


2015 Legislative Update

Legislation Affecting Probate, Guardianship and Trust Law in Texas

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Will reformation based on scrivener's errors, a new disclaimer statute and a ton of new rules affecting guardianships – including new attorney certification requirements -- led the way in the 84th Texas Legislature's changes affecting estate planning, probate, guardianship and trust law. Most changes took effect September 1, 2015.

1. Introduction

The Real Estate, Probate and Trust Law Section of the State Bar of Texas (REPTL) had a particularly ambitious legislative slate – nine bills in all. Of these, seven passed. The two that got away were significant – REPTL's biennial trust bill and a major power of attorney and advance directives bill. These bills cleared most obstacles but ran out of time.

This article discusses the following key changes in detail, then briefly summarizes other changes:

1. For the first time, Texas statutes will permit an unambiguous will to be reformed to correct a scrivener's error.
2. A Texas version of the Uniform Disclaimer of Property Interests Act was enacted which removes the nine-month deadline for disclaimers for state law purposes, permits trustee disclaimers and changes delivery and filing requirements.
3. Attorneys practicing guardianship law need to focus on three key changes:
 - a. The applicant's attorney in a guardianship – not just ad litem -- must complete a certification course, and the course has been lengthened from three to four hours.
 - b. There are new requirements regarding “alternatives to guardianship” and “supports and services,” as well as a new Supported Decision-Making Agreement Act.
 - c. The pleadings, proof and judgment requirements for applications for guardianship have changed.

4. The directed trustee provisions of the Trust Code were changed to let the trustee off the hook if directed to act by a third party, potentially leaving beneficiaries without recourse against anyone.
5. Beneficiaries may waive the right to receive a copy of the inventory when an affidavit in lieu of inventory is used, and there is speculation that this may do away with the requirement to prepare an inventory in some cases.

The 2015 changes require attorneys to make changes to a number of forms routinely used in a probate and guardianship practice. The paper gathers all of these changes and discusses them under the section entitled “Form Changes.”

While this paper discusses these key changes and many other changes, it does not cover every probate, guardianship and trust law change. For a more complete list, see William D. Pargaman’s 2015 legislative update, entitled “[Insert Catchy Title Here],” which is available at many continuing legal education programs and at www.snpalaw.com.

Much hard work went into drafting and passing REPTL’s legislation. Particular thanks should go to Judge Guy Herman, Craig Hopper and Bill Pargaman of Austin, Laura Upchurch of Brenham, Eric Reis of Dallas and Jeff Myers of Fort Worth, as well as the legislation’s sponsors: Representatives John Wray and Senfronia Thompson and Senators José Rodríguez, Judith Zaffirini and Joan Huffman.

2. Key changes

2.1. Will reformation or modification

SB 995 adds Subchapter J to Chapter 255 of the Estates Code permitting judicial modification or reformation of wills. The new provisions are modeled on Section 112.054 of the Trust Code but in some ways go further than the trust modification statute. New Section 255.541 permits modification or reformation of wills or directing or prohibiting actions of personal representatives if:

1. Modification of administrative, nondispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate’s administration;
2. The order is necessary or appropriate to achieve the testator’s tax objectives or to qualify a distributee for government benefits and is not contrary to the testator’s intent; or
3. The order is necessary to correct a scrivener’s error in the terms of the will, even if ambiguous, to conform with the testator’s intent.

2.1.1. Reformation or modification to correct a scrivener’s error

The most significant change is allowing judicial reformation or modification of a will to correct a

scrivener's error. This permits any provision of the will to be changed, including dispositive provisions. In the plainest if most extreme example, this would permit a court to reform a will that says "I give Blackacre to Sue" to say "I give Blackacre to Bill."

There are limits to this remedy which hopefully will prevent abuse:

- First, making changes due to scrivener's error requires proof by clear and convincing evidence. The other changes permitted by Section 255.541 require proof by a preponderance of evidence. This raises the bar, but it still permits a litigant to get a jury determination if he or she can avoid summary judgment.
- It is limited to scrivener's errors. It is not sufficient for a child of the decedent to say, "I talked to Dad, and he said he was leaving Blackacre to me." In most cases, the attorney drafting the instrument will have to fall on her sword and admit a mistake. In cases where the lawyer is dead, this probably means going through his or her notes. There is more room for mischief in non-lawyer prepared wills. Is LegalZoom the scrivener of a computer-generated self-help will or is the computer operator the scrivener? What about holographic wills? These often are woefully inadequate, using improper terms or forgetting to include a residuary gift. Presumably the testator is the scrivener in these cases. Does this new law permit a self-help will to be reformed by proving that the testator intended one thing but wrote another?
- Only the personal representative of an estate is permitted to bring an action to reform or modify a will. This may have the effect of preventing specious lawsuits brought by spurned heirs. On the other hand, if the executor or administrator personally benefits from the alleged scrivener's error, the spurned heir may attempt to bring a derivative claim. Also, if a personal representative brings an action to reform one will provision, does this open the door for the spurned heir to counterclaim that other provisions should be changed?

2.1.2. **Administrative, nondispositive modifications**

Since 2005, the Trust Code has permitted judicial modification of "administrative, nondispositive" provisions of a trust upon a showing that the change would prevent waste or avoid impairment of administration. This has been quite useful. Now executors will be able to ask courts to make changes to wills on this same basis. Taken to its logical extreme, an executor may attempt to change a dependent administration to an independent one, since it is universally accepted that independent administrations are cheaper and easier, thereby preventing waste and impairment. This probably goes beyond the intended scope of the new law since there are other provisions of the Estates Code addressing how to qualify for an independent administration if the will does not provide for one. See Tex. Est. Code §401.002.

2.1.3. **Modification to achieve tax or government benefit objectives**

The provision permitting changes to achieve the testator's tax objectives or to qualify a distributee for government benefits also is likely to be quite useful. These changes require a

showing that they are not contrary to the testator's intent. Taken to its extreme (*see*, for example, *In re Hubberd Testamentary Trust*, 432 S. W. 2d 358, 367 (Tex. App. – San Antonio 2014), which in the author's opinion focuses much too narrowly in defining the settlor's purposes), it is almost impossible to show that meaningful changes from words the testator used are not contrary to his or her intent. For example, if the testator writes "I give Blackacre to Sue," putting Blackacre in a special needs trust seems literally contrary to the plain language in the will, but it could greatly enhance the benefit the testator obviously wanted to bestow on Sue if it gets the protection of an SNT. The clear intent of the new law is to permit this type of change in appropriate cases, so hopefully the courts will interpret it this way.

2.1.4. **Other issues**

Like Section 112.054(b) of the Trust Code, Section 255.452 of the Estates Code directs the court to exercise its discretion to order a modification or reformation in the manner that conforms as nearly as possible to the probable intent of the testator.

Since actions to modify or reform a will may be brought only by the personal representative, he or she is put in a potentially vulnerable position in deciding to bring or not to bring an action. Section 255.455 states that the statutes do not create or imply a duty for the personal representative to petition a court for modification or reformation, inform devisees about the availability of this remedy or review the will or other evidence to determine whether a petition should be filed. It also provides that a personal representative is not liable for failing to file a petition.

The REPTL trust bill would have made similar changes to Section 112.054 of the Trust Code – to permit reformation due to scrivener's error – but it failed to pass.

These changes take effect September 1, 2015. Modification or reformation of a will is permitted if the administration of the estate of a decedent is pending or commenced on or after that date. Since most independent administrations have no clear termination date, this could permit going back a ways to change a will if the executor is able to establish that the administration is still pending.

2.2. **The Texas Uniform Disclaimer of Property Interests Act**

HB 2428 enacted a Texas version of the Uniform Disclaimer of Property Interests Act, replacing the disclaimer provisions formerly in the Estates Code and Trust Code. For an in-depth discussion of the new statute, see Karisch, Featherston and Jonas, *To Disclaim or Not to Disclaim: "How?" Is the Real Question*, 39th Annual Advanced Estate Planning and Probate Course, State Bar of Texas (2015). An updated version of this paper, including forms, may be found on texasprobate.com.

The National Council of Commissioners on Uniform State Laws (NCCUSL) first adopted the Uniform Disclaimer of Property Interests Act in 1999. It was last updated in 2010. Eighteen states have enacted versions of the 1999 act.

2.2.1. **There is just one statute**

The Texas Uniform Disclaimer of Property Interests Act (the “Texas Disclaimer Act”) addresses disclaimers of all types of property in Chapter 240 of the Property Code. It replaces the disclaimer provisions of Chapter 122 of the Estates Code and Section 112.010 of the Trust Code.

2.2.2. **There is no state law time limit for disclaimers**

Prior to 1976, federal tax law did not have a hard-and-fast nine-month deadline for qualified disclaimers. Like most states, Texas reacted to the 1976 Tax Reform Act by adopting a nine-month deadline in its statute. However, there is no reason why disclaimers under state law need to be tied to that deadline. Problems arise because the Texas nine-month deadline does not match perfectly with the tax law deadline. Those problems are eliminated if the Texas statute has no deadline. This is even more relevant in light of the recent increase in the applicable exclusion amount for federal estate tax purposes. Fewer and fewer disclaimers will be tax-based, so there is less and less of a reason to tie Texas’s statute to the tax law deadline.

Of course, as a practical matter a tax-motivated disclaimer must meet the federal tax deadline.

Instead of a deadline, the Texas Disclaimer Act bars disclaimers after the disclaimant accepts the interest sought to be disclaimed by taking possession of it or exercising dominion and control over it. Tex. Prop. Code §240.151(b)(1).

Eliminating the deadline should make it possible for a debtor who has not filed a petition in bankruptcy to disclaim property more than nine months after a decedent’s death and thereby avoid having the property go to the debtor’s creditors, so long as the debtor has not accepted the property. Under case law interpreting prior Texas law, pre-petition disclaimers work because of the relation back doctrine (which the new law retains), but post-petition disclaimers do not work. See *Matter of Simpson*, 36 F.3d. 450 (5th Cir. 1999) and *In re Schmidt*, 362 B.R. 318 (Bankr. W.D. Tex 2007).

Nothing in the Texas Disclaimer Act should change the treatment of disclaimers for Medicaid qualification purposes. Currently, a disclaimant is treated as having received property and then transferred it, making the disclaimer ineffective to protect assets for Medicaid purposes. See H. Clyde Farrell and Bliss Burdette Pak, *Estate Planning for Beneficiaries Who May Need Long Term Care*,” 2014 Stanley M. Johanson Estate Planning Workshop (UT-CLE, 2014).

2.2.3. **There are less restrictive technical requirements**

Many of the duplicative and logistically challenging technical requirements applicable under Chapter 122 have been eliminated in the Texas Disclaimer Act. The new act has specific notice requirements for each type of property. For example, when disclaiming property passing by will or intestacy in an estate subject to administration, the Texas Disclaimer Act permits delivery of the disclaimer to the executor to suffice. It is not necessary also to file a disclaimer in the probate proceeding. Tex. Prop. Code §240.102.

Also, the new act has its own mailbox rule. If the disclaimer is mailed to the intended recipient by certified mail, return receipt requested, at an address the disclaimant in good faith believes is likely to result in the disclaimer's receipt, delivery is considered to have occurred on the date of mailing regardless of receipt. Tex. Prop. Code §240.101(b).

While this streamlines things in most cases, it also means that it may be necessary to deliver disclaimers to multiple persons in some situations. For example, it would be necessary to send notice of the disclaimer of probate assets to the personal representative and to send notice of the post-death disclaimer of life insurance benefits to the insurance company paying the benefits. Tex. Prop. Code §§240.101, 240.105(c).

2.2.4. Different types of property are specifically addressed

The Texas Disclaimer Act includes provisions that are specifically designed to address unique characteristics of different types of property and ownership structures. For example, there are specific provisions regarding survivorship property and beneficiary designation property which are missing in Chapter 122.

2.2.5. Fiduciary disclaimers are expanded with clear rules for different types of fiduciaries

The Texas Disclaimer Act more clearly addresses the disclaimer of interests and powers by fiduciaries. The rules for disclaimers by different types of fiduciaries are stated. Trustees are expressly permitted to disclaim property, causing the property not to pass into the trust. For guardians, dependent administrators and trustees of court-created trusts, prior court approval is required. Court approval is required if the effect of the fiduciary disclaimer is to cause the property to pass to the fiduciary individually. The duties of fiduciaries in making disclaimers are clarified. Tex. Prop. Code §240.008.

The most significant of the fiduciary disclaimer changes permits trustees to disclaim. It was unclear under prior law if a trustee could disclaim. Now it is clear that a trustee may disclaim in appropriate cases, and the result of the disclaimer is that the disclaimed interest does not become property of the trust. Rather, unless the trust instrument provides otherwise, the disclaimed property passes as if all beneficiaries of the trust had died, but only with respect to that trust. Tex. Prop. Code §240.053. A good example is a case in which the will leaves a pecuniary amount to a bypass trust benefiting the surviving spouse and the residuary estate to the surviving spouse. Under the new law, the trustee of the bypass trust could disclaim. This permits the trust property to pass as part of the residuary estate, which would prevent the loss of a basis step-up on the death of the surviving spouse.

In order to protect the interests of trust beneficiaries, trustee disclaimers either require court approval or 30 days' written notice to the income beneficiaries and to first-tier remainder beneficiaries. If the trustee chooses to forego court approval by using the notice procedure, the disclaimer must be compatible with the trustee's fiduciary duties. However, once the disclaimer is completed, a disgruntled beneficiary cannot undo the disclaimer by having it declared void or

ineffective because of breach of fiduciary duty. Rather, the beneficiary must sue the trustee for damages or seek other relief. Tex. Est. Code §240.008.

The Texas Disclaimer Act permits the natural guardian (parent) of a minor to disclaim without court approval on behalf of the minor an interest in or power over property that the minor is to receive *solely as a result of another disclaimer*, but only if there is no court-appointed guardian and only if the disclaimed interest does not pass to or for the benefit of the natural guardian as a result of the disclaimer. Tex. Prop. Code §240.008(e). This makes it easier to use disclaimers to cause property to skip a branch of the family and go to another branch or relative.

2.2.6. Tax savings catch-all

Although it is not necessary to comply with Section 2518 of the Internal Revenue Code in order for a disclaimer to be effective under the Texas Disclaimer Act, the act includes a safe harbor for disclaimers that are qualified for federal tax purposes. Specifically, Section 240.057 provides that if a disclaimed interest is treated under the Internal Revenue Code as never having been transferred to the disclaimant, the disclaimer is effective as a disclaimer under the Texas Disclaimer Act. Under this provision, a disclaimant that is focused on making a qualified disclaimer for federal tax purposes can follow the guidance under Section 2518 and the developed case law in order to comply with federal law and be assured that the disclaimer will be effective for state law purposes as well. Note that the Texas Disclaimer Act does not require compliance with Section 2518; rather, Section 240.057 is a permissive provision that provides an alternative method of making a disclaimer that is effective under Texas law.

2.2.7. Effective date issues

The Texas Disclaimer Act is effective September 1, 2015, and applies to disclaimers of any interest in or power over property, whenever created. Tex. Prop. Code §240.003. If the event giving rise to the disclaimer (for example, the death of a decedent) occurs prior to September 1, 2015, should the disclaimant follow the rules of Chapter 240 of the Property Code or the rules of prior law?

The key is to determine if the deadline for making a disclaimer under prior law has passed prior to September 1, 2015. Under prior law, the disclaimer had to be filed not later than nine months after the date of the decedent's death. Sections 17 and 18 of HB 2428 (which are in the bill but do not appear in the Property Code itself) provide that the Texas Disclaimer Act applies if the filing and notice provisions under the former law have not elapsed. If the time for filing or delivering notice of a written memorandum of disclaimer under former law has elapsed, the former law applies and is continued in effect for that purpose.

In most cases, this means that:

- If the disclaimer is based on a decedent dying on or before November 30, 2014, the old law applies, including the nine-month deadline and the notice and filing requirements.

- If the disclaimer is based on a decedent dying on or after December 1, 2014, but before September 1, 2015, the disclaimant has a choice:
 - He or she may disclaim prior to September 1, 2015, following the old law, including its rules about notice and filing; or
 - He or she may wait until September 1, 2015, or later and follow the new law. This means that the nine-month deadline under the former law does not apply, even though the death giving rise to the disclaimer occurred before the effective date of the new law. It also means that the new notice requirements would apply.
 - If the disclaimer is based on a decedent dying on or after September 1, 2015, the new law applies.

2.3. Directed trustees

HB 3190 significantly changes the rules about directed trusts – trusts where a non-trustee has the power to direct the trustee to take, or refrain from taking, an action. The bill calls the person who has the power to direct the trustee to act an “advisor,” even though he or she is not “advising” the trustee when it directs the trustee to act. The Texas Bankers Association Trust and Financial Services Division (“TBA”) supported this measure.

2.3.1. Trustee not liable if it follows the advisor’s direction or the advisor refuses to consent

Modeled on a Delaware statute (Section 3313, Title 12, Delaware Code), this bill lets the trustee completely off the hook when the instrument provides that the trustee is to follow another party’s direction – even if the directing party owes no fiduciary duties to the beneficiary – unless the trustee acts with willful misconduct. Tex. Trust Code §114.0031(f).

Under prior law, the trustee was required to act in accordance with the third party’s direction unless the direction was manifestly contrary to the terms of the trust or the trustee knew the direction was a serious breach of the directing party’s fiduciary duties. See former Tex. Trust Code §114.003(b). This safeguard for beneficiaries could have put the trustee in a difficult position, so TBA pushed for this change to protect trustees. REPTL’s trust bill had a similar provision which provided protection to beneficiaries by imposing at least minimal duties on the directing party, but that bill failed to pass.

The new law also provides that, if the trust terms say that the trustee must make decisions with the consent of a third party, and if the third party “fails to provide the required consent after having been requested to do so by the trustee,” the trustee is not liable for loss resulting directly or indirectly from any act taken or not taken as a result of the third party’s failure to consent, absent willful misconduct or gross negligence on the part of the trustee. Tex. Trust Code §114.0031(g).

2.3.2. Advisor not required to be a fiduciary

Unless the trust terms provide otherwise, an advisor is a fiduciary. However, a settlor is permitted to provide in the trust instrument that the directing party acts in a nonfiduciary capacity. Tex. Trust Code §114.0031(e). If the settlor does so, the beneficiary may be left without a remedy, even if the directing party is grossly negligent or willfully acts in his or her own self-interest against the interests of the beneficiary.

2.3.3. Trust protectors

The REPTL bill would have been broader – covering so-called trust protectors or trustee appointers who have the power to remove and replace trustees, amend the trust and similar powers that do not involve directing the trustee. HB 3190 defines a “protector” by saying a protector “has all the power and authority granted to the protector by the trust terms,” and it contains a nonexclusive list of powers which may be given to the protector. Tex. Trust Code §114.0031(d). However, HB 3190 does nothing more beyond defining protector. It does not define the duties and liabilities of a trust protector or address liability issues between trustees and trust protectors, except in cases where the protector has the power to direct the trustee to act and except in cases where the consent of the protector is required.

2.3.4. Trustee has no duty to monitor the advisor

The TBA bill also relieves the trustee from the duty to monitor the activities of the directing party, advisor or protector and the duty to provide advice to or consult with the advisor. Tex. Trust Code §114.0031(h).

It does not address what duty, if any, the advisor has to monitor the trustee. This is a tricky area, since the duty to monitor could cause the trust to incur considerable expense. The trust instrument should clearly define the advisor’s duty to monitor (if any) and provide for how the costs of monitoring will be covered. Since the new law permits the settlor to provide that the advisor has no fiduciary duties, the settlor could completely relieve the advisor from the duty to monitor by so providing in the trust instrument.

The new law also does not state what duty, if any, the trustee has to provide information to the advisor. This should be addressed in the trust instrument, since it will be difficult or impossible for the advisor to function if the trustee refuses to provide information on request.

2.3.5. No duty to warn beneficiaries regarding discretionary decisions

HB 3190 relieves the trustee from the duty to warn a beneficiary concerning instances in which the trustee “would or might have exercised the trustee’s own discretion in a manner different from the manner directed by the advisor.” Tex. Trust Code §114.0031(h). In most cases, this means that the trustee has no duty to warn the beneficiary of the advisor’s imprudence. However, the statute may be read to provide that, if the trustee knows that the advisor is acting in a malicious or grossly negligent manner – in a manner which goes beyond the mere exercise of discretion – then Section 114.0031(h) does not relieve the trustee of liability for failing to warn

the beneficiary. A trustee has a fiduciary duty of full disclosure of all material facts known to the trustee that might affect a beneficiary's rights. *Montgomery v. Kennedy*, 669 S. W. 2d 309, 313 (Tex. 1984). Section 114.0031(h) erodes that duty with respect to within a trustee's discretion, but it may not erode it with respect to an advisor's direction which the trustee knows to be malicious or grossly negligent.

2.3.6. Settlor may override statute and impose duties on trustee

The terms of the trust prevail over all provisions of the Trust Code except those listed in Section 111.0035. Therefore, a settlor wishing for the trustee to have liability for following the direction of an advisor may provide for this liability in the trust instrument. In practice, it seems more likely that a settlor would try to reduce a trustee's liability than increase the trustee's liability. This often is due to a trustee's insistence on reduced liability (or at least no increased liability) as a condition to agreeing to serve as trustee. Still, if the settlor is more concerned about protecting the beneficiary than protecting the trustee, the settlor may override Section 114.0031 in whole or in part.

2.3.7. Charitable trusts not affected

The Texas Attorney General's office was able to negotiate a carve-out to protect charitable trusts. Former Section 114.003 of the Trust Code was retained but amended to apply only to charitable trusts. HB 3190 adds new Section 114.0031 to apply to all other trusts.

2.4. Three major guardianship changes

This was a big session for guardianship law. Competing interest groups worked at cross purposes. The resulting mish-mash streamlines some procedures while complicating others. Many of these changes are in HB 39. This bill contained several proposals which originated from the Texas Judicial Council's Elders Committee and the Texas Working Interdisciplinary Network of Guardianship Stakeholders ("WINGS"). Most of these encourage consideration of less restrictive alternatives to guardianships. These changes are intended to make fewer guardianships necessary and to impose less restrictive alternatives if a guardianship is necessary. The changes mean extra work for attorneys and the courts, which is likely to make a proceeding to appoint a guardian more expensive in the future.

Here are three things to which persons with a guardianship practice should pay particular attention.

2.4.1. New certification requirements for all attorneys, not just ad litem

Under prior law, all court-appointed attorneys in a guardianship case, including ad litem, had to be certified by the State Bar as having completed a three-hour certification course. Tex. Est. Code §1054.201. HB39 amends Section 1054.201 to require an attorney for an applicant for guardianship to be certified. It also makes the course four hours long, with the extra hour devoted to "alternatives to guardianship" and "supports and services" (discussed below).

According to the MCLE department at the State Bar of Texas:

- An attorney who was certified under the old law on September 1, 2015, could remain certified for the remainder of his or her original term by taking a one-hour supplementary course before September 1, 2015.
- If any attorney (including a currently certified attorney) takes a new four-hour course, a new two-year (or four-year) certification cycle begins.
- An attorney who was certified under the old law on September 1, 2015, but does not take a one-hour or four-hour course on or before September 1, 2015, is not eligible for appointments until he/she takes the one-hour or four-hour course, but his or her certification does not expire for purposes of determining eligibility for the four-year certification period after two consecutive two-year certifications. See Section 1054.202(b).

The change to Section 1054.201 applies to court-appointed attorneys and attorneys for applicants for guardianships. It does not apply to attorneys for guardians who no longer are applicants or for others who appear in guardianship cases, such as contestants and creditors.

2.4.2. **Alternatives to guardianship and supports and services**

The proponents of HB 39 believe in “alternatives to guardianship” and “supports and services.” These phrases are woven into the guardianship application process, affecting applicants, ad litem and the court.

A. Alternatives to guardianship

“Alternatives to guardianship” are defined to include execution of a medical power of attorney, appointment of an agent under a durable power of attorney, execution of a declaration for mental health treatment under Chapter 137 of the Civil Practices and Remedies Code, appointment of a representative payee to manage public benefits, establishment of a joint bank account, creation of a management trust under Chapter 1301 of the Estates Code, creation of a special needs trust, designation of a guardian before the need arises and “establishment of alternate forms of decision-making based on person-centered planning.” Tex. Est. Code §1002.0015. This is a nonexclusive list.

Attorneys working in this area are familiar with most of the listed alternatives. Establishing “alternate forms of decision-making based on person-centered planning” is unfamiliar language, but this is what most attorneys already try to do in virtually every case – think outside the box to come up with a way for prospective wards and their families to avoid a guardianship.

B. Supports and services

“Supports and services” are defined in Section 1002.031 to mean available formal and informal resources and assistance that enable an individual to:

- Meet the individual’s needs for food, clothing, and shelter;
- Care for the individual’s physical or mental health;
- Manage the individual’s financial affairs; or
- Make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

The court must consider available supports and services in determining if a guardianship is necessary and in setting the rights of the ward in appointing guardians with limited authority. Tex. Est. Code §§1101.101 and 1101.152. The applicant’s attorney, the attorney ad litem and the guardian ad litem all must consider and address available supports and services. Tex. Est. Code §§1101.001, 1054.004 and 1054.004. Judge Steve M. King of Tarrant County Probate Court No. 1 has compiled a list of entities and organizations providing supports and services which can be found in his paper entitled “Less Restrictive Alternatives & Supports and Services,” 17th Annual Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas, August 6-7, 2015.

C. The Supported Decision-Making Agreement Act

While not listed in definition of alternatives to guardianship, one of the alternatives is a supported decision-making agreement. SB 1881 enacted new Chapter 1357 of the Estates Code, entitled the Supported Decision-Making Agreement Act. The purpose of the act is to recognize a less restrictive alternative for guardianship for “adults with disabilities” who need assistance with decisions regarding daily living but who are not considered incapacitated persons for purposes of establishing a guardianship. Tex. Est. Code §1357.003. The adult names a “supporter” to engage in “supported decision-making.” Tex. Est. Code §1357.003(3) and (5).

1. Who is permitted to enter into an agreement?

A “disability” is a physical or mental impairment that substantially limits one or more major life activities. Tex. Est. Code §1357.002(2). An adult without a disability is not permitted to sign a supported decision-making agreement. For persons with a physical impairment only, there is no issue regarding the capacity of the adult to sign a supported decision-making agreement. For persons with a mental impairment, the attorney must consider if the impairment means that the adult lacks the capacity to make the agreement. The act provides that an adult with a disability “may voluntarily, without undue influence or coercion,” enter into an agreement. Tex. Est. Code §§1357.051 and 1357.055.

It could be difficult for an attorney to determine if a client:

- Is “disabled,” making him or her eligible for a supported decision-making agreement, but

- Is not an “incapacitated person” for guardianship purposes under Tex. Est. Code §1002.017, and
- Is “voluntarily, without undue influence or coercion,” entering into the supported decision-making agreement.

Supported decision-making agreements are not durable. A power of attorney can be made to survive the disability or incapacity of the principal. Tex. Est. Code §751.002. Supported decision-making agreements cannot. Therefore, even if the adult had the capacity to enter into a supported decision-making agreement when it was executed, the agreement becomes unenforceable when the adult becomes incapacitated.

2. Situations in which agreements are most likely to be useful

Because of the difficulty in determining capacity at the time of signing and the difficulty in assuring that the adult continues to have capacity after signing, supported decision-making agreements are likely to be most useful in the following situations:

- When the adult suffers from a physical impairment only.
- When the adult suffers from an easily measured mental impairment that is unlikely to deteriorate over time.
- When a physician’s certificate is obtained confirming disability due to mental impairment but affirmatively stating that the adult has the capacity to enter into a supported decision-making agreement.
- When a guardianship proceeding is pending and the court is able to order that the adult is not incapacitated for guardianship purposes but has the capacity to enter into a supported decision-making agreement. (A declaratory judgment proceeding related to the guardianship proceeding may be necessary for this.)

3. Situations in which agreements are less likely to be useful

Conversely, supported decision-making agreements are less likely to be useful in these situations:

- When the adult suffers from dementia or other mental impairment which is expected to worsen over time.
- When it is difficult or impossible to obtain a contemporaneous physician’s certificate or other diagnosis.
- When the adult is in a particularly vulnerable situation, especially when the sole caregiver wants the adult to name him or her as supporter.

4. What is supported decision-making and does it extend to financial decisions?

Supported decision-making means “a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.” Tex. Est. Code §1357.002(3). While the main emphasis of this definition appears to be assistance with non-financial decisions, nothing in the act limits the authority of the supporter to non-financial decisions.

5. Third parties are required to rely on the agreement

A person who receives the original or a copy of a supported decision-making agreement is required to rely on the agreement. Tex. Est. Code §1357.101(a). A person is not subject to criminal or civil liability and is not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement. Tex. Est. Code §1357.101(b). However, if that person has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, he or she must report the alleged abuse to the Department of Family and Protective Services. Tex. Est. Code §1357.102.

This puts the person being asked to accept a supported decision-making agreement – especially a financial institution, title company or other party involved with financial decisions on behalf of the adult – in a difficult position. The person must rely on the agreement, but has a duty to report possible exploitation. If the adult is incapacitated at the time the agreement is presented for acceptance, then the agreement is unenforceable. The only protection is the good faith defense in Section 1357.101(b).

6. Required and permissible terms of the agreement

The act includes a statutory form in Section 1357.056. The agreement is valid only if it is substantially in the statutory form, Tex. Est. Code §1357.056(a), but “a supported decision-making agreement may be in any form not inconsistent with” the statutory form and the other requirements of the act. Tex. Est. Code §1357.056(b). This appears to mean that (1) the statutory form must be used, but (2) any form will do. No doubt practitioners will use the statutory form but may modify it appropriately, which is a common practice with the statutory durable power of attorney form.

The agreement must be signed in the presence of a notary public or in the presence of two or more witnesses 14 years of age or older. Tex. Est. Code §1357.055.

The agreement may authorize the supporter to do any or all of the following (Tex. Est. Code §1357.051):

1. Provide supported-decision making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult with a disability.
2. Assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person.
3. Assist the adult with a disability in understanding this information.
4. Assist the adult in communicating the adult's decisions to appropriate persons.

2.4.3. **New pleading, proof and judgment requirements in guardianships**

A. Applications for guardianship

Under Section 1101.001 of the Estates Code, the application for guardianship must state:

- Whether alternatives to guardianship and available supports and services to avoid guardianship were considered.
- Whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for a guardianship.
- Whether the limitation or termination of rights requested includes the right of the proposed ward to make personal decisions regarding residence.

B. Findings and proof required

Under Section 1101.101 of the Estates Code, before appointing a guardian, the court must find *by clear and convincing evidence* that:

- Alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.
- Supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

Also, if the court finds by a preponderance of the evidence that the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property, the finding must specifically state whether the proposed ward lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage. Tex. Est. Code §1101.10.

The court must make a reasonable effort to consider the proposed ward's preference regarding who should be appointed guardian, whether or not the proposed ward has executed a declaration of guardian before the need arises. Tex. Est. Code §1104.002.

2.5. Eliminating the need to deliver a copy of the inventory to some beneficiaries

Under Section 309.056 of the Estates Code prior to its amendment by HB 3136, an independent executor could file an affidavit in lieu of filing the inventory, appraisal and list of claims if there were no unpaid debts other than secured debts, taxes and administration expenses at the time the inventory is due, so long as he or she could swear to the court that all beneficiaries have received a verified, full and detailed inventory and appraisal. This meant that the independent executor had to send the inventory to beneficiaries whose gifts were insignificant, to beneficiaries who already had fully received their gifts and to beneficiaries who waived the right to receive a copy of the inventory.

Section 308.002, which requires the independent executor to send notices to beneficiaries that he or she has been appointed, permits the waiver of the notice requirement and permits the independent executor to forego giving notice to beneficiaries whose gifts are worth \$2,000 or less and to beneficiaries who have received all gifts they are entitled to receive. Therefore, under prior law the independent executor was faced with the incongruous situation of not having to send the notice to beneficiaries to all beneficiaries but having to send a copy of the inventory to all beneficiaries, including beneficiaries who no longer have an interest in the estate.

HB 3136 changes that. Section 309.056 was amended to provide that, unless a beneficiary requests a copy of the inventory in writing, the independent executor is not required to send a copy of the inventory to a beneficiary whose gifts are worth \$2,000 or less, who has received all gifts he or she is entitled to receive or who has waived the right to receive a copy of the inventory. This means that:

- If the independent executor fully pays gifts to troublemaker beneficiaries before the notice to beneficiaries and the inventory are due, he or she can avoid sending the notice and a copy of the inventory to the troublemakers.
- If the independent executor is able to get all beneficiaries to waive the notice to beneficiaries and waive the right to receive a copy of the inventory, the independent executor does not have to send the notice or inventory to anyone.

2.5.1. Waiver issues

Currently it is fairly common for the independent executor named in the will to ask the beneficiaries to sign a waiver of the notice to beneficiaries requirement shortly after the decedent's death and before the will is probated. It usually is fairly easy to get waivers from everyone at this time since past and future animosities may subside around the time of the loved one's death. In most cases there is no harm in this. The waiver of the notice to beneficiaries states that the beneficiary has received a copy of the will and knows that the independent executor is to serve. Thus, the purpose of the notice is fulfilled by the waiver.

Under the new law, it no doubt will become prevalent to see named independent executors asking beneficiaries to sign waivers of both the notice requirement and the right to receive a copy of the inventory. The beneficiaries may be assured that this is routine, and they may wish to cooperate with the named executor by signing the waiver.

However, waiving the right to receive a copy of the inventory is more significant than waiving the notice requirement. While the beneficiary retains the right to later request a copy of the inventory under Section 309.056(b-1) and (c)(1), he or she may not know of this right. Also, the inventory may have revealed a problem with the administration, and the beneficiary will not become aware of the problem until much later, when it may be difficult or impossible to address the problem. Therefore, the rights of beneficiaries who unwittingly sign the waiver may be harmed by this new statute. An attorney advising a beneficiary probably should recommend the he or she refrain from signing such a waiver.

2.5.2. Does this mean that there's no need to prepare an inventory if all beneficiaries waive?

In his legislative update, (which can be found at www.snpalaw.com), William D. Pargaman points out a possible reading of Sections 309.051 and 309.056 which would mean that the independent executor is relieved of the obligation to prepare an inventory if all beneficiaries have received their gifts or waived the right to receive a copy of the inventory.

Section 309.051 requires the preparing and filing of an inventory “[e]xcept as provided by ... Section 309.056....” This exception is why an affidavit in lieu of inventory obviates the need to file the inventory. The sentence structure does not make the exception applicable only to the “filing” of an inventory; it could apply also to the “preparing” of an inventory.

Because of this session’s changes, Section 309.056(b) no longer requires the affidavit in lieu to include a sworn statement that all beneficiaries have received a copy of the inventory (which necessitates preparation of an inventory in order to be true). Rather, it requires a sworn statement that all beneficiaries other than the beneficiaries described by Subsection (b-1) (beneficiaries receiving less than \$2,000 worth of property, beneficiaries who already have received their gifts and beneficiaries who waive) have received a copy of the inventory. Therefore, Sections 309.051 and 309.056 can be read to take away the requirement that an inventory must be prepared.

Despite this possible reading, the best practice will be for the independent executor to prepare an inventory in all cases. Among the reasons for this are:

- This narrow reading may be incorrect.
- It is clear that the change to Section 309.056 was not intended to remove the requirement to prepare an inventory.

- An interested person, including a beneficiary who waives the right to receive a copy of the inventory, still may request a copy of the inventory, and the independent executor is required to provide a copy if requested. Tex. Est. Code §309.056(b-1) and (c). An independent executor who fails to prepare an inventory in a timely manner could have trouble creating one just to respond to a beneficiary’s request, which might come years after the death.
- If any problems arise during the estate administration, the court appointing the independent executor is not likely to take kindly to an independent executor who had not prepared an inventory.
- The independent executor has a common law duty to disclose material facts to a beneficiary. Preparing and delivering a copy of the inventory to a beneficiary helps fulfill this duty.
- It is useful to have an inventory to show the starting point of the estate and to help establish tax basis.

3. Form changes

Here is a collection of statutory changes which require form changes:

3.1.1. One-signature combo self-proving affidavit forms

The one-signature combination will and self-proving affidavit form has been changed to correct the tenses of the verbs. Tex. Est. Code §251.1045(a). The verb tenses also were corrected in the one-signature combination declaration of guardian and self-proving affidavit forms. Tex. Est. Code §§1104.154 and 1104.205.

3.1.2. Directive to Physicians and Family or Surrogates

The statutory Directive to Physicians and Family or Surrogates form was revised slightly, including changing the term “artificial nutrition and hydration” to “artificially administered nutrition and hydration.” Tex. Health and Safety Code §166.033.

3.1.3. Appointment for Disposition of Remains

The statutory Appointment of Agent for Disposition of Remains form (Tex. Health and Safety Code §711.002) was renamed the “Appointment for Dispositions of Remains” and revised extensively.

- It no longer includes blanks in the body of the document for the agent to sign to accept appointment. Rather, it provides that the instrument is valid without the signature of agents or successor agents. At the end of the form it provides a place for the agent to accept the appointment before acting as agent. The agent’s signature after the principal’s death makes the instrument legally sufficient.

- It automatically revokes the authority of an ex-spouse on divorce.

Section 711.002 now includes the duly qualified executors and administrators of a decedent's estate in the order of persons having the right to control the disposition of the decedent's remains and provides that an executor or administrator is not personally liable for the reasonable cost of interment.

3.1.4. Application to probate will

In the application to probate a will, the applicant must state the date of death, not the time of death. If the original will is not produced in court, the applicant is no longer required to state the age and marital status of each devisee or heir, but he or she must state whether or not the devisee or heir is an adult or minor. Tex. Est. Code §§256.052 and 256.054. If the application is to probate the will as a muniment of title, the applicant also must state the name, state of residence, and physical address where service can be had of the executor named in the will, as well as the name of each subscribing witness. The residence address of the executor and witnesses no longer needs to be included. Tex. Est. Code §257.051.

3.1.5. Application for letters of administration

In the application for letters of administration, the applicant must state the date of death, not the time of death, and the applicant is no longer required to state the age and marital status of each heir, but he or she must state whether or not the heir is an adult or minor. Tex. Est. Code §§301.052.

3.1.6. Determination of heirship

In the application for determination of heirship, the applicant must state the date of death, not the time of death, and the applicant must state the physical address where service may be had of each heir and must state if each heir is an adult or a minor. Tex. Est. Code §202.005. Also, Sections 202.055 and 202.056 were amended to make it clear that a party may waive citation in an heirship proceeding and that no service is required on a party who enters and appearance in an heirship proceeding. The judgment declaring heirship no longer needs to state the places of residence of heirs; it only must state their names. Tex. Est. Code §202.201.

3.1.7. Affidavit or certificate of compliance with notice to beneficiaries requirement

The independent executor or his or her attorney is required to sign and file an affidavit or certification confirming compliance with the notice to beneficiary requirements of Section 308.002. Now the affidavit or certification no longer is required to state the addresses of beneficiaries. Tex. Est. Code §308.004.

3.1.8. Small estate affidavits

Previously a small estate affidavit had to include a list of all known estate assets and liabilities. Now that list must indicate which assets the applicant claims are exempt. Tex. Est. Code §205.002. Section 205.009 was added to state that references to “homestead” or “exempt property” means only a homestead or other exempt property that would be eligible to be set aside under Estates Code Section 353.051 if the estate was being administered. This means that, in the case of a homestead, there must be a surviving spouse or minor child and, in the case of exempt property, there must be a surviving spouse, minor child, unmarried adult child remaining with the family or adult incapacitated child.

3.1.9. Disclaimers

Forms for disclaimers and notices related to disclaimers have changed under the new Texas Uniform Disclaimer of Property Interests Act, discussed above.

3.1.10. Applications, reports and orders in guardianships

See the discussion of the three big changes in guardianships above for changes in applications, reports and orders in guardianships.

3.1.1. Physician’s certificate in guardianships

The physician’s certificate required before a guardianship may be created must state whether improvement is possible and, if so, when the proposed ward should be reevaluated. Tex. Est. Code §1101.053.

4. Other changes

4.1. Decedent’s estates

Other changes affecting decedent’s estates include the following:

4.1.1. Provisions in favor of former spouse in the event of divorce

In its continuing effort to make provisions in favor of a former spouse unenforceable in the event of divorce, REPTL pushed for and obtained these changes:

- Section 123.001 of the Estates Code already provided that testamentary gifts and fiduciary appointments in favor of an ex-spouse or his or her relatives (who are not also relatives of the testator) were void. This has been extended to testamentary pour-over gifts to irrevocable trusts. The pour-over gift still is made, but to a separate trust of which the ex-spouse and the ex-spouse’s relatives are eliminated as beneficiaries and fiduciaries.

- If in a trust instrument a divorced individual revocably conferred a power of appointment on the ex-spouse or the relative of an ex-spouse or revocably named the ex-spouse or ex-spouse's relative as a fiduciary, the provision conferring the power of appointment or naming the person as fiduciary is revoked. As amended, the automatic revocation does not occur if the instrument conferred an irrevocable power of appointment on the ex-spouse or the ex-spouse's relative or irrevocably named the person as a fiduciary. Tex. Est. Code §123.052.
- If an ex-spouse or the ex-spouse's relative is named as the beneficiary of a P. O. D. account, upon divorce the money in the account is not paid to the ex-spouse or his or her relative as a P. O. D. beneficiary. However, this does not affect the right of the ex-spouse to asserting an ownership interest in an undivided multiple party account. Tex. Est. Code §123.151.
- Under prior law courts could not prohibit a person (including a person in a pending divorce proceeding) from executing a new will or codicil. Now the court cannot prohibit a person from revoking a will in whole or in part. Tex. Est. Code §253.001(b)(3).

4.1.2. **Probating wills executed outside Texas**

Section 251.053 was added to the Estates Code to provide that the will requirements in Section 251.051 for domestic wills do not apply to a written will executed in compliance with the law of the state or foreign country where the will was executed or the law of the state or foreign country where the testator was domiciled or had a place of residence. This means that a will may be admitted to probate in Texas if it was executed in compliance with the law of the state of execution or domicile.

This change is similar to a recent change recognizing the form of self-proving affidavit used in the state where the testator was domiciled. This has been expanded to recognize the form of self-proving affidavit used in the state where the will was executed, not just in the state of the testator's domicile. Tex. Est. Code §256.152(b) and (c).

4.1.3. **Forfeiture provisions**

In 2013, the sponsor of a bill making changes to the Estates Code and Trust Code provisions regarding forfeiture clauses in wills and trust instruments read into the legislative history a statement supplied by REPTL to clarify the effect of those changes. This was done because it was too late to make changes to the text of the bill itself, but the sponsor was willing to make clear that the statute did not apply in certain equitable situations.

This session Section 254.005 was amended to add this language as Subsection (b):

This section is not intended to and does not repeal any law recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust.

REPTL's trust bill included a similar change to Section 112.038 of the Trust Code. However, REPTL's trust bill failed to pass, so litigants and courts must continue to rely on the legislative history of the 2013 act.

4.2. Guardianships

It feels like there were hundreds of changes to the guardianship provisions of the Estates Code. The good news is that only 67 sections of the guardianship statutes had changes. Of course, the bad news is that 67 sections of the guardianship statutes had changes! Following is a discussion of some, but not all, of them (in addition to the changes discussed above).

4.2.1. Duties of ad litem

HB 39 requires the attorney ad litem to discuss with the proposed ward to the greatest extent possible whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for a guardianship. Before the hearing, the attorney ad litem is required to discuss with the proposed ward to the greatest extent possible the ad litem's opinion whether a guardianship is necessary and, if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services. Tex Est. Code §1054.004.

An attorney ad litem is an attorney appointed to represent and advocate on behalf of a proposed ward. Tex. Est. Code §1002.002. The attorney ad litem is the legal representative of the proposed ward and an attorney-client relationship is established. *Coleson v. Bethan*, 931 S. W. 2d 706, 712 (Tex. App. – Fort Worth 1996, no writ). Therefore, while the attorney ad litem is required to discuss these matters with the proposed ward, those discussions and the opinions expressed by the attorney ad litem are subject to the attorney-client privilege. It should not be possible to compel the attorney ad litem to disclose those opinions to the court.

HB 39 requires the guardian ad litem to investigate whether a guardianship is necessary and evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian. The information gathered in this investigation and evaluation is subject to examination by the court. Tex. Est. Code §1054.054.

A guardian ad litem is a person appointed to represent the best interests of an incapacitated person. Tex. Est. Code §1002.013. A guardian ad litem participates as the personal representative of the incapacitated person, not as an attorney for the incapacitated person. *Coleson v. Bethan*, 931 S. W. 2d 706, 710 (Tex. App. – Fort Worth 1996, no writ). Absent willful misconduct or gross negligence, a guardian ad litem has judicial immunity and is not liable for civil damages arising from a recommendation made or an opinion given as guardian ad litem. Tex. Est. Code §1054.056. Therefore, it makes sense that the guardian ad litem can be required to provide information to the court related to the investigation and evaluation of alternatives to guardianship and supports and services.

4.2.2. **Bill of rights for wards**

SB 1882 added new Section 1151.351 to the Estates Code, entitled “Bill of Rights for Wards.” It provides that a ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of Texas and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted. It lists 24 rights the ward has unless limited by a court or otherwise restricted by law, including the right to have a copy of the guardianship order and contact information for the court and the right to petition the court and retain guardianship-certified counsel of the ward’s choice to represent the ward’s interest for capacity restoration, modification of the guardianship, appointment of a different guardian or for other appropriate relief, including transition to a supported decision-making agreement.

The new statute does not say what attorneys ad litem and courts are required to do with the bill of rights for wards. Anyone working in the guardianship area should read and be familiar with these rights. It may be prudent for attorneys ad litem and courts to provide proposed wards and wards with a copy of the bill of rights.

4.2.3. **Interested persons must file a motion to intervene in a guardianship proceeding**

In the continuing effort to address serial recusal motions in guardianships (see *Whatley v. Walker*, 302 S. W. 3d 314 (Tex. App. – Houston [14th Dist.] 2009, pet. denied, and Tex. Civ. Prac. & Rem. Code §30.016)), the legislature added Section 1055.003 to the Estates Code. This section requires a person wishing to intervene in a guardianship proceeding to file a motion to intervene. The motion must state the grounds for intervention and be accompanied by a pleading which sets out the purpose for which intervention is sought. The court has discretion to grant or deny the motion and, in exercising that discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights or whether the proposed intervenor has such an adverse relationship with the ward or proposed ward that the intervention would unduly prejudice the adjudication of the original parties’ rights.

4.2.4. **Safekeeping agreements permitted before guardian qualifies**

Section 1101.156 was added to the Estates Code to permit the safekeeping of funds by a person appointed as guardian of the estate prior to his or her qualification. Previously the guardian had to post a bond in an amount sufficient to cover funds which he or she planned to place in safekeeping. Now the person named as guardian may safekeep the funds before qualifying, reducing the amount (and cost) of the bond.

4.2.5. **Proposed guardians must have criminal background check even if they are family members**

Previously Section 1104.402 of the Estates Code exempted attorneys and members of the ward’s or proposed ward’s family from criminal background checks for persons proposed to be a guardian. That exemption for family members has been removed. Now family members are

subject to background checks. The only persons not required to undergo background checks prior to becoming guardians are attorneys.

4.2.6. Temporary guardianships pending contest terminate in nine months unless extended

Section 1251.052 of the Estates Code was amended to provide that a temporary guardian pending contest expires nine months after the temporary guardian qualifies, even if the contest remains pending and no permanent guardian has been appointed. The court may extend the term after a motion and a hearing.

4.2.7. Decisions regarding personal residence

An incapacitated person who is the subject a limited guardianship is presumed to retain the capacity to make personal decisions regarding the person's residence. Tex. Est. Code §1001.001. The application for guardianship and order appointing guardian must specifically address the capacity to make personal decisions regarding residence if the guardian has limited authority. Tex. Est. Code §§1101.001, 1101.002.

4.2.8. Rights of relatives to access and information

As a result of HB 2665, a spouse, parent, sibling or child of a ward may file an application requesting access to the ward, including the opportunity to establish visitation or communication with the ward. A hearing must be held within 60 days, unless the application states that the ward's health is in significant decline or death is imminent, in which case the court is required to conduct an emergency hearing within 10 days. The guardian must be served and cited to appear. Tex. Est. Code §1151.055.

Unless the court relieves the guardian of this duty, the guardian must as soon as practicable inform a ward's spouse, parent, sibling or child if the ward dies, is admitted to a medical facility for acute care for three days or more, changes residence, or stays at a location other than the ward's residence for more than a week. Tex. Est. Code §1151.056.

4.3. Nontestamentary transfers

4.3.1. Transfer on death deed

SB 462 enacted the Texas Real Property Transfer on Death Act, which is found in new Chapter 114 of the Estates Code. The Act is based on the Uniform Real Property Transfer on Death Act.

An individual may transfer an interest in real property to one or more beneficiaries effective on the transferor's death by a transfer on death deed. Tex. Est. Code §114.051. A transfer on death deed is revocable. Tex. Est. Code §114.052. It is a nontestamentary transfer. Tex. Est. Code §114.053. A transfer on death deed must state that the transfer is to occur at the transferor's death, and it must be recorded in the real property records before the transferor's death. Tex. Est. Code §114.055. Notice, delivery or acceptance is not required. Tex. Est. Code §114.056.

A transfer on death deed may be revoked by another transfer on death deed or by a written, acknowledged and recorded written instrument. A will may not revoke a transfer on death deed. Tex. Est. Code §114.057(a) and (b). The divorce of the marriage between the transferor and a designated beneficiary revokes the transfer on death deed as to that designated beneficiary if notice of the judgment is recorded in the real property records before the transferor's death. Tex. Est. Code §114.057(c). A transfer on death deed is revoked if the transferor executes another deed conveying the property and that deed is recorded before the transferor's death. Tex. Est. Code §114.102.

The personal representative of the transferor's estate has responsibilities with respect to the property passing by transfer on death deed even though it is a nontestamentary transfer. If the property is subject to a lien or security interest, the personal representative must send a notice to the secured creditor under Section 308.053, and the secured creditor must elect matured, secured or preferred debt and lien status like any other security interest in estate property. Tex. Est. Code §114.104(b). To the extent the transferor's estate is insufficient to satisfy a claim against the estate, expenses of administration, estate taxes or allowances, the personal representative may enforce that liability against property passing under a transfer on death deed. Tex. Est. Code §114.106(a). This means that the probate estate must be exhausted before the transfer on death deed property is liable.

The statute includes an optional form of transfer on death deed. Tex. Est. Code §114.151.

4.3.2. **Account disclosures**

SB 1791 requires a financial institution to disclose the information contained on the statutory multiple party account form found in Section 113.052 of the Estates Code whether it uses the statutory form or varies the form.

If it uses the form, the financial institution is considered to have disclosed the information if "the customer places the customer's initials to the right of each paragraph of the form." Tex. Est. Code §113.052(a)(2). This is an interesting requirement since the form itself provides for the customer to indicate his or her choice of type of account by placing his or her initials "next to the account selected." The form has blanks for initials to the left of the description of each type of account. A literal reading of the amended statute would require the customer to initial each account type to the right of the text regardless of whether or not the account type is selected and to initial the single account type which he or she selects in the space provided on the left of the text.

If the institution varies the form, the disclosures must be given separately from other account information, be provided before account selection or modification, be printed in 14-point boldfaced type and, if the discussions that preceded the account opening or modification were conducted in a language other than English, be in that language. Tex. Est. Code §113.053.

These changes apply to any account opened or modified on or after September 1, 2015. The new rules do not apply to credit unions, which have their own rules in new Section 113.0531.

4.4. Thirty-day deadline for recording of power of attorney for real property transactions

Under prior law, a durable power of attorney used for the conveyance of real property was required to be recorded in the office of the county clerk of the county in which the property is located. Tex. Est. Code §751.151. That section has been amended to require the recording to occur not later than the 30th day after the date the conveyance instrument is filed for recording.

The statute does not state the consequences of noncompliance. If the power of attorney is not timely filed, does that mean that the conveyance instrument is ineffective or simply that the agent has failed to comply with his or her duties? Is the agent liable to the principal for this failure? Does the grantee have a claim against the agent for failing to record the power of attorney? For transactions closed through title companies, this should not be a problem, since the title company is incentivized to record the power in a timely manner.

4.5. Uniform Transfers to Minors Act

SB 1202 amends Sections 141.007 and 141.008 of the Property Code to increase the limit for transfers to custodians under the Uniform Transfers to Minors Act from \$10,000 or \$15,000 to \$25,000.

4.6. Exempt property

HB 2706 increases the maximum value of exempt personal property under Section 42.001 of the Property Code from \$60,000 to \$100,000 for a family and from \$30,000 to \$50,000 for a single adult. These amounts affect the exempt property to be set aside in a decedent's estate under Section 353.051 of the Estates Code.