Sec. 1154.201).** Last session, **HB 39** (Smithee) required the applicant's attorney to successfully complete the ad litem certification course. **SB 37** (Zaffirini | Gutierrez) would have extended that requirement to any attorney representing any person's interests in a guardianship proceeding.

8.2 **Parental Administration. (Secs. 1002.0015, 1002.002, 1002.004, Ch. 1359; Pen. Code Sec. 25.10).** **HB 3901** (Metcalf) and **SB 2016** (Creighton) would have added new Ch. 1359 which creates a new alternative to guardianship called "parental administration." A parental administration may be only between a parent and an adult child who has been incapacitated since the child was a minor. The procedure for appointment as a parental administrator is similar to the appointment of a guardian, and the rights and duties of the parental administrator are similar to a guardian of the person, with similar reporting requirements. An existing guardianship may be converted to a parental administration, and vice versa.

8.3 **Using Person First Respectful Language (Secs. 22.033, 1001.004, and 1002.026; Gov't. Code Secs. 155.001, 411.114; & Prop. Code Sec. 240.002).** **SB 498** (Zaffirini | Neave) would have directed the legislature, Leg. Council, and other state agencies to avoid using the term "ward" in any new law and to replace it in existing law as the law is otherwise amended with the preferred phrases "person," "incapacitated person," or "person with a guardian." A reference in Estates Code Sec. 1002.026 to a "proposed ward" adds "alleged incapacitated person" as an alternative term. References in several other statutes to a "ward" add the alternative term "person with a guardian."

The bill failed to pass to third reading in the House by a 72-73 vote.

> ***Drafting Tip***
>
> Even though the bill didn't pass, there's nothing preventing you from reducing or eliminating the use of the term "ward" in your guardianship pleadings.

8.4 **Duration of Attorney Ad Litem's Appointment in DFPS Case (Fam. Code Sec. 107.016).** **HB 596** (Johnson, J.), **HB 3109** (Giddings) and **SB 469** (West) would have required an order appointing the Department of Family and Protective Services as a child's ***permanent*** managing conservator to provide the continuation of the attorney ad litem's appointment for the duration of that conservatorship.

8.5 **Rotational Appointment of Guardians Ad Litem and Guardians (Gov't. Code Sec. 37.004).** **HB 596** (Johnson, J.), **HB 3109** (Giddings) and **SB 469** (West) would have required an order appointing the Department of Family and Protective Services as a child's ***permanent*** managing conservator to provide the continuation of the attorney ad litem's appointment for the duration of that conservatorship.

8.6 **Financial Elder Abuse and Exploitation.** Several bills would have dealt with financial abuse or exploitation of an elderly person.

(a) Reporting Financial Abuse of Elderly Persons (Fin. Code Ch. 280, Hum. Res. Code Ch. 48). **HB 916** (Thierry) and **SB 792** (Miles) require an employee of a financial institution who has a good faith believe that financial abuse of an elderly person has occurred or is occurring, the institution must submit a report notifying Adult Protective Services and the appropriate local law enforcement agency. The institution is not required to investigate an allegation of financial abuse made by an elderly person. Failure to comply subjects the institution to a penalty of up to $1,000, or up to $5,000 if the court finds the violation to be willful. **HB 959** (Thierry) and **SB 791** (Miles) create a criminal penalty for the person engaging in financial abuse, ranging from a Class A misdemeanor to a 1st degree felony depending on the value of property involved.

(b) Reporting Financial Exploitation of Elderly Person (Securities Act, VTCS Art. 581-1, Sec. 45; Hum. Res. Code Ch. 48). **HB 3972** (Johnson, E.) requires an agent, investment adviser representative, or person serving in a supervisory, compliance, or legal capacity for a dealer or investment adviser (a "qualified individual") to report any suspected financial exploitation of an elderly person who is an account holder to the State Securities Board. The qualified

[1] Section references are to the Texas Estates Code unless otherwise noted.

individual may also notify a third-party reasonably associated with the elderly person, unless the third party is suspected of the financial exploitation, and may place a hold on disbursements from the account.

(c) Investigation of Exploitation of Elderly Person or Person With Disability (Hum. Res. Code Sec. 48.1512). **HB 4184** (Perez) authorizes an agency that receives a report of exploitation of an elderly person or a person with a disability by a person who does **not** have an ongoing relationship with the alleged victim to investigate the allegations and, if applicable, send a report to appropriate entities and agencies.

(d) Financial Elder Abuse and Exploitation Prevention Act (Penal Code Pen. Code Sec. 32.55). **HB 3503** (Thierry) creates a criminal offense (that can be either a misdemeanor or a felony) for financial abuse or exploitation of an elderly person. "Financial abuse" is the wrongful or negligent taking or appropriation of money or other property of another person by any means, including by exerting undue The term includes financial exploitation. Financial exploitation" means the wrongful or negligent taking or appropriation of money or other property of another person by a person who has a relationship of confidence or trust with the other person. Financial exploitation may involve coercion, manipulation, threats, intimidation, misrepresentation, or the exerting of undue influence. The term includes:

- the breach of a fiduciary relationship, including the misuse of a durable power of attorney or the abuse of guardianship powers, that results in the unauthorized appropriation of another person's property;
- the unauthorized taking of personal assets;
- the misappropriation, misuse, or unauthorized transfer of another person's money from a personal or a joint account; and
- the negligent or intentional failure to effectively use another person's income and assets for the necessities required for the person's support and maintenance.

A person has a relationship of confidence or trust with another person if the person:

- is a parent, spouse, adult child, or other relative by blood or marriage of the other person;
- is a joint tenant or tenant-in-common with the other person;
- has a legal or fiduciary relationship with the other person;
- is a financial planner or investment professional who provides services to the other person; or
- is a paid or unpaid caregiver of the other person.

8.7 **Office of Public Guardian (Secs. 1002.0215, 1002.0265, 1104.251, 1104.326-1104.338, 1104.402, 1104.409, 1155.151, & 1163.101; Gov't Code Sec. 155.001, 155.101, 155.102, 155.105, & 411.1386, Hum. Res. Code Sec. 161.103).** **SB 1325** (Zaffirini | Thompson, S.) would have authorized a commissioners court to establish an "office of public guardian." The position may be full or part-time, may be shared with another county, and may be filled through an agreement with a nonprofit guardianship program or private professional guardian in that county or an adjacent county. The term of the public guardian is five years, and the public guardian may employ personnel to facilitate carrying out the duties of the office. The public guardian is compensated by the commissioners court, and is not entitled to standard guardian commissions, which makes sense since the office may be appointed to serve in cases where there are not enough assets or resources to pay a private professional guardian. A public guardian may also be appointed where no family member, friend, or other suitable person is willing to act, or where the appointment of a public guardian is in the ward's best interest. No single person in the office of public guardian may be appointed as guardian in more than 35 cases.

(a) Guardian Court Pilot Program (Gov't. Code Ch. 111). **SB 963** (Zaffirini) would have directed the Supreme Court to establish a guardianship court pilot program in at least one administrative region to facilitate the adjudication of guardianship matters. The court should consider where the appointment of an associate judge for guardianship proceedings would reduce caseload in the region. The presiding judge of the selected administrative region would then determine which courts in the region require the appointment of a full- or part-time associate judge, and appoint each associate judge from a list of qualified applicants (a judge could be appointed to serve more than one court). Then, all guardianship proceedings in the county served by the associate judge shall be referred to that judge. The host county must provide an adequate courtroom, furniture, equipment, and personnel. The associate judge's salary may not exceed 90% of a district judge's salary, and is paid by the county. The associate judge's authority includes the ability to:

(1) conduct a hearing;
(2) hear evidence;
(3) compel production of relevant evidence;
(4) rule on the admissibility of evidence;
(5) issue a summons for the appearance of witnesses;
(6) examine a witness;
(7) swear a witness for a hearing;
(8) make findings of fact on evidence;

(9) formulate conclusions of law;
(10) recommend an order to be rendered in a case;
(11) regulate all proceedings in a hearing;
(12) render and sign a pretrial order;
(13) order the attachment of a witness or party who fails to obey a subpoena;
(14) order the detention of a witness or party found guilty of contempt, pending approval by the referring court; and
(15) take action as necessary and proper for efficient performance of the associate judge 's duties.

Following issuance of an order by the associate judge, any party may request a *de novo* hearing before the referring court. The pilot program ends at the end of 2019, by which time the OCA must submit a report with recommendations.

8.8 **Funding Guardianship Programs and Money Management Services.** **HB 3970** (Rose) would have appropriated the first $750,000 of the general revenue fund Medicaid account (funds recovered under the Medicaid estate recovery program) are to be appropriated each year to provide grants for the development, expansion, and operation of local guardianship programs and money management services.

8.9 **Electronic Filings in Mental Health Proceedings (Health & Saf. Code Sec. 571.014).** Instead of requiring that originals of signed papers be delivered to the clerk within 72 hours of an initial efiling in a mental health proceeding, **SB 1039** (Uresti) would have directed the filer to maintain those originals and filed them only on request of a party or the court.

8.10 **Non-Physician Mental Health Professional (Health & Saf. Code Sec. 571.003.** **HB 1977** (Sheffield) and **SB 1624** (Uresti) would have added a licensed physician assistant to the list of persons considered a non-physician mental health professional. **HB 2502** (Coleman) also would have added a licensed occupational therapist whose practice does not include diagnosis or psychological services typically performed by a psychologist, an RN with a graduate degree in psychiatric nursing, a licensed clinical social worker, a licensed professional counselor, or a licensed marriage and family therapist.

8.11 **Unlawful Possession of Firearms (Penal Code Sec. 46.04).** **HB 2543** (Nevárez) would have made it a Class A misdemeanor for certain persons, including an incapacitated adult for whom a guardian of the person has been appointed based on a lack of mental capacity, to possess a firearm (unless certain defenses apply).

8.12 **Handguns in State Hospitals (Gov't. Code Sec. 411.209; Health & Saf. Code Sec. 552.002).** **HB 14** (Murr) and **SB 1146** (Nichols) would have authorized any of the ten state hospitals to prohibit a license holder from carrying a handgun on the hospital property. A license holder carrying a handgun on hospital property in violation of the prohibition is subject to a civil penalty.

8.13 **Temporary and Emergency Detention (Health & Saf. Code Secs. 573.001, 573.002, 573.005, 573.012, 573.013, 573.021, & 573.022).** Instead of transporting a person subject to temporary detention to a mental health facility, **HB 1289** (Murr) would have expanded the persons to whom the detainee may be transferred to include anyone listed in Health & Saf. Code Sec. 574.015. **HB 71** (Martinez) would have authorized a judge or magistrate "in a county located on the Texas-Mexico border that has a population of 500,000 or more and is adjacent to two or more counties each of which has a population of 50,000 or more"[2] to authorize certain persons in a specified order of priority to transport a detainee. **HB 2913** (Miller) would have provided that when a person who has been detained in one facility is transported to a mental health facility, a copy of the detention notice form must accompany the detained person.

8.14 **Notice to Peace Officer of Communication Impediment (Trans. Code Secs. 502.061 & 521.142).** **HB 2978** (Klick) would have allowed the owner of a vehicle to voluntarily list any health condition that may impede communication with a peace officer. A physical condition must be evidenced by a physician's statement, while a mental condition must be evidenced by a statement from a physician, psychologist, or non-physician mental health professional. This information is then shared with the DPS, which shall include the information in the Texas Law Enforcement Telecommunication System for the purpose of alerting a peace officer who may make a traffic stop of that vehicle. The DMV **may not** issue a license plate with any visible marking indicating the health condition to the public.

8.15 **Notice of Right to Use Public Transportation (Trans. Code Sec. 461.009).** **HB 837** (Allen) would have required a public transportation provider that provides public transportation services designed for people with disabilities who are unable to use the provider's bus or rail services to notify each of those eligible individuals residing in its service area of the rights of visitors with disabilities to complementary paratransit services.

[2] Rep. Martinez represents part of Hidalgo County.

9. Trusts.

9.1 **Rule Against Perpetuities (Prop. Code Sec. 112.036).** **HB 2842** (Burrows) would have extend the rule against perpetuities to 300 years for trusts with an effective date (*i.e.*, when the trust becomes irrevocable) of September 1, 2017, or later. Trusts with an earlier effective date may also use the extended perpetuities period if the trust provides that interests must vest under the provisions of Sec. 112.036 applicable to trusts on the date the interest vests (a bit circular, wouldn't you say?). See Part 19's discussion of the Delaware Tax Trap for thoughts on whether this change, if passed, would have been constitutional.

11. Other Bills Relating to Disability Documents.

11.1 **The REPTL Anatomical Gift and Disposition of Remains Bill (Health & Saf. Code Secs. 692A.004-007 & 711.002).** **HB 994** (Wray) and **SB 513** (Rodríguez) were REPTL bills that would have authorized the use of one notary in lieu of two witnesses on anatomical gift forms. They also revoked the authority of a spouse under a disposition of remains form if the marriage is dissolved before the decedent's death.

HB 994 was not brought up on the House floor out of fear that some unwanted amendments might be added, and SB 513 did not emerge from committee (since HB 994 was thought to be the primary vehicle.

Drafting Tip

Rather than using anatomical gift forms, I recommend clients register at:

https://www.donatelifetexas.org/

to increase the likelihood of medical providers finding out about a donor's wishes in an emergency.

11.2 **Accounting Demand by Principal's Guardian (Secs. 751.104-751.105, & 752.051).** In the event a principal is unable to demand an accounting from the agent under a financial power of attorney because of a mental or physical condition, **SB 41** (Zaffirini | Thompson, S.) would have given the following persons the right to demand one: a guardian or spouse, a person named as a successor agent in the power of attorney, an agent under a medical power, an attorney representing the principal, or any other family member who the court finds has shown good cause to have standing to make the demand (so a court proceeding would be necessary in that event).

11.3 **Advance Directives.** Several bills have been filed changing rules for advance directives.

(a) Disclosure of Policy Regarding Life-Sustaining Treatment; Withholding Treatment from Minor (Health & Saf. Code Secs. 166.012 & 166.013). **SB 883** (Perry) would have required a health care facility or treating physician to disclose in writing any policy it may have relating to the provision of life-sustaining treatment. Further, neither the facility nor treating physician may withhold or withdraw life-sustaining treatment from a minor unless authorized by a directive executed by the minor's adult spouse, parents, or guardian, or by an out-of-hospital DNR order executed by the minor's parents, legal guardian, or managing conservator. Even then, the facility or physician may not follow the authorization unless it has complied with a request of the minor's parent, legal guardian, or managing conservator to obtain another medical opinion; or cooperated with any attempt by the minor's parent, legal guardian, or managing conservator to transfer the minor to another facility selected by the parent, guardian, or conservator. The facility **may** withhold or withdraw life-sustaining treatment without the authorization if, after a reasonably diligent effort, the facility is unable to locate the parent, legal guardian, or managing conservator within 72 hours after the attending physician determines life-sustaining treatment to be medically inappropriate. Finally, the desire of a competent minor to receive life-sustaining treatment supersedes the effect of any other authorization or determination.

(b) Effect of Pregnancy (Health & Saf. Code Secs. 166.033, 166.049, & 166.098). **HB 439** (Collier) would have deleted the statement "I understand that under Texas law this directive has no effect if I have been diagnosed as pregnant." from the statutory form of directive to physicians. It also repeals the provisions that prohibit pregnant patients from withdrawing or withholding life-sustaining treatment or CPR.

(c) Advance Directive and DNR of Pregnant Patient (Health & Saf. Code Secs. 166.033, 166.049, 166.083, & 166.098). **HB 4223** (Farrar) 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, and makes conforming amendments to the statutory forms. On the other hand, **HB 3542** (Cain) would have prohibited anyone from withholding life-sustaining treatment (including CPR) from a pregnant patient, **even if there is irreversible cessation of all spontaneous brain function**, if the life-sustaining treatment is enabling the "unborn child" to mature.

(d) The Texas Patient Autonomy Restoration Act of 2017 (Health & Saf. Code Secs. 166.045, 166.046, 166.051, & 166.052; Gov't Code Sec. 25.021). When an attending physician is 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, **HB 4090** (Klick) and **SB 1213** (Hughes, *et al.*) would have required that life-sustaining treatment continue to be provided until the patient can be transferred to a health care provider willing to honor the directive or treatment decision. (rather than going through the procedure currently set forth in Sec. 166.146). The provisions making the patient responsible for the costs of transfer, and limiting the physician's and health care facility's obligation to provide treatment for only ten days, are repealed. Because there is no time limit on the obligation to continue to provide life-sustaining treatment, the statutory statement advising the patient or decision maker of their options is repealed.

11.4 **Anatomical Gifts.** Several bills were filed relating to anatomical gifts.

(a) Default Inclusion on Donor Registry (Trans. Code Secs. 502.189 & 502.401; Health & Saf. Code Secs. 692A.006 & 692A.007). HB 1938 (Villalba) automatically indicates on each adult driver's license or personal identification certificate applicant the person's willingness to make an anatomical gift, and automatically includes the person in the Glenda Dawson Donate Life-Texas Registry, unless the person affirmatively refuses to authorize the indication or join the registry.

(b) Brain Donation (Health & Saf. Code Sec. 692A.002). HB 2406 (Price) redefines a "part" of the donor's body to include the donor's brain.

(c) No Anatomical Gifts by Certain Persons (Health & Saf. Code Secs. 692A.002 & 692A.009). HB 1092 (Oliverson) and **SB 1074** (Hancock) deal with who may **not** make anatomical gifts. A "guardian" appointed by a court to make decisions regarding an individual's support, care, health or welfare currently does not include procurement organizations or anyone associated with the hospital in possession of the decedent's body (other than someone who is already a relative of the decedent). An adult exhibiting special care or concern for the decedent is currently the 8th person in line of priority to authorize an anatomical gift. That person is disqualified if they're associated with the hospital. In addition, the hospital administrator and any other person having authority to dispose of the decedent's body are removed as the final two persons in line of priority to authorize an anatomical gift. Finally, procurement organizations are prohibited from petitioning a court to become the decedent's guardian or to otherwise be authorized to make an anatomical gift.

(d) Anatomical Gifts by HIV-Positive Patients (Health & Saf. Code Sec. 692A.0155). HB 227 (Howard) authorizes anatomical gifts by HIV-positive donors if the donee is also HIV-positive.

11.5 **General Procedures for DNR Orders (Health & Saf. Code Sec. 166.012). HB 2063** (Bonnen, G.) would have outlined the conditions required to make a DNR order in-facility valid, expressly excluding application to out-of-hospital DNRs. The DNR order must be:

1. Issued in compliance with:
   a. written directions of a patient made while competent;
   b. oral directions of a competent patient delivered to or observed by two witnesses;
   c. directions in an advance directive;
   d. directions of the patient's guardian or agent under a medical power; or
   e. a treatment decision made under Sec. 166.039 for an incompetent or noncommunicative person without an advanced directive; or
2. Is not contrary to the directions of a patient who was competent at the time the patient conveyed the directions, and in the reasonable medical judgment of the patient's attending physician, the patient's death is imminent within 24 hours regardless of the provision of CPR or other life-sustaining treatment, and the DNR order is medically appropriate.

If a spouse, adult child, or parent notifies the facility of his or her arrival after a DNR order is issued, the order must be disclosed to the individual.

12. Nontestamentary Transfers.

12.1 **Elimination of Convenience and Trust Accounts (Ch. 113).** No, **HB 1954** (Murr | Nichols) **would not have** eliminated the ability to have a convenience signer on an account or open an account for a trustee of an actual trust. This is an IBAT bill, and they believe that these account types are confusing to both bankers and customers. You can have a convenience signer on all of the various account types listed in Ch. 113. They believe it's therefore confusing to have a separate account type called "convenience account." Similarly, "trust accounts" under Ch. 113 are not accounts of trustees of express trusts. Rather, they're another way to establish a POD beneficiary without any actual trust agreement. This bill is designed to eliminate both of those types of accounts since the same result can be achieved with other types of accounts. It clarifies that a convenience signer is not an owner of the account, but may make deposits or withdrawals from the account during the lifetime of the parties, and may be designated as a P.O.D. payee of the account. The bill also includes a complete release of a financial institution that makes a payment from an account (1) before it receives written notice from a

party not to make the payment, (2) to a convenience signer after the death of all parties before it receives notice of the last party's death, or (3) to the personal representative of the last surviving party's estate before a court order prohibiting the payment is served on the institution. Transitional language is also included so that current law continues to apply to existing convenience and trust accounts.

14. Exempt Property

14.1 **Insurance Proceeds of Certain Criminal Defendants (Code Crim. Proc. Art. 21.32; Ins. Code Sec. 1108.053).** **HB 4030** (Phillips) would have required a court to determine if a defendant indicted for criminal homicide, sexual abuse of a young child, indecency with a child, improper relationship between an educator and student, or aggravated sexual assault is covered by a life insurance policy. If so, the court must notify the insurer and the alleged victim. If the defendant dies before disposition of the charge, the insurer must pay the proceeds to a court-appointed trustee to be held until the expiration of the statute of limitations on a civil action for damages incurred by the alleged victim. The trustee must pay any judgment rendered against the defendant's estate. Within a reasonable time after the statute of limitations expires, the trustee must pay any remaining proceeds to the beneficiaries of the policy.

To get around the fact that insurance proceeds are exempt from creditors of the insured, the Insurance Code is amended to except a court order described in the previous paragraph from the general insurance exemption.

15. Jurisdiction and Venue.

15.1 **Venue for Probate of Wills (Sec. 33.1011).** As filed, **SB 1056** (Perry) would have amended Sec. 33.001 to expand proper venue for probate of the will of a Texas-resident decedent if no immediate family member (parent, spouse, child, or sibling) lives in the same county in which the decedent resided. In that case, venue would be permissible in **either** the county of the decedent's residence **or** the county of the applicant's residence. However, with REPTL input, after it emerged from State Affairs, the bill instead would have added a new section authorizing 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.)

While SB 1056 passed in the House on May 24th (with the Senate amendments), the Senate failed to concur in the House amendments. (See Secs. 15.2 and 16.4 below.)

15.2 **"Venue" for Recording Adverse Possession Affidavit of Cotenant Heir (Sec. 33.1011).** Two amendments were added to **SB 1056** on the House floor. One added another new subsection that's unrelated to the rest of new Sec. 33.1011. It provides that nothing in "this chapter" (meaning Ch. 33 where all the venue provisions are located) requires that an affidavit under "SECTION 203 Estates Code" (I think [s]he meant **Chapter** 203, which contains the form of what we commonly refer to as an affidavit of heirship) "filed to establish adverse possession by a co-tenant" be filed in the county of the executor's residence.

This appears to me to be an unnecessary amendment. We currently don't have any affidavit to establish adverse possession by a cotenant. However, if the Governor signs **SB 1249** (see Sec. 7.7), we will on September 1st. That bill (adding new Sec. 16.0265 of the Civil Practice & Remedies Code) requires a cotenant heir to file an affidavit of heirship "in the form prescribed by Section 203.002, Estates Code," along with an affidavit of adverse possession in the county where the property is located. That's two affidavits. The one filed under Ch. 203 (assuming that's what the floor amendment to **SB 1056** meant) isn't the one filed to establish adverse possession. It's the second affidavit filed under Sec. 16.0265 that's filed to establish adverse possession.

Further, Ch. 33 of the Estates Code establishes venue for judicial proceedings that are probate-related. Filing an affidavit in deed records isn't a judicial proceeding, so saying Ch. 33 doesn't apply to the filing of a particular type of affidavit in the deed records is unnecessary. It doesn't apply to the filing of any affidavit in the deed records. For example, Sec. 203.001(a)(2) requires that an affidavit of heirship be filed in the deed records of the county where the property is located.

I would also note that this floor amendment is not germane to the caption of the bill – "An act relating to the transfer of certain probate proceedings to the county in which the executor or administrator of a decedent's estate resides."

See Sec. 16.4 below for a discussion of the other floor amendment.

While SB 1056 passed in the House on May 24th (with the Senate amendments) (see Sec. 15.1 above, the Senate failed to concur in the House amendments. (See also Sec. 16.4 below.)

15.3 **Jurisdictional $$ Limits (Gov't. Code Secs. 26.042 & 27.031).** **SB 409** (Huffines) would have increased the jurisdiction of justice courts (and concurrent jurisdiction with county courts) to matters in controversy with a value of $20,000 (from $10,000).

15.4 **Review of Travis County Venue Requirements.** **SB 525** (Birdwell) would have directed the Sunset Commission to identify each statute and agency rule requiring an action to be brought in Travis County and make recommendations on whether that location serves a legitimate state purpose other than the convenience of a state agency that supersedes the interests of persons required to travel to Travis County to participate, or whether the statute or rule should be revised to allow the action to be brought in another county.

16. Court Administration.

16.1 **Electronic Display of Clerk's Notices (Gov't. Code Sec. 51.3032).** **HB 624** (Leach) and **SB 414** (Taylor) would have authorized district clerks to post official and legal notices by electronic display, instead of posting physical documents, in the manner already provided for county clerks in Loc. Gov't. Code Sec. 82.051. (That section allows a county clerk to post notices using an electronic kiosk, electronic bulletin board, or other similar device, or on the county's public website.)

16.2 **The Uniform Electronic Legal Material Act (Gov't. Code Ch. 2051).** **HB 1032** (Thompson, S.) would have adopted the Uniform Electronic Legal Material Act. It designates Leg. Council as the official publisher of the Texas Constitution and statutes, and the Secretary of State as the official publisher of session laws and agency rules. Either may publish legal materials in electronic form that is reasonably available for public use and designate the electronic version as the official version, even if the material is also published in printed form. Copies of legal material published in electronic form that is authenticated in the manner provided by the act are presumed to be accurate copies of the original legal material. It also contains a reciprocity provision for states with similar provisions.

16.3 **Amendment to 2011 "Loser Pays" Bill (Gov't. Code Sec. 22.004).** The 2011 legislature passed what became known as the "Loser Pays" bill – **H.B. 274** (Creighton, *et al.*). In a nutshell, that bill directed the Supreme Court to adopt rules to streamline civil actions involving $100,000 or less, although the directive did not include cases arising out of the Family or Property Codes. (Further description of that legislation can be found in my 2011 update.) **HB 2574** (Murr) changes that direction to apply to actions involving $200,000 or less, and excluding attorney's fees from the determination of the amount in controversy.

16.4 **Payment of Costs Associated with Assigned Statutory Probate Judge (Gov't. Code Sec. 25.0022).** **SB 1056** (Perry | Murr) (see Section 15.4) was amended on the floor of the House to add the substance of **HB 1744** (Murr | Perry), a bill that had previously died in a Senate committee. That bill provided that if a party to a contested probate proceeding in a county without a statutory county court or statutory probate court requests the assignment of a statutory probate judge under Est. Code Sec. 32.003(1)(1), the court, on its own motion, or on the motion of the party requesting the assignment, may order that the county be reimbursed for the costs of the assignment out of the estate. The county may seek reimbursement from one or more of the parties as apportioned by the judge. If the judge does not order that the county be reimbursed from the estate, the county can seek reimbursement from the party requesting the assignment. If more than one party requested the assignment, then the judge must apportion the costs among those parties.

Setting aside situations where parties agree to hire a "private judge," I am not aware of any other situation under Texas law where a party is required to pay for a judge.

I would also note that this floor amendment is not germane to the caption of the bill – "An act relating to the transfer of certain probate proceedings to the county in which the executor or administrator of a decedent's estate resides."

While SB 1056 passed in the House on May 24th (with the Senate amendments) (see Sec. 15.1 above, the Senate failed to concur in the House amendments. (See also Sec. 15.2 above.)

16.5 **Judicial Term Limits (Gov't. Code Sec. 22.021).** **SB 109** (Huffines) would have directed the Supreme Court to establish term limits by rule on the number of terms a judge may be elected to any court established by the Texas Constitution, state statute, or municipal ordinance. The term limits may not allow a judge to serve more than 18 years on any one court, although a judge who has maxed out on one court may begin anew on another court. (Wouldn't this require a constitutional amendment?)

16.6 **Assignment Eligibility of Retired Judges (Gov't. Code Secs. 74.041 & 74.055).** **HB 650** (White) would have reduced the length of time a retired or former judge must have served as an active judge from 96 to 48 months. Meanwhile, **HB 1172** (Nevárez) **eliminates** the requirement that a retired or former

judge certify under oath that the judge has never been publicly reprimanded or censured, nor did the judge resign or retire while an investigation was pending.

16.7 **Records Accepted by District Clerk (Gov't. Code Sec. 51.303).** **HB 1393** (Reynolds) would have authorized a district clerk to accept a record filed electronically, either directly with the court or through the statewide electronic filing system; or physically by an individual. It also prohibits a person, including a governmental entity, from selling a record filed with the district clerk without the clerk's written permission.

16.8 **New 15th Court of Appeals (Gov't. Code Chs. 22 and 101).** **HB 474** (Stephenson) would have moved Cameron, Hidalgo, and Willacy Counties from the current 13th Court of Appeals to a newly-created 15th Court of Appeals.

17. Selected Marital Issues.

17.1 **Divorce.** **HB 65** (Krause) would have extended the waiting period for a divorce on grounds of insupportability to 180 days if the household of one of the spouses is the primary residence for a minor child, an adult child attending high school, or an adult disabled child. **HB 93** (Krause) would have flat out repealed insupportability as a ground for divorce.

17.2 **Application of Foreign Law to Marital Relationship and SAPCRs.** **HB 498** (Fallon) is similar to bills filed in several prior sessions. New Family Code Chapters 1A and 112 would have prohibited basing a Texas ruling under the Family Code on a foreign law if application of that law would violate a right guaranteed by the U.S. Constitution or the Texas Constitution, violate good morals or natural justice; or be prejudicial to the general interests of the citizens of this state.

17.3 **Forcing Minor to Marry.** **SB 1706** (Taylor, V.) would have added forcing or coercing a child to marry as an act of abuse under Family Code Sec. 261.001.

17.4 **Same-Sex Marriages and Conduct.** Here are some bills that would have affected this area:

- **SB 522** (Birdwell) allows a county clerk to notify the commissioners court that he or she has a sincerely held religious belief that conflicts with issuing a marriage license, in which case the clerk may not be required to issue the license. Upon receipt of that notice, the court must ensure that a deputy clerk or other certifying official is available to carry out those functions.
- **HB 573** (Thompson, S.) amends numerous provisions of the Family Code to acknowledge that a marriage may not be between a man and a woman. It also amends the Health & Safety Code to eliminate the requirement that sex education classes state that homosexual conduct is unacceptable and criminal.
- **SB 157** (Hinojosa | Rodríguez) and **SB 251** (Rodríguez) contain similar amendments to Family Code provisions.
- **HB 1663** (Dutton) amends the Family Code to provide that gender-specific terminology be construed in a neutral manner to refer to a person of either gender if necessary to implement the rights of spouses or parents in a same-sex marriage. It also makes a number of specific gender-neutral amendments.
- **SJR 16** (Rodríguez) proposes a constitutional amendment to repeal the constitutional ban on same-sex marriages and the prohibition against creating or recognizing any legal status identical or similar to marriage.
- **SB 136** (Rodríguez) and **SB 236** (Menéndez) all contain similar amendments to the Health & Safety Code.
- **HB 96** (Moody), **HB 1848** (Coleman) and **SB 166** (Rodríguez) eliminate a requirement that sex education materials state that homosexual conduct is unacceptable and criminal.
- **HB 1849** (Coleman) adds "gender identity or expression to the list of protected categories of hate crimes. (Current categories are race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference.)
- **HB 2860** (Coleman) directs a court to order a change of name if the petition is accompanied by a sworn affidavit of a licensed physician to the effect that the petitioner identifies as a gender other than that indicated on a driver's license, birth certificate, or other official document. That court shall simultaneously order DPS and the vital statistics unit of DSHS to change the petitioner's name and gender on the petitioner's driver's license, other identification documents, and birth certificate.
- **HB 4101** (Lucio III) and **SB 1341** (Garcia | Rodríguez) provides a nonjudicial process for applying for a new birth certificate reflecting a new name and different gender if accompanied by a physician's affidavit that includes a verification that the applicant has undergone a clinically appropriate treatment to transition to another sex.

- **HB 1923** (Krause) and **SB 893** (Hughes) prohibits any governmental entity from taking any adverse action against any person based wholly **or partly** on the person's belief or action based on a sincerely held religious belief or moral conviction that marriage involves one man or one woman, or that sexual relationships are properly reserved to such a marriage.
- **HB 2795** (Lang) authorizes a deputy county clerk (not just the county clerk) to issue a marriage license.
- **HB 2876** (Sanford) prohibits requiring a wedding industry professional or one of its employees to sell, rent, or provide goods, services, accommodations, or facilities in connection with any marriage that would cause the professional or employee to violate a sincerely held religious belief.

17.5 **Persons Conducting Marriage Ceremonies.** **HB 974** (Cortez) would have authorized the county clerk or any deputy clerk in a county with a population of at least 1.7 million that contains a municipality in which at least 75% of the population resides to conduct a marriage ceremony. Hmmm… Rep. Cortez is from Bexar County… **HB 2310** (Muñoz) isn't geographically limited. It would have authorized a county clerk or any deputy clerk to conduct a marriage ceremony and collect a $25 fee that must be deposited into the county treasury to be used by the county only to provide assistance to local charities.

18. Stuff That Doesn't Fit Elsewhere.

18.1 **New "Chancery" Court (Gov't Code Ch. 24A).** Last session, **HB 1603** (Villalba) would have created a new "chancery court" that has concurrent jurisdiction with district courts in certain actions pertaining to business organizations. A new chancery court of appeals would also have been created to hear appeals from orders of the chancery court. The proposal was back this session in the form of **HB 2594** (Villaba). Note that this court must sever any claim in which a party seeks recovery of damages for personal injury or death, or arising under the DTPA, **the Estates Code**, the Family Code, **or the Trust Code** unless all parties and the chancery court judge agree that the claim may proceed in the chancery court.

18.2 **Compliance With Ethical and Statutory Requirements by Out-of-State Attorneys (Gov't Code Ch. 85).** **HB 3627** (Shaheen) would have prohibited any out-of-state attorney who is not a member of the SBOT from entering into a legal services contract to represent clients in Texas or appear in any Texas court or arbitration proceeding on their behalf unless the attorney complies with all state laws and ethical duties imposed by Texas disciplinary rules and codes of ethics applicable to attorneys licensed in Texas.

18.3 **Voting of Jointly Held Interests (Bus. Org. Code Sec. 6.157).** **HB 2827** (Oliveira) is an act "Relating to corporations, associations, real estate investment trusts, and related entities." In other words, it would have made a number of changes. One of interest (to me, at least) is a new provision dealing specifically with how jointly-held interests in domestic entities are voted. A "jointly held ownership interest" is an ownership interest held in the names of two or more persons, whether fiduciaries, joint tenants, tenants in common, or otherwise. It also includes an ownership interest for which two or more persons have the right to vote the interest under Sec. 6.154 (which allows an administrator, executor, guardian, or conservator of an estate to vote the interest of the estate without transferring the interest into the person's name). Any one of the holders of the jointly held interests has the right to vote the interest. If more than one holders vote, the act of a majority of holders binds all owners. If the votes are evenly split, then each "faction" may vote the interest proportionately. None of these rules apply if the person tabulating the votes has a good faith belief based on written information that reliance on these rules is unwarranted.

18.4 **Availability of Financial Records of Nonprofit Corporations (Bus. Org. Code Secs. 22.353 & 22.354).** Nonprofit corporations are required to keep records, books, and annual reports for at least three years following the close of a fiscal year, and to make them available for public inspection during regular business hours. **SB 2180** (Menéndez) would have exempted nonprofits from the obligation to make all of the documents available if a CPA has audited any of the previous three fiscal years. In that case, the nonprofit need only make available a copy of the audit letter and its most recent three annual reports.

18.5 **Perpetual Duration of Old Corporations (Bus. Org. Code Sec. 402.015).** Apparently, notwithstanding provisions in the articles of incorporation of a for-profit corporation formed before September 6, 1955, or a nonprofit corporation formed before August 10, 1959, the duration of these corporations became perpetual on May 2, 1979, if they were still in existence at that time. **HB 2827** (Oliveira) would have clarified that these corporations may amend their articles (or certificate of formation) to limit the period of duration after May 2, 1979.

18.6 **Notary Fee Schedules (Gov't. Code Secs. 406.024 & 406.027). HB 2254** (Gutierrez) would have repealed the current statutory fee schedule for notaries and authorizes the Secretary of State to adopt a fair and reasonable fee schedule that assures the public's access to notary services. The Secretary of State may adjust the fee schedule each year to reflect inflation.

18.7 **Recording Signer's Address in Notary's Record Book (Gov't. Code Sec. 406.014). HB 2018** (Anderson, R.) would have substituted a signer's, grantor's, or maker's address for residence or alleged residence as an item to be recorded in the notary's record book.