2007 LEGISLATIVE UPDATE

Summary of Changes Affecting Probate, Guardianship and Trust Law

By GLENN M. KARISCH
Barnes & Karisch, P. C.
2901-D Bee Caves Road
Austin, Texas 78746
(512) 328-8355 FAX (512) 328-8413
karisch@texasprobate.com

The Texas Probate Web Site
www.texasprobate.com

State Bar of Texas
18TH ANNUAL ADVANCED DRAFTING: ESTATE PLANNING AND PROBATE COURSE
October 25 - 26, 2007
Houston

CHAPTER 9

Glenn M. Karisch

Barnes & Karisch, P. C.
2901 Bee Caves Road, Suite D
Austin, Texas 78746
(512) 328-8355 Fax: (512) 328-8413
karisch@texasprobate.com

Education

The University of Texas School of Law, Austin, Texas
Juris Doctor with Honors, 1980
The University of Texas at Austin, Austin, Texas
Bachelor of Journalism with Highest Honors, 1977

Professional Experience

Barnes & Karisch, P. C., Austin, Texas, 1998 - Present
Ikard & Golden, P. C., Austin, Texas, 1992 - 8
Hoffman & Stephens, P. C., Austin, Texas, 1991-2
The Texas Methodist Foundation, Austin, Texas, Vice President and General Counsel, 1989-1991
Coats, Yale, Holm & Lee, Houston, Texas, 1980-1989

Professional Activities

Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
American College of Trust and Estate Counsel (Fellow)
Real Estate, Probate and Trust Law Section, State Bar of Texas
Chair, 2007-Present; Chair-Elect, 2006-7; Treasurer, 2005-6; Council Member, 1999-2003; Chair, Guardianship Law Committee, 1999-2000; Chair, Trust Code Committee, 2000-2004; Chair, Probate Legislation Committee, 2003-Present.
Chair, Estate Planning and Probate Section, Travis County Bar Association, 1996-97

Legal Articles and Papers

Author and Editor, Texas Probate Web Site [www.texasprobate.com] and email mailing list [probate@io.com] (1995-Present).

"UPIA Handbook," The Texas Probate Web Site [www.texasprobate.com] (2003 - 4).

"The Two UPIAs – How They Will Change the World," State Bar of Texas Advanced Estate Planning and Probate Law Course (2003).

"Modifying and Terminating Irrevocable Trusts," State Bar of Texas Advanced Estate Planning and Probate Law Course (1999), updated through 2005 on The Texas Probate Web Site [www.texasprobate.com]

"Protecting the Surviving Spouse," Southwestern Legal Foundation Wills and Probate Institute (1999).

"Court-Created Trusts in Texas," State Bar of Texas Advanced Drafting: Estate Planning and Probate Law Course (1995), updated on The Texas Probate Web Site [www.texasprobate.com].

Legislative Updates, 1999 – 2007, The Texas Probate Web Site [www.texasprobate.com].

2007 Legislative Update

Summary of Changes Affecting Probate, Guardianship and Trust Law

By Glenn M. Karisch
Barnes & Karisch, P. C.
2901-D Bee Caves Road
Austin, Texas 78746
(512) 328-8355 FAX (512) 328-8413
karisch@texasprobate.com

The Texas Probate Web Site
www.texasprobate.com

Table of Contents

2007 Legislative Update

Summary of Changes Affecting Probate, Guardianship and Trust Law

By Glenn M. Karisch

The 80th Regular Session of the Texas Legislature, which ended May 28, 2007, will be remembered by many for the fight over the speaker's chair, for the threatened filibuster over the voter photo ID bill and for general rancor and animosity. Legislation in the probate, guardianship and trust areas was affected by each of these things. Some initiatives died because of it, while others passed but required much more effort than normal.

In the final analysis, of course, lawyers and others who work in the estate planning, probate, guardianship and trust areas will remember the session by how the changes affected their practices. They will ask:

- Were there any significant changes that will have an immediate effect on my practice?
- Were there relatively minor but helpful changes that will improve the way wills work and estates, guardianships and trusts are administered?
- Were there any unnecessary, nit-picking changes that seem designed only to complicate my life?
- Were there any crazy changes which seem to make no sense?

As with most sessions, but perhaps with a little more vigor this time, the answers are Yes, Yes, Yes and Yes. This paper will discuss all of them, beginning with the two changes that I consider to be the most significant. With the exception of these two changes, I leave you to guess which bills are the answers to which questions.

If it is any consolation, I believe that, if it were not for the efforts of the groups and individuals listed below and others that I will unintentionally fail to mention, things could have been much, much worse. The probate bar found itself acting much more defensively than usual, and multiple initiatives that could have corrupted the Probate and Trust Codes were beaten back like the Vandals at the gates of Rome. . . . wait, the Vandals sacked Rome. Hopefully that's a bad analogy and not a portent of sessions to come.

Despite contentiousness from outside the probate community, the following groups worked harder than ever to reach consensus on legislation:

- The Real Estate, Probate and Trust Law Section of the State Bar of Texas ("REPTL"), which is the 7,000-member-strong group which brings forward positive legislative initiatives in the probate, guardianship and trust areas.
- The Texas Academy of Probate and Trust Lawyers (the "Academy"), which consists of attorneys who either are board certified in estate planning and probate law or are members of the American College of Trust and Estate Counsel ("ACTEC") and responds to events that happen after the deadline for REPTL-State Bar approval. An Academy Membership Application is attached as Appendix "B."
- The Statutory Probate Judges of Texas, who hear the vast majority of probate and guardianship cases in the state.

- The Wealth Management and Trust Division of the Texas Bankers Association ("TBA"), which represents the interests of corporate fiduciaries in the state.

As a result of much hard work, for the first time in several sessions most of the legislative initiatives of these groups proceeded through the legislative process with no opposition from within the estate planning and probate community.

The list of persons who helped this session is so long that I am sure I will leave someone off. Nevertheless, and with apologies to those omitted, these people went above and beyond the call of duty: Judge Guy Herman of Travis County, Judges Pat Ferchill and Steve King of Tarrant County and Judge Nikki DeShazo of Dallas County; Dave Folz, Deborah Cox, Janice Torgeson and John Brigance of the TBA; Barbara Klitch and Clint Hackney, who worked beyond normal human endurance on REPTL and Academy matters; Bill Pargaman, Linda Goehrs, Mary Burdette, who chaired REPTL's main legislative committees, together with their committee members; Harry Wolff, James Woo, Art Bayern, Deborah Green, Jerry Jones, Al Golden and Frank Ikard, who took time to attend hearings and meetings at the Capitol to move REPTL's legislation; and Law Professors Mark Ascher and Stanley Johanson of the University of Texas, Gerry Beyer of Texas Tech and Thomas Featherston of Baylor.

Of course, nothing is possible without the hard work and cooperation of legislators. This session, special thanks goes to Rep. Will Hartnett, Sen. Jeff Wentworth and Sen. Robert Duncan and their staffs for sponsoring REPTL legislation; Rep. Elliott Naishtat, Rep. Ken Paxton, Sen. Juan Hinojosa, Sen. Carlos Uresti, Sen. Chris Harris and Sen. Kirk Watson and their staffs for working with the Academy and REPTL; and the staffs of the House Judiciary and Senate Jurisprudence Committees, who had to figure out what all these esoteric bills meant.

Finally, I especially thank my wife, Suzanne, and my children, Julia, Augustus, Cooper and Jack, for letting their husband and father spend more time on legislation than on billable work for the second session in a row.

Veto and Effective Date Information

None of the bills referred to in this paper were vetoed. The Governor signed all but one, and he allowed that one – HB 568 – to become law without his signature. All bills mentioned are effective September 1, 2007, unless otherwise indicated.

1. The Big Two.

Departing from tradition, this paper discusses in detail the two changes which I believe will have the most impact on the most people at the beginning of the paper rather than in their normal spots in the subject-by-subject narrative which follows.

1.1. Notice to Beneficiaries that Will Has Been Probated. The change that will have the quickest, most notable impact on lawyers who handle decedents' estates is the amendment to Section 128A of the Texas Probate Code. Previously this section required the personal representative of a decedent's estate to give charities named as beneficiaries in the will notice of the fact that the will has been probated within thirty (30) days of when it was probated.

SB 593 amends Section 128A to require personal representatives to give notice to all beneficiaries -- not just charities -- within sixty (60) days of the date a will is probated, unless one of the three exceptions applies, and to file an affidavit or certificate with the court within ninety (90) days confirming that notice was given or explaining why it was not given.

1.1.1. The Reason for the Amendment Requiring Notice. A series of articles in *The Austin American-Statesman* in 2006 reported on a lawyer who had served as independent executor of estates and was

accused of misappropriating thousands of dollars from those estates. The stories focused on the plight of the will beneficiaries, who said they did not know the will had been probated or that the lawyer had been appointed independent executor because no one gave them notice. If they had known of the estate administration, they reasoned, perhaps they could have acted to prevent the loss of property.

At about the same time as these articles were published, the Senate Jurisprudence Committee announced a between-sessions hearing on "fiduciary oversight" in statutory probate courts. Many of the witnesses at the hearing were the attorneys or family members of disgruntled (and unsuccessful) litigants who complained about practices in certain statutory probate courts. The newspaper stories and the hearings led to suggestions for legislative changes. Among the ideas discussed were:

- Prohibiting lawyers from serving as guardians or personal representatives.
- Prohibiting lawyers serving as guardians or personal representatives from providing legal services to themselves (and, therefore, prohibiting them from charging their hourly rates as lawyers for services).
- Requiring court appointment of fiduciaries to come in order from a list not maintained by the probate court.
- Requiring all beneficiaries and heirs to receive notice that a will has been offered for probate.
- Requiring all independent executors to post a bond, even if the will waives the bond requirement.
- Requiring recusals of statutory probate judges to be heard by non-statutory probate judges.

Senator Jeff Wentworth, chair of the Senate Jurisprudence Committee, and Rep. Will Hartnett, chair of the House Judiciary Committee, were contacted by the *American-Statesman* reporter and were quoted as being concerned about the no notice issue and as planning to offer legislation to address this concern. The Academy quickly tapped its resource of talented and experienced probate lawyers and drafted proposed legislation to address the notice to beneficiaries problem.

The Academy's approach was to require notice *after* probate rather than notice *before* probate. Requiring the notice before probate would result in serious slowdowns in administrations, since the notice process would have to be completed before administration was opened (unless a temporary administration was necessary). Section 128A was already on the books, and it required notice to charities *after* the will is probated. The Academy adapted it to include notice to beneficiaries other than charities, and then tried to make the system work with the least amount of headaches and expense. The Academy offered its drafts to Rep. Hartnett and Sen. Wentworth, and the two bills these legislators filed (SB 593 and HB 2507) were based on the Academy draft. Here's a detailed analysis of SB 593, which passed the Legislature and becomes effective September 1, 2007:

1.1.2. To Whom Is Notice Given? New Section 128A(b) requires notice to be given to "each beneficiary named in the will whose identity and address are known to the personal representative or, through reasonable diligence, can be ascertained." Subsection (d), discussed below, provides some exceptions, but the starting point is that "each beneficiary named in the will" gets notice.

A. "Beneficiary." Section 128A(a) defines "beneficiary" for purpose of the notice as:

> a person, entity, state, governmental agency of the state, charitable organization, or trust entitled to receive real or personal property under the terms of a decedent's will, to be determined for purposes of this section with the assumption that each person who is alive on the date of the decedent's death survives any period required to receive the bequest as specified by the terms of the will.

This appears to be an all-inclusive definition as to direct estate beneficiaries, including both life tenants and remaindermen of true life estates. (Notice to trust beneficiaries is discussed below.) The last phrase of Subsection (a) is intended to permit the required notice to go out within 60 days of probate even if the beneficiary named in the will has to survive the decedent for, say, 120 days, in order to take. The personal representative

is entitled to assume (but only for purposes of satisfying the notice requirement) that everyone living at the decedent's death will reach the required survival date. Thus, if the will leaves a gift to a 98-year-old on life support if she survives the testator by 90 days, the notice would go to the 98-year-old and not the children (at least assuming she was alive when the notice was sent).

B. "Named in the Will." Section 128A(b) requires notice to be given to "each beneficiary named in the will" (with some exceptions, discussed below). What does it mean to be "named in the will?" If the will leaves property to "my descendants, per stirpes" without giving the names of any or all of the descendants entitled to receive property, are the nameless descendants "named in the will" for purposes of receiving notice?

The safest practice will be to comply with the notice requirement with respect to beneficiaries identified by class or status rather than name if these beneficiaries are known to the personal representative or can be ascertained with reasonable effort. Subsection (b) refers to beneficiaries "named" in the will whose "identity" and address are known or can be reasonably obtained. It makes no sense for the statute to address whether or not the beneficiary's "identity" is known or can be ascertained if he or she is "named in the will." Therefore, the safe practice will be to read "named in the will" broadly to include persons whose name does not appear in the will itself but are identified by class or status. There is little or no downside to giving the notice in these cases. The personal representative may be under a common law duty to notify these beneficiaries even if the new statute does not require it. On the other hand, if there is a long-lost family member whose name is omitted from the will but who later asserts a right to receive property, the "named in the will" requirement may provide some protection for the personal representative from fiduciary liability for failing to give that person the Section 128A notice.

C. Known or Ascertainable Identity and Address. What if the personal representative does not know the identity or address of a beneficiary? Section 128A(b) requires the personal representative to attempt to ascertain the beneficiary's identity and address "through reasonable diligence." One assumes that, at a minimum, this requires the personal representative to inquire among the known beneficiaries about the existence and address of others who, by name, class or status, are entitled to benefits under the will.

This requirement should not be interpreted as requiring the same level of inquiry as that of an attorney ad litem in an heirship proceeding. In an heirship, the decedent died without a will, so there is no reason to presume that the list of heirs stops with the ones who come forward. On the other hand, a decedent dying testate probably named persons close to him or her to benefit and to serve as personal representative. A reduced level of scrutiny should be required of personal representatives under Section 128A, unless there is a reason to suspect that there is a missing beneficiary (such as a person identified by name in the will as a beneficiary whose address is unknown.

What if the personal representative is unable to ascertain the identity and/or whereabouts of a beneficiary prior to the 60th day after the date the will is probated? Subsection (g), discussed below, requires this fact to be stated in the affidavit or certificate filed with the court. If the identity and/or address of a beneficiary is discovered after the 60th day, Subsection (b) requires the notice to be given to him or her as soon as possible after the personal representative becomes aware of that information.

D. Special Rules for Certain Types of Beneficiaries. Section 128A(c) gives the personal representative guidance about notifying certain types of beneficiaries.

1) Trusts. If all or a portion of the estate passes in trust to the trustee of a trust, then Subsection (c)(1) requires the notice to be sent to the trustee of the trust, unless the personal representative and the trustee are the same person. In those cases, having the personal representative notify himself or herself as trustee would not meet the statute's purpose. For this reason, if the personal representative and the trustee are the same person, the notice must be given to the income beneficiaries unless the personal representative is the trustee, in which case the personal representative shall give the notice to the "person or class of persons first eligible to receive

the trust income, to be determined for purposes of this subdivision as if the trust were in existence on the date of the decedent's death." In other words, the personal representative/trustee would send the notice to the persons who would be the initial income beneficiaries of the trust as of the decedent's death without regard to whether those persons survive until the date of trust funding and, therefore, actually become income beneficiaries.

2) Minors and Incapacitated Persons. If the beneficiary has a court-appointed conservator or guardian, Section 128A(c)(2) requires the notice intended for that beneficiary to be given to his or her conservator or guardian. If the beneficiary is a minor with no conservator or court-appointed guardian, then Subsection (c)(3) requires the notice to be given to a parent of the minor. The statute says "a" parent, not "both" parents, so the personal representative will have to decide which parent to notify in the case of divorced parents. Of course, it would be safest, and best, to serve both parents in that case, but it may not be required. Unlike Subsection (c)(1) with respect to trusts, Subsections (c)(2) and (c)(3) do not instruct the personal representative to notify someone else if he or she also is the conservator, guardian or parent of the child.

3) Charities Which Cannot be Notified. If the beneficiary is a charity that for any reason cannot be notified, then Section 128A(c)(4) requires the notice to be given to the attorney general. I believe this subsection may apply in the following situations:

- The will names a charity as beneficiary which no longer exists and for which there is no apparent successor.
- The will names a charity whose address cannot be determined.
- The will names a class of charities as beneficiary rather than an individual charity.

E. Exceptions to the Notice Requirement. As initially proposed, SB 593 contained no exceptions to the notice requirement. The Academy pushed for inclusion of exceptions, including an exception for cash gifts of $1,000 or less. While the Academy was able to get that exception into the House version of the bill, the final conference committee version deleted that exception. Therefore, under the new Section 128A, unless another exception applies, ***every beneficiary must receive the notice regardless of the size of the bequest or devise.*** Still, the final version contains these exceptions to the notice requirement:

1) Beneficiaries Who Have Appeared. Section 128A(d)(1) provides that the personal representative is not required to give notice to beneficiaries who made an appearance in the probate proceeding before the will was admitted to probate. For example, a party to a will contest does not need to receive the notice since presumably he or she already knows the contents of the will and the fact that it was probated.

2) Beneficiaries Who Have Waived Notice. By far the most useful exception is found in Section 128A(d)(2): No notice need be given to a beneficiary who:

> received a copy of the will that was admitted to probate and waived the right to receive the notice in an instrument that:
>
> (A) acknowledges the receipt of the copy of the will;
>
> (B) is signed by the beneficiary; and
>
> (C) is filed with the court.

a) Received Copy of Will Admitted to Probate. This exception will enable avoiding the notice requirement in many “happy family” situations. In order to use the exception, the beneficiary must have received a copy of the will admitted to probate, but the statute does not require that the copy be a file-stamped copy or that the beneficiary receive a copy of the order admitting the will to probate. Therefore, the personal representative or his or her attorney should be able to distribute copies of the will to be probated among

family members and ask them to sign waivers before the application for probate is filed and/or the probate hearing is held.

b) Waiver. The beneficiary must sign a waiver of the right to receive the statutory notice that (1) acknowledges receipt of the copy of the will, (2) is signed by the beneficiary and (3) is filed with the court.

While the statute requires the beneficiary to acknowledge receipt of a copy of the will and sign the waiver, it does not require the beneficiary's signature to be acknowledged or sworn. Therefore, no notarization should be necessary for the waiver to be effective.

The waiver must be filed with the court in order to be effective. I anticipate that the waivers either will be filed with the application to probate the will, at the time of the hearing or when the certificate or acknowledgment required by Section 128A(g), described below, is filed.

In many cases the personal representative also is a beneficiary of the estate. The statute does not exempt the personal representative from the notice requirement. Therefore, even though it seems silly, the personal representative who also is a beneficiary should sign and file a waiver.

1.1.3. What Must the Notice Contain? Section 128A(e) provides that the notice must:

- State the name and address of the beneficiary to whom the notice is given (or, for notices given to representatives of the beneficiary as permitted by Subsection (c), discussed above, the name and address of the beneficiary *and* of the person to whom the notice is given);
- State the decedent's name;
- State that the decedent's will has been admitted to probate;
- State that the beneficiary to whom or for whom the notice is given is named as a beneficiary in the will; and
- Include copies of the will and the order admitting it to probate.

An earlier version of this legislation would have required the personal representative to inform the beneficiary of certain fiduciary duties, including the duty to keep the beneficiary informed. This requirement is not in the final version of the bill.

1.1.4. How Must the Notice be Sent? Section 128A(f) requires the notice to be sent by certified or registered mail, return receipt requested. There's no provision for hand delivery, overnight courier delivery or telephone facsimile delivery.

1.1.5. How is Satisfaction of the Notice Requirement Proven? Prior to its amendment by SB 593, Section 128A required the personal representative to prove that the required notice to a charity had been sent by filing a copy of the notice with the court. There was some support for retaining that method of proof, but the Academy foresaw these problems:

- Since the notices required copies of the will and order admitting it to probate, a copy of each notice would be 10 -- 100 pages long. This would substantially increase the size of each case file.
- If a copy of each notice was filed, court personnel may have difficulty determining the parties to whom notice was required to be given. At a minimum, this would require someone in the judge's office to

review the will for the names of beneficiaries. In some cases, the beneficiaries' names may not be apparent from the will.

For these reasons, the Academy urged, and the Legislature adopted, an affidavit or certificate approach to proving that notice was given. The advantages of the approach are:

- It permits the status of notice to be summarized in one place for the benefit of court personnel and others who examine the court file.

- It focuses the personal representative's thinking on completion of the notice requirement by requiring the personal representative or his or her attorney to list each beneficiary and the notice status.

- It permits the personal representative or his or her attorney to explain why a particular beneficiary has not been notified, enabling the court to determine if estate resources should be used to continue the search for the missing beneficiary.

- It takes up less room in the court file.

A. Contents of Affidavit or Certificate. Section 128A(g) requires the personal representative to file with the clerk of the court a sworn affidavit of the personal representative, or a certificate signed by his or her attorney, stating:

(1) The name and address of each beneficiary notified (or, if the beneficiary's representative was notified pursuant to Subsection (c), then the name and address of the beneficiary and the person to whom notice was given);

(2) The name and address of each beneficiary who filed a waiver of the notice;

(3) The name of each beneficiary whose identity or address could not be ascertained despite the personal representative's exercise of reasonable diligence; and

(4) Any other information necessary to explain why the personal representative was unable to give the notice to or for any beneficiary required to receive the notice.

The names and addresses of all beneficiaries -- including beneficiaries who signed and filed waivers -- must be included in the affidavit or certificate and that the affidavit or certificate must be filed even if all beneficiaries sign and file waivers. This is a public disclosure of information not previously required to be made. The statute does not say if the address must be a physical address or if a post office box address is satisfactory. It also does not say if "in care of" or other types of addresses can be used. If the beneficiary is represented by an attorney, perhaps the attorney's address can be given for the beneficiary. In these cases, it probably is a good idea for the personal representative to obtain a written request from the beneficiary or his or her attorney to use the attorney's address.

B. When Must It Be Filed? Section 128A(g) requires the affidavit or certificate to be filed "not later than the 90th day after the date of an order admitting a will to probate." This often will be the due date of the inventory, appraisement and list of claims, although that instrument's filing deadline is 90 days after the personal representative qualifies. So, if the personal representative does not qualify on the date the will is admitted to probate (for example, if he or she does not attend the hearing and submits his or her oath (and bond, if required) a few days after the hearing), the Section 128A affidavit or certificate will be due a few days before the inventory is due.

If the notice must be given within 60 days, why does the personal representative have up to 90 days to file

the affidavit or certificate? In an attempt to keep the costs of complying with the notice requirement down, Rep. Will Hartnett, the House sponsor, had the idea of permitting the certificate or affidavit to be included with another pleading filed with the court. One pleading that always is filed is the inventory. Therefore, while the notice must be given within 60 days of the probate hearing, proof of giving the notice (in the form of a Section 128A affidavit or certificate) need not be filed until 90 days after the probate hearing.

However, the statute makes clear that the 90-day requirement for filing the Section 128A affidavit or certificate cannot be extended. Tex. Prob. Code §128A(h). Therefore, even if the personal representative obtains an extension of the deadline for filing the inventory, he or she must file the affidavit or certificate by the 90-day deadline. If the personal representative anticipates asking for an extension of the deadline for filing the inventory, he or she can put the affidavit or certificate in the application for the extension. In fact, Subsection (h) anticipates that this may happen.

C. Affidavit or Certificate? Which should be filed, the personal representative's affidavit or his or her lawyer's certificate? It depends on the attorney's preference and the convenience of obtaining the personal representative's affidavit. In most cases, the attorney will send the notices on the personal representative's behalf, so the attorney is in the best position to describe the efforts taken to give the notice. On the other hand, the attorney likely is acting on information provided by the personal representative when trying to locate beneficiaries. Also, the personal representative's signature on the inventory, appraisement and list of claims is likely to be required at the same time (discussed below), so it may be convenient to obtain his or her sworn signature.

The "certificate" of the attorney is intended to be similar to the certificate of service attached to pleadings. Therefore, it need not be sworn.

1.1.6. Notice Not Required in Intestate Estates or When Will is Probated as Muniment of Title. Section 128A requires the personal representative to give this notice within 60 days after probate of the will. Therefore, if there is no probate administration or no will, the notice is not required.

The Section 128A notice serves no purpose in the administration of an intestate decedent's estate. All heirs must be served (or waive citation) in a proceeding to determine heirship. Therefore, each has an opportunity to participate in the proceeding and take steps to protect his or her rights.

If the will is probated as a muniment of title, there is no probate administration of the testator's estate. Since no personal representative is appointed, Section 128A is inapplicable. Similar protection is afforded in the case of a will probated as a muniment of title by requiring the applicant to file an affidavit of fulfillment. Tex. Prob. Code §89C(d).

1.1.7. Effective Date. The amendments to Section 128A apply only to "the estates of decedents dying on or after" September 1, 2007. Therefore, if the will of a person who dies before September 1, 2007, is probated after that date, the new notice requirement does not apply.

1.1.8. Practice Tips. I offer the following unsolicited practice tips about the new Section 128A notice requirement, completely without warranty of any kind, express or implied, etc.:

A. Get the Beneficiaries' Names and Addresses When the Will is Drafted. In many cases attorneys end up handling the probates of the wills they draft. Make every effort to get the names and addresses and, if possible, the social security numbers of the will beneficiaries from the testator at the time of the estate planning conference. This information does not have to be included in the will (and, in fact, should not be included in the will in many cases), but it will make it easier to locate the beneficiaries after the testator's death.

B. Decide How You are Going to Meet the Notice Requirement, and Stick With It. The safest,

most cost-effective way of dealing with the notice requirement is to establish a policy in your office about how the notice issue will be handled and then handle it the same way every time. Do you want to try to get waivers? Fine, try every time. Do you want to dispense with waivers and send notices to every one? Then do so every time. Do you want to file a separate affidavit, or combine it with another pleading? It doesn't matter, just be sure to do the same thing each time.

C. Be Ready to Address the Notice Issue at the Initial Probate Conference. Be ready to collect signatures on waivers as soon as possible after the death of the testator. Prepare standard waiver forms with blanks that can be filled in with the name of the decedent and the name and address of the beneficiary. Have these ready in the temporary client file or in a conference room drawer so that they can be used at the initial conference with the potential client in a probate matter. In many cases, the applicant will bring other family members to the meeting, and there will be no better time to get them to sign the waiver. They must be given a copy of the will admitted to probate in order for the waiver to be truthful and effective, but usually a copy of the will is available at the initial conference. If beneficiaries don't attend the meeting, the applicant can take the blank waiver forms and copies of the will with him or her to start the process of getting the waivers. Take care, though -- asking non-clients to sign waivers may create other problems.

D. Get the Waivers Notarized If Possible. Even though Section 128A does not require the signature of the beneficiary on a waiver to be notarized, try to get them notarized if possible. Some other waivers required in probate matters must be notarized, so the judge is going to be much more comfortable with notarized waivers.

E. Combine the Waiver with a Receipt for Beneficiaries Receiving Small Specific Gifts. There is no exception to the notice requirement of small gifts, and the notice must be given to a beneficiary even if the beneficiary already has received his or her gift. Still, a creative personal representative can reduce his or her notice responsibilities if the personal representative distributes small cash gifts and other specific gifts under the will to the recipients and asks the recipients to sign a combination receipt and waiver.

F. If Privacy is an Issue, Creativity is Required to Avoid Disclosing the Names and Addresses of the Beneficiaries. For the first time, the names and addresses of the beneficiaries under a will must be filed in the clerk's official court file. Even when a living trust-based plan is used for privacy reasons, the names and addresses of the current income beneficiaries of the trust must be filed with the clerk if the personal representative and the trustee of the living trust are the same person. In most cases, putting the name and address of a beneficiary in the public court file is no big deal. In those cases where it *is* a big deal and where the family wishes to avoid that disclosure, consider the following strategies:

- Use the beneficiary's attorney's address for a beneficiary. (For example, say the following in the Section 128A affidavit: "Hillary Rodham Clinton is a beneficiary of the estate. She filed a waiver with the court. Her address is: In care of Glenn M. Karisch, Barnes & Karisch, P. C., 2901-D Bee Caves Road, Austin, Texas 78746.") As long as a legitimate address is used and the beneficiary can be reached through that address, there is no public policy reason why this should not work. Of course, it still requires the name of the beneficiary to be included.

- In living trust-based plans, consider having different persons serve as the trustee of the living trust and the personal representative of the estate. This negates the requirement that the notice go to income beneficiaries and, therefore, prevents the disclosure of the names and addresses of the income beneficiaries (other than the trustee, whose name and address must be given). If it is desired that the personal representative also serve as trustee of the living trust, his or her succession to trustee could be provided for in the trust instrument.

- Consider filing the will as a muniment of title in appropriate cases, including in cases where the will pours over to a living trust.

G. Give the Notice to All "Real" Beneficiaries Even if Some Are Not "Named in the Will." As mentioned above, it is possible to read Section 128A(b) to require the notice to be given only to beneficiaries whose names actually appear in the will. However, a more reasonable reading of that provision requires the notice to be given to beneficiaries defined by class or status rather than by name. For example, the will may give a gift to "my descendants, per stirpes" without naming each such person. Giving the notice to anyone who may be required to receive it is almost always going to be the right choice, so don't let personal representative clients wear you down on this point.

H. Has Anyone Every Told You That Engagement Letters are Important? Make sure the engagement letter addresses this new responsibility. In most cases, the attorney is probably going to send the required notices, while the personal representative may solicit waivers. The attorney should be clear that he or she is relying on the information the personal representative provides, including the validity of waivers he or she solicits and the accuracy of the names and addresses provided to the attorney. If the personal representative "forgets" a long-lost brother or sister, make it clear in the engagement letter that the failure to notify this person is not the attorney's fault.

I. When in Doubt, Use the Affidavit and Not the Certificate. Make your client swear to the efforts to notify beneficiaries and, tacitly, the validity of the waivers.

J. Add the Affidavit Form to All Appropriate Pleading Forms. Rather than adding other dates to your office tickler system, plan on including the personal representative's affidavit about notice at the end of the inventory. Then, if the inventory is filed on time, the personal representative can swear to the notice affidavit when he or she swears to the inventory. Don't let the inventory go past due without filing an application for extending the inventory deadline, but remember to include the notice affidavit in that application since the deadline for filing the notice affidavit cannot be extended.

One court coordinator asked me to encourage attorneys who combine the notice affidavit with another pleading to mention the notice in the title of the pleading. For example, the name of the pleading may be "Inventory, Appraisement and List of Claims; Section 128A Affidavit."

K. Forms? Did Someone Mention Forms? Attached as Appendix "F" are my forms for Notice to Beneficiary, Waiver of Notice, Receipt and Waiver of Notice and Affidavit of Compliance, offered without warranty, express or implied, including without warranty of merchantability or fitness for a particular purpose.

1.2. Repeal of the Statutory Duty To Keep Trust Beneficiaries Informed.

1.2.1. Problem? What Problem? A reasonably alert estate planning and probate attorney probably has noticed that Texas's trust statutes have been undergoing an overhaul lately. In 2003 the Legislature enacted Texas versions of the Uniform Prudent Investor Act and the Uniform Principal and Income Act. Then, in 2005, REPTL's trust bill attempted to "cherry-pick" the best of the Uniform Trust Code ("UTC") for incorporation in the Texas Trust Code.

One of the 2005 changes was the enactment of Section 111.0035 of the Trust Code. The Texas Trust Code primarily provides default rules that apply unless the settlor of the trust imposes a different rule in the trust instrument. The general rule is that the trust terms stated by the settlor trump contrary provisions in the Trust Code. Prior to 2003, most experienced trust professionals in Texas assumed that there were a few trust principles which could not be overridden. For example, most trust lawyers would have said in 2002 that a trust instrument that says the trustee is accountable to no one and may lie, cheat and steal from the trust without liability would not be enforceable -- it either would be carved back by a court on public policy grounds or it would not be considered a trust and, therefore, not be subject to the Trust Code.

Despite this general assumption, the Trust Code itself in 2002 only expressly prevented the settlor from

waiving two provisions -- the corporate self-dealing prohibitions contained in Sections 113.052 and 113.053. (By the way, in a coincidental change, the 2007 Legislature has eliminated the prohibition against waiving these two self-dealing rules for corporate trustees, so now the Trust Code does not prevent the settlor from waiving these rules. This change is discussed below.)

Then the Texas Supreme Court announced its decision in *Texas Commerce Bank v. Grizzle,* 96 S. W. 2d 240 (Tex. 2002). The court allowed an exculpation provision to be enforced to protect the trustee, stating that the only thing a settlor could not change about Texas trust law was the waiver of the two corporate self-dealing rules. While the exculpation provision in *Grizzle* was held to exculpate only negligent conduct, in some minds the opinion raised the possibility that the Court may find that willful and grossly negligent conduct could be exculpated by the settlor. This would have been contrary to trust principles, including the Restatement of Trusts.

An immediate reaction to *Grizzle* was the 2003 enactment of a Trust Code provision limiting the enforceability of an exculpation provision. *See* former Tex. Trust Code §113.059 (2003), now Tex. Trust Code §114.007. A more deliberate reaction was the 2005 enactment of Section 111.0035. This section attempts to collect in one place all of the trust principles which cannot be overridden by the terms of the trust -- the so-called "mandatory rules." The Uniform Trust Code uses this approach, and REPTL adapted the UTC statute for Texas.

One mandatory provision in the UTC is the duty to keep certain beneficiaries informed about certain aspects of the trust administration. Under the UTC approach, the settlor could relieve the trustee of the duty to keep underage beneficiaries (under age 25) and remote beneficiaries informed, but the settlor could not relieve the trustee of the duty to keep certain "qualified beneficiaries" informed.

This is a laudable notion -- a trustee who doesn't have to account to anyone is hardly a trustee. The concept proved difficult to incorporate into Texas law, however. The Texas Trust Code has always required the trustee to respond to a beneficiary's demand for an accounting (*see* Tex. Trust Code §113.151), but the statute did not impose an affirmative duty on a trustee to disclose information when it had not been demanded. On the other hand, Texas courts have imposed an affirmative common law duty of disclosure on trustees in some cases. *See Montgomery v. Kennedy,* 669 S. W. 2d 309 (Tex. 1984).

If a non-statutory duty to disclose existed, how could Section 111.0035 be drafted so that this duty could be waived by settlors to a reasonable extent? Halfway through the 2005 session, the solution presented itself: If the common law duty was codified, it would be easier to identify what could be waived under Section 111.0035. Thus, Section 113.060 was born.

Section 113.060 attempted to draw from the language of the Uniform Trust Code and the *Montgomery v. Kennedy* opinion to affirmatively state a trustee's duty to keep beneficiaries informed. Unfortunately, lawyers and trustees almost immediately saw problems with its wording. Here are a few of its problems:

- It is one thing to have a common law duty to keep beneficiaries informed. It is quite another to have it stated in black and white in a statute.

- Since the Texas Trust Code does not employ the concept of a "qualified beneficiary" -- a beneficiary whose interest in the trust is significant -- Section 113.060 imposed this duty with respect to "beneficiaries," which could include persons whose interests are very remote.

- The UTC attempted to state what types of disclosures would meet the standard. The Texas version did not.

- A good argument can be made that the broad language in *Montgomery v. Kennedy* that was incorporated into Section 113.060 really was intended to address material, unusual transactions being considered by the trustee, rather than day-to-day activities. The statute doesn't make this distinction.

Many prominent trust officers and attorneys immediately began to think of ways to fix Section 113.060. Two possibilities were to define what types of disclosure is required and to narrow the group of beneficiaries entitled to the notice. Unfortunately, no consensus could be reached on exactly how to do this. On the other hand, one consensus was easily reached -- everyone thought Texas was better off before the enactment of Section 113.060 than after it. There was no agreement on exactly what the common law duty is and how far it reaches, but everyone was more comfortable with the common law duty than the statutory duty.

Therefore, in REPTL's 2007 trust bill (HB 564), Section 113.060 is repealed, and transitional language is included in the bill to indicate everyone's desire to return to the good ole days prior to 2005 when Texas only had the common law duty. Section 22 of HB 564 states:

> The enactment of Section 113.060, Property Code, by Chapter 148, Acts of the 79th Legislature, Regular Session, 2005, was not intended to repeal any common-law duty to keep a beneficiary of a trust informed, and the repeal by this Act of Section 113.060, Property Code, does not repeal any common-law duty to keep a beneficiary informed. The common-law duty to keep a beneficiary informed that existed immediately before January 1, 2006, is continued in effect.

REPTL tried to make the 113.060 repeal retroactive to January 1, 2006, which was the effective date of the enactment of Section 113.060. However, the Legislative Council would not allow this. However, HB 564 does make the Section 113.060 repeal effective immediately. The Governor signed HB 564 on June 15, 2007, so that is its effective date.

A corresponding amendment to Section 111.0035 (also effective June 15, 2007) makes it possible for a settlor to waive the common law duty with respect to beneficiaries under age 25 and certain remote beneficiaries.

1.2.2. Practice Tips. Here are more of my practice tips, which were not solicited and are not guaranteed.

A. It's Time for the Mother of All Disclosures. Now that the repeal of Section 113.060 is effective, trustees have an 17 ½ -month window of added exposure for failing to disclose information to beneficiaries -- January 1, 2006 (when Section 113.060 became effective) until June 15, 2007 (when the Governor signed the bill). How can a trustee best protect itself from added liability due to the short-lived Section 113.060? Disclose. Disclose everything the trustee can think of to disclose, and disclose it to every beneficiary that can be located, regardless of remoteness. There are two significant risks for trustees in failing to meet the Section 113.060 disclosure requirements: (1) a risk of removal by a court and (2) delaying the beginning of the statute of limitations for undisclosed breaches of trust. A significant disclosure to all beneficiaries at the time of the repeal of Section 113.060 helps with both of these risks. A court is less likely to remove the trustee if it appears that the trustee was trying to comply with this confusing statute, and the more the trustee discloses, the more likely the statute of limitations will start to run on breaches of trust.

B. Consider Waiving the Duty in New Trust Documents. Section 111.0035 tells settlors how far they can go in relieving the trustee of the duty to disclose. In appropriate cases, consider relieving the trustee of this duty to the extent allowed. Appropriate cases might include bypass trusts with the surviving spouse as trustee and GST dynasty-type trusts with the primary beneficiary serving as trustee.

2. Changes Affecting Trusts

Following are summaries of the 2007 changes to Texas statutes affecting trusts, with the exception of the repeal of Section 113.060 of the Texas Trust Code and the corresponding change to Section 111.0035, which are discussed above.

2.1. Settlor Can Permit Self-Dealing by Corporate Trustees. The Legislature finally will permit settlors to waive the previously un-waivable prohibitions of self-dealing by corporate trustees. Such waivers have been permitted for non-corporate trustees since before the enactment of the Trust Code in 1983. HB 564 amends Trust Code Sections 111.0035(b)(2) and 114.005(a), as well as Section 187.005(b) of the Finance Code to remove the prohibition that a settlor could not waive the self-dealing rules in Sections 113.052 and 113.053.

Note that this change does not authorize self-dealing; rather, it permits the settlor to include in the trust terms a waiver of the duty not to self-deal by a corporate trustee. If the trust terms do not alter the trustee's duties, the trustee still is prohibited by the Trust Code from entering into certain self-dealing transactions (*see, e.g.*, Texas Trust Code §§ 113.052 and 113.053).

This change is consistent with the trend in trust law to give the trustee greater and greater latitude in how to invest the trust assets. When Texas adopted the Uniform Prudent Investor Act (effective January 1, 2004), serious consideration was given to eliminating the rule prohibiting settlors from waiving the duty not to self-deal. The comments to the Uniform Prudent Investor Act encourage this, since the Act's philosophy is that all types of investments should be permitted and the trustee should be judged on portfolio performance, not the performance of each individual investment. However, in 2003, there still was opposition to eliminating this provision (perceived as a consumer protection measure), so the Texas version of the Uniform Prudent Investor Act was enacted without the repeal of these prohibitions.

This change particularly will be useful to corporate trustees managing large, sophisticated trusts with non-traditional investments such as hedge funds. Many corporate trustees set up in-house limited partnerships or other vehicles with which to pool their clients' investments (to permit flow-through of tax effects, for example). Most of these investment vehicles violate Trust Code § 113.053. However, if the trustee can persuade the settlor to waive the duty to avoid self-dealing with respect to this type of investment, the Texas trustee can compete with out-of-state rivals in offering these investments.

The amendment to Section 111.0035, which permits a settlor to include a provision in the trust relieving a corporate trustee from the self-dealing rules, is effective June 15, 2007. However, the amendment to Section 114.005 and to Finance Code Section 187.005 are effective September 1, 2007. I believ this means that, if a trust instrument relieves the corporate trustee from the self-dealing duty, the corporate trustee may begin the actions which otherwise would violate Texas Trust Code Sections 113.052 and 113.053 on June 15, 2007, but no effective release of liability by a beneficiary for violating Sections 113.052 or 113.053 by a corporate trustee will be valid if executed before September 1, 2007.

Even though this change makes it possible to waive the duty not to self-deal for corporate trustees, planners should tread slowly into these waters. There's a reason that the default rule in Texas still prohibits these types of transactions.

2.2. Trustees Will Find it Easier to Deal With Third Parties. HB 564 substantially amends Section 114.081 and adds Section 114.086 to the Trust Code to offer greater protection to third parties dealing with a trustee and to permit a trustee to provide a certificate of trust to third parties instead of the full trust instrument. Both of these sections are Texanized versions of similar provisions from the Uniform Trust Code.

The change to the title of Section 114.081 says it all. Previously, that section was entitled "Payment of Money to Trustee." Now it is entitled "Protection of Person Dealing With Trustee." Under the former statute, a person who "actually and in good faith pays to a trustee money that the trustee is authorized to receive is not responsible for the proper application of the money according to the trust." Under the new statute, a person who "deals with a trustee in good faith and for fair value" is not liable to the trustee or the beneficiaries if the trustee has exceeded the trustee's authority in dealing with the person. The statute also now protects a third party from further inquiry into the trustee's power and the appropriateness of the trustee's actions if the third party deals in good faith and receives either a certificate of trust or a copy of the trust instrument.

New Section 114.086 provides statutory authority for the common practice of having the trustee to provide a certificate containing appropriate excerpts of the trust instrument documenting the trustee's authority to act, rather than requiring the trustee to provide the entire trust instrument. Section 114.086(d) makes it clear that the certificate does not have to include the dispositive provisions of the trust. Thus, the trustee may be able to close a real estate transaction with, and the title company and third parties may be able to rely upon, a trust certificate that does not disclose the names of the beneficiaries or their respective interests.

2.3. Trust Jurisdiction Clarified. HB 564 amends Section 115.001 of the Trust Code to make it clear that the list of actions over which district courts (and, because of Trust Code Section 115.001(d) and Probate Code Section 5(e), statutory probate courts) have jurisdiction is not an exclusive list. Rather, Section 115.001(a) was changed to provide that such courts have jurisdiction over "all proceedings by or against a trustee."

2.4. Changes Affecting 142 Trusts. No organized group began the 2007 legislative session with the intention of making any changes to Section 142.005, which governs court-created trusts commonly referred to as "142 Trusts." However, due to one of those wrinkles in the fabric of the universe that only seem to occur in that big pink granite building in Austin, Section 142.005 emerged from the session like a 1974 Chevy Nova on "Pimp My Ride."

HB 564's changes to Section 142.005 fall in two distinct categories. First, provisions were added that attempted to deal with concerns that the mother of a beneficiary of a 142 Trust addressed to the Governor's office. Section 142.005(b) now requires the first page of the trust instrument to contain this notice:

> **NOTICE: THE BENEFICIARY AND CERTAIN PERSONS INTERESTED IN THE WELFARE OF THE BENEFICIARY MAY HAVE REMEDIES UNDER SECTION 114.008 OR 142.005, PROPERTY CODE.**

Also, new Subsection (k) permits the parent of a beneficiary (or certain other persons acting on the beneficiary's behalf) to ask the court that created the 142 Trust to appoint a guardian ad litem to "investigate and report to the court whether the trustee should be removed for failing or refusing to make distributions for the health, education, support or maintenance of the beneficiary required under the terms of the trust." Subsection (l) assures that the parent or other interested person asking for the ad litem gets reimbursed for up to $1,000 in attorneys' fees.

If that smells like a bunch of Elgin Hot Sausage being made, I offer my humble apologies. But, as the old German-American saying goes, when you are making sausage, try to make it good-tasting sausage. If Section 142.005 was going to be tweaked, it might as well be tweaked. Deborah Green, to whom I also apologize for failing to use a vegetarian-approved metaphor, helped with the second category of Section 142.005 changes by suggesting a number of changes to Section 142.005 to make 142 Trusts easier to use as special needs trusts. As included in the final version of HB 564, these include:

- (Hopefully) making it possible for persons who are "disabled" for federal benefits purposes to use 142 Trusts even though they are not "incapacitated" for purposes of Section 142.007.

- Permitting 142 Trusts to be altered from the "mandatory" terms if necessary to qualify the beneficiary for "public benefits or assistance under a state or federal program," not just to meet the requirements of 42 U.S.C. Section 1396p(d)(4)(A).

- Permitting non-corporate trustees in certain circumstances when the trust corpus is less than $50,000.

The changes to Section 142.005 apply to existing trusts as well as new trusts. Trustees of existing trusts should consider if they must comply with the new notice requirement in Section 142.005(b), and, if so, how. There are only two ways I can think of to get the notice on the first page of an existing trust instrument:

- Apply to the court for it to be added to the trust instrument; or

- Just stick it on there without court approval.

Neither of these options seems reasonable in most cases. Spending trust resources to get the notice on the trust instrument seems like a waste, and modifying the trust instrument to include the notice without court approval seems ill-advised. Trustees should consider corresponding with the beneficiary's parents or other surrogates to inform them of the law change, the required notice, and the new rights under Subsection (k) and (l), and to let them know that the trustee doesn't intend to ask the court to modify the trust to include the required notice (due to the expense to the trust) unless requested to do so. That should limit the damages for failing to add the notice.

2.5. New Options with the Transfers to Minors Act. Several sections of Chapter 141 of the Property Code were amended by HB 564 to:

- Make it possible for the custodian to place the assets remaining in the custodial account into a Section 2503(c) "qualified minor's trust." Thus, if the value of the assets in the account has grown to the extent that the custodian and the minor are concerned about the ability of the minor to manage the assets at age 21, the custodian can place the assets in a trust which gives the minor the power to withdraw the property for a limited period at age 21, after which the property that is not withdrawn is held in a trust for the minor until he or she reaches an older age.

- Make it easier to pay retirement plan benefits to an UTMA custodian. This has become more important due to the stricter designated beneficiary rules the Internal Revenue Service is now applying to trusts receiving benefits.

This part of HB 564 becomes effective on September 1, 2007, and applies to "trusts existing" on that date. Hopefully it also applies to custodial accounts existing on that date, but that is not clear from the statute.

2.6. Fixing a Bug in the Charitable Trust Litigation Statute. Chapter 123 of the Property Code addresses attorney general participation in "proceedings involving charitable trusts." In 2005, Section 123.003 was amended to increase the length of time between notice to the attorney general and the date on which a hearing can be held to 25 days. Since the definition of "proceeding involving a charitable trust" is so broadly defined in Chapter 123, the Academy asked the attorney general's office in 2005 to make it clear that the notice requirement did not apply to uncontested probates. The language added by the attorney general's office that was intended to make this clear can also be read to require notice to the attorney general only if the proceeding was under Probate Code Section 83, which applies when two wills are offered for probate.

HB 564 fixes this problem (hopefully) by more carefully wording the exception in Section 123.003(a) for uncontested probates.

2.7. Termination of Uneconomic Trusts. HB 564 adds Section 112.059 to the Trust Code to permit the trustee to terminate a trust in certain circumstances if the value of trust property is less than $50,000. This type of provision is found in many trust instruments. Now it is the default rule.

2.8. Other Technical or Minor Changes Affecting Trusts. HB 564 makes the following additional changes to the Trust Code:

- Certain definitions in Sections 111.004 and 116.002 were made consistent with each other.

- Section 112.035(d) was amended to help assure that spendthrift trust protection is not lost when a intentionally defective grantor trust is used.

- Section 113.058, regarding the trustee's bond, was cleaned up, and the 2005 amendment to the section was clarified to make it clear that a court may order the trustee to post a bond even in cases where the trust instrument waives the bond. As initially filed, HB 564 would have reversed the Texas rule regarding bonds, so that a bond would be required only if the instrument required it or a judge ordered it. However, that change failed to pass the Senate, so the Texas rule still is that a bond is required of non-corporate trustees unless the trust instrument waives the bond.

- Section 113.085(a) was amended to make it consistent with pre-2005 Texas law. Because of 2005 amendments, some practitioners feared that co-trustees had a duty to attempt to get unanimous approval before a majority was authorized to act. HB 564 eliminates the implication that an attempt at a unanimous decision must be made. A majority of co-trustees can simply act without the joinder of all co-trustees.

- Section 116.172 -- the Texas version of the rule regarding allocating deferred compensation receipts under the Uniform Principal and Income Act -- was tweaked for the second session in a row.

- Under the existing Texas version of the rule regarding allocation of oil, gas and mineral receipts under the Uniform Principal and Income Act, "nominal" delay rental and "nominal" annual rent on a mineral lease was treated as income, while amounts that are "more than nominal" are allocated equitably. Tex. Trust Code §116.174(a). This was the case despite the requirement in Section 116.171 that "insubstantial" amounts should be allocated to principal. HB 564 amends Section 116.174(a) to provide that all delay rental and annual rental on a mineral lease is income.

3. Changes Affecting Decedents' Estates

Following is a summary of legislative changes affecting decedents' estates, other than the amendments to Probate Code Section 128A, which are discussed above.

3.1. Marriage Voidable Based on Mental Incapacity. HB 391 adds new Section 47A to the Probate Code to permit a post-death challenge to the validity of a marriage based on the mental incapacity of one of the spouses. Previously the Family Code permitted such challenges to be brought prior to death, but once one of the spouses died, the marriage could not be challenged. This left a door open for abusive caregivers -- one that could not be closed despite terrible facts.

As a section of the State Bar, REPTL is required to circulate its legislative proposals to all sections of the bar and to obtain the approval of the State Bar Board of Directors before it is permitted to urge the adoption of the legislation. This proposal was reviewed by the Family Law Section, which requested changes to the bill that were made in Summer 2006 as part of the bar approval process. Nonetheless, the Family Law Foundation, which is closely affiliated with the Section, opposed HB 391 when it came up for hearing in the House. The version which passed is a compromise that was necessary to avoid Family Law Foundation opposition.

As it passed, Section 47A permits a challenge first brought after the death of one of the spouses to void a marriage that occurred within three years of the death. Marriages that occurred more than three years before the death of a spouse cannot be challenged unless there was at death a pending Family Code action or guardianship proceeding in which the court has been asked to void the marriage under Chapter 6, Family Code. In addition, the compromise requires any post-death challenge to the validity of a marriage based on incapacity to be brought within one year of the death of the spouse.

The standards under Section 47A are difficult to meet, but at least there is a procedure to deal with the most egregious cases.

3.2. Judge May Require a New Bond Without Hearing. Under current Section 205 of the Probate Code,

if the judge determines that the amount of an administrator's bond is insufficient, the judge must cause the administrator to be cited to appear and show cause why the bond should not be increased. HB 1709 amends Sections 205 and 206 to permit the judge without notice or hearing to order that the bond be increased. In many cases, such as when real property is sold, it will be obvious to everyone that the bond must be increased. These changes will make it unnecessary for the court to hold a show cause hearing just to increase the bond. In those cases where the administrator believes that the bond should not be increased or that the amount of the new bond is too high, Section 206 permits the administrator to demand a hearing on the order.

3.3. Operation of a Business in a Dependent Administration. If a decedent dies intestate holding a farm or business as a sole proprietorship, the dependent administrator appointed by the court faces an uphill battle. How can the administrator hope to operate the business when the rules governing dependent administration rely on court approval for most actions?

The current Section 238 provides an answer, but some (including title companies) believed it did not go far enough. It permits the administrator to ask the court for orders authorizing it to take certain actions without needing further court approval.

HB 1352 amends Section 238. The amended section goes into much greater detail about the types of orders that may be entered and the scope of the administrator's authority under those orders. For example, the court can order that the administrator is permitted to sell real estate without further order of the court. This could be useful if the decedent was a real estate developer and the administrator needs to sell lots to keep the business going.

The new version makes clear, however, that all such authority of the personal representative must be obtained from the court. The court must carefully scrutinize orders requested under new Section 238 due to the broad authority that can be given in such orders.

3.4. Unpaid Child Support Claims Against the Decedent's Estate. Currently Section 154.006 of the Family Code provides that, unless the court orders otherwise, child support obligations end when the obligor dies. Of course, most well-drafted divorce decrees provide that the child support obligation survives the death of the obligor. This leads to problems for the personal representative of the obligor's estate, since the claim for future child support is not a liquidated claim.

SB 617 amends Section 154.006 of the Family Code to reverse the general rule. Under the new rule, the child support obligation survives the death of the obligor even if the divorce decree does not so provide. The bill also adds Sections 154.015 and 154.016 to the Family Code to provide for the acceleration of child support obligations on the death of the obligor. The changes anticipate that the family court will determine a liquidated amount of the child support obligation using discounting analysis and other means. Section 154.016 permits the court to require that one's child support obligations be "secured" by the purchase of life insurance, and it provides a means for determining what portion of the life insurance goes to pay the child support obligation. Any child support obligation that remains unpaid can be reduced to a liquidated sum by the family court. An amendment to Section 322 of the Probate Code makes the obligee's claim for the liquidated sum a Class 4 claim.

This will increase the amount of Class 4 claims in probate estates, and therefore make it less likely that creditors holding claims of a lower priority will be paid. The probate judge's job should be easier under the new provisions, since it is the family court, not the probate court, that must set the amount of the accelerated, liquidated claim.

3.5. No Hearing Required on Application to Sell Real Estate. HB 391 repeals Section 343, adds Section 345A and amends Sections 344, 345 and 346 to make it easier to sell real estate in a dependent administration. Under the changes, if there is no opposition to the application to sell, the court may order the sale without a hearing. Section 345A(b) permits the court to require a hearing even if there is no opposition.

3.6. Venue of Heirship Proceedings. REPTL attempted to clarify the venue and transfer rules for statutory probate courts in non-personal injury cases in light of the decision in *Gonzalez v. Reliant Energy, Inc.,* 159 S. W. 3d 615 (Tex. 2005). However, this bill (HB 660) failed to pass.

Nonetheless, there was a venue clean-up of sorts this session. HB 391 amends Sections 8 and 48(a) of the Probate Code to make the venue of heirship proceedings more consistent with other proceedings involving decedents' estates. Previously if no other venue rules applied and no administration was pending, Section 48(a) required a determination of heirship application to be filed in the county where the decedent owned real property. Now that section provides that the venue is determined under Section 6, which is the primary venue statute regarding decedents' estates. This should move the proper venue of some heirship proceedings from the county where real property is located to the county of the decedent's domicile.

3.7. Genetic Testing in Heirship Proceedings. SB 1624 adds Sections 53A, 53B, 53C, 53D and 53E to the Probate Code, establishing a procedure for using genetic testing in heirship proceedings. The procedure is modeled after, and refers to, the Family Code procedures on the same subject.

3.8. Disinheriting Bad Parents. HB 568 adds Subsections (e) and (f) to Section 41, permitting the probate court to disinherit a parent who abandoned the child or its pregnant mother or committed certain enumerated criminal acts. A parent who is disinherited is treated as having predeceased the child and, therefore, does not inherit from or through the child.

3.9. Say Goodbye to Nuncupative Wills and Qualified Community Administrations. Two bills actually took the time and energy to remove two old and little-used probate institutions. HB 391 eliminates oral nuncupative wills. From here on out, folks are just going to have to write it down. HB 1710 eliminates qualified community administrations. Non-qualified community administrations survived, as did the surviving spouse's right to manage his or her sole management community property under former Section 177(b) (now simply Section 177). It is surprising how many sections of the Probate Code have something to do with nuncupative wills or qualified community administrations. Care to guess? See the end of the paper (before the appendices) for the answer.

3.10. Soldiers Killed in Combat Zone Do Not Pay Probate Fees. HB 3787 (effective June 15, 2007) adds Section 11A to the Probate Code, exempting the estates of service men and women killed in a combat zone from paying probate fees.

3.11. Disclaimer Statute Cleaned Up. HB 391 gives Section 37A a face-lift, reorganizing the subsections and giving them names. The only substantive change is to the deadline for a charity or governmental organization to file a disclaimer. Previously the charity or organization had nine months from the date it received the Section 128A notice. Since Section 128A was substantially rewritten, a certain charity with an orange tower located just north of the Capitol complex in Austin asked for, and received, a change to new Subsection (h), giving charities until the first anniversary of the receipt of the Section 128A notice or six months after the personal representative files the inventory, whichever is later. The disclaimer face-lift also caused a minor change to Section 37B(b).

3.12. Effect of Divorce on Will Provisions. HB 391 amends Section 69 of the Probate Code to assure the result reached by the Texas Supreme Court in *In re Estate of Nash*, 2007 WL 1163925, 50 Tex. Sup. Ct. J. 649 (Tex. Apr 20, 2007). Instead of the divorce voiding all provisions "in favor of the testator's former spouse," the amended Section 69 also treats "each relative of the former spouse who is not a relative of the testator" as having failed to survive the testator, thus voiding gifts to and fiduciary appointments of the former spouse's relatives.

3.13. Change in Proof Required to Prove Contents of Lost Will. Since the Probate Code was first enacted more than 50 years ago, a person wishing to admit a lost will to probate under Section 85 had to (among other things) prove the contents of the will by the testimony of a credible witness who has read it or hear it read.

HB 391 amends Section 85 to permit such proof "the testimony of a credible witness who has read the will, has heard the will read, *or can identify a copy of the will."* This is a statutory recognition that, with today's technology, a copy of the will is probably the best way to prove the contents of the will.

3.14. Granting Letters of Administration. HB 391 makes two distinct changes to Section 178 of the Probate Code. First, it permits a named executor who fails to present the will for probate within 30 days of the decedent's death to show the court good cause for not presenting the will and thereby avoid having letters of administration with will annexed granted to someone else. Second, it provides that a necessity for an administration exists if the administration is necessary to receive or recover funds or other property due the estate.

3.15. Other Technical or Minor Changes Affecting Decedents' Estates. Bills passing the 80th Regular Session of the Texas Legislature also made these changes affecting decedents' estates:

- A minor change to the definition of "interested persons" in Section 3(r) of the Probate Code (HB 391).
- Increasing the fee for depositing a will with the county clerk during the testator's lifetime from $3 to $5 (Section 71, HB 290, effective June 15, 2007).
- Removing the word "neglect" from Section 83(c) (HB 391).
- Removing the requirement that the applicant's social security number be included in an emergency intervention application filed under Sections 111 or 112 of the Probate Code (HB 391, effective June 15, 2007).
- The title to Section 128B of the Probate Code changed (SB 593).
- Sections 149C, regarding removal of independent executors, and 222, regarding removal of dependent administrators, were changed to correspond to the amendments to Section 128A regarding notice to beneficiaries that a will has been probated (SB 593).
- Amending Section 179 to require that a person wishing to file an opposition to the application for letters of administration be an "interested person" (HB 391).
- Amending Section 190(b) to remove the word "neglected" from the oath of an administrator.

4. Changes Affecting Guardianships

4.1. Protecting the Right of an Incapacitated Person to Vote (and Drive). HB 417 made several changes to the Probate Code and the Election Code intended to protect incapacitated persons' right to vote and, in some cases, drive. Section 682 of the Probate Code requires the application for a guardianship to state if the applicant seeks to take away the right of an adult proposed ward to vote or hold a license to operate a motor vehicle. This is intended to put the proposed ward on notice that his or her constitutional right to vote is threatened by the proceeding, thus affording the proposed ward due process. *See Doe v. Rowe*, 156 F.Supp. 2d 35 (D.Me. 2001). Section 687 is amended to require the physician's certificate to state whether in the physician's opinion the proposed ward has the mental capacity to vote or safely operate a motor vehicle. Section 693(a) is amended to, in effect, provide that a determination by the court that a person is totally incapacitated means that the person cannot vote or operate a motor vehicle and that the order appointing the guardian must so provide. Sections 694G and 694H are amended to require guardianship modification orders to address the ward or former ward's right to vote. Finally, it makes several changes to the Election Code to reflect that some wards retain the right to vote and others do not.

4.2. Criminal Background Checks for All Guardians, Except Family Members and Lawyers. Section 698 of the Probate Court was amended late in the session to require the clerk to obtain a criminal background check on each person proposed to serve as a guardian, including temporary guardians and successor guardian. However, family members of the proposed ward and attorneys are exempt from the criminal background check requirement. Section 698(a-1). Rather than waiting for the clerk to obtain the background check, an applicant subject to the requirement may submit the criminal history record, so long as it is dated within 30 days of the hearing.

4.3. Judge May Require a New Bond Without Hearing. Under current Section 713 of the Probate Code, if the judge determines that the amount of a guardian's bond is insufficient, the judge must cause the guardian to be cited to appear and show cause why the bond should not be increased. HB 1709 amends Sections 713 and 714 to permit the judge without notice or hearing to order that the bond be increased. In many cases, such as when real property is sold, it will be obvious to everyone that the bond must be increased. These changes will make it unnecessary for the court to hold a show cause hearing just to increase the bond. In those cases where the guardian believes that the bond should not be increased or that the amount of the new bond is too high, Section 714 permits the guardian to demand a hearing on the order.

4.4. No Hearing Required on Application to Sell Real Estate. HB 417 repeals Section 822, adds Section 824A and amends Sections 823, 824 and 825 to make it easier to sell real estate in a guardianship. Under the changes, if there is no opposition to the application to sell, the court may order the sale without a hearing. Section 345A(b) permits the court to require a hearing even if there is no opposition.

4.5. No Plan is the Default Investment Plan. A couple of sessions ago, Section 855B was added to the Probate Code, requiring each guardian of the estate to file an application for the approval of an investment plan within 180 days of qualifying as guardian. Several courts have adopted local rules saying that the application for approval of investment plan need be filed only if the guardian wishes to opt out of the approved investments in Section 855 of the Probate Code. Now HB 417 has amended Section 855B to follow this lead. Under the amendment, a guardian must either have the estate assets invested according to Section 855(b) or file an application for approval of an investment plan within 180 days of qualifying. Section 855B(a-1) permits the approval of an investment plan without a hearing.

4.6. Interstate Guardianship Disputes. HB 342 (effective June 15, 2007) adds Section 894 to the Probate Code to give probate courts a basis for resolving interstate venue disputes such as the Glasser case from San Antonio. The statute permits the Texas court to delay further action if another guardianship application is filed in a foreign jurisdiction. It directs the court to determine whether venue is "more suitable" in Texas or in the foreign jurisdiction, considering, among other things, the interests of justice, the best interests of the ward and the convenience of the parties. The statute permits the court to enter orders protecting the ward or the ward's property during this delay.

As more and more people spend time in different states each year, there are likely to be more disputes over which state is the proper forum for a guardianship. The Texas statute gives this state's courts some basis for resolving the dispute. The National Conference of Commissioners on Uniform State Laws is considering a uniform act on this subject which, if adopted in a sufficient number of states, could help solve this problem.

4.7. Court Must Have Probate Jurisdiction to Create 867 Trust. HB 519 amends Section 867(b-1) of the Probate Code to clarify that, under the 2005 amendments to that section, the "proper court" which may create a guardianship management trust (often called an "867 Trust") must be "exercising probate jurisdiction." The 2005 amendments were not intended to permit district courts or other courts not exercising probate jurisdiction to create 867 Trusts, and HB 519 makes that clear, as well as providing a means for getting applications filed in the wrong court transferred to the correct court.

4.8. "Ineligible" Guardians May Be Removed. Section 681 lists the grounds for a court considering

whether or not to appoint a guardian to determine that a prospective guardian is ineligible to serve. However, current law does not provide a specific basis for removal of (1) a guardian who was ineligible when appointed but whose ineligibility was not detected at the time of appointment or (2) a guardian who becomes ineligible after being appointed. HB 417 amends Section 761(c) to make the guardian's subsequent ineligibility a basis for removal. It also amends Sections 695, 760(b) and 761(f) to permit the appointment of a successor guardian immediately, without citation or notice, if a necessity exists.

4.9. Appointing Non-Spouses as Co-Guardians. HB 417 amends Section 690 of the Probate Code to permit the appointment of both parents of an adult incapacitated child if the child has never been the subject of a suit affecting the parent-child relationship or if both parents were named joint managing conservators of the child. The bill also amends Section 690 to provide that joint guardians will be appointed only if it is in the best interest of the ward.

4.10. SAPCR Versus Guardianship Jurisdiction. HB 585 (effective June 15, 2007) adds Subsection (k) to Section 606 to provide that a probate court has jurisdiction to hear a guardianship proceeding with respect to an adult disabled child who became the subject of a suit affecting the parent-child relationship (SAPCR) when the child was a minor, notwithstanding the continuing, exclusive jurisdiction of the SAPCR court. It also adds Section 682A to the Probate Code. This late-session addition is a not-too-successful attempt to make the probate court have to appoint as guardian the person appointed by the SAPCR court as conservator and to make the probate court "preserve the terms of possession and access to the ward" that the SAPCR court set, as much as possible. However, since the probate court is bound by these requirements only if it is able to make the findings required by Section 684 of the Probate Code, and since Section 684 requires the probate court to find, among other things, that the applicant is eligible to serve as guardian, the probate court retains some say in how the guardianship is established.

4.11. Various Application and Ad Litem Issues. HB 417 makes several tweaks of the application process, including a few that affect ad litems. Sections 645 and 646 are amended to provide that, unless the court otherwise orders, a guardian ad litem and attorney ad litem appointed in connection with an application for a guardianship are discharged when the order appointing the guardian or dismissing the application is entered. Section 683(a) is amended to provide that, if the court investigator or a guardian ad litem is appointed to investigate whether a guardianship is necessary, and if such person determines that a guardianship is not necessary, he or she need not file an application for creation of a guardianship. Sections 683(c), 694C and 694L are amended to provide that the ad litems appointed under those sections (regarding court-initiated guardianships and restoration/modification proceedings) are entitled to be paid even if no guardianship is established or no changes are made.

4.12. Other Technical or Minor Changes Affecting Guardianships. Bills passing the 80th Regular Session of the Texas Legislature also made these changes affecting guardianships:

- HB 417 amends Section 665A of the Probate Code to make the payment for professional services apply to professionals appointed under any provisions of Chapter XII of the Probate Code, not just Sections 646 or 687.

- SB 291 amends Sections 697A, 697B and 698 regarding public guardians, private professional guardians and the Guardianship Certification Board.

5. Other Legislation

5.1. Recusals in Statutory Probate Courts. SB 406 amends Section 25.00255 of the Government Code, removing the presiding statutory probate judge's power to assign a judge to hear a motion for the recusal or disqualification of a statutory probate judge. Under SB 406, the presiding statutory probate judge forwards the request for assignment of a judge to hear the recusal to the local administrative judge, who assigns a judge to hear

the motion. The bill also adds new Government Code Section 25.00256, which addresses "tertiary recusal motions." When a party has filed two recusal motions in a case, subsequent (or tertiary) motions shall not cause the other proceedings in the matter to stop.

5.2. Uniform Prudent Management of Institutional Funds Act. HB 860 enacts the Uniform Prudent Management of Institutional Funds Act in Chapter 163 of the Property Code. The act is modeled after the Uniform Prudent Investor Act (Chapter 117 of the Trust Code). It applies to funds managed by charitable institutions for itself. It applies to trusts with only charitable beneficiaries (including trusts that had non-charitable beneficiaries whose interests in the trust have terminated), but only if the trustee and beneficiary are both charitable institutions. If the act applies to a fund, then the Trust Code does not apply.

5.3. Filing Fees. Several bills affect filing fees. HB 1295 requires the clerks in all counties (not just statutory probate court counties) to collect a $20 supplemental fee on original probate actions and certain contested probate actions. The money is used to pay guardians ad litems and attorneys ad litem appointed in court-initiated guardianship proceedings under Section 683 of the Probate Code and to fund local guardianship programs that provide guardians for indigent incapacitated persons who do not have family members suitable and willing to serve as guardians. HB 2359 affects how the $40 filing fee collected in statutory probate courts is divided among the statutory probate court counties. SB 819 permits avoidance of the $25 filing fee for inventories filed more than 90 days after the personal representative qualifies if the deadline for filing the inventory is extended by the court. HB 290 (effective June 15, 2007) increases the fee for depositing a will with the county clerk during the testator's lifetime from $3 to $5.

5.4. Statutory Probate Judges' Bonds. HB 2967 (effective October 1, 2007) requires all statutory probate judges to execute a $500,000 performance bond. Under current law, the amounts of those bonds varies.

5.5. State Court Review of Medicaid Decisions. HB 75 permits state court judicial review on final determinations for Medicaid benefits. Medicaid is the only state benefit program that does not permit the applicant to appeal an administrative law judge's decision to a state district court. HB 75 removes the Medicaid exemption from state court review.

5.6. Minimum Personal Needs Allowance Increased to $60. HB 52 increases the minimum personal needs allowance for certain recipients of Medicaid benefits in long-term care facilities from $45 to $60 per month.

5.7. Social Security Numbers and Driver's License Numbers on Pleadings. In order to make it easier for title companies and others to determine the identity of judgment debtors on abstracts of judgment, SB 699 requires that each party's initial pleading in a civil action filed in a district court, county court or statutory county court include the last three digits of the party's drivers license number and the last three digits of the party's social security number. The Academy was able to get proceedings in statutory probate courts exempted from this requirement. Unfortunately, probate and guardianship cases in non-statutory probate court counties will be subject to the requirement. The requirement applies to civil actions filed on or after September 1, 2007.

5.8. Social Security Numbers in Documents Filed with Clerk. Meanwhile, HB 2061(effective March 28, 2007) was rushed through the Legislature to protect clerks who unintentionally disclose a person's social security number by allowing a document containing the number to be examined by a member of the public. The bill also requires the clerk to remove all but the last four digits of a person's social security number from a filed document if the person so requests.

6. Conclusion

The answer is 28.

Appendix "A" -- 2007 Amendments to the Texas Probate Code

I believe this compilation of Probate Code changes to be complete and accurate, but I do not warrant that this is the case.

Glenn Karisch

Changes Affecting Decedents' Estates

Sec. 3. DEFINITIONS AND TERMS OF USE. Except as otherwise provided by Chapter XIII of this Code, when used in this Code, unless otherwise apparent from the context:

(a) – (q) [No change]

(r) "Interested persons" or "persons interested" means heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of an incapacitated person, including a minor [~~or incompetent ward~~].

Added by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. This change applies to a proceeding that is pending or commenced on or after September 1, 2007.

Sec. 8. CONCURRENT VENUE & TRANSFER OF PROCEEDINGS.

(a) **Concurrent Venue.** When two or more courts have concurrent venue of an estate or a proceeding to declare heirship under Section 48(a) of this code, the court in which the application for a proceeding in probate or determination of heirship [~~proceedings thereon~~] is first filed shall have and retain jurisdiction of the estate or heirship proceeding, as appropriate, to the exclusion of the other court or courts. The proceeding [~~proceedings~~] shall be deemed commenced by the filing of an application averring facts sufficient to confer venue; and the proceeding first legally commenced shall extend to all of the property of the decedent or the decedent's estate. Provided, however, that a bona fide purchaser of real property in reliance on any such subsequent proceeding, without knowledge of its invalidity, shall be protected in such purchase unless the decree admitting the will to probate, determining heirship, or granting administration in the prior proceeding shall be recorded in the office of the county clerk of the county in which such property is located.

(b) **Proceedings in More Than One County.** If a proceeding in [~~proceedings for~~] probate or to declare heirship under Section 48(a) of this code is [~~are~~] commenced in more than one county, the proceeding [~~they~~] shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the clerk, after making and retaining a true copy of the entire file in the case, shall transmit the original file to the proper county, and the proceeding [~~proceedings~~] shall thereupon be had in the proper county in the same manner as if the proceeding [~~proceedings~~] had originally been instituted therein.

(c) **Transfer of Proceeding.**

(1) **Transfer for Want of Venue.** If it appears to the court at any time before the final decree that the proceeding was commenced in a court which did not have priority of venue over such proceeding, the court shall, on the application of any interested person, transfer the proceeding to the proper county by transmitting to the proper court in such county the original file in such case, together with certified copies of all entries in the minutes theretofore made, and the probate of the will, determination of heirship, or administration of the estate in such county shall be completed in the same manner as if the proceeding had originally been instituted therein;

but, if the question as to priority of venue is not raised before final decree in the proceedings is announced, the finality of such decree shall not be affected by any error in venue.

(2) **Transfer for Convenience of the Estate.** If it appears to the court at any time before the estate is closed or, if there is no administration of the estate, when the proceeding in probate or to declare heirship is concluded that it would be in the best interest of the estate or, if there is no administration of the estate, that it would be in the best interest of the heirs or beneficiaries of the decedent's will, the court, in its discretion, may order the proceeding transferred to the proper court in any other county in this State. The clerk of the court from which the proceeding is transferred shall transmit to the court to which the proceeding is transferred the original file in the proceeding and a certified copy of the index.

(d) [No change]

(e) **Jurisdiction to Determine Venue.** Any court in which there has been filed an application for a proceeding [~~proceedings~~] in probate or determination of heirship shall have full jurisdiction to determine the venue of the [~~such~~] proceeding in probate or heirship proceeding, and of any proceeding relating thereto, and its determination shall not be subject to collateral attack.

Added by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. These changes apply only to a proceeding commenced on or after September 1, 2007. A proceeding commenced before the effective date of this article is governed by the law applicable to the proceeding immediately before September 1, 2007, and that law is continued in effect for that purpose.

Sec. 11A. EXEMPTION FROM PROBATE FEES FOR ESTATES OF CERTAIN MILITARY SERVICEMEMBERS.

(a) In this section, "combat zone" means an area that the president of the United States by executive order designates for purposes of 26 U.S.C. Section 112 as an area in which armed forces of the United States are or have engaged in combat.

(b) Notwithstanding any other law, the clerk of a county court may not charge, or collect from, the estate of a decedent any of the following fees if the decedent died while in active service as a member of the armed forces of the United States in a combat zone:

(1) a fee for or associated with the filing of the decedent's will for probate; and

(2) a fee for any service rendered by the probate court regarding the administration of the decedent's estate.

Added by Acts 2007, 80th Leg., Ch. ___ (HB 3787), effective June 15, 2007.

Sec. 37A. MEANS OF EVIDENCING DISCLAIMER OR RENUNCIATION OF PROPERTY OR INTEREST RECEIVABLE FROM A DECEDENT.

(a) **Persons Who May Disclaim.** Any person, or the guardian of an incapacitated person, the personal representative of a deceased person, or the guardian ad litem of an unborn or unascertained person, with prior court approval of the court having, or which would have, jurisdiction over such guardian, personal representative, or guardian ad litem, or any independent executor of a deceased person, without prior court approval, or an attorney in fact or agent appointed under a durable power of attorney authorizing disclaimers that is executed by a principal, who may be entitled to receive any property as a beneficiary and who intends to effect disclaimer irrevocably on or after September 1, 1977, of the whole or any part of such property shall evidence same as herein provided.

(b) **Effective Date of Disclaimer.** A disclaimer evidenced as provided by this section [~~herein~~] shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent and is not subject to the claims of any creditor of the disclaimant.

(c) **Effect of Disclaimer.** Unless the decedent's will provides otherwise, the property subject to the disclaimer shall pass as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent and a future interest that would otherwise take effect in possession or enjoyment after the termination of the estate or interest that is disclaimed takes effect as if the disclaiming beneficiary had predeceased the decedent.

(d) **Ineffective Disclaimer.** Failure to comply with the provisions of this section [~~hereof~~] shall render such disclaimer ineffective except as an assignment of such property to those who would have received same had the person attempting the disclaimer died prior to the decedent.

(e) **Definitions**. The term "property" as used in this section shall include all legal and equitable interests, powers, and property, whether present or future, whether vested or contingent, and whether beneficial or burdensome, in whole or in part. The term "disclaimer" as used in this section shall include "renunciation." In this section "beneficiary" includes a person who would have been entitled, if the person had not made a disclaimer, to receive property as a result of the death of another person by inheritance, under a will, by an agreement between spouses for community property with a right of survivorship, by a joint tenancy with a right of survivorship, or by any other survivorship agreement, account, or interest in which the interest of the decedent passes to a surviving beneficiary, by an insurance, annuity, endowment, employment, deferred compensation, or other contract or arrangement, or under a pension, profit sharing, thrift, stock bonus, life insurance, survivor income, incentive, or other plan or program providing retirement, welfare, or fringe benefits with respect to an employee or a self-employed individual.

(f) **Subsequent Disclaimers.** Nothing in this section shall be construed to preclude a subsequent disclaimer by any person who shall be entitled to property as a result of a disclaimer.

(g) **Form** [~~The following shall apply to such disclaimers:~~ [~~(a) Written Memorandum~~] of Disclaimer [~~and Filing Thereof~~]. In the case of property receivable by a beneficiary, the disclaimer shall be evidenced by a written memorandum, acknowledged before a notary public or other person authorized to take acknowledgements of conveyances of real estate.

(h) **Filing of Disclaimer.** Unless the beneficiary is a charitable organization or governmental agency of the state, a written memorandum of disclaimer disclaiming a present interest shall be filed not later than nine months after the death of the decedent and a written memorandum of disclaimer disclaiming a future interest may be filed not later than nine months after the event determining that the taker of the property or interest is finally ascertained and his interest is indefeasibly vested. If the beneficiary is a charitable organization or a governmental agency of the state, a written memorandum of disclaimer disclaiming a present or future interest shall be filed not later than the first anniversary of the date [~~nine months after~~] the beneficiary receives the notice required by Section 128A of this code, or the expiration of the six-month period following the date the personal representative files the inventory, appraisement, and list of claims due or owing to the estate, whichever occurs later. The written memorandum of disclaimer shall be filed in the probate court in which the decedent's will has been probated or in which proceedings have been commenced for the administration of the decedent's estate or which has before it an application for either of the same; provided, however, if the administration of the decedent's estate is closed, or after the expiration of one year following the date of the issuance of letters testamentary in an independent administration, or if there has been no will of the decedent probated or filed for probate, or if no administration of the decedent's estate has been commenced, or if no application for administration of the decedent's estate has been filed, the written memorandum of disclaimer shall be filed with the county clerk of the county of the decedent's residence, or, if the decedent is not a resident of this state but real property or an interest therein located in this state is disclaimed, a written memorandum of disclaimer shall be

filed with the county clerk of the county in which such real property or interest therein is located, and recorded by such county clerk in the deed records of that county.

(i) [~~(b)~~] **Notice of Disclaimer.** Unless the beneficiary is a charitable organization or governmental agency of the state, copies of any written memorandum of disclaimer shall be delivered in person to, or shall be mailed by registered or certified mail to and received by, the legal representative of the transferor of the interest or the holder of legal title to the property to which the disclaimer relates not later than nine months after the death of the decedent or, if the interest is a future interest, not later than nine months after the date the person who will receive the property or interest is finally ascertained and the person's interest is indefeasibly vested. If the beneficiary is a charitable organization or government agency of the state, the notices required by this section shall be filed not later than the first anniversary of the date [~~nine months after~~] the beneficiary receives the notice required by Section 128A of this code, or the expiration of the six-month period following the date the personal representative files the inventory, appraisement, and list of claims due or owing to the estate, whichever occurs later.

(j) [~~(c)~~] **Power to Provide for Disclaimer.** Nothing herein shall prevent a person from providing in a will, insurance policy, employee benefit agreement, or other instrument for the making of disclaimers by a beneficiary of an interest receivable under that instrument and for the disposition of disclaimed property in a manner different from the provisions hereof.

(k) [~~(d)~~] **Irrevocability of Disclaimer.** Any disclaimer filed and served under this section shall be irrevocable.

(l) [~~(e)~~] **Partial Disclaimer.** Any person who may be entitled to receive any property as a beneficiary may disclaim such property in whole or in part, including but not limited to specific powers of invasion, powers of appointment, and fee estate in favor of life estates; and a partial disclaimer or renunciation, in accordance with the provisions of this section, shall be effective whether the property so renounced or disclaimed constitutes a portion of a single, aggregate gift or constitutes part or all of a separate, independent gift; provided, however, that a partial disclaimer shall be effective only with respect to property expressly described or referred to by category in such disclaimer; and provided further, that a partial disclaimer of property which is subject to a burdensome interest created by the decedent's will shall not be effective unless such property constitutes a gift which is separate and distinct from undisclaimed gifts.

(m) [~~(f)~~] **Partial Disclaimer by Spouse.** Without limiting Subsection (l) [~~(e)~~] of this section, a disclaimer by the decedent's surviving spouse of a transfer by the decedent is not a disclaimer by the surviving spouse of all or any part of any other transfer from the decedent to or for the benefit of the surviving spouse, regardless of whether the property or interest that would have passed under the disclaimed transfer passes because of the disclaimer to or for the benefit of the surviving spouse by the other transfer.

(n) [~~(g)~~] **Disclaimer After Acceptance.** No disclaimer shall be effective after the acceptance of the property by the beneficiary. For the purpose of this subsection [~~section~~], acceptance shall occur only if the person making such disclaimer has previously taken possession or exercised dominion and control of such property in the capacity of beneficiary.

(o) [~~(h)~~] **Interest in Trust Property.** A beneficiary who accepts an interest in a trust is not considered to have a direct or indirect interest in trust property that relates to a licensed or permitted business and over which the beneficiary exercises no control. Direct or indirect beneficial ownership of not more than five percent of any class of equity securities that is registered under the Securities Exchange Act of 1934 shall not be deemed to be an ownership interest in the business of the issuer of such securities within the meaning of any statute, pursuant thereto.

Added by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 37B. ASSIGNMENT OF PROPERTY RECEIVED FROM A DECEDENT.

(a) [No change]

(b) The assignment may, at the request of the assignor, be filed as provided for the filing of a disclaimer under Section 37A(h) [~~37A(a)~~] of this code. The filing requires the service of notice under Section 37A(i) [~~37A(b)~~] of this code.

(c) – (e) [No change]

Added by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 41. MATTERS AFFECTING AND NOT AFFECTING THE RIGHT TO INHERIT.

(a) -- (d) [No change]

(e) **Parent-Child Relationship.** A probate court may declare that the parent of a child under 18 years of age may not inherit from or through the child under the laws of descent and distribution if the court finds by clear and convincing evidence that the parent has:

(1) voluntarily abandoned and failed to support the child in accordance with the parent's obligation or ability for at least three years before the date of the child's death, and did not resume support for the child before that date;

(2) voluntarily and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from and failed to support the child since birth; or

(3) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code or adjudicated under Title 3, Family Code, for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following sections of the Penal Code:

(A) Section 19.02 (murder);

(B) Section 19.03 (capital murder);

(C) Section 19.04 (manslaughter);

(D) Section 21.11 (indecency with a child);

(E) Section 22.01 (assault);

(F) Section 22.011 (sexual assault);

(G) Section 22.02 (aggravated assault);

(H) Section 22.021 (aggravated sexual assault);

(I) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(J) Section 22.041 (abandoning or endangering child);

(K) Section 25.02 (prohibited sexual conduct);

(L) Section 43.25 (sexual performance by a child); or

(M) Section 43.26 (possession or promotion of child pornography).

(f) **Treatment of Certain Relationships.** On a determination that the parent of a child may not inherit from or through the child under Subsection (e) of this section, the parent shall be treated as if the parent predeceased the child for purposes of:

(1) inheritance under the laws of descent and distribution; and

(2) any other cause of action based on parentage.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 568), effective September 1, 2007. Section 4 of HB 568 provides that these changes apply only to the estate of a person who dies on or after September 1, 2007.

Sec. 47A. MARRIAGE VOIDABLE BASED ON MENTAL INCAPACITY. (a) If a proceeding under Chapter 6, Family Code, to declare a marriage void based on the lack of mental capacity of one of the parties to the marriage is pending on the date of death of one of those parties, or if a guardianship proceeding in which a court is requested under Chapter 6, Family Code, to declare a ward's or proposed ward's marriage void based on the lack of mental capacity of the ward or proposed ward is pending on the date of death of the ward or proposed ward, the court may make the determination and declare the marriage void after the decedent's death. In making that determination after the decedent's death, the court shall apply the standards for an annulment prescribed by Section 6.108(a), Family Code.

(b) Subject to Subsection (c) of this section, if a proceeding described by Subsection (a) of this section is not pending on the date of a decedent's death, an interested person may file an application with the court requesting that the court void the marriage of the decedent if, on the date of the decedent's death, the decedent was married, and that marriage commenced not earlier than three years before the decedent's date of death. The notice applicable to a proceeding for a declaratory judgment under Chapter 37, Civil Practice and Remedies Code, applies to a proceeding under this subsection.

(c) An application requesting that the court void a decedent's marriage authorized by Subsection (b) of this section may not be filed after the first anniversary of the date of the decedent's death.

(d) Except as provided by Subsection (e) of this section, in a proceeding brought under Subsection (b) of this section, the court shall declare the decedent's marriage void if the court finds that, on the date the marriage occurred, the decedent did not have the mental capacity to:

(1) consent to the marriage; and

(2) understand the nature of the marriage ceremony, if a ceremony occurred.

(e) In a proceeding brought under Subsection (b) of this section, a court that makes a finding described by Subsection (d) of this section may not declare the decedent's marriage void if the court finds that, after the date the marriage occurred, the decedent:

(1) gained the mental capacity to recognize the marriage relationship; and

(2) did recognize the marriage relationship.

(f) If the court declares a decedent's marriage void in a proceeding described by Subsection (a) of this section or brought under Subsection (b) of this section, the other party to the marriage is not considered the decedent's surviving spouse for purposes of any law of this state.

Added by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. This new section applies only to: (1) the estate of a decedent who dies before the effective date of this article, if the probate or administration of the estate is pending on or commenced on or after the effective date of this article; and (2) the estate of a decedent who dies on or after the effective date of this article.

Sec. 48. PROCEEDINGS TO DECLARE HEIRSHIP. WHEN AND WHERE INSTITUTED.

(a) When a person dies intestate owning or entitled to real or personal property in Texas, and there shall have been no administration in this State upon his estate; or when there has been a will probated in this State or elsewhere, or an administration in this State upon the estate of such decedent, and any real or personal property in this State has been omitted from such will or from such administration, or no final disposition thereof has been made in such administration, the court of the county in which such proceedings were last pending, or in the event no will of such decedent has been admitted to probate in this State, and no administration has been granted in this State upon the estate of such decedent, then the court of the county in which venue would be proper for commencement of an administration of the decedent's estate under Section 6 of this code [~~any of the real property belonging to such estate is situated, or if there is no such real estate, then of the county in which any personal property belonging to such estate is found~~], may determine and declare in the manner hereinafter provided who are the heirs and only heirs of such decedent, and their respective shares and interests, under the laws of this State, in the estate of such decedent, and proceedings therefor shall be known as proceedings to declare heirship.

(b) – (c) [No changes]

Added by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. These changes apply only to a proceeding commenced on or after September 1, 2007. A proceeding commenced before the effective date of this article is governed by the law applicable to the proceeding immediately before September 1, 2007, and that law is continued in effect for that purpose.

Sec. 53A. ORDER FOR GENETIC TESTING AUTHORIZED.

(a) In a proceeding to declare heirship under this chapter, the court may, on the court's own motion, and shall, on the request of a party to the proceeding, order one or more specified individuals to submit to genetic testing as provided for in Subchapter F, Chapter 160, Family Code. If two or more individuals are ordered to be tested, the court may order that the testing of those individuals be done concurrently or sequentially. The court may enforce an order under this subsection by contempt.

(b) Subject to any assessment of costs following the proceeding in accordance with Rule 131, Texas Rules of Civil Procedure, the cost of genetic testing ordered under Subsection (a) of this section must be advanced:

(1) by a party to the proceeding who requests the testing;

(2) as agreed by the parties and approved by the court; or

(3) as ordered by the court.

(c) Subject to Subsection (d) of this section, the court shall order genetic testing subsequent to the testing conducted under Subsection (a) of this section if:

(1) a party to the proceeding contests the results of the genetic testing ordered under Subsection (a) of this section; and

(2) the party contesting the results requests that additional testing be conducted.

(d) If the results of the genetic testing ordered under Subsection (a) of this section identify a tested individual as an heir of the decedent, the court may order additional genetic testing in accordance with Subsection (c) of this section only if the party contesting those results pays for the additional testing in advance.

(e) If a sample of an individual's genetic material that could identify another individual as the decedent's heir is not available for purposes of conducting genetic testing under this section, the court, on a finding of good cause and that the need for genetic testing outweighs the legitimate interests of the individual to be tested, may order any of the following other individuals to submit a sample of genetic material for the testing under circumstances the court considers just:

(1) a parent, sibling, or child of the individual whose genetic material is not available; or

(2) any other relative of that individual, as necessary to conduct the testing.

(f) On good cause shown, the court may order:

(1) genetic testing of a deceased individual under this section; and

(2) if necessary, removal of the remains of the deceased individual as provided by Section 711.004, Health and Safety Code, for that testing.

(g) An individual commits an offense if the individual intentionally releases an identifiable sample of the genetic material of another individual that was provided for purposes of genetic testing ordered under this section, the release is for a purpose not related to the proceeding to declare heirship, and the release was not ordered by the court or done in accordance with written permission obtained from the individual who provided the sample. An offense under this subsection is a Class A misdemeanor.

Added by Acts 2007, 80th Leg., Ch. ___ (SB 1624), effective September 1, 2007. Section 2 of SB 1624 provides that these changes apply to a proceeding to declare heirship that is pending or commenced on or after September 1, 2007.

Sec. 53B. RESULTS OF GENETIC TESTING; ADMISSIBILITY.

(a) A report of the results of genetic testing ordered under Section 53A of this chapter:

(1) must comply with the requirements for a report prescribed by Section 160.504, Family Code; and

(2) is admissible in a proceeding to declare heirship under this chapter as evidence of the truth of the facts asserted in the report.

(b) The presumption under Section 160.505, Family Code, applies to the results of genetic testing ordered under this section, and the presumption may be rebutted as provided by that section.

(c) A party to the proceeding who contests the results of genetic testing may call one or more genetic testing experts to testify in person or by telephone, videoconference, deposition, or another method approved by the court. Unless otherwise ordered by the court, the party offering the testimony bears the expense for the expert testifying.

Added by Acts 2007, 80th Leg., Ch. ___ (SB 1624), effective September 1, 2007. Section 2 of SB 1624 provides that these changes apply to a proceeding to declare heirship that is pending or commenced on or after September 1, 2007.

Sec. 53C. USE OF GENETIC TESTING RESULTS IN CERTAIN PROCEEDINGS TO DECLARE HEIRSHIP.

(a) This section applies in a proceeding to declare heirship of a decedent only with respect to an individual who:

(1) petitions the court for a determination of right of inheritance as authorized by Section 42(b) of this code; and

(2) claims to be a biological child of the decedent, but with respect to whom a parent-child relationship with the decedent was not established as provided by Section 160.201, Family Code, or who claims inheritance through a biological child of the decedent, if a parent-child relationship between the individual through whom the inheritance is claimed and the decedent was not established as provided by Section 160.201, Family Code.

(b) Unless the results of genetic testing of another individual who is an heir of the decedent are admitted as rebuttal evidence, the court shall find that the individual described by Subsection (a) of this section is an heir of the decedent if the results of genetic testing ordered under Section 53A of this chapter identify a tested individual who is an heir of the decedent as the ancestor of the individual described by Subsection (a) of this section.

(c) Unless the results of genetic testing of another individual who is an heir of the decedent are admitted as rebuttal evidence, the court shall find that the individual described by Subsection (a) of this section is not an heir of the decedent if the results of genetic testing ordered under Section 53A of this chapter exclude a tested individual who is an heir of the decedent as the ancestor of the individual described by Subsection (a) of this section.

(d) If the results of genetic testing ordered under Section 53A of this chapter do not identify or exclude a tested individual as the ancestor of the individual described by Subsection (a) of this section:

(1) the court may not dismiss the proceeding to declare heirship; and

(2) the results of the genetic testing and other relevant evidence are admissible in the proceeding.

Added by Acts 2007, 80th Leg., Ch. ___ (SB 1624), effective September 1, 2007. Section 2 of SB 1624 provides that these changes apply to a proceeding to declare heirship that is pending or commenced on or after September 1, 2007.

Sec. 53D. ADDITIONAL ORDERS AUTHORIZED. On the request of an individual determined by the results of genetic testing to be the heir of a decedent and for good cause shown, the court may:

(1) order the name of the individual to be changed; and

(2) if the court orders a name change under Subdivision (1) of this section, order the bureau of vital statistics to issue an amended birth record for the individual.

Added by Acts 2007, 80th Leg., Ch. ___ (SB 1624), effective September 1, 2007. Section 2 of SB 1624 provides that these changes apply to a proceeding to declare heirship that is pending or commenced on or after September 1, 2007.

Sec. 53E. PROCEEDINGS AND RECORDS PUBLIC. A proceeding under this chapter involving genetic testing is open to the public as in other civil cases, and papers and records in the proceeding are available for public inspection.

Added by Acts 2007, 80th Leg., Ch. ___ (SB 1624), effective September 1, 2007. Section 2 of SB 1624 provides that these changes apply to a proceeding to declare heirship that is pending or commenced on or after September 1, 2007.

Sec. 64. CAPACITY TO MAKE A NUNCUPATIVE WILL. [Repealed].

Repealed by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 65. REQUISITES OF A NUNCUPATIVE WILL. [Repealed].

Repealed by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 69. WILL PROVISIONS MADE BEFORE DISSOLUTION OF MARRIAGE [~~VOIDNESS ARISING FROM DIVORCE~~].

(a) In this section, "relative" means an individual who is related to another individual by consanguinity or affinity, as determined under Sections 573.022 and 573.024, Government Code, respectively.

(b) If, after making a will, the testator's marriage is dissolved, whether by divorce, annulment, or a declaration that the marriage is void [~~testator is divorced or the testator's marriage is annulled~~], all provisions in the will, including all fiduciary appointments [~~in favor of the testator's former spouse, or appointing such spouse to any fiduciary capacity under the will or with respect to the estate or person of the testator's children~~], shall [~~must~~] be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator, [~~and shall be null and void and of no effect~~] unless the will expressly provides otherwise.

(c) [~~(b)~~] A person whose marriage to [~~who is divorced from~~] the decedent has been dissolved, whether by divorce, annulment, or a declaration that the marriage is void, [~~or whose marriage to the decedent has been annulled~~] is not a surviving spouse unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death and the subsequent marriage is not declared void under Section 47A of this code.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. These changes apply only to the estate of a decedent who dies on or after the effective date of this article. The estate of a decedent who dies before the effective date of this article is governed by the law in effect on the date of the decedent's death, and the former law is continued in effect for that purpose.

Sec. 71. DEPOSIT OF WILL WITH COURT DURING TESTATOR'S LIFETIME.

(a) **Deposit of Will.** A will may be deposited by the person making it, or by another person for him, with the county clerk of the county of the testator's residence. Before accepting any will for deposit, the clerk may require such proof as shall be satisfactory to him concerning the testator's identity and residence. The clerk, on being paid a fee of Five [~~Three~~] Dollars therefor, shall receive and keep the will, and shall give a certificate of deposit for it. All wills so filed shall be numbered by the clerk in consecutive order, and all certificates of deposit shall bear like numbers respectively.

(b) – (g) [No change]

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 290), effective June 15, 2007.

Sec. 81. CONTENTS OF APPLICATION FOR LETTERS TESTAMENTARY.

(a) – (b) [No change]

(c) **Nuncupative Wills.** [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 82. CONTENTS OF APPLICATION FOR LETTERS OF ADMINISTRATION. An application for letters of administration when no will[~~, written or oral,~~] is alleged to exist shall state:

(a) The name and domicile of the applicant, relationship to the decedent, if any, and that the applicant is not disqualified by law to act as administrator;

(b) The name and intestacy of the decedent, and the fact, time and place of death;

(c) Facts necessary to show venue in the court to which the application is made;

(d) Whether the decedent owned real or personal property, with a statement of its probable value;

(e) The name, age, marital status and address, if known, and the relationship, if any, of each heir to the decedent;

(f) If known by the applicant at the time of the filing of the application, whether children were born to or adopted by the decedent, with the name and the date and place of birth of each;

(g) If known by the applicant at the time of the filing of the application, whether the decedent was ever divorced, and if so, when and from whom; and

(h) That a necessity exists for administration of the estate, alleging the facts which show such necessity.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. These changes apply only to a nuncupative, or oral, will made on or after September 1, 2007. A nuncupative, or oral, will made before September 1, 2007, is governed by the law in effect on the date the will was made, and the former law is continued in effect for that purpose.

Sec. 83. PROCEDURE PERTAINING TO A SECOND APPLICATION.

(a) – (b) [No change]

(c) **Where Letters of Administration Have Been Granted**. Whenever letters of administration shall have been granted upon an estate, and it shall afterwards be discovered that the deceased left a lawful will, such will may be proved in the manner provided for the proof of wills; and, if an executor is named in such will, and he is not disqualified, he shall be allowed to qualify and accept as such executor, and the letters previously granted shall be revoked; but, if no such executor be named in the will, or if the executor named be disqualified, be dead, or shall renounce the executorship, or shall [~~neglect or otherwise~~] fail or be unable to accept and qualify within twenty days after the date of the probate of the will, or shall <u>fail</u> [~~neglect~~] for a period of thirty days after the discovery of such will to present it for probate, then administration with the will annexed of the estate of such testator shall be granted as in other cases. All acts done by the first administrator, prior to the qualification of the executor or of the administrator with the will annexed, shall be as valid as if no such will had been discovered.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. These changes apply an application for the administration of an estate that is pending on or filed on or after September 1, 2007.

Sec. 85. PROOF OF WRITTEN WILL NOT PRODUCED IN COURT. A written will which cannot be produced in court shall be proved in the same manner as provided in the preceding Section for an attested written will or an holographic will, as the case may be, and the same amount and character of testimony shall be required to prove such will as is required to prove a written will produced in court; but, in addition thereto, the cause of its non-production must be proved, and such cause must be sufficient to satisfy the court that it cannot by any reasonable diligence be produced, and the contents of such will must be substantially proved by the testimony of a credible witness who has read the will, has [~~it or~~] heard the will [~~it~~] read, or can identify a copy of the will.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 6.02 of HB 391 provides: The changes in law made by this article apply only to[: (1) the estate of a decedent who dies before the effective date of this article, if the probate or administration of the estate is pending on or commenced on or after the effective date of this article; and (2)] the estate of a decedent who dies on or after the effective date of this article. The bracketed language in the previous sentence was deleted by Acts 2007, 80th Leg., Ch. ___ (HB 593), Section 5, effective September 1, 2007.

Sec. 86. PROOF OF NUNCUPATIVE WILL. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 89A. CONTENTS OF APPLICATION FOR PROBATE OF WILL AS MUNIMENT OF TITLE.

(a) – (b) [No change]

(c) [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 91. WHEN WILL NOT IN CUSTODY OF COURT[~~, OR ORAL~~]. If for any reason a written will is not in the custody of the court, [~~or if the will is oral,~~] the court shall find the contents thereof by written order, and certified copies of same as so established by the court may be recorded in other counties, and may be used in evidence, as in the case of certified copies of written wills in the custody of the court.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 111. CONTENTS OF EMERGENCY INTERVENTION APPLICATION FOR FUNERAL AND BURIAL EXPENSE.

(a) An application for emergency intervention to obtain funds needed for a decedent's funeral and burial expenses must be sworn and must contain:

(1) the name, address, [~~social security number,~~] and interest of the applicant;

(2) the facts showing an immediate necessity for the issuance of an emergency intervention order under this section by the court;

(3) the date of the decedent's death, place of death, decedent's residential address, and the name and address of the funeral home holding the decedent's remains;

(4) any known or ascertainable heirs and devisees of the decedent and the reason:

(A) the heirs and devisees cannot be contacted; or

(B) the heirs and devisees have refused to assist in the decedent's burial;

(5) a description of funeral and burial procedures necessary and a statement from the funeral home that contains a detailed and itemized description of the cost of the funeral and burial procedures; and

(6) the name and address of an individual, entity, or financial institution, including an employer, that is in possession of any funds of or due to the decedent, and related account numbers and balances, if known by the applicant.

(b) [No change]

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective June 15, 2007. Section 8.03 of HB 391 provides that these changes apply to an emergency intervention application filed before, on, or after June 15, 2007.

Sec. 112. CONTENTS FOR EMERGENCY INTERVENTION APPLICATION FOR ACCESS TO PERSONAL PROPERTY. An application for emergency intervention to gain access to rental accommodations of a decedent at the time of the decedent's death that contain the decedent's personal property must be sworn and must contain:

(1) the name, address, [~~social security number,~~] and interest of the applicant;

(2) the facts showing an immediate necessity for the issuance of an emergency intervention order by the court;

(3) the date and place of the decedent's death, the decedent's residential address, and the name and address of the funeral home holding the decedent's remains;

(4) any known or ascertainable heirs and devisees of the decedent and the reason:

(A) the heirs and devisees cannot be contacted; or

(B) the heirs and devisees have refused to assist in the protection of the decedent's personal property;

(5) the type and location of the decedent's personal property and the name of the person in possession of the property; and

(6) the name and address of the owner or manager of the decedent's rental accommodations and whether access to the accommodations is necessary.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective June 15, 2007. Section 8.03 of HB 391 provides that these changes apply to an emergency intervention application filed before, on, or after June 15, 2007.

Sec. 128. CITATIONS WITH RESPECT TO APPLICATIONS FOR PROBATE AND FOR ISSUANCE OF LETTERS.

(a) [No change]

(b) **Where Application Is for Probate of a Written Will Not Produced [~~or of a Nuncupative Will~~].** When the application is for the probate of a [~~nuncupative will, or of a~~] written will which cannot be produced

in court, the clerk shall issue a citation to all parties interested in such estate, which citation shall contain substantially the statements made in the application for probate, and the time when, place where, and the court before which such application will be acted upon. If the heirs of the testator be residents of this state, and their residence be known, the citation shall be served upon them by personal service. Service of such citation may be made by publication in the following cases:

(1) When the heirs are non-residents of this state; or

(2) When their names or their residences are unknown; or

(3) When they are transient persons.

(c) [No change]

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007.

Sec. 128A. NOTICE TO CERTAIN BENEFICIARIES [~~ENTITIES~~] AFTER PROBATE OF WILL.

(a) In this section, "beneficiary" means a person, entity, state, governmental agency of the state, charitable organization, or trust entitled to receive real or personal property under the terms of a decedent's will, to be determined for purposes of this section with the assumption that each person who is alive on the date of the decedent's death survives any period required to receive the bequest as specified by the terms of the will.

(b) Except as provided by Subsection (d) of this section, not later than the 60th day after the date of an order admitting a decedent's will to probate, the personal representative of the decedent's estate, including an independent executor or independent administrator, shall give notice that complies with Subsection (e) of this section to each beneficiary named in the will whose identity and address are known to the personal representative or, through reasonable diligence, can be ascertained. If, after the 60th day after the date of the order, the personal representative becomes aware of the identity and address of a beneficiary who was not given notice on or before the 60th day, the personal representative shall give the notice as soon as possible after becoming aware of that information.

(c) Notwithstanding the requirement under Subsection (b) of this section that the personal representative give the notice to the beneficiary, the personal representative shall give the notice with respect to a beneficiary described by this subsection as follows:

(1) if the beneficiary is a trust, to the trustee, unless the personal representative is the trustee, in which case the personal representative shall give the notice to the person or class of persons first eligible to receive the trust income, to be determined for purposes of this subdivision as if the trust were in existence on the date of the decedent's death;

(2) if the beneficiary has a court-appointed guardian or conservator, to that guardian or conservator;

(3) if the beneficiary is a minor for whom no guardian or conservator has been appointed, to a parent of the minor; and

(4) if the beneficiary is a charity that for any reason cannot be notified, to the attorney general.

(d) A personal representative is not required to give the notice otherwise required by this section to a beneficiary who:

(1) made an appearance in the proceeding with respect to the decedent's estate before the will was admitted to probate; or

(2) received a copy of the will that was admitted to probate and waived the right to receive the notice in an instrument that:

(A) acknowledges the receipt of the copy of the will;

(B) is signed by the beneficiary; and

(C) is filed with the court.

(e) The notice required by this section must:

(1) state:

(A) the name and address of the beneficiary to whom the notice is given or, for a beneficiary described by Subsection (c) of this section, the name and address of the beneficiary for whom the notice is given and of the person to whom the notice is given;

(B) the decedent's name;

(C) that the decedent's will has been admitted to probate;

(D) that the beneficiary to whom or for whom the notice is given is named as a beneficiary in the will; and

(E) the personal representative's name and contact information; and

(2) contain as attachments a copy of the will admitted to probate and the order admitting the will to probate.

(f) The notice required by this section must be sent by registered or certified mail, return receipt requested.

(g) Not later than the 90th day after the date of an order admitting a will to probate, the personal representative shall file with the clerk of the court in which the decedent's estate is pending a sworn affidavit of the personal representative, or a certificate signed by the personal representative's attorney, stating:

(1) for each beneficiary to whom notice was required to be given under this section, the name and address of the beneficiary to whom the personal representative gave the notice or, for a beneficiary described by Subsection (c) of this section, the name and address of the beneficiary and of the person to whom the notice was given;

(2) the name and address of each beneficiary who filed a waiver of the notice;

(3) the name of each beneficiary whose identity or address could not be ascertained despite the personal representative's exercise of reasonable diligence; and

(4) any other information necessary to explain the personal representative's inability to give the notice to or for any beneficiary as required by this section.

(h) The affidavit or certificate required by Subsection (g) of this section may be included with any pleading or other document filed with the clerk of the court, including the inventory, appraisement, and list of claims or an application for an extension of the deadline to file the inventory, appraisement, and list of claims, provided that the pleading or other document with which the affidavit or certificate is included is filed not later than the date the affidavit or certificate is required to be filed as provided by Subsection (g) of this section [~~If the address of the entity can be ascertained with reasonable diligence, an applicant under Section 81 of this code shall give the state, a governmental agency of the state, or a charitable organization notice that the entity is named as a devisee in a written will, a written will not produced, or a nuncupative will that has been admitted to probate.~~

[~~(b) The notice required by Subsection (a) of this section must be given not later than the 30th day after the date of the probate of the will.~~

[~~(c) The notice must be in writing and state the county in which the will was admitted to probate. A copy of the application and the order admitting the will to probate and, if the application is for probate of a written will, a copy of the will must be attached to the notice.~~

[~~(d) An entity entitled to notice under Subsection (a) of this section must be notified by registered or certified mail, return receipt requested.~~

[~~(e) The applicant must file a copy of the notice with the court in which the will was admitted to probate~~].

Amended by Acts 2007, 80th Leg., Ch. ___ (SB 593), effective September 1, 2007. Section 6 of SB 593 provides that these changes apply only to the estates of decedents dying on or after September 1, 2007.

Section 128A(a), Texas Probate Code, is amended to read as follows:

(a) If the address of the entity can be ascertained with reasonable diligence, an applicant under Section 81 of this code shall give the state, a governmental agency of the state, or a charitable organization notice that the entity is named as a devisee in a written will or [~~,~~] a written will not produced[~~, or a nuncupative will~~] that has been admitted to probate.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Note that this subsection of Section 128A is completely superseded by the amendments to Section 128A made by SB 593. Hopefully, this change in HB 391 will not apply or should be ignored.

Sec. 128B. NOTICE TO HEIRS ON APPLICATION TO PROBATE [~~WHEN~~] WILL [~~PROBATED~~] AFTER FOUR YEARS.

[No change in text, just in section title]

Amended by Acts 2007, 80th Leg., Ch. ___ (SB 593), effective September 1, 2007. Section 6 of SB 593 provides that these changes apply only to the estates of decedents dying on or after September 1, 2007.

Sec. 149C. REMOVAL OF INDEPENDENT EXECUTOR.

(a) The county court, as that term is defined by Section 3 of this code, on its own motion or on motion of any interested person, after the independent executor has been cited by personal service to answer at a time and place fixed in the notice, may remove an independent executor when:

(1) the independent executor fails to return within ninety days after qualification, unless such time is extended by order of the court, an inventory of the property of the estate and list of claims that have come to the independent executor's [~~his~~] knowledge;

(2) sufficient grounds appear to support belief that the independent executor [~~he~~] has misapplied or embezzled, or that the independent executor [~~he~~] is about to misapply or embezzle, all or any part of the property committed to the independent executor's [~~his~~] care;

(3) the independent executor [~~he~~] fails to make an accounting which is required by law to be made;

(4) the independent executor [~~he~~] fails to timely file the affidavit or certificate [~~notice~~] required by Section 128A of this code;

(5) the independent executor [~~he~~] is proved to have been guilty of gross misconduct or gross mismanagement in the performance of the independent executor's [~~his~~] duties; or

(6) the independent executor [~~he~~] becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause becomes legally incapacitated from properly performing the independent executor's [~~his~~] fiduciary duties.

(b) -- (d) [No change]

Amended by Acts 2007, 80th Leg., Ch. ___ (SB 593), effective September 1, 2007. Section 6 of SB 593 provides that these changes apply only to the estates of decedents dying on or after September 1, 2007.

Sec. 151. CLOSING INDEPENDENT ADMINISTRATION BY AFFIDAVIT.

(a) – (d) [No change]

(e) **Community Administration.** [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 155. NO NECESSITY FOR ADMINISTRATION OF COMMUNITY PROPERTY. When a husband or wife dies intestate and the community property passes to the survivor, no administration thereon[~~, community or otherwise,~~] shall be necessary. Nothing in this part of this chapter prohibits the administration of community property under other provisions of this code relating to the administration of an estate.

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 160. POWERS OF SURVIVING SPOUSE WHEN NO ADMINISTRATION IS PENDING.

(a) When no one has qualified as executor or administrator of the estate of a deceased spouse, the surviving spouse, whether the husband or wife, as the surviving partner of the marital partnership[~~, without qualifying as community administrator as hereinafter provided,~~] has power to sue and be sued for the recovery of community property; to sell, mortgage, lease, and otherwise dispose of community property for the purpose of paying community debts; to collect claims due to the community estate; and has such other powers as shall be necessary to preserve the community property, discharge community obligations, and wind up community affairs.

(b) – (c) [No change]

Amended by Acts, 2007, 80th Leg., Ch. ___ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 161. COMMUNITY ADMINISTRATION. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 162. APPLICATION FOR COMMUNITY ADMINISTRATION. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 163. APPOINTMENT OF APPRAISERS. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 164. INVENTORY, APPRAISEMENT AND LIST OF CLAIMS. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 165. BOND OF COMMUNITY ADMINISTRATOR. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 166. ORDER OF THE COURT. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 167. POWERS OF COMMUNITY ADMINISTRATOR. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 168. ACCOUNTING BY SURVIVOR. The survivor[~~, whether qualified as community administrator or not,~~] shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of the community property; and, upon final partition of such estate, shall deliver to the heirs, devisees or legatees of the deceased spouse their interest in such estate, and the increase and profits of the same, after deducting therefrom the proportion of the community debts chargeable thereto, unavoidable losses, necessary and reasonable expenses, and a reasonable commission for the management of the same. <u>The</u> [~~Neither the~~] survivor <u>may not</u> [~~nor his bondsmen shall~~] be liable for losses sustained by the estate, except when the survivor has been guilty of gross negligence or bad faith.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 169. PAYMENT OF DEBTS. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 170. NEW APPRAISEMENT OR NEW BOND. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 171. CREDITOR MAY REQUIRE EXHIBIT. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 172. ACTION OF COURT UPON EXHIBIT. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 173. APPROVAL OF EXHIBIT. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 174. FAILURE TO FILE EXHIBIT. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 175. TERMINATION OF COMMUNITY ADMINISTRATION. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 176. REMARRIAGE OF SURVIVING SPOUSE. The remarriage of a surviving spouse shall not terminate the surviving spouse's [~~powers or liabilities as a qualified community administrator or administratrix; nor shall it terminate his or her~~] powers as a surviving partner.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 177. DISTRIBUTION OF POWERS AMONG PERSONAL REPRESENTATIVES AND SURVIVING SPOUSE. [~~(a) When Community Administrator Has Qualified. The qualified community administrator is entitled to administer the entire community estate, including the part which was by law under the management of the deceased spouse during the continuance of the marriage.~~

[~~(b) When No Community Administrator Has Qualified.~~] When a personal representative of the estate of a deceased spouse has duly qualified, the personal representative is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the continuance of the marriage. The surviving spouse, as surviving partner of the marital partnership, is entitled to retain possession and control of all community property which was legally under the sole management of the surviving spouse during the continuance of the marriage and to exercise over that property all the powers elsewhere in this part of this code authorized to be exercised by the surviving spouse when there is no administration pending on the estate of the deceased spouse. The surviving spouse may by written instrument filed with the clerk waive any right to exercise powers as community survivor, and in such event the personal representative of the deceased spouse shall be authorized to administer upon the entire community estate.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 1710), effective September 1, 2007. Section 8 of HB 1710 provides that these changes apply only to the estate of a decedent who dies on or after September 1. 2007.

Sec. 178. WHEN LETTERS TESTAMENTARY OR OF ADMINISTRATION SHALL BE GRANTED.

(a) [No change]

(b) **Letters of Administration.** When a person shall die intestate, or where no executor is named in a will, or where the executor is dead or shall fail [~~or neglect~~] to accept and qualify within twenty days after the probate of the will, or shall fail [~~neglect~~] for a period of thirty days after the death of the testator to present the will for probate and the court finds there was no good cause for not presenting the will for probate during that period, then administration of the estate of such intestate, or administration with the will annexed of the estate of such testator, shall be granted, should administration appear to be necessary. No administration of any estate shall be granted unless there exists a necessity therefor, such necessity to be determined by the court hearing the application. Such necessity shall be deemed to exist if two or more debts exist against the estate, or if or when it is desired to have the county court partition the estate among the distributees, or if the administration is necessary to receive or recover funds or other property due the estate, but mention of these three [~~two~~] instances of necessity for administration shall not prevent the court from finding other instances of necessity upon proof before it.

(c) [No change]

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 7.05 of HB 391 provides that these changes apply to an application for the administration of an estate that is pending on or filed on or after September 1, 2007.

Sec. 179. OPPOSITION TO GRANT OF LETTERS OF ADMINISTRATION. When application is made for letters of administration, any interested person may at any time before the application is granted, file the person's [~~his~~] opposition thereto in writing, and may apply for the grant of letters to the person [~~himself~~] or to any other person; and, upon the trial, the court shall grant letters to the person that may seem best entitled to them, having regard to applicable provisions of this Code, without further notice than that of the original application.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 7.05 of HB 391 provides that these changes apply to an application for the administration of an estate that is pending on or filed on or after September 1, 2007.

Sec. 190. OATHS OF EXECUTORS AND ADMINISTRATORS.

(a) [No change]

(b) **Administrator**. Before the issuance of letters of administration, the person appointed administrator shall take and subscribe an oath in form substantially as follows: "I do solemnly swear that _____, deceased, died without leaving any lawful will (or that the named executor in any such will is dead or has failed [~~or neglected~~] to offer the same for probate, or to accept and qualify as executor, within the time required, as the case may be), so far as I know or believe, and that I will well and truly perform all the duties of administrator of the estate of said deceased."

(c) – (d) [No change]

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 7.05 of HB 391 provides that these changes apply to an application for the administration of an estate that is pending on or filed on or after September 1, 2007.

Sec. 205. JUDGE TO REQUIRE NEW BOND. When it shall be known to him that any such bond is in any respect insufficient or that it has, together with the record thereof, been lost or destroyed, the judge shall:

(1) without delay and without notice enter an order requiring the representative to give a new bond; or

(2) without delay cause the representative to be cited to show cause why he should not give a new bond.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 1709), effective September 1, 2007.

Sec. 206. ORDER REQUIRING NEW BOND.

(a) The order entered under Section 205(1) of this code must state the reasons for requiring a new bond, the amount of the new bond, and the time within which the new bond must be given, which may not be earlier than the 10th day after the date of the order. If the personal representative opposes the order, the personal representative may demand a hearing on the order. The hearing must be held before the expiration of the time within which the new bond must be given.

(b) Upon the return of a citation ordering a personal representative to show cause why he should not give a new bond, the judge shall, on the day named therein for the hearing of the matter, proceed to inquire into the sufficiency of the reasons for requiring a new bond; and, if satisfied that a new bond should be required, he shall enter an order to that effect, stating in such order the amount of such new bond, and the time within which it shall be given, which shall not be later than twenty days from the date of such order.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 1709), effective September 1, 2007.

Sec. 222. REMOVAL.

(a) [No change]

(b) **With Notice.** The court may remove a personal representative on its own motion, or on the complaint of any interested person, after the personal representative has been cited by personal service to answer at a time and place fixed in the notice, when:

(1) Sufficient grounds appear to support belief that the personal representative [~~he~~] has misapplied, embezzled, or removed from the state, or that the personal representative [~~he~~] is about to misapply, embezzle, or remove from the state, all or any part of the property committed to the personal representative's [~~his~~] care;

(2) The personal representative [~~He~~] fails to return any account which is required by law to be made;

(3) The personal representative [~~He~~] fails to obey any proper order of the court having jurisdiction with respect to the performance of the personal representative's [~~his~~] duties;

(4) The personal representative [~~He~~] is proved to have been guilty of gross misconduct, or mismanagement in the performance of the personal representative's [~~his~~] duties;

(5) The personal representative [~~He~~] becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause becomes incapable of properly performing the duties of the personal representative's [~~his~~] trust;

(6) As executor or administrator, the personal representative [~~he~~] fails to make a final settlement within three years after the grant of letters, unless the time be extended by the court upon a showing of sufficient cause supported by oath; or

(7) As executor or administrator, the personal representative [~~he~~] fails to timely file the affidavit or certificate [~~notice~~] required by Section 128A of this code.

Amended by Acts 2007, 80th Leg., Ch. ___ (SB 593), effective September 1, 2007. Section 6 of SB 593 provides that these changes apply only to the estates of decedents dying on or after September 1, 2007.

Sec. 238. OPERATION OF FARM, RANCH, FACTORY, OR OTHER BUSINESS.

(a) In this section, "business" includes a farm, ranch, or factory.

(b) A court, after notice to all interested persons and a hearing, may order the personal representative of an estate to operate a business that is part of the estate and may grant the personal representative the powers to operate the business that the court determines are appropriate, after considering the factors listed in Subsection (f) of this section, if:

(1) [~~If the estate owns a farm, ranch, factory, or other business,~~] the disposition of the business [~~which~~] has not been specifically directed by the decedent's will;

(2) it is not necessary to sell the business [~~, and if the same be not required to be sold~~] at once for the payment of debts or other lawful purposes; and

(3) the court determines that the operation of the business by the personal representative is in[~~, the representative, upon order of the court, shall carry on the operation of such farm, ranch, factory, or other business, or cause the same to be done, or rent the same, as shall appear to be for~~] the best interest of the estate.

(c) A personal representative who is granted the power to operate a business in an order entered under this section has the powers granted under Section 234(b) of this code, regardless of whether the order specifies that the personal representative has those powers, unless the order specifically provides that the personal representative does not have one or more of the powers listed in that section.

(d) In addition to the powers granted to the personal representative under Section 234(b) of this code, subject to any specific limitation on those powers in accordance with Subsection (c) of this section, an order entered under this section may grant the personal representative one or more of the following powers:

(1) the power to hire, pay, and terminate the employment of employees of the business;

(2) the power to incur debt on behalf of the business, including debt secured by liens against assets of the business or estate, if permitted or directed in the order;

(3) the power to purchase and sell property in the ordinary course of the operation of the business, including the power to purchase and sell real property if the court finds that the principal purpose of the business is the purchasing and selling of real property and the order states that finding;

(4) the power to enter into a lease or contract, the term of which may extend beyond the settlement of the estate, but only to the extent granting that power appears to be consistent with the speedy settlement of the estate; and

(5) any other power the court finds is necessary with respect to the operation of the business.

(e) If the order entered under this section gives the personal representative the power to purchase, sell, lease, or otherwise encumber real or personal property:

(1) the purchase, sale, lease, or encumbrance is governed by the terms of the order; and

(2) the personal representative is not required to comply with any other provision of this code regarding the purchase, sale, lease, or encumbrance, including provisions requiring citation or notice.

(f) In determining which powers to grant a personal representative in an order entered under this section, the court shall consider the following factors:

(1) the condition of the estate and the business;

(2) the necessity that may exist for the future sale of the business or of business property to provide for payment of debts or claims against the estate or other lawful expenditures with respect to the estate;

(3) the effect of the order on the speedy settlement of the estate; and

(4) the best interests of the estate.

(g) A personal representative who operates a business under an order entered under this section has the same fiduciary duties as a personal representative who does not operate a business that is part of an estate. The personal representative shall:

(1) in operating the business, consider:

(A) the condition of the estate and the business;

(B) the necessity that may exist for the future sale of the business or of business property to provide for payment of debts or claims against the estate or other lawful expenditures with respect to the estate;

(C) the effect of the order on the speedy settlement of the estate; and

(D) the best interests of the estate; and

(2) report to the court with respect to the operation and condition of the business as part of the accounts required by Parts 11 and 12, Chapter VIII, of this code, unless the court orders the reports regarding the business to be made more frequently or in a different manner or form.

(h) Before purchasing, selling, leasing, or otherwise encumbering any real property of the business in accordance with an order entered under this section, the personal representative shall file a notice in the real property records of the county in which the real property is located. The notice must state:

(1) the name of the decedent;

(2) the county of the court in which the decedent's estate is pending;

(3) the cause number assigned to the pending estate;

(4) that one or more orders have been entered under this section; and

(5) a description of the property that is the subject of the purchase, sale, lease, or other encumbrance.

(i) For purposes of determining a personal representative's powers with respect to a purchase, sale, lease, or other encumbrance of real property of a business that is part of an estate, a third party who deals in good faith with a personal representative with respect to the transaction may rely on the notice under Subsection (h) of this section and an order that is entered under this section and filed as part of the estate records maintained by the clerk of the court in which the estate is pending. [~~In deciding, the court shall consider the condition of the estate, and the necessity that may exist for future sale of such property or business for the payment of debts, claims, or other lawful expenditures, and shall not extend the time of renting any of the property beyond what appears consistent with the speedy settlement of the estate of a deceased person or the settlement of his estate.~~]

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 1352), effective September 1, 2007. Section 2 of HB 1352 provides that these changes apply to the estate of a decedent that is pending on or after September 1, 2007, regardless of the decedent's date of death.

Sec. 322. CLASSIFICATION OF CLAIMS AGAINST ESTATES OF DECEDENT. Claims against an estate of a decedent shall be classified and have priority of payment, as follows:

Class 1. Funeral expenses and expenses of last sickness for a reasonable amount to be approved by the court, not to exceed a total of Fifteen Thousand Dollars, with any excess to be classified and paid as other unsecured claims.

Class 2. Expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate, including fees and expenses awarded under Section 243 of this code, and unpaid expenses of administration awarded in a guardianship of the decedent.

Class 3. Secured claims for money under Section 306(a)(1), including tax liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien, and when more than one mortgage, lien, or security interest shall exist upon the same property, they shall be paid in order of their priority.

Class 4. Claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment, as determined under Subchapter F, Chapter 157, Family Code, and claims for unpaid child support obligations under Section 154.015, Family Code.

Class 5. Claims for taxes, penalties, and interest due under Title 2, Tax Code; Chapter 8, Title 132, Revised Statutes; Section 81.111, Natural Resources Code; the Municipal Sales and Use Tax Act (Chapter 321, Tax Code); Section 451.404, Transportation Code; or Subchapter I, Chapter 452, Transportation Code.

Class 6. Claims for the cost of confinement established by the institutional division of the Texas Department of Criminal Justice under Section 501.017, Government Code.

Class 7. Claims for repayment of medical assistance payments made by the state under Chapter 32, Human Resources Code, to or for the benefit of the decedent.

Class 8. All other claims.

Amended by Acts 2007, 80th Leg., Ch. ___ (SB 617), effective September 1, 2007. Section 4(b) of SB 617 provides that this change applies only to estates of decedents dying on or after September 1, 2007.

Sec. 343. SETTING OF HEARING ON APPLICATION. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 9.06 of HB 391 provides that this change applies to administrations pending on September 1, 2007, as well as to estates of decedents dying on or after September 1, 2007.

Sec. 344. CITATION [~~AND RETURN~~] ON APPLICATION. Upon the filing of such application and exhibit, the clerk shall issue a citation to all persons interested in the estate, describing the land or interest or part thereof sought to be sold, and informing [~~requiring~~] them of the right under Section 345 of this code to file an opposition to the sale during the period prescribed by the court [~~to appear at the time set by the court~~] as shown in the citation [~~and show cause why the sale should not be made~~], if they so elect. Service of such citation shall be by posting.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 9.06 of HB 391 provides that this change applies to administrations pending on September 1, 2007, as well as to estates of decedents dying on or after September 1, 2007.

Sec. 345. OPPOSITION TO APPLICATION. When an application for an order of sale is made, any person interested in the estate may, during the period provided in the citation issued under Section 344 of this code [~~before an order is made thereon~~], file his opposition to the sale, in writing, or may make application for the sale of other property of the estate.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 9.06 of HB 391 provides that this change applies to administrations pending on September 1, 2007, as well as to estates of decedents dying on or after September 1, 2007.

Sec. 345A. HEARING ON APPLICATION AND ANY OPPOSITION.

(a) The clerk of a court in which an application for an order of sale is filed shall immediately call to the attention of the judge any opposition to the sale that is filed during the period provided in the citation issued under Section 344 of this code. The court shall hold a hearing on an application if an opposition to the sale is filed during the period provided in the citation.

(b) A hearing on an application for an order of sale is not required under this section if no opposition to the application is filed during the period provided in the citation. The court, in its discretion, may determine that a hearing is necessary on the application even if no opposition was filed during that period.

(c) If the court orders a hearing under Subsection (a) or (b) of this section, the court shall designate in writing a date and time for hearing the application and any opposition, together with the evidence pertaining to the application and opposition. The clerk shall issue a notice to the applicant and to each person who files an opposition to the sale, if applicable, of the date and time of the hearing.

(d) The judge may, by entries on the docket, continue a hearing held under this section from time to time until the judge is satisfied concerning the application.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 9.06 of HB 391 provides that this change applies to administrations pending on September 1, 2007, as well as to estates of decedents dying on or after September 1, 2007.

Sec. 346. ORDER OF SALE. If satisfied [~~upon hearing~~] that the sale of the property of the estate described in the application is necessary or advisable, the court shall order the sale to be made; otherwise, the court may deny the application and may, if it deems best, order the sale of other property the sale of which would be more advantageous to the estate. An order for the sale of real estate shall specify:

(a) The property to be sold, giving such description as will identify it; and

(b) Whether the property is to be sold at public auction or at private sale, and, if at public auction, the time and place of such sale; and

(c) The necessity or advisability of the sale and its purpose; and

(d) Except in cases in which no general bond is required, that, having examined the general bond of the representative of the estate, the court finds it to be sufficient as required by law, or finds the same to be insufficient and specifies the necessary or increased bond, as the case may be; and

(e) That the sale shall be made and the report returned in accordance with law; and

(f) The terms of the sale.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 391), effective September 1, 2007. Section 9.06 of HB 391 provides that this change applies to administrations pending on September 1, 2007, as well as to estates of decedents dying on or after September 1, 2007.

Changes Affecting Guardianships

Sec. 606. JURISDICTION WITH RESPECT TO GUARDIANSHIP PROCEEDINGS.

(a) – (j) [No change]

(k) A statutory probate court or other court exercising the jurisdiction of a probate court has jurisdiction in a guardianship proceeding involving a disabled adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 585), effective June 15, 2007. Section 4 of HB 585 provides that this change applies applies to a guardianship proceeding pending in a trial court on or filed on or after the effective date of this Act.

Sec. 645. GUARDIANS AD LITEM.

(a) – (e) [No change]

(f) The term of appointment of a guardian ad litem made in a proceeding for the appointment of a guardian expires, without a court order, on the date the court either appoints a guardian or denies the application for appointment of a guardian, unless the court determines that the continued appointment of the guardian ad litem is in the ward's best interest.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to a guardianship proceeding for which a court has appointed a guardian ad litem or attorney ad litem to represent the interests of a person on or after September 1, 2007.

Sec. 646. APPOINTMENT OF ATTORNEY AD LITEM AND INTERPRETER.

(a) – (d) [No change]

(e) The term of appointment of an attorney ad litem appointed under this section expires, without a court order, on the date the court either appoints a guardian or denies the application for appointment of a guardian, unless the court determines that the continued appointment of the attorney ad litem is in the ward's best interest.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to a guardianship proceeding for which a court has appointed a guardian ad litem or attorney ad litem to represent the interests of a person on or after September 1, 2007.

Sec. 665A. PAYMENT FOR PROFESSIONAL SERVICES. The court shall order the payment of a fee set by the court as compensation to the attorneys, mental health professionals, and interpreters appointed under [~~Section 646 or 687 of~~] this chapter [~~code~~], as applicable, to be taxed as costs in the case. If after examining the proposed ward's assets the court determines the proposed ward is unable to pay for services provided by an attorney, a mental health professional, or an interpreter appointed under [~~Section 646 or 687 of~~] this chapter [~~code~~], as applicable, the county is responsible for the cost of those services.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to only to a guardianship proceeding for which a court has appointed an attorney, mental health professional, or interpreter to represent the interests of a person (1) on or after September 1, 2007, or (2) before September 1, 2007, if the proceeding is pending on September 1, 2007.

Sec. 682. APPLICATION; CONTENTS. Any person may commence a proceeding for the appointment of a guardian by filing a written application in a court having jurisdiction and venue. The application must be sworn to by the applicant and state:

(1) the name, sex, date of birth, and address of the proposed ward;

(2) the name, relationship, and address of the person the applicant desires to have appointed as guardian;

(3) whether guardianship of the person or estate, or both, is sought;

(4) the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation or termination of rights requested to be included in the court's order of appointment, including a termination of:

(A) the right of a proposed ward who is 18 years of age or older to vote in a public election; and

(B) the proposed ward's eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code;

(5) the facts requiring that a guardian be appointed and the interest of the applicant in the appointment;

(6) the nature and description of any guardianship of any kind existing for the proposed ward in any other state;

(7) the name and address of any person or institution having the care and custody of the proposed ward;

(8) the approximate value and description of the proposed ward's property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled;

(9) the name and address of any person whom the applicant knows to hold a power of attorney signed by the proposed ward and a description of the type of power of attorney;

(10) if the proposed ward is a minor and if known by the applicant:

(A) the name of each parent of the proposed ward and state the parent's address or that the parent is deceased;

(B) the name and age of each sibling, if any, of the proposed ward and state the sibling's address or that the sibling is deceased; and

(C) if each of the proposed ward's parents and siblings are deceased, the names and addresses of the proposed ward's next of kin who are adults;

(11) if the proposed ward is a minor, whether the minor was the subject of a legal or conservatorship proceeding within the preceding two-year period and, if so, the court involved, the nature of the proceeding, and the final disposition, if any, of the proceeding;

(12) if the proposed ward is an adult and if known by the applicant:

(A) the name of the proposed ward's spouse, if any, and state the spouse's address or that the spouse is deceased;

(B) the name of each of the proposed ward's parents and state the parent's address or that the parent is deceased;

(C) the name and age of each of the proposed ward's siblings, if any, and state the sibling's address or that the sibling is deceased;

(D) the name and age of each of the proposed ward's children, if any, and state the child's address or that the child is deceased; and

(E) if the proposed ward's spouse and each of the proposed ward's parents, siblings, and children are deceased, or, if there is no spouse, parent, adult sibling, or adult child, the names and addresses of the proposed ward's next of kin who are adults;

(13) facts showing that the court has venue over the proceeding; and

(14) if applicable, that the person whom the applicant desires to have appointed as a guardian is a private professional guardian who is certified under Subchapter C, Chapter 111, Government Code, and has complied with the requirements of Section 697 of this code.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the appointment of a guardian filed on or after September 1, 2007.

Sec. 682A. APPLICATION FOR APPOINTMENT OF GUARDIAN FOR CERTAIN PERSONS.

(a) [No change]

(a-1) Notwithstanding any other law, if the applicant who files an application under Subsection (a) of this section or Section 682 of this code is a person who was appointed conservator of a disabled child for whom a court obtains jurisdiction under Section 606(k) of this code, the applicant may present to the court a written letter or certificate that meets the requirements of Section 687(a) of this code.

(a-2) If, on receipt of the letter or certificate described by Subsection (a-1) of this section, the court is able to make the findings required by Section 684 of this code, the court, notwithstanding Section 677 of this code, shall appoint the conservator as guardian without conducting a hearing and shall, to the extent possible, preserve the terms of possession and access to the ward that applied before the court obtained jurisdiction under Section 606(k) of this code.

(b) [No change]

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 585), effective June 15, 2007. Section 4 of HB 585 provides that this change applies applies to a guardianship proceeding pending in a trial court on or filed on or after the effective date of this Act.

Sec. 683. COURT'S INITIATION OF GUARDIANSHIP PROCEEDINGS.

(a) If a court has probable cause to believe that a person domiciled or found in the county in which the court is located is an incapacitated person, and the person does not have a guardian in this state, the court shall appoint a guardian ad litem or court investigator to investigate the person's conditions and circumstances to determine whether the person is an incapacitated person and whether a guardianship is necessary. If after the investigation the guardian ad litem or court investigator believes that the person is an incapacitated person and that a guardianship is necessary, the guardian ad litem or court investigator shall [~~and~~] file an application for the appointment of a guardian of the person or estate, or both, for [~~of~~] the person [~~believed to be incapacitated~~].

(b) To establish probable cause under this section, the court may require:

(1) an information letter about the person believed to be incapacitated that is submitted by an interested person and satisfies the requirements of Section 683A of this code; or

(2) a written letter or certificate from a physician who has examined the person believed to be incapacitated that satisfies the requirements of Section 687(a) of this code, except that the letter must be dated not earlier than the 120th day before the date of the appointment of a guardian ad litem or court investigator [~~filing of an application~~] under Subsection (a) of this section and be based on an examination the physician performed not earlier than the 120th day before that date.

(c) A court that appoints a guardian ad litem under Subsection (a) of this section [~~creates a guardianship for a ward under this chapter~~] may authorize compensation of the [~~a~~] guardian ad litem [~~who files an application under Subsection (a) of this section~~] from available funds of the proposed ward's estate, regardless of whether a guardianship is created for the proposed ward. If after examining the ward's or proposed ward's assets the court determines the ward or proposed ward is unable to pay for services provided by the guardian ad litem, the court may authorize compensation from the county treasury.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to the appointment of a guardian ad litem or court investigator made on or after the effective date.

Sec. 687. EXAMINATIONS & REPORTS.

(a) The court may not grant an application to create a guardianship for an incapacitated person, other than a minor, person whose alleged incapacity is mental retardation, or person for whom it is necessary to have a guardian appointed only to receive funds from a governmental source, unless the applicant presents to the court a written letter or certificate from a physician licensed in this state that is dated not earlier than the 120th day before the date of the filing of the application and based on an examination the physician performed not earlier than the 120th day before the date of the filing of the application. The letter or certificate must:

(1) describe the nature and degree of incapacity, including the medical history if reasonably available;

(2) provide a medical prognosis specifying the estimated severity of the incapacity;

(3) state how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the person's physical or mental health;

(4) state whether any current medication affects the demeanor of the proposed ward or the proposed ward's ability to participate fully in a court proceeding;

(5) describe the precise physical and mental conditions underlying a diagnosis of senility, if applicable; [~~and~~]

(6) state whether in the physician's opinion the proposed ward:

(A) has the mental capacity to vote in a public election; and

(B) has the ability to safely operate a motor vehicle; and

(7) include any other information required by the court.

(b) – (c) [No change]

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the appointment of a guardian filed on or after September 1, 2007.

Sec. 690. PERSONS APPOINTED GUARDIAN. Only one person may be appointed as guardian of the person or estate, but one person may be appointed guardian of the person and another of the estate, if it is in the best interest of the ward. Nothing in this section prohibits the joint appointment, if the court finds it to be in the best interest of the ward, of:

(1) a husband and wife;

(2) [~~, of~~] joint managing conservators;

(3) [~~, or of~~] coguardians appointed under the laws of a jurisdiction other than this state; or

(4) both parents of an adult who is incapacitated if the incapacitated person:

(A) has not been the subject of a suit affecting the parent-child relationship; or

(B) has been the subject of a suit affecting the parent-child relationship and both of the incapacitated person's parents were named as joint managing conservators in the suit but are no longer serving in that capacity.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the appointment of a guardian filed on or after September 1, 2007.

Sec. 693. ORDER OF COURT.

(a) If it is found that the proposed ward is totally without capacity [~~as provided by this code~~] to care for himself or herself, [~~and~~] to manage the individual's property, to operate a motor vehicle, and to vote in a public election, the court may appoint a guardian of the individual's person or estate, or both, with full authority over the incapacitated person except as provided by law. An order appointing a guardian under this subsection must contain findings of fact and specify:

(1) the information required by Subsection (c) of this section;

(2) that the guardian has full authority over the incapacitated person; [~~and~~]

(3) if necessary, the amount of funds from the corpus of the person's estate the court will allow the guardian to expend for the education and maintenance of the person under Section 776 of this code;

(4) whether the person is totally incapacitated because of a mental condition; and

(5) that the person does not have the capacity to operate a motor vehicle and to vote in a public election.

(b) If it is found that the person lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage the individual's property, the court may appoint a guardian with limited powers and permit the individual to care for himself or herself or to manage the individual's property commensurate with the individual's ability. An order appointing a guardian under this subsection must contain findings of fact and specify:

(1) the information required by Subsection (c) of this section;

(2) the specific powers, limitations, or duties of the guardian with respect to the care of the person or the management of the person's property by the guardian; [~~and~~]

(3) if necessary, the amount of funds from the corpus of the person's estate the court will allow the guardian to expend for the education and maintenance of the person under Section 776 of this code; and

(4) whether the person is incapacitated because of a mental condition and, if so, whether the person retains the right to vote in a public election or maintains eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code.

(c) – (e) [No change]

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the appointment of a guardian filed on or after September 1, 2007.

Sec. 694C. APPOINTMENT OF ATTORNEY AD LITEM.

(a) – (b) [No Change]

(c) An attorney ad litem appointed under this section is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or a modification of the ward's guardianship.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed on or after the effective date.

Sec. 694G. ORDER OF COMPLETE RESTORATION OF WARD'S CAPACITY. If the court finds that a ward is no longer an incapacitated person, the order completely restoring the ward's capacity must contain findings of fact and specify:

(1) the information required by Section 694J of this code;

(2) that the ward is no longer an incapacitated person;

(3) that there is no further need for a guardianship of the person or estate of the ward;

(3-a) if the ward's incapacity resulted from a mental condition, that the ward's mental capacity is completely restored;

(4) that the guardian is required to:

(A) immediately settle the guardianship in accordance with this chapter; and

(B) deliver all of the remaining guardianship estate to the ward; and

(5) that the clerk shall revoke letters of guardianship when the guardianship is finally settled and closed.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed on or after the effective date.

Sec. 694H. MODIFICATION OF GUARDIANSHIP. If the court finds that a guardian's powers or duties should be expanded or limited, the order modifying the guardianship must contain findings of fact and specify:

(1) the information required by Section 694J of this code;

(2) the specific powers, limitations, or duties of the guardian with respect to the care of the ward or the management of the property of the ward, as appropriate;

(3) the specific areas of protection and assistance to be provided to the ward;

(4) any limitation of the ward's rights; [~~and~~]

(5) if the ward's incapacity resulted from a mental condition, whether the ward retains the right to vote; and

(6) that the clerk shall modify the letters of guardianship to the extent applicable to conform to the order.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed on or after the effective date.

Sec. 694L. PAYMENT FOR GUARDIANS AD LITEM. As provided by Section 645(b) of this code, a guardian ad litem appointed in a proceeding involving the complete restoration of a ward's capacity or modification of a ward's guardianship is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or modification of the ward's guardianship.

Added by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed on or after the effective date.

Sec. 695. APPOINTMENT OF SUCCESSOR GUARDIAN.

(a) If a guardian dies, resigns, or is removed, the court may, on application and on service of notice as directed by the court, appoint a successor guardian. On a finding that a necessity for the immediate appointment of a successor guardian exists, the court may appoint a successor guardian without citation or notice.

(b) [No Change]

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the appointment of a successor guardian filed on or after the effective date.

Sec. 697A. LIST OF CERTAIN PUBLIC GUARDIANS MAINTAINED BY COUNTY CLERKS OR GUARDIANSHIP CERTIFICATION BOARD.

(a) [No change]

(b) Not later than February 1 of each year, the [~~The~~] Department of Aging and Disability Services[~~, if the department files an application for and is appointed to serve as guardian for one or more incapacitated persons residing in the county as provided by Subchapter E, Chapter 161, Human Resources Code,~~] shall submit [~~annually~~] to the Guardianship Certification Board a statement containing:

(1) the name, address, and telephone number of each department employee who is or will be providing guardianship services to a ward or proposed ward on behalf of the department; and

(2) the name of the county or counties in which each employee named in Subdivision (1) of this subsection is providing or is authorized to provide those services [~~county clerk the information required under Subsection (a) of this section for each department employee who is or will be providing guardianship services in the county on the department's behalf~~].

(c) Not later than February 1 of each year, the county clerk shall submit to the Guardianship Certification Board the information received under Subsection (a) of this section during the preceding year.

Amended by Acts 2007, 80th Leg., Ch. ____ (SB 291), effective September 1, 2007.

Sec. 697B. CERTIFICATION REQUIREMENT FOR PRIVATE PROFESSIONAL GUARDIANS AND PUBLIC GUARDIANS.

(a) – (d) [No change]

(e) In this section, "certified" includes holding a provisional certificate under Section 111.0421, Government Code.

Amended by Acts 2007, 80th Leg., Ch. ____ (SB 506), effective April 25, 2007.

Sec. 698. ACCESS TO CRIMINAL HISTORY RECORDS.

(a) Except as provided by Subsections (a-1) and (a-5) of this section, the [~~The~~] clerk of the county having venue over the proceeding for the appointment of a guardian shall obtain criminal history record information that is maintained by the Department of Public Safety or the Federal Bureau of Investigation identification division relating to:

(1) a private professional guardian;

(2) each person who represents or plans to represent the interests of a ward as a guardian on behalf of the private professional guardian;

(3) each person employed by a private professional guardian who will:

(A) have personal contact with a ward or proposed ward;

(B) exercise control over and manage a ward's estate; or

(C) perform any duties with respect to the management of a ward's estate;

(4) each person employed by or volunteering or contracting with a guardianship program to provide guardianship services to a ward of the program on the program's behalf; or

(5) any other person proposed to serve as a guardian under this chapter, including a proposed temporary guardian and a proposed successor guardian, other than the ward's or proposed ward's family member or an attorney [~~an employee of the Department of Aging and Disability Services who is or will be providing guardianship services to a ward of the department~~].

(a-1) The Department of Aging and Disability Services shall obtain criminal history record information that is maintained by the Department of Public Safety or the Federal Bureau of Investigation identification division relating to each individual who is or will be providing guardianship services to a ward of or referred by the department, including:

(1) an employee of or an applicant selected for an employment position with the Department of Aging and Disability Services;

(2) a volunteer or an applicant selected to volunteer with the Department of Aging and Disability Services;

(3) an employee of or an applicant selected for an employment position with a business entity or other person that contracts with the Department of Aging and Disability Services to provide guardianship services to a ward referred by the department; and

(4) a volunteer or an applicant selected to volunteer with a business entity or other person described by Subdivision (3) of this subsection.

(a-2) The information in Subsection (a-1) of this section regarding applicants for employment positions must be obtained before an offer of employment, and the information regarding applicant volunteers must be obtained before the person's contact with a ward of or referred by the Department of Aging and Disability Services.

(a-3) The information in Subsection (a-1) of this section regarding employees or volunteers providing guardianship services must be obtained annually.

(a-4) The Department of Aging and Disability Services shall provide the information obtained under Subsection (a-1) of this section to:

(1) the clerk of the county having venue over the guardianship proceeding at the request of the court; and

(2) the Guardianship Certification Board at the request of the board.

(a-5) Not later than the 10th day before the date of the hearing to appoint a guardian, a person may submit to the clerk a copy of the person's criminal history record information required under Subsection (a)(5) of this section that the person obtains from the Department of Public Safety or the Federal Bureau of Investigation not earlier than the 30th day before the date of the hearing.

(b) The criminal history record information obtained under Subsection (a) or (a-5) of this section is for the exclusive use of the court and is privileged and confidential. The criminal history record information may not

be released or otherwise disclosed to any person or agency except on court order or consent of the person being investigated. The county clerk may destroy the criminal history information records after the records are used for the purposes authorized by this section.

(b-1) The criminal history record information obtained under Subsection (a-4) of this section is for the exclusive use of the court or Guardianship Certification Board, as appropriate, and is privileged and confidential. The information may not be released or otherwise disclosed to any person or agency except on court order or consent of the person being investigated. The county clerk or Guardianship Certification Board may destroy the criminal history record information after the information is used for the purposes authorized by this section.

(c) The court shall use the information obtained under this section only in determining whether to:

(1) appoint, remove, or continue the appointment of a private professional guardian, a guardianship program, or the Department of Aging and Disability Services; or

(2) appoint any other person proposed to serve as a guardian under this chapter, including a proposed temporary guardian and a proposed successor guardian, other than the ward's or proposed ward's family member or an attorney.

(c-1) Criminal history record information obtained by the Guardianship Certification Board under Subsection (a-4)(2) of this section may be used for any purpose related to the issuance, denial, renewal, suspension, or revocation of a certificate issued by the board.

(d) A person commits an offense if the person releases or discloses any information received under this section without the authorization prescribed by Subsection (b) or (b-1) of this section. An offense under this subsection is a Class A misdemeanor.

(e) The clerk may charge a $10 [~~reasonable~~] fee [~~sufficient~~] to recover the costs of obtaining criminal history information records authorized by Subsection (a) of this section.

(f) This section does not prohibit the Department of Aging and Disability Services from obtaining and using criminal history record information as provided by other law.

Amended by Acts 2007, 80th Leg., Ch. ____ (SB 291), effective September 1, 2007.

Sec. 713. JUDGE TO REQUIRE NEW BOND. When it is made known to a judge that a bond is insufficient or that the bond has, with the record of the bond, been lost or destroyed, the judge [~~without delay~~] shall:

(1) without delay and without notice enter an order requiring the guardian to give a new bond; or

(2) without delay cause the guardian to be cited to show cause why the guardian should not give a new bond.

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 1709), effective September 1, 2007.

Sec. 714. ORDER REQUIRING NEW BOND.

(a) The order entered under Section 713(1) of this code must state the reasons for requiring a new bond, the amount of the new bond, and the time within which the new bond must be given, which may not be earlier than the 10th day after the date of the order. If the guardian opposes the order, the guardian may demand a hearing

on the order. The hearing must be held before the expiration of the time within which the new bond must be given.

(b) On the return of a citation ordering a guardian to show cause why the guardian should not give a new bond, the judge on the day contained in the return of citation as the day for the hearing of the matter, shall proceed to inquire into the sufficiency of the reasons for requiring a new bond. If the judge is satisfied that a new bond should be required, the judge shall enter an order to that effect that states the amount of the new bond and the time within which the new bond shall be given, which may not be later than 20 days from the date of the order issued by the judge under this subsection [~~section~~].

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 1709), effective September 1, 2007.

Sec. 759. APPOINTMENT OF SUCCESSOR GUARDIAN.

(a) In case of the death of the guardian of the person or of the estate of a ward, a personal representative of the deceased guardian shall account for, pay, and deliver to a person legally entitled to receive the property, all the property belonging to the guardianship that is entrusted to the care of the representative, at the time and in the manner as the court orders. [~~On a finding that a necessity for the immediate appointment of a successor guardian exists, the court may appoint a successor guardian without citation or notice.~~]

(b) – (e) [No change]

(f) Except when otherwise expressly provided in this chapter, letters may not be revoked [~~and other letters granted~~] except on application, and after personal service of citation on the person[~~, if living,~~] whose letters are sought to be revoked, that the person appear and show cause why the application should not be granted.

(g) – (h) [No change]

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the appointment of a successor guardian filed on or after the effective date.

Sec. 760. RESIGNATION.

(a) [No change]

(b) If the necessity exists, the court may immediately accept a resignation and appoint a successor without citation or notice but may not discharge the person resigning as guardian of the estate or release the person or the sureties on the person's bond until final order or judgment is rendered on the final account of the guardian.

(c) – (g) [No Change]

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for resignation filed on or after the effective date.

Sec. 761. REMOVAL.

(a) – (b) [No change]

(c) The court may remove a guardian on its own motion, or on the complaint of an interested person, after the guardian has been cited by personal service to answer at a time and place set in the notice, when:

(1) sufficient grounds appear to support belief that the guardian has misapplied, embezzled, or removed from the state, or that the guardian is about to misapply, embezzle, or remove from the state, all or any part of the property committed to the care of the guardian;

(2) the guardian fails to return any account or report that is required by law to be made;

(3) the guardian fails to obey any proper order of the court having jurisdiction with respect to the performance of the guardian's duties;

(4) the guardian is proved to have been guilty of gross misconduct or mismanagement in the performance of the duties of the guardian;

(5) the guardian becomes incapacitated, or is sentenced to the penitentiary, or from any other cause becomes incapable of properly performing the duties of the guardian's trust;

(6) the guardian neglects or cruelly treats the ward;

(6-a) the guardian neglects to educate or maintain the ward as liberally as the means of the ward's estate and the ward's ability or condition permit;

(7) the guardian interferes with the ward's progress or participation in programs in the community;

(8) the guardian fails to comply with the requirements of Section 697 of this code; [~~or~~]

(9) the court determines that, because of the dissolution of the joint guardians' marriage, the termination of the guardians' joint appointment and the continuation of only one of the joint guardians as the sole guardian is in the best interest of the ward; or

(10) the guardian would be ineligible for appointment as a guardian under Section 681 of this code.

(d) – (e) [No change]

(f) If the necessity exists, the court may immediately appoint a successor without citation or notice but may not discharge the person removed as guardian of the estate or release the person or the sureties on the person's bond until final order or judgment is rendered on the final account of the guardian.

(g) [No change]

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that the change to Subsection (f) applies only to a motion for the removal of a guardian made or filed on or after the effective date.

Sec. 822. SETTING OF HEARING ON APPLICATION. [Repealed]

Repealed by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007.

Sec. 823. CITATION [~~AND RETURN~~] ON APPLICATION. On the filing of an application for the sale of real estate under Section 820 of this code and exhibit, the clerk shall issue a citation to all persons interested in the guardianship that describes the land or interest or part of the land or interest sought to be sold and that informs [~~requires~~] the persons of the right under Section 824 of this code to file an opposition to the sale during the period prescribed by the court [~~to appear at the time set by the court~~] as shown in the citation [~~and show cause why the sale should not be made~~], if they so elect. Service of citation shall be by posting.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the sale of real property filed on or after the effective date.

Sec. 824. OPPOSITION TO APPLICATION. When an application for an order of sale is made, a person interested in the guardianship[~~, before an order of sale is made by the court,~~] may, during the period provided in the citation issued under Section 823 of this code, file the person's opposition to the sale, in writing, or may make application for the sale of other property of the estate.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the sale of real property filed on or after the effective date.

Sec. 824A. HEARING ON APPLICATION AND ANY OPPOSITION.

(a) The clerk of a court in which an application for an order of sale is filed shall immediately call to the attention of the judge any opposition to the sale that is filed during the period provided in the citation issued under Section 823 of this code. The court shall hold a hearing on an application if an opposition to the sale is filed during the period provided in the citation.

(b) A hearing on an application for an order of sale is not required under this section if no opposition to the application is filed during the period provided in the citation. The court, in its discretion, may determine that a hearing is necessary on the application even if no opposition was filed during that period.

(c) If the court orders a hearing under Subsection (a) or (b) of this section, the court shall designate in writing a date and time for hearing the application and any opposition, together with the evidence pertaining to the application and opposition. The clerk shall issue a notice to the applicant and to each person who files an opposition to the sale, if applicable, of the date and time of the hearing.

(d) The judge may, by entries on the docket, continue a hearing held under this section from time to time until the judge is satisfied concerning the application.

Added by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007.

Sec. 825. ORDER OF SALE. If satisfied [~~on hearing~~] that the sale of the property of the guardianship described in the application made under Section 820 of this code is necessary or advisable, the court shall order the sale to be made. Otherwise, the court may deny the application and, if the court deems best, may order the sale of other property the sale of which would be more advantageous to the estate. An order for the sale of real estate must specify:

(1) the property to be sold, giving a description that will identify the property;

(2) whether the property is to be sold at public auction or at private sale, and, if at public auction, the time and place of the sale;

(3) the necessity or advisability of the sale and its purpose;

(4) except in cases in which no general bond is required, that, having examined the general bond of the representative of the estate, the court finds it to be sufficient as required by law, or finds the bond to be insufficient and specifies the necessary or increased bond;

(5) that the sale shall be made and the report returned in accordance with law; and

(6) the terms of the sale.

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the sale of real property filed on or after the effective date.

Sec. 855B. PROCEDURE FOR MAKING INVESTMENTS OR RETAINING ESTATE ASSETS.

(a) Not later than the 180th day after the date on which the guardian of the estate qualified as guardian or another date specified by the court, the guardian shall:

(1) have estate assets invested according to Section 855(b) of this code; or

(2) file a written application with the court for an order:

(A) [~~(1)~~] authorizing the guardian to:

(i) [~~(A)~~] develop and implement an investment plan for estate assets;

(ii) [~~(B)~~] invest in or sell securities under an investment plan developed under Subparagraph (i) [~~Paragraph (A)~~] of this paragraph [~~subdivision~~];

(iii) [~~(C)~~] declare that one or more estate assets must be retained, despite being underproductive with respect to income or overall return; or

(iv) [~~(D)~~] loan estate funds, invest in real estate or make other investments, or purchase a life, term, or endowment insurance policy or an annuity contract; or

(B) [~~(2)~~] modifying or eliminating the guardian's duty to invest the estate.

(a-1) The court may approve an investment plan under Subsection (a)(2) of this section without a hearing.

(b) If the court determines [~~On hearing the application under this section and on a finding by the preponderance of the evidence~~] that the action requested in the application is in the best interests of the ward and the ward's estate, the court shall render an order granting the authority requested in the application or an order modifying or eliminating the guardian's duty to keep the estate invested. An [~~The~~] order under this subsection must state in reasonably specific terms:

(1) the nature of the investment, investment plan, or other action requested in the application and authorized by the court, including, if applicable, the authority to invest in and sell securities in accordance with the objectives of the investment plan;

(2) when an investment must be reviewed and reconsidered by the guardian; and

(3) whether the guardian must report the guardian's review and recommendations to the court.

(c) -- (e) [No change]

Amended by Acts 2007, 80th Leg., Ch. ____ (HB 417), effective September 1, 2007. Section 34 of HB 417 provides that this change applies only to an application for the appointment of a guardian filed on or after the effective date.

Sec. 867. CREATION OF MANAGEMENT TRUST.

(a) -- (b) [No change]

(b-1) On application by an appropriate person as provided by Subsection (a-1) of this section and regardless of whether an application for guardianship has been filed on the alleged incapacitated person's behalf, a proper court exercising probate jurisdiction may enter an order that creates a trust for the management of the estate of an alleged incapacitated person who does not have a guardian if the court, after a hearing, finds that:

(1) the person is an incapacitated person; and

(2) the creation of the trust is in the incapacitated person's best interests.

(b-2) -- (f) [No change]

Amended by Acts 2007, 80th Leg., Ch. ___ (HB 519), effective September 1, 2007. Section 2 of HB 519 provides that HB 519 is intended to clarify, not change, existing law, and that:

> *A court in which an application for the creation of a management trust under Section 867, Texas Probate Code, is pending on the effective date of this Act and that is not a proper court exercising probate jurisdiction, as required by that section, shall transfer the proceeding to a proper court exercising probate jurisdiction. When a proceeding is transferred from one court to another as provided by this subsection, all processes, writs, bonds, recognizances, or other obligations issued from the transferring court are returnable to the court to which the proceeding is transferred as if originally issued by that court. The obligees in all bonds and recognizances taken in and for a court from which a proceeding is transferred, and all witnesses summoned to appear in a court from which a proceeding is transferred, are required to appear before the court to which a proceeding is transferred as if originally required to appear before the court to which the transfer is made.*

Sec. 894. GUARDIANSHIP PROCEEDINGS FILED IN THIS STATE AND IN FOREIGN JURISDICTION.

(a) A court in which a guardianship proceeding is filed and in which venue of the proceeding is proper may delay further action in the proceeding in that court if:

(1) another guardianship proceeding involving a matter at issue in the proceeding filed in the court is subsequently filed in a court in a foreign jurisdiction; and

(2) venue of the proceeding in the foreign court is proper.

(b) A court that delays further action in a guardianship proceeding under Subsection (a) of this section shall determine whether venue of the proceeding is more suitable in that court or in the foreign court. In making that determination, the court may consider:

(1) the interests of justice;

(2) the best interests of the ward or proposed ward; and

(3) the convenience of the parties.

(c) A court that delays further action under Subsection (a) of this section may issue any order it considers necessary to protect the proposed ward or the proposed ward's estate.

(d) The court shall resume the guardianship proceeding if the court determines that venue is more suitable in that court. If the court determines that venue is more suitable in the foreign court, the court shall, with the consent of the foreign court, transfer the proceeding to the foreign court.

Added by Acts 2007, 80th Leg., Ch. ___ (HB 342), effective June 15, 2007. Section 2 of HB 342 provides that it applies only to a guardianship proceeding filed on or after the effective date.

Appendix "B" -- 2007 Amendments to the Texas Trust Code (And Other Selected Property Code Amendments)

I believe this compilation of Probate Code changes to be complete and accurate, but I do not warrant that this is the case.

Glenn Karisch

Trust Code Changes

Sec. 111.0035. DEFAULT AND MANDATORY RULES; CONFLICT BETWEEN TERMS AND STATUTE.

(a) [No change]

(b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:

(1) the requirements imposed under Section 112.031;

(2) [~~the duties and liabilities of and restrictions placed on a corporate trustee under Section 113.052 or 113.053;~~

[~~(3)~~] the applicability of Section 114.007 to an exculpation term of a trust;

(3) [~~(4)~~] the periods of limitation for commencing a judicial proceeding regarding a trust;

(4) [~~(5)~~] a trustee's duty:

(A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:

(i) is entitled or permitted to receive distributions from the trust; or

(ii) would receive a distribution from the trust if the trust terminated at the time of the demand; and

(B) to act in good faith and in accordance with the purposes of the trust; [~~and~~

[~~(C) under Section 113.060 to a beneficiary described by Paragraph (A) that is 25 years of age or older;~~] or

(5) [~~(6)~~] the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:

(A) modify or terminate a trust or take other action under Section 112.054;

(B) remove a trustee under Section 113.082;

(C) exercise jurisdiction under Section 115.001;

(D) require, dispense with, modify, or terminate a trustee's bond; or

(E) adjust or deny a trustee's compensation if the trustee commits a breach of trust.

(c) The terms of a trust may not limit any common-law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed at any time during which the beneficiary:

(1) is entitled or permitted to receive distributions from the trust; or

(2) would receive a distribution from the trust if the trust were terminated.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective June 15, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 111.004. DEFINITIONS. In this subtitle:

(1) – (9) [No change]

(10) "Person" means:

(A) an individual;

(B) [,] a corporation;

(C) a limited liability company;

(D) [,] a partnership;

(E) a joint venture;

(F) [,] an association;

(G) [,] a joint-stock company;

(H) [,] a business trust;

(I) [,] an unincorporated organization;

(J) [, or] two or more persons having a joint or common interest, including an individual or a corporation acting as a personal representative or in any other fiduciary capacity;

(K) a government;

(L) a governmental subdivision, agency, or instrumentality;

(M) a public corporation; or

(N) any other legal or commercial entity.

(11 – 17) [No change]

(18) "Trustee" means the person holding the property in trust, including an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 112.035. SPENDTHRIFT TRUSTS.

(a) – (c) [No change]

(d) If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's [~~his~~] beneficial interest does not prevent the settlor's [~~his~~] creditors from satisfying claims from the settlor's [~~his~~] interest in the trust estate. A settlor is not considered a beneficiary of a trust solely because a trustee who is not the settlor is authorized under the trust instrument to pay or reimburse the settlor for, or pay directly to the taxing authorities, any tax on trust income or principal that is payable by the settlor under the law imposing the tax.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 112.059. TERMINATION OF UNECONOMIC TRUST.

(a) After notice to beneficiaries who are distributees or permissible distributees of trust income or principal or who would be distributees or permissible distributees if the interests of the distributees or the trust were to terminate and no powers of appointment were exercised, the trustee of a trust consisting of trust property having a total value of less than $50,000 may terminate the trust if the trustee concludes after considering the purpose of the trust and the nature of the trust assets that the value of the trust property is insufficient to justify the continued cost of administration.

(b) On termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(c) A trustee may not exercise a power described by Subsection (a) if the trustee's possession of the power would cause the assets of the trust to be included in the trustee's estate for federal estate tax purposes.

(d) This section does not apply to an easement for conservation or preservation.

Added by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 113.058. BOND.

(a) [No change]

(b) Unless [~~a court orders otherwise or~~] the instrument creating the trust provides otherwise, a noncorporate trustee must give bond:

(1) payable to the trust estate of the trust, the registry of the court, or each person interested in the trust, as their interests may appear; and

(2) conditioned on the faithful performance of the trustee's duties.

(c) [No change]

(d) Any interested person may bring an action to increase or decrease the amount of a bond, require a bond, or [~~to~~] substitute or add sureties. Notwithstanding Subsection (b), for cause shown, a court may require a bond even if the instrument creating the trust provides otherwise.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

~~Sec. 113.060. INFORMING BENEFICIARIES~~. [Repealed]

Repealed by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective June 15, 2007. Section 22 of HB 564 provides: "The enactment of Section 113.060, Property Code, by Chapter 148, Acts of the 79th Legislature, Regular Session, 2005, was not intended to repeal any common-law duty to keep a beneficiary of a trust informed, and the repeal by this Act of Section 113.060, Property Code, does not repeal any common-law duty to keep a beneficiary informed. The common-law duty to keep a beneficiary informed that existed immediately before January 1, 2006, is continued in effect." Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 113.085. EXERCISE OF POWERS BY MULTIPLE TRUSTEES.

(a) Cotrustees [~~that are unable to reach a unanimous decision~~] may act by majority decision.

(b) – (e) [No change]

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 114.005. RELEASE OF LIABILITY BY BENEFICIARY.

(a) A beneficiary who has full legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability as to the beneficiary that would otherwise be imposed on the trustee by this subtitle, including liability for past violations[~~, except as to the duties, restrictions, and liabilities imposed on corporate trustees by Section 113.052 or 113.053 of this subtitle~~].

(b) [No change]

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 114.081. PROTECTION OF PERSON DEALING WITH [~~PAYMENT OF MONEY TO~~] TRUSTEE.

(a) A person who deals with a trustee [~~actually and~~] in good faith and for fair value actually received by the trust is not liable to the trustee or the beneficiaries of the trust if the trustee has exceeded the trustee's authority in dealing with the person [~~pays to a trustee money that the trustee is authorized to receive is not responsible for the proper application of the money according to the trust~~].

(b) A person other than a beneficiary is not required to inquire into the extent of the trustee's powers or the propriety of the exercise of those powers if the person:

(1) deals with the trustee in good faith; and

(2) obtains:

(A) a certification of trust described by Section 114.086; or

(B) a copy of the trust instrument.

(c) A person who in good faith delivers money or other assets to a trustee is not required to ensure the proper application of the money or other assets.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated, is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section [~~A right or title derived from the trustee in consideration of the monetary payment under Subsection (a) of this section may not be impeached or questioned because of the trustee's misapplication of the money~~].

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 114.086. CERTIFICATION OF TRUST.

(a) As an alternative to providing a copy of the trust instrument to a person other than a beneficiary, the trustee may provide to the person a certification of trust containing the following information:

(1) a statement that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and mailing address of the currently acting trustee;

(4) one or more powers of the trustee or a statement that the trust powers include at least all the powers granted a trustee by Subchapter A, Chapter 113;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all of the cotrustees are required in order to exercise powers of the trustee; and

(7) the manner in which title to trust property should be taken.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification to be incorrect.

(d) A certification of trust:

(1) is not required to contain the dispositive terms of a trust; and

(2) may contain information in addition to the information required by Subsection (a).

(e) A recipient of a certification of trust may require the trustee to furnish copies of the excerpts from the original trust instrument and later amendments to the trust instrument that designate the trustee and confer on the trustee the power to act in the pending transaction.

(f) A person who acts in reliance on a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for the action and may assume without inquiry the existence of the facts contained in the certification.

(g) If a person has actual knowledge that the trustee is acting outside the scope of the trust, and the actual knowledge was acquired by the person before the person entered into the transaction with the trustee or made a binding commitment to enter into the transaction, the transaction is not enforceable against the trust.

(h) A person who in good faith enters into a transaction relying on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification are correct. This section does not create an implication that a person is liable for acting in reliance on a certification of trust that fails to contain all the information required by Subsection (a). A person's failure to demand a certification of trust does not:

(1) affect the protection provided to the person by Section 114.081; or

(2) create an inference as to whether the person has acted in good faith.

(i) A person making a demand for the trust instrument in addition to a certification of trust or excerpts as described by Subsection (e) is liable for damages if the court determines that the person did not act in good faith in making the demand.

(j) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

(k) This section does not limit the rights of a beneficiary of the trust against the trustee.

Added by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 115.001. JURISDICTION.

(a) Except as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to:

(1) construe a trust instrument;

(2) determine the law applicable to a trust instrument;

(3) appoint or remove a trustee;

(4) determine the powers, responsibilities, duties, and liability of a trustee;

(5) ascertain beneficiaries;

(6) make determinations of fact affecting the administration, distribution, or duration of a trust;

(7) determine a question arising in the administration or distribution of a trust;

(8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;

(9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and

(10) surcharge a trustee.

(a-1) The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a).

(b) – (c) [No change]

(d) The jurisdiction of the district court [~~over proceedings concerning trusts~~] is exclusive except for jurisdiction conferred by law on:

(1) a statutory probate court;

(2) [~~,~~] a court that creates a trust under Section 867, Texas Probate Code;

(3) [~~, or~~] a court that creates a trust under Section 142.005;

(4) a justice court under Chapter 27, Government Code; or

(5) a small claims court under Chapter 28, Government Code.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 116.002. DEFINITIONS. In this chapter:

(1) – (8) [No change]

(9) "Person" has the meaning assigned by Section 111.004 [~~means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity~~].

(10) – (12) [No change]

(13) "Trustee" has the meaning assigned by Section 111.004 [~~includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court~~].

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 116.172. DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR PAYMENTS.

(a) – (b) [No change]

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income the part of the payment that does not exceed an amount equal to:

(1) four percent of the fair market value of the future payment asset on the date specified in Subsection (d); less

(2) the total amount that the trustee has allocated to income for all previous payments received from the future payment asset during the same accounting period in which the payment is received [~~made~~].

(d) [No change]

(e) For each accounting period [~~year~~] a [~~future~~] payment [~~asset~~] is received [~~made~~], the amount determined under Subsection (c)(1) [~~(c)~~] must be prorated on a daily basis unless the determination of the fair market value of a future payment asset is made under Subsection (d)(2) and is for an accounting period of 365 days or more.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 116.174. MINERALS, WATER, AND OTHER NATURAL RESOURCES.

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as [~~nominal~~] delay rental or [~~nominal~~] annual rent on a lease, a receipt must be allocated to income.

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(3) If [~~an amount~~] received as a royalty, shut-in-well payment, take-or-pay payment, or bonus, [~~or delay rental is more than nominal,~~] the trustee shall allocate the receipt equitably.

(4) If an amount is received from a working interest or any other interest not provided for in Subdivision (1), (2), or (3), the trustee must allocate the receipt equitably.

(b) – (e) [No change]

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Other Selected Property Code Changes

Chapter 123. ATTORNEY GENERAL PARTICIPATION IN PROCEEDINGS INVOLVING CHARITABLE TRUSTS

Sec. 123.003. NOTICE.

(a) Any party initiating a proceeding involving a charitable trust shall give notice of the proceeding to the attorney general by sending to the attorney general, by registered or certified mail, a true copy of the petition or other instrument initiating the proceeding involving a charitable trust within 30 days of the filing of such petition or other instrument, but no less than 25 days prior to a hearing in such a proceeding. This subsection does not apply to a proceeding that[~~:~~

[~~(1)~~] is initiated by an application that exclusively seeks the admission of a will to probate, regardless of whether the application seeks the appointment of a personal representative, if the application:

(1) is uncontested; and [~~or~~]

(2) is not subject to [~~a proceeding under~~] Section 83, Texas Probate Code.

(b) – (c) [No change]

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

CHAPTER 141. TRANSFERS TO MINORS

Sec. 141.002. DEFINITIONS. In this chapter:

(1) [No change]

(2) "Benefit plan" means a [~~an employer's plan for the benefit of an employee or partner or an individual~~] retirement plan, including an interest described by Sections 111.004(19)-(23) [~~account~~].

(3) – (12) [No change]

(12-a) "Qualified minor's trust" means a trust to which a gift is considered a present interest under Section 2503(c), Internal Revenue Code of 1986.

(13) – (14) [No change]

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 141.004. NOMINATION OF CUSTODIAN.

(a) A person having the right to designate the recipient of property transferable on the occurrence of a future event may revocably nominate a custodian to receive the property for a minor beneficiary on the occurrence of that event by naming the custodian followed in substance by the words: "as custodian for ___ (name of minor) ___ under the Texas Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians to whom the property must be transferred, in the order named, if the first nominated custodian dies before the transfer or is unable, declines, or is ineligible to serve. The nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment, or in a writing designating a beneficiary of contractual rights, including the right to receive payments from a benefit plan, that is registered with or delivered to the payor, issuer, or other obligor of the contractual rights.

(b) – (c) [No change]

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 141.008. TRANSFER BY OBLIGOR.

(a) Subject to Subsections (b) and (c), a person who is not subject to Section 141.006 or 141.007 and who holds property, including a benefit plan of a minor who does not have a guardian, or who owes a liquidated debt to a minor who does not have a guardian may make an irrevocable transfer to a custodian for the benefit of the minor under Section 141.010.

(b) [No change]

(c) If a custodian has not been nominated under Section 141.004, or all persons nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, a transfer under this section may be made to an adult member of the minor's family or to a trust company unless the property exceeds $15,000 [~~$10,000~~] in value.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Sec. 141.015. USE OF CUSTODIAL PROPERTY.

(a) – (b) [No change]

(b-1) A custodian may, without a court order, transfer all or part of the custodial property to a qualified minor's trust. A transfer of property under this subsection terminates the custodianship to the extent of the property transferred.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

CHAPTER 142. MANAGEMENT OF PROPERTY RECOVERED IN SUIT BY A NEXT FRIEND OR GUARDIAN AD LITEM

Sec. 142.005. TRUST FOR PROPERTY.

(a) Any [~~In a suit in which a minor who has no legal guardian or an incapacitated person is represented by a next friend or an appointed guardian ad litem, any~~] court of record with jurisdiction to hear a [~~the~~] suit involving a beneficiary may, on application [~~by the next friend or the guardian ad litem~~] and on a finding that the creation of a trust would be in the best interests of the beneficiary [~~minor or incapacitated person~~], enter a decree in the record directing the clerk to deliver any funds accruing to the beneficiary [~~minor or incapacitated person~~] under the judgment to a financial institution, except as provided by Subsections (m) and (n) [~~trust company or a state or national bank having trust powers in this state~~].

(b) The decree shall provide for the creation of a trust for the management of the funds for the benefit of the beneficiary [~~minor or incapacitated person~~] and for terms, conditions, and limitations of the trust, as determined by the court, that are not in conflict with the following mandatory provisions:

(1) The beneficiary shall be [~~the minor or incapacitated person is~~] the sole beneficiary of the trust.[~~;~~]

(2) The [~~the~~] trustee may disburse amounts of the trust's principal, income, or both as the trustee in the trustee's [~~his~~] sole discretion determines to be reasonably necessary for the health, education, support, or maintenance of the beneficiary. The trustee may conclusively presume that medicine or treatments approved by a licensed physician are appropriate for the health of the beneficiary.[~~;~~]

(3) The [~~the~~] income of the trust not disbursed under Subdivision (2) shall be [~~is~~] added to the principal of the trust.[~~;~~]

(4) If [~~if~~] the beneficiary is a minor, the trust shall terminate [~~terminates~~] on the death of the beneficiary, on the beneficiary's attaining an age stated in the trust, or on the 25th birthday of the beneficiary, whichever occurs first, or if the beneficiary is an incapacitated person, the trust shall terminate [~~terminates~~] on the death of the beneficiary or when the beneficiary regains capacity.[~~;~~]

(5) A [~~the~~] trustee that is a financial institution shall serve [~~serves~~] without bond.[~~; and~~]

(6) The [~~the~~] trustee shall receive [~~receives~~] reasonable compensation paid from trust's income, principal, or both on application to and approval of the court.

(7) The first page of the trust instrument shall contain the following notice:

NOTICE: THE BENEFICIARY AND CERTAIN PERSONS INTERESTED IN THE WELFARE OF THE BENEFICIARY MAY HAVE REMEDIES UNDER SECTION 114.008 OR 142.005, PROPERTY CODE.

(c) – (f) [No change]

(g) Notwithstanding any other provision of this chapter, if the court finds that it would be in the best interests of the beneficiary [~~minor or incapacitated person~~] for whom a trust is established [~~created~~] under this section, the court may omit or modify any terms required by Subsection (b) if the court determines that the omission or modification is necessary or appropriate to allow the beneficiary to be eligible to receive public benefits or assistance under a state or federal program. This section does not require a distribution from a trust if the distribution is discretionary under the terms of the trust [~~may contain provisions determined by the court to be necessary to establish a special needs trust as specified under 42 U.S.C. Section 1396p(d)(4)(A)~~].

(h) – (j) [No change]

(k) In addition to ordering other appropriate remedies and grounds, the court may appoint a guardian ad litem to investigate and report to the court whether the trustee should be removed for failing or refusing to make distributions for the health, education, support, or maintenance of the beneficiary required under the terms of the trust if the court is petitioned by:

(1) a parent of the beneficiary;

(2) a next friend of the beneficiary;

(3) a guardian of the beneficiary;

(4) a conservator of the beneficiary;

(5) a guardian ad litem for the beneficiary; or

(6) an attorney ad litem for the beneficiary.

(l) A person listed in Subsection (k) shall be reimbursed from the trust for reasonable attorney's fees, not to exceed $1,000, incurred in bringing the petition.

(m) If the value of the trust's principal is $50,000 or less, the court may appoint a person other than a financial institution to serve as trustee of the trust only if the court finds the appointment is in the beneficiary's best interests.

(n) If the value of the trust's principal is more than $50,000, the court may appoint a person other than a financial institution to serve as trustee of the trust only if the court finds that:

(1) no financial institution is willing to serve as trustee; and

(2) the appointment is in the beneficiary's best interests.

(o) In this section:

(1) "Beneficiary" means:

(A) a minor or incapacitated person who:

(i) has no legal guardian; and

(ii) is represented by a next friend or an appointed guardian ad litem; or

(B) a person with a physical disability.

(2) "Financial institution" means a financial institution, as defined by Section 201.101, Finance Code, that has trust powers, exists, and does business under the laws of this or another state or the United States.

Amended by Acts 2007, 80th Legislature, Ch. ___ (HB 564), effective September 1, 2007. Section 23 of HB 564 provides: "Except as otherwise provided by the terms of a trust, the changes in law made by this Act apply to a trust existing or created on or after the effective date of this Act."

Appendix "C" – List of Bills and Effective Dates

Bill Number	*Status*	*Earliest Effective Date*
HB 0052	Signed	September 1, 2007
HB 0075	Signed	September 1, 2007
HB 0290	Signed	June 15, 2007
HB 0342	Signed	June 15, 2007
HB 0391	Signed	June 15, 2007*
HB 0417	Signed	September 1, 2007
HB 0519	Signed	September 1, 2007
HB 0564	Signed	June 15, 2007*
HB 0568	Became Law Without Governor's Signature	September 1, 2007
HB 0585	Signed	June 15, 2007
HB 0860	Signed	September 1, 2007
HB 1295	Signed	September 1, 2007
HB 1352	Signed	September 1, 2007
HB 1709	Signed	September 1, 2007
HB 1710	Signed	September 1, 2007
HB 2061	Signed	March 28, 2007
HB 2359	Signed	September 1, 2007
HB 2967	Signed	October 1, 2007
HB 3787	Signed	June 15, 2007
SB 0291	Signed	September 1, 2007
SB 0406	Signed	September 1, 2007
SB 0506	Signed	April 25, 2007
SB 0593	Signed	September 1, 2007
SB 0617	Signed	September 1, 2007
SB 0699	Signed	September 1, 2007
SB 0819	Signed	September 1, 2007
SB 1624	Signed	September 1, 2007

* Most parts of this bill have a September 1, 2007, effective date.

Appendix "D" -- Academy Membership Application

Texas Academy of Probate and Trust Lawyers
Membership Application/2007 Dues Notice

List below the information to be included in the membership roster.

_____
Name

_____
Firm or School/University

_____
Address

_____, Texas _____
City Zip

_____ _____
Telephone Number Fax Number

_____
E-mail

Please Check the Appropriate Boxes: Dues

☐ Board Certified, Estate Planning and Probate Law,
Texas Board of Legal Specialization ***and/or***
☐ Fellow, American College of Trust and Estate Counsel $125.00

☐ I am an Academician $75.00

Please make your check payable to the **Texas Academy of Probate and Trust Lawyers** and mail to the following:

Texas Academy of Probate and Trust Lawyers
c/o Tom Featherston, Treasurer
1114 S. University Parks Drive
Waco, TX 76798-7288

If you have any questions, contact Al Golden, Academy Chair, at (512) 472-5675 or ajg@ikardgolden.com

Appendix "E" -- Ten Things to Change Now

Most changes made by the 80th Texas Legislature affecting probate, guardianship and trust law became effective September 1, 2007. Here are ten things that lawyers who practice in this area should do now to comply with these changes. For a more thorough explanation of the changes, see my 2007 Texas Legislative Update.

1. ***Include identifying numbers in probate and guardianship applications that are not filed in statutory probate court.*** As crazy as it sounds in this era of hightened privacy concerns, SB 699 requires the first pleading filed by a party to any civil action filed after September 1, 2007, to include the last three digits of the party's social security number and the last three digits of the party's driver's license number. With the support of the Texas Academy of Probate and Trust Lawyers, Rep. Will Hartnett of Dallas was able to amend this bill at the last minute to make actions in statutory probate courts exempt from the requirements of this bill. Are probate actions "civil actions" that are subject to the bill? There's no reason to think otherwise. So, until a court rules otherwise, if you are filing an application to probate a will, application for appointment of a guardian or other initial pleading in a non-statutory probate court after September 1, 2007, your client must include the last three digits of his or her social security number and driver's license number in the pleading. This change was requested by title companies, who want an easy way to distinguish between persons with the same or similar names in searching real property records for abstracts of title. Perhaps local county court judges and local statutory county court judges can adopt local rules that the new requirement does not apply to probate matters. After all, core probate and guardianship proceedings rarely end in an abstract of judgment.

2. ***Independent executors must notify all beneficiaries that the will has been probated and prove that notice was given by filing an affidavit.*** For every person who dies on or after September 1, 2007, the personal representative appointed after a will is probated must notify all beneficiaries named in the will within 60 days of the date the will is probated. The notice must include a copy of the will and the order admitting it to probate. There are special rules for trusts, minors and incapacitated persons. Waivers are permitted. Personal representatives prove that they complied with the new requirements of Section 128A by filing an affidavit within 90 days of probate. See my 2007 Texas Legislative Update for a detailed explanation of this change. Also, see my forms for the Notice to Beneficiaries, Waiver of Notice, Receipt and Waiver of Notice, and Affidavit of Compliance Under Section 128A at www.texasprobate.com.

3. ***Better check the statute before doing the next 142 Trust.*** Substantial changes to Property Code Section 142.005 became effective September 1, 2007. The first page of every 142 Trust must include a statutory warning. Persons who are disabled for purposes of receiving federal benefits but who are not incapacitated for purposes of Property Code Section 142.007 or for purposes of guardianships now may file for creation of a 142 Trust themselves (without the aid of a next friend or guardian ad litem). Several changes enhance the use of 142 Trusts as special needs trusts. Chances are, you need to make several changes to your 142 Trust form.

4. ***Guardianship applications must state that the proposed ward's right to vote and drive may be affected.*** In order to better protect the civil and constitutional rights of incapacitated persons, the application for a guardianship that may result in the loss of the proposed ward's right to vote or drive a car must disclose this fact. Also, the physician's certificate and order requirements were changed to make the decision of the court regarding the ward's voting rights and driving rights more explicit. Be sure your guardianship application and order comply with these changes, and be sure the physician's certificate includes explicit statements about the proposed ward's ability to vote and drive.

5. ***Don't give the title company the whole trust agreement; give it a certificate of trust.*** Texas finally has a statute that permits a trustee to provide third parties with a certificate describing the trustee's powers

rather than providing the entire trust instrument. Trust Code Section 114.086 states the requirements for a certificate of trust. The certificate permits the third party to ascertain that the trustee has the authority to complete the transaction in question without requiring a disclosure of all of the trust terms. Since a trustee has a duty to keep private matters regarding the trust and its beneficiaries, a cautious trustee always will opt for the certificate if given a choice.

6. ***Your boilerplate provision authorizing a trustee to self-deal now permits corporate trustees to self-deal.*** Since Texas has had statutes governing trusts, settlors have not been permitted to waive the statutory prohibitions against self-dealing for corporate trustees. Uncle Benny or Aunt Sue could be authorized to self-deal, but not Big State Bank and Trust. Now settlors are permitted to waive self-dealing rules for corporate trustees as well as individual trustees. This will come in handy in some cases (for example, to authorize a corporate trustee to utilize an affiliated hedge fund as a trust investment), but be aware that provisions buried in your trust instruments which were intended to authorize family members serving as trustee to self-deal now may authorize corporate trustees to do so as well, unless the wording limits this effect. And why exactly did you have a self-dealing authorization in your boilerplate provision in the first place?

7. ***Texas statutes now recognize the existence of copiers.*** In 1955, when the Texas Probate Code was enacted, copy machines were rare. (I remember my dad had a weird kind of machine that made sort of a negative of a document. That was in the early 1960s, though.) That is probably why Section 85 required the testimony of someone who had read a lost will or heard it read to prove up the contents of a lost will. Now, since virtually every lawyer keeps a photographic copy of each signed will in his or her files, maybe looking at the signed copy is a slightly more reliable way to prove the contents of the lost will. Section 85 was amended in 2007 to permit this method of proving up the will. So, in your next lost will case, change your pleadings and consider this new-fangled method of proving what a document says.

8. ***Prospective guardians must provide criminal background checks, unless. . . .*** Section 698 of the Probate Code was amended to require the clerk to obtain a criminal background check on each person proposed to serve as a guardian or temporary guardian. Before you call the DPS to get your client's record, however, note that the bill was amended late in the session so that it does not apply to family members or attorneys. If it doesn't apply to family members and it doesn't apply to lawyers, to whom does it apply? Non-lawyer employees of private professional guardians and providers of community guardianship services will be subject to the requirement, as well as the fairly rare case in which a non-family member and non-attorney is proposed as a guardian.

9. ***Deja vu, Part 1: "No plan" is the default investment plan in guardianships again.*** For the longest time, guardians of the estate had to obtain court approval of an investment plan only if they were not going to follow the statutorily-approved guardianship investments. Then, in 2003 Section 855B of the Texas Probate Code was amended to require guardians of the estate to file an investment plan within 180 days of qualifying as guardian. Now, that section is amended to provide that the guardian must file an investment plan only if he or she plans to deviate from the statutorily-approved guardianship investments. Hey, isn't this where I got on?

10. ***Deja vu, Part 2: Back to the common law duty of trustees to keep beneficiaries informed.*** Prior to 2005, the Texas Trust Code contained no provision imposing an affirmative duty on trustees to keep beneficiaries informed about the trust. There was a requirement to respond to an accounting demand by a beneficiary, and the Supreme Court had found a duty to exist in the common law in some cases, but the Trust Code was missing this requirement. Then, in 2005, Section 113.060 was added to the Trust Code, imposing such a duty. After much hue and cry, and after attempts to reach an agreement on amending its terms, Section 113.060 was repealed effective June 17, 2007. However, the bill repealing Section 113.060 says that the common law duty prior to 2005's enactment of Section 113.060 continues to exist. I believe this is where I get off. . . .

Appendix "F" -- Section 128A Forms

Under the 2007 amendment to Probate Code Section 128A, personal representatives are required to give notice to beneficiaries within 60 days after a will is probated. The new requirement applies to decedent's dying on or after September 1, 2007. Here are Glenn Karisch's forms for use in connection with that section, provided without warranty of any kind, including warranty of merchantability or fitness for a particular purpose:

1. Notice to Beneficiaries Under Section 128A

[Firm Name]
[Firm Address]

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED #_____

[Beneficiary Name]
[Beneficiary Address]

Re: Estate of [Decedent's Name], Deceased; Cause No. [Number] in the Probate Court No. 1 of Travis County, Texas

Dear [Beneficiary Name]:

[Executor Name] has retained this firm to represent her in her capacity as Independent Executor of the Estate of [Decedent Name], Deceased (referred to in this letter as the "Estate"). I am writing this letter to you on behalf of [Executor Name]. Section 128A of the Texas Probate Code requires the independent executor of an estate to notify all beneficiaries of the Estate that the will has been probated. Accordingly, you are hereby notified that:

1. [Decedent Name]'s will dated [Date of Will] was admitted to probate in the Probate Court No. 1 of Travis County, Texas, under Cause No. [Number], and [Executor Name] was appointed as and qualified as independent executor of the Estate on [Date of Qualification].

2. [Beneficiary Name] is named as a beneficiary in the will.

3. The name and address of [Executor Name] is: [Executor Name], Estate of [Decedent Name], c/o [Firm Name], [Firm Address].

4. A copy of the will and order admitting it to probate is attached.

This firm represents [Executor Name]. It does not represent you or the Estate.

Very truly yours,

[Lawyer Name]

Enclosures

2. Waiver of Notice Under Section 128A

CAUSE NO. _____

ESTATE OF	**§**	**IN THE _____ COURT**
	§	
_____,	**§**	**OF**
	§	
DECEASED	**§**	**_____ COUNTY, TEXAS**

WAIVER OF NOTICE PURSUANT TO
TEXAS PROBATE CODE SECTION 128A

1. My name is _____.
2. My address is _____.
3. I am a beneficiary under the will of _____.
4. The date of the will is _____.
5. I acknowledge that I have received a copy of the will. I waive my right to receive the notice that the personal representative otherwise would have to send me under the terms of Section 128A of the Texas Probate Code. The personal representative does not have to send me the Section 128A notice.

My signature: _____

THE STATE OF TEXAS

COUNTY OF _____

This instrument was acknowledged before me on the____ day of _____, 200__, by

_____.

_____
Notary Public, State of Texas

3. Receipt and Waiver of Notice (For use in cases where the personal representative can distribute a specific gift to the beneficiary within 60 days of probating the will. The form serves as a receipt and a waiver of the Section 128A notice requirement.)

CAUSE NO. _____

ESTATE OF	**§**	**IN THE _____ COURT**
	§	
_____,	**§**	**OF**
	§	
DECEASED	**§**	**_____ COUNTY, TEXAS**

RECEIPT AND WAIVER OF NOTICE

1. My name is _____.

2. My address is _____.

3. I am a beneficiary under the will of _____.

4. The date of the will is _____.

5. I acknowledge that I have received a copy of the will. I waive my right to receive the notice that the personal representative otherwise would have to send me under the terms of Section 128A of the Texas Probate Code. The personal representative does not have to send me the Section 128A notice.

6. I also acknowledge that I have received the following property, which was given to me under the terms of the will: _____

_____

My signature: _____

THE STATE OF TEXAS

COUNTY OF _____

This instrument was acknowledged before me on the____ day of _____, 200__, by _____.

_____

Notary Public, State of Texas

4. Affidavit of Compliance with Section 128A

CAUSE NO. [Number]

ESTATE OF	**§**	**IN THE PROBATE COURT**
	§	
[Decedent Name],	**§**	**NO. 1 OF**
	§	
DECEASED	**§**	**TRAVIS COUNTY, TEXAS**

INDEPENDENT EXECUTOR'S AFFIDAVIT OF NOTICE PURSUANT TO TEXAS PROBATE CODE SECTION 128A

THE STATE OF TEXAS

COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared [Executor Name], independent executor of the Estate of [Decedent Name], Deceased, who, after being duly sworn by me, did upon oath swear, state and affirm as follows:

1. ***Introduction.*** I, [Executor Name], am the independent executor of the Estate of [Decedent Name], Deceased. [Decedent Name] (the "Decedent") died [Date of Death]. Decedent's will dated [Date of Will] was admitted to probate and [Executor Name] qualified as independent executor of the Decedent's estate on [Date of Qualification]. This affidavit is being given to comply with the requirements of Section 128A of the Texas Probate Code.

2. ***Description of Decedent's Family and Beneficiaries.*** The Decedent was unmarried at the time of death. The Decedent previously was married to _____, who predeceased the Decedent. The Decedent had four children: [Child 1 Name], [Child 2 Name], [Child 3 Name] and [Executor Name]. These four children all survived the Decedent. These four children are the only beneficiaries named in the Decedent's will.

3. ***Notices Given.*** I gave notices that complied with Section 128A of the Texas Probate Code to the following persons at the following addresses by certified mail, return receipt requested, and I received back the green card evidencing that such persons received the notice:

[Child 1 Name]
[Child 1 Address]

[Child 2 Name]
[Child 2 Address]

4. ***Notices Not Required to Be Given.*** I did not give notice to the following persons at the following addresses because I was not required to do so by Section 128A of the Texas Probate Code:

A. ***Persons Waiving Notice.*** The following persons with the following addresses signed and filed a waiver meeting the requirements of Section 128A of the Texas Probate Code:

[Child 3 Name]
[Child 3 Address]

B. ***Persons Who Appeared in Probate Proceeding.*** The following persons appeared in this proceeding prior to the probate of the will:

[Executor Name]
[Executor Address]

5. ***Notices Unable to Be Given.*** I was unable to give notice to the following beneficiaries or possible beneficiaries under the will because I could not identify them or determine their whereabouts after the exercise of reasonable diligence. I do not intend to actively continue to try to locate these persons after the date hereof because of the cost and expense to the Estate unless ordered to do so by the Court. However, if I locate any of these persons after the making and filing of this affidavit, I will send them a notice under Section 128A:

None

6. I believe that I have complied with the requirements imposed on me by Section 128A.

_____
[Executor Name]

SWORN TO AND SUBSCRIBED BEFORE ME on the ____ day of _____, 200__.

_____
Notary Public, State of Texas