

[Insert Catchy Title Here]

## 2015 Texas Estate and Trust Legislative Update

(Including Probate, Guardianships, Trusts,  
Powers of Attorney, and Other Related Matters)

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# Read the Paper!

- Or at least the main part of the paper (pp. 6 – 23).
- Due to time constraints, we can't cover every change described in the paper.
- Some of the ones we'll skip may be of interest to you.

# The 2015 REPTL “Big” Bills

- Decedents’ Estates
  - Disclaimers
- Guardianships
- Trusts
- Financial and Medical Powers of Attorney

# The 2015 REPTL “Small” Bills

- “One Continuous Statute” (Probate vs. Estates Code)
  - Exempt Property
  - TUTMA
  - Anatomical Gifts
  - Disposition of Remains
- 
- General Code Update – SB 1296

# But First, a REPTL “Disclaimer”...

- REPTL bills are introduced with proposals that have received State Bar Board of Directors' approval.
- Once introduced, they're no longer “REPTL bills.”
- REPTL bills end up with provisions that were not originally REPTL proposals.
- Non-REPTL provisions added to REPTL bills are noted in the paper. In this presentation, they are highlighted in burnt orange.

# Speaking of Disclaimers....

- The Texas Uniform Disclaimer of Property Interests Act.
- New **Property** Code Ch. 240. (Sorry.)
- There's no 9-month deadline for disclaimers **for state law purposes**.
  - De-coupled from tax law.
  - Focus on acceptance, not the calendar. If property is accepted, it cannot be disclaimed.
- See Glenn Karisch's paper for more detailed discussion.
  - [www.texasprobate.com](http://www.texasprobate.com)

# Fiduciary's Power to Disclaim

- Fiduciaries may disclaim property otherwise passing into trust or for benefit of ward, estate or beneficiary.
- Court must approve some disclaimers by fiduciaries:
  - Dependent administrations;
  - Guardianships;
  - Statutory trusts; and
  - Disclaimers resulting in property or power passing to fiduciary individually.
- A trustee disclaiming property on trust's behalf must either give notice to beneficiaries or obtain court approval.
- Natural guardian may disclaim on behalf of minor if property would pass to minor only by virtue of another disclaimer (and wouldn't pass to guardian).

# How to Disclaim

- Disclaimers must be in writing, describe the power or property, be signed by the disclaimant and delivered or filed.
- Specific delivery or filing requirements for different types of disclaimers.
- Generally, only one delivery or filing is required.
  - No need to notify executor **and** file.
  - Any method likely to result in delivery may be used.
  - Safe harbor: if sent by certified mail, delivery is deemed to occur on the date of mailing regardless of receipt.

# Other Disclaimer Tidbits

- If disclaimer satisfies federal “qualified disclaimer” rules, it’s effective under Texas law.
- The relation-back doctrine is preserved – the disclaimer relates back to the date of death or the irrevocable transfer.
- Effective September 1, 2015.
  - New law applies to pre-effective date interests, but if the 9-month clock had already elapsed before 9/1/15, the deadline for disclaiming under old law continues to apply.

# REPTL Decedents' Estates Bill

- Modification or reformation of wills:
  - Testator's tax objectives,
  - Qualify for government assistance, or
  - Correct scrivener's error (clear and convincing evidence)
- Copy of inventory need not be sent automatically to beneficiaries who weren't required to receive Chapter 308 notice.
- Rules voiding provisions in favor of ex-spouse are extended to **revocable** (1) pourover gifts to trusts, (2) powers of appointment, and (3) account designations.

# REPTL Decedents' Estates Bill – Foreign Wills

- If will validly executed under laws of state of execution, where testator has a residence, or testator's domicile at execution or death, it's valid here.
- If will probated elsewhere within four years of death, will may be probated and administration opened here more than four years after death.
- Self-proving affidavits of law of state of execution or where testator has a residence, not just testator's domicile, are recognized.

# REPTL Decedents' Estates Bill (cont...)

- Verb tense in one-step self-proving affidavit is corrected.
- Legislative intent behind 2013 amendment of forfeiture provision is incorporated into statutes.
- More tinkering (end of Section 7.2).
  - Ch. 308 affidavit or attorney's certificate need not include beneficiaries' addresses.
  - Preferred debt and lien creditor must take possession within reasonable time.
  - Lawyer trust accounts.

# Other Decedents' Estates Bills

- Small estate affidavits should identify exempt assets. "Homestead" and "exempt property" limited to property eligible to be set aside.
- The state inheritance tax is repealed!
- Simplified process for obtaining intestate's account information.
- Surviving spouse can obtain mortgage information with death certificate and affidavit.

# REPTL Guardianship Bill

- Mostly tinkering.
- Existing bond remains in effect while guardianship transferred to another court.
- Costs may be assessed against management trust (if no guardianship estate) or applicant.
  - Includes cost of GAL's, AAL's, court visitors, mental health professionals, and interpreters.
  - In amount court considers equitable and just.
- Interested person wishing to intervene must file timely motion, serve parties, state grounds, and attach pleading setting forth purpose of intervention.
  - Court has discretion to grant or deny motion.

# REPTL Guardianship Bill (cont...)

- Verb tense in one-step self-proving affidavit is corrected.
- Criminal background checks for **all** proposed guardians (eliminates family member exception).
- Safekeeping agreements may be obtained prior to qualification.
- Temporary guardianship pending contest limited to 9 months, unless renewed following hearing.

# REPTL Guardianship Bill (cont...)

- **All** management trustees must file initial report within 30 days (not just those with existing guardianships).
- Court may appoint ad litem to sell property of minor without parent or guardian.
- Court may appoint ad litem to sell property of ward whose guardian is appointed by court outside Texas.
- Court investigators may compel discovery of customer's financial information.

# H.B. 39 – Less Restrictive Alternatives

- From Judicial Council's Elders Committee and WINGS.
- Incapacitated person subject to limited guardianship presumed to retain capacity to make personal decisions regarding person's residence.
- Numerous alternatives to guardianships are listed.
- "Supports and services" are defined – resources and assistance that enable an individual to meet basic needs, manage health and finances, and make certain personal decisions.

## H.B. 39 –

# Less Restrictive Alternatives (cont...)

- **Attorney** ad litem should discuss and investigate alternatives to guardianship that might avoid need for one.
- Or if certain powers of guardian should be limited if ward receives supports and services.

# H.B. 39 –

## Less Restrictive Alternatives (cont...)

- **Guardian** ad litem should investigate need for guardianship and evaluate alternatives and supports and services.
- Information gathered is subject to court examination.
- Applicant's attorney must complete ad litem certification course.
- Course is increased to four hours, with one devoted to alternatives and supports and services.

# H.B. 39 –

## Less Restrictive Alternatives (cont...)

- Application must state whether alternatives and supports and services were considered, and whether any are available and feasible.
- Application should specifically state whether proposed ward's right to make residence decisions should be terminated.
- Order must find **by clear and convincing evidence** that alternatives and supports and services were considered, but are not feasible.
- If ward retains some capacity, order must specifically state them, and whether ward needs supports and services for each.

# H.B. 39 –

## Less Restrictive Alternatives (cont...)

- Physician's certificate must state whether improvement is possible, and if so, when ward should be reevaluated. (If less than one year, order must include deadline for updated certificate.)
- Court must make reasonable effort to consider proposed ward's preferred guardian, whether or not ward has executed declaration.
- Absent emergency, guardian of the person must obtain court approval to place ward in a more restrictive care facility.

# S.B. 1882 – Ward’s Bill of Rights

- Twenty-four specific rights are listed.
- Read new Section 1151.351 in Attachment 5.

# S.B. 1881 – Supported Decision-Making Agreements

- A less restrictive alternative to guardianship for adults who are not “incapacitated” but need assistance with daily living decisions.
- Supported decision-making agreement authorizes a “supporter” to:
  - provide supported decision-making without making those decisions on behalf of the adult;
  - assist the adult in accessing and understanding information relevant to a life decision; and
  - assist the adult in communicating the adult's decisions.

# Other Guardianship Bills

- Criminal background checks for contractor (or employee of same) providing services to DADS ward.
- Judicial procedure for relatives of ward to obtain court authority to visit and communicate with ward.
- Guardian of adult ward has duty to promptly notify ward's spouse, parents, siblings, and children if the ward:
  - dies (including funeral and burial arrangements),
  - is admitted to acute care medical facility for more than 3 days,
  - changes residence, or
  - is staying at location other than ward's residence for more than a week.

# REPTL TUTMA Bill

- Increases amount a fiduciary or obligor may transfer to a TUTMA custodianship from \$10,000 or \$15,000 to \$25,000.

# Other Guardianship Bills (cont...)

- Guardians of inmates are given same visitation rights as next of kin.
- Convalescent homes, nursing homes and assisted living facilities must keep copies of court orders appointing guardian in resident's medical records.
- Patient restrained during court-ordered transportation to protect patient may only be restrained during transportation.
- Certain facilities may temporarily detain person requesting treatment if physician believes person has mental illness with substantial risk of doing serious harm.

# REPTL Trusts Bill

- To paraphrase a great Austrian ...



# TBA Directed Trust Bill

- Current Sec. 114.003 only applies to “charitable trusts.”
- All other trusts subject to new Sec. 114.0031.
- Person with authority to direct, consent to, or disapprove trustee's investment, distribution, or other decision is considered fiduciary (unless trust provides otherwise).
- Trustee acting in accordance with directions is not liable absent willful misconduct **on part of trustee**.
  - Trustee is not liable for following directions just because it knows of willful misconduct **on part of advisor**.

# TBA Directed Trust Bill (cont...)

- Trustee not liable for any act resulting from advisor's failure to provide required consent after request by trustee, except in cases of trustee's willful misconduct or gross negligence.
  - But trustee who does not receive requested consent is not liable for ordinary negligence stemming from any decision it makes without that consent.
- Trustee has **no duty to monitor** advisor's conduct, provide advice to or consult with advisor, or communicate with or warn any beneficiary or third party.
- Absent clear and convincing evidence, trustee's acts within scope of advisor's authority are presumed administrative only, and not undertaking to monitor advisor.

# REPTL Financial and Medical Power of Attorney Bill

- To paraphrase him again ...



- Back in theaters July 1<sup>st</sup> ...

# The *Norwood* Problem

- Scope broader than this paper can cover.
- And it's not yet a legislative issue.
- Involves ability to use financial powers of attorney in home refinancing.
- See Part 18 of paper for more detailed discussion.

# Other Power of Attorney Bills

- Power of attorney used to consummate real property transaction must be recorded within 30 days of recording of transaction.
- Irrevocable business powers of attorney related to LLC or partnership.
  - No guidance on whether Estates Code Chapter 751 applies.

# REPTL Disposition of Remains Bill

- Executors and administrators added after immediate family to list of persons with the right to control disposition.
- Listed persons authorized to seek reimbursement from decedent's estate.
- Statutory form becomes permissive.
- Authority granted to spouse terminates upon dissolution of marriage.
- Appointments are valid without agents' signatures, although agent must sign before acting.

# Advance Directives

- Change in terminology.
  - “Artificial nutrition and hydration” now “artificially administered nutrition and hydration.”
  - “Stomach (gastrointestinal tract)” now simply “gastrointestinal tract.”
  - “Treatment decision” and “health care decision” now “health care or treatment decision.”
  - “Fluids” now “hydration.”
  - “Review process” now “ethics or medical committee.”
- Following determination that life-sustaining treatment is medically inappropriate, patient or surrogate may request 10 day extension in many situations.

# REPTL Decedents' Estates Bill – Nontestamentary Transfers

- Definition of P.O.D. account expanded to include T.O.D. account.
- Guardian or agent under financial power allowed to sign P.O.D. agreement.

# Access to Estate Planning and Probate Initiative

- T.O.D. deed based on uniform act.
- Disclosures by financial institution when opening account.

# Access to Estate Planning and Probate Initiative – Forms

- Supreme Court directed to promulgate forms for certain matters:
  - Small estate affidavit,
  - Muniment pleadings, and
  - Simple wills for married and single individuals with adult, minor, or no children.
- Forms and instructions to be written in plain, easy-to-understand language, with conspicuous statement that form is not substitute for legal advice.
- Absent substantive incurable defect, courts must accept promulgated form.
- Similar bill for landlord-tenant forms.

# REPTL Bills – Exempt Property

- **REPTL Decedents' Estates bill** clarifies “other” exempt property to be set aside after inventory – homestead and Sec. 42.002(a) property.
- **REPTL Exempt Property bill** increases exempt tangible personal property value limits from \$30,000/\$60,000 to \$50,000/\$100,000 (accounting for inflation since 1991).
- **REPTL Trusts bill** would have corrected language of 2013 amendment to retirement plan exemption.

# REPTL Guardianship Bill – Recusal

- Random assignment of judge to hear recusal motions.
- Presiding statutory probate judge assigns new judge in statutory probate court following recusal.
- Recusal judge may assess attorney's fees and expenses if judge determines motion was:
  - groundless and filed in bad faith or for purpose of harassment; or
  - clearly brought for unnecessary delay without sufficient cause.
- Movant may be enjoined from filing further recusal motions without consent of presiding statutory probate judge.

# Remember...

- You can always download the latest version of the [2015 Texas Estate and Trust Legislative Update](#) at:

[www.snpalaw.com/resources/2015LegislativeUpdate](http://www.snpalaw.com/resources/2015LegislativeUpdate)

- Or go to our [Resources](#) page:

[www.snpalaw.com/resources](http://www.snpalaw.com/resources)

And scroll down to “[2015 Texas “Estate and Trust” Legislative Update.](#)”

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