Revised September 16, 2009

2009 TEXAS LEGISLATIVE UPDATE:

INTESTACY, WILLS, TRUSTS, AND RELATED MATTERS

by

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This article reviews the legislation enacted by the 2009 Texas Legislature relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. The reader is warned that not all recent legislation is presented and not all aspects of each cited statute are analyzed. You must read and study the full text of the legislation before relying on it or using it as authority.

I. THE ESTATES CODE

The 2009 Legislature began the process of codifying the current Probate Code into the new Estates Code. It is interesting to note that although called a "Code," the Probate Code is *not* a true "code" because it was enacted in 1955 which was before the 1963 Legislature began the process of codifying Texas law into 27 codes. The codification process is supposed to be nonsubstantive.

The portion of the Estates Code passed by the 2009 Legislature focuses on intestacy, wills, and estate administration. The plan is to add the guardianship provisions in 2011. The 2013 Legislature will then have the opportunity to make certain everything fits together nicely and that any substantive changes are properly integrated into the Code.

The entire Estates Code is then slated to become effective on January 1, 2014.

II. INTESTACY

No changes were made to the Texas law of intestate succession.

III. WILLS

A. In Terrorem Provisons

Ever since dicta in *Calvery v. Calvery*, 55 S.W.2d 527, 530 (Tex. 1932, opinion adopted), there has been uncertainty in Texas as to whether a no contest clause would be enforced to cause a beneficiary who contests a will to forfeit his or her gift if the beneficiary had both (1) probable cause for bringing the action and (2) was in good faith in bringing and maintaining the action. The 2009 Legislature resolved this issue by codifying the good faith/probable cause exception to the enforceability of *in terrorem* provisions in Probate Code § 64.

It is important to note that § 64 only applies to the estates of decedents who died on or after the date of enactment, that is, June 19, 2009. Thus, the existence of this exception remains unclear with respect to estates of testators who included no contest provisions in their wills and who died before June 19, 2009.

Some testators may wish to trigger a forfeiture even if their wills are contested with probable cause and in good faith. Before the statute, these testators would state their intent and there was a good chance the court would carry out their intent. The new statute makes this approach problematic. Perhaps a "reverse" approach would work such as,"If X does not contest this will, X receives [gift]." In other words, the provision does not take something away if a contest occurs (no forfeiture) but rather provides a gift if the person does not contest the will (a reward). Instead of a condition subsequent (taking away something already given if the condition is breached, that is, a forfeiture), this is type of provision imposes a condition precedent giving something if a condition is satisfied.

IV. ESTATE ADMINISTRATION

A. Jurisdiction

The jurisdiction provisions of the Probate Code (§§ 4, 5, & 5A) were repealed and replaced with new sections (§§ 4A-4G). For the most part, the rules remain the same and were merely reorganized to make them easier to understand. However, there are some significant changes such as the following:

- A detailed definition of the types of actions include within the penumbra of a "probate proceeding" or "probate matter" was added to clarity the types of issues which may be resolved by the court which has jurisdiction over the case. Prob. Code § 3(bb). The jurisdictional statutes no longer use the phrase "appertaining to or incident to an estate."

- The jurisdiction of a county court at law exercising probate jurisdiction was expanded to include the interpretation and administration of a testamentary trust if the will creating the trust was admitted to probate in that court. Prob. Code § 4B(b)(2).

- If a probate action is contested in a county with no statutory probate court or county court at law exercising probate jurisdiction and that action is transferred to a district court, the district court may hear any matter related to the probate proceeding brought subsequently. The district court may, either on its own or upon the motion of an interested party, determine that the matter is not contested and transfer it to the constitutional county court that has jurisdiction. Prob. Code § 4D(g).

- If a probate action is contested in a county with no statutory probate court or county court at law exercising probate jurisdiction and a statutory probate judge is assigned to hear the case, then any other contested matter filed after the assignment must also be assigned to the same statutory probate judge. Prob. Code § 4D(h).

- If a probate action filed in the constitutional county court is contested in a county with a county court at law exercising probate jurisdiction and only the contested matter is transferred to that county court at law, the county court at law must now return the case to the constitutional county court once the contested matter is resolved. Prob. Code § 4E(b).

- A statutory probate court now has jurisdiction, concurrent with the district court, over a wider range of matters such as actions involving inter vivos trusts and matters involving powers of attorney. Prob. Code §§ 4G & 4H.

B. Contents of Applications to Probate Wills

The information about the testator's prior marriages which must be contained in an application to probate a will has been changed. Previously, all of the testator's prior divorces needed to be disclosed. Now, only marriages that were dissolved *after* the will was executed need to be revealed. In addition to describing divorces, the applicant must also describe annulments and declarations of void marriages. Prob. Code §§ 81(a)(8) (application for letters testamentary) and 89A (application to probate will as muniment of title).

C. Notation of Probate Matters

Throughout the Probate Code, references to noting probate matters in the "minutes" of court were replaced with references to the "judge's probate docket."

D. Economic Contribution

The Legislature made a significant change to the way a marital estate that makes an economic contribution to property owned by another marital estate determines the amount of its claim for reimbursement with respect to the benefited estate upon the death of a spouse. Essentially, the prior scheme was based on a complex statutory formula for determining economic contribution. Amendments to Family Code §§ 3.401-3.410 adopt instead an equitable reimbursement approach

and provide a laundry list of elements which the court may consider in determining the reimbursement amount.

V. TRUSTS

A. *In Terrorem* Provisions

To be consistent with new Probate Code § 64, the Legislature enacted Trust Code § 112.038 which provides that a no contest clause is unenforceable if (1) probable cause exists for bringing the action and (2) the action was brought and maintained in good faith. The unenforceability of *in terrorem* provisions under these circumstances cannot be changed by the settlor under new Trust Code § 111.0035(b)(6).

B. Disclaimers

The list of individuals who may disclaim a trust interest was modified to include an independent *administrator*. Trust Code § 112.010(c)(3) & (c-1). Although the Probate Code defines "independent executor" to include "independent administrator" in § 3(q), no similar definition exists in the Trust Code which triggered uncertainty as to whether an independent administrator could disclaim a trust interest.

C. Grant of Discretion

The Legislature added Trust Code § 113.029(a) to codify the common law rule that regardless of the extent of discretion the settlor grants to a trustee, the trustee must always act "in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." Thus, even if the settlor provides that the trustee's discretion is "absolute" or "uncontrolled," the trustee's actions must still comport with fiduciary standards and are reviewable by the court.

D. Savings Provision for Non-HEMs Distributions

Tax problems may result if a non-settlor beneficiary is also the trustee of a trust and is given the power to make self-distributions that are not limited by an ascertainable standard relating to health, education, support, or maintenance. A settlor may create this problem inadvertently by giving the trustee/beneficiary unrestricted discretion or may limit distributions to a standard that is not ascertainable such as for the trust/beneficiary's comfort, benefit, welfare, or well-being.

To remedy this problem, the Legislature provided that in such situations, the trustee/beneficiary's power to distribute is "cut back" to an ascertainable standard relating to health, education, support, or maintenance. Likewise, the trustee/beneficiary's power to distribute is restricted so that distributions cannot be made to satisfy a legal obligation of support that the trustee/beneficiary personally owes to another person. Trust Code § 113.029(b).

If there are other trustees besides the beneficiary, a majority of the remaining trustees may exercise the power to make discretionary distributions to the "limited" trustee/beneficiary without regard to the cut-back. If there is no trustee who is not free of restrictions, the court may appoint a special fiduciary with authority to exercise the power. Trust Code § 113.029(c).

The automatic cut-back will not apply if one of the following circumstances exists:

- The trust was created and became irrevocable before September 1, 2009. (If the trust was created before September 1, 2009 but did not become irrevocable until September 1, 2009 or thereafter, the cut-back will apply.)
- The settlor is the beneficiary/trustee. Trust Code § 113.029(b)(1)
- The settlor expressly indicated that the cut-back provisions of this section do not apply. Trust Code § 113.029(b).
- The trustee/beneficiary is the settlor's spouse and a martial deduction was previously allowed for the trust. Trust Code § 113.029(d)(1).
- The settlor may amend or revoke the trust. Trust Code § 113.029(d)(2)
- Contributions to the trust qualify for the gift tax annual exclusion. Trust Code § 113.029(d)(3).

E. Homestead in Trust

The Legislature provided that if a settlor transfers property to a "qualifying trust" (basically a revocable inter vivos trust) which otherwise would qualify as the homestead of the settlor or the beneficiary had it not been transferred into the trust, this property may still qualify as the settlor's or beneficiary's homestead if the person occupies and uses it as his or her homestead. Prop. Code § 41.0021. Accordingly, the homestead does not lose the creditor protection it would normally have merely because the homestead property is being held in trust form.

F. Charitable Trusts

1. Relocation

The Legislature enacted Trust Code § 113.029 to remedy the "orphan trust" problem as described in the analysis of S.B. 666 as follows:

> The "orphan trust" or charitable foundations set up by donors who have no heirs or other family that they wish to carry out their wills, are often entrusted to lawyers or local banks who will keep the money invested in the local community. However, when an attorney retires or local banks are sold to multinational financial institutions, the foundations are no longer run by the people and banks familiar with the donors' specific wishes. The corporate trustees have wide

> latitude to change the way the trust operates, and to decide which charities will receive grants and thus the danger of distorting or altogether ignoring the donor's intent is increased with each transaction. Banks give fewer and smaller charitable gifts from the trusts they manage, all the while increasing the foundation's assets, and increasing administrative fees that the banks charge to foundations for the services they provide. Additionally, banks as trustees will often provide grants which serve their own interests, but that do not honor the donor's favorite causes. * * * The consequences of charitable funds being moved and used as assets and revenue streams for large financial institutions is that communities that stood to benefit from the philanthropy of their citizens are denied the good works and good will of the original donors.

The statute provides that the location of a charitable trust's administration cannot be changed to an out-of-state location other than as (1) the settlor provided in the trust or (2) the court approves under the procedure set forth in the statute. Trust Code § 113.029(b).

A trustee who wants to move the location out of Texas must first give proper notice. If the settlor is alive and competent, the trustee must consult with the settlor and submit the selection to the attorney general. Trust Code § 113.029(c)(1). If the settlor is dead or incapacitated, then the trustee must propose a new location and submit the proposal to the attorney general. Trust Code § 113.029(c)(2).

The trustee must then file an action in the appropriate court to get permission to move the trust administration out of the Texas. Trust Code § 113.029(d). The court may not authorize a relocation unless it finds that the charitable purposes of the trust will not be impaired by the move. Trust Code § 113.029(e).

The statute grants the attorney general the power to enforce this section. If a trustee does not comply with the statute, the court may remove the trustee and appoint a new trustee. The court may charge the costs of the removal, including reasonable attorney's fees, against the removed trustee. Trust Code § 113.029(f).

2. Venue

The Legislature expanded the ability to the attorney general to have venue in charitable trust matters in Travis County by including proceedings the attorney general brings against a charity for breach of fiduciary duty. Prop. Code § 123.005. Prior to this change, this section applied only to actions against a fiduciary or managerial agent of a charitable trust, not the charity itself.

3. Attorney's Fees

Property Code § 123.006 was added to clarify the circumstances in which the attorney general is or may be entitled to recover court costs and reasonable attorney's fees.

G. Exercise of Powers by Multiple Trustees

The Legislature expanded the ability of co-trustees to act if a co-trustee is unable to participate in the performance of a trustee function. In addition to the previous reasons for the need for prompt action such as to carry out the purposes of the trust and to avoid injury to the trust property, two reasons were added – to achieve the efficient administration of the trust and to avoid injury to a beneficiary. Trust Code § 113.085(d).

H. Attorney ad Litem

A court now has the power to appoint an attorney ad litem to represent any interest that the court considers necessary. Trust Code § 115.014(b). The attorney ad litem is entitled to reasonable compensation for his or her services. Trust Code § 115.014(e).

I. Guardian ad Litem

The Legislature made it clear than a guardian ad litem in a trust proceeding is entitled to reasonable compensation for his or her services as determined by the court The compensation is to be taxed as costs in the proceeding. Trust Code § 115.014(d).

J. Deferred Compensation, Annuities, and Similar Payments

Trust Code § 116.172 provides guidance for a trustee when allocating receipts from deferred compensation plans, annuities, and similar arrangements such as IRAs. Generally, each year, receipts are allocated to income until they total 4 percent of the asset's fair market value. Amounts in excess of 4 percent are allocated to principal. This plan, however, is problematic given Rev. Ruling 2006-26 which indicates that if this type of provision controls, the qualified plan or IRA may not qualify for marital deduction treatment. Accordingly, the Legislature amended § 116.172 to include a marital deduction savings clause which, in summary, requires the trustee to determine the internal income of these assets which qualify for the marital deduction.

K. Section 867 Management Trusts

The Legislature made a variety of enhancements to Probate Code § 867 management trusts. Here are some of the significant changes:

- The court must appoint an attorney ad litem and, if necessary, may also appoint a guardian ad litem, to represent the interests of the person who is alleged to be incapacitated. Prob. Code § 867(b-3).

- A non-financial institution trustee may be appointed if the value of the trust is $150,000 or less. Previously, the threshold was only $50,000. Prob. Code § 867(d).

- A non-financial institution trustee may be appointed even if the value of the trust exceeds $150,000 if there is no financial institution in the geographic area that is willing to serve as the trustee. Prob. Code § 867(d).

- The court may award compensation to the attorney who represents a person seeking the creation of a management trust. Prob. Code § 665B(a).

- The trustee is no longer limited to receiving compensation on an annual basis but may receive compensation at more frequent intervals as approved by the court. Prob. Code § 868(a)(5).

- A procedure was established to permit the court to order the transfer of funds in a management account to a subaccount of a pooled income trust such as the Master Pooled Trust which is operated by The Arc of Texas. Prob. Code § 868C (see also new Subpart I (Prob. Code §§ 910-916) which governs the establishment of pooled trust subaccounts).

VI. OTHER ESTATE PLANNING MATTERS

A. Designations of Guardian

The Legislature has authorized a one-step execution procedure for both a declaration of guardian by a parent for their children (Prob. Code § 677A) and a self-designation of guardian before the need arises (Prob. Code § 679). Instead of the using the traditional self-proving affidavit which requires a "double" set of signatures, statutory language that combines the execution, attestation, and affidavit under one set of signatures may now be used. This optional execution method permits a streamlined execution procedure so that the declarant and the witnesses need to sign only once.

B. Convenience Signers on Accounts

The Legislature enacted new provisions to authorize convenience signers on accounts that are not expressly labeled as convenience accounts. Prob. Code § 438B. A person who opens a single-party or multiple-party account that is not expressly deemed a convenience account under § 438A now has the option of indicating a convenience signer who has the ability to make withdrawals but does not have ownership or survivorship rights. The Uniform Single-Party or Multiple-Party Account Form was modified to provide for convenience signers on all types of accounts. Prob. Code § 439A.

C. Anatomical Gifts

The Legislature enacted the 2006 version of the Uniform Anatomical Gift Act as Chapter 692A of the Health and Safety Code as a replacement for the 1968 version enacted in 1969. (Texas never adopted the 1987 version of the Uniform Act.) The revision modernizes the law regarding

anatomical gifts and makes it easier for a donor to make a gift. Significant changes include the following:

- A donor card no longer needs two witnesses under most circumstances. Health & Safety Code § 692A.005.

- The methods by which a donor may make an anatomical gift before death now include (1) an authorization of the gift in a donor registry and (2) any form of communication made by the donor to two adults, one being a disinterested witness, during terminal illness or injury. Health & Safety Code §§ 692A.005 & 692A.007.

- In addition to procedures for making an anatomical gift, there are procedures for refusing to make an anatomical gift. Health & Safety Code § 692.007.

- The decision of an adult or emancipated minor to be a donor or to refuse to be a donor is strengthened. Absent subsequent revocation or a contrary indication, all other persons are barred from making, amending, or revoking the (potential) donor's decision. Health & Safety Code §§ 692A.007(d) & 692.008(a).

- The list of priority persons authorized to make an anatomical gift of a decedent's body has been expanded to include (1) an agent who could have made the gift immediately preceding the decedent's death, (2) adult grandchildren, (3) grandparents, (4) "an adult who exhibited special care and concern for the decedent," and (5) hospital administrators. An agent who could have made the gift immediately preceding death now has top priority for making the anatomical gift decision; the remaining added classes have a lower priority than a spouse, adult child, parent, or adult sibling. Furthermore, whereas prior law prohibited an anatomical gift over the known opposition of a member of the same or a higher priority class, the new law allows for a majority of members of the priority class who are "reasonably available" to make an anatomical gift over the minority's objection. Health & Safety Code § 692A.009.

- There are no provisions allowing a donor to specify the physician to perform procedures to make an anatomical gift. See Health & Safety Code § 692.006 (repealed 2009).

- When a person makes an anatomical gift of his or her entire body, the family does not have a right to use of the donor's body for purposes of a funeral. Compare Health & Safety Code § 692A.014(h) with Health & Safety Code § 692.010(c) (repealed 2009).

- It is now a class A misdemeanor to (1) sell or purchase a body part for transplant or therapy if removal of the body part is intended to occur after the person's death, or (2) intentionally alter, falsify, conceal, or destroy a document of gift in exchange for financial gain. Health & Safety Code §§ 692A.016-.017.

- The Department of State Health Services is required to create the Dawson Donate Life-Texas Registry, a statewide Internet registry of organ, tissue, and eye donors. Health & Safety Code § 692A.020.

- When there is a conflict between the measures required by an advanced medical directive and the measures necessary to ensure medical suitability of organs for transplant or therapy, the prospective donor or the donor's agent and the attending physician must confer to resolve the conflict. If a resolution cannot be reached, the ethics or medical committee of the health care facility must initiate an expedited review of the matter. Health & Safety Code § 692A.021.

D. Signatures on Advance Directives

The Legislature has authorized new methods for a declarant, the witnesses, and the notary to sign medical powers of attorney, directives to physicians, and out-of-hospital do-not-resuscitate orders.

1. Digital Signature

A digital signature is "an electronic identifier intended by the person using it to have the same force and effect as the use of a manual signature." Health & Safety Code § 166.002(5-a). The digital signature is sufficient if it meets the following requirements under § 166.011(a)(1) and is made on or after January 1, 2010:

- uses an algorithm approved by the Department of State Health Services (formerly known as the Texas Department of Health);

- is unique to the person using it;

- is capable of verification;

- is under the sole control of the person using it;

- is linked to data in a manner that invalidates the digital signature if the data is changed;

- persists with the document and not by association in separate files; and

- is bound to a digital certificate.

2. Electronic Signature

An electronic signature is "a facsimile, scan, uploaded image, computer-generated image, or other electronic representation of a manual signature that is intended by the person using it to have the same force and effect of law as a manual signature." Health & Safety Code

§ 166.002(5-b). The electronic signature is sufficient if it meets the following requirements under § 166.011(a)(2) and is made on or after January 1, 2010:

- is capable of verification;
- is under the sole control of the person using it;
- is linked to data in a manner that invalidates the electronic signature if the data is changed; and
- persists with the document and not by association in separate files.

3. Notarization as Substitute for Attestation

In lieu of signing in the presence of two witnesses, the declarant may now sign the directive and have the signature acknowledged before a notary public. Health and Safety Code §§ 166.032(b) (directive to physicians), 166.082(b) (out-of-hospital do-not-resuscitate order), and 166.154(b) (medical power of attorney).