2009 Texas Probate, Guardianship and Trust Legislation

By Glenn M. Karisch
The Karisch Law Firm, PLLC
7200 North MoPac Expressway, Suite 300
Austin, TX 78731
texasprobate.com

Texas probate and trust practitioners will find a few gifts in their legislative stockings this year, as well as one or two lumps of coal. They won't have to wait until Christmas to open these packages, since most of the changes are effective September 1, 2009.

As usual, our friends in the Texas legislature have done their best to improve our laws and our lives, with mixed results. Among the headline items are:

- Sixty-five chapters of the new "Estates Code" were enacted as part of the Legislative Council's mandated codification of the Probate Code. The new Estates Code will replace the Probate Code on January 1, 2014.
- The jurisdiction statutes applicable to decedents' estates were completely and substantively rewritten. While these changes are part of the overall codification of the Probate Code, they become effective September 1, 2009.
- There is an increased likelihood that residential homesteads placed in inter vivos trusts will have some form of homestead protection, but the extent of this protection is not clear.
- Texas has a new statute on *in terrorem* provisions in wills and trusts which prohibits their enforcement in cases where probable cause exists for bringing the action and the action is brought and maintained in good faith.
- New options for special needs trusts become available September 1, 2009. It should be easier to get court approval of these government-benefit-planning devices, including 867 Trusts with individuals or guardianship programs as trustees and court-ordered placement of funds in a pooled interest trust.

William Pargaman of Austin took over primary responsibility for passage of the legislative package of the Real Estate, Probate and Trust Law Section of the State Bar of Texas ("REPTL"). His unpaid hours and hours of work on behalf of REPTL and on behalf of the Texas Academy of Probate and Trust Lawyers (the "Academy") made a lot of the good things possible and kept more of the bad things from happening. Rep. Will Hartnett of Dallas, Sen. Kirk Watson of Austin and Sen. John Carona of Dallas were instrumental in the passage of REPTL's legislation in 2009.

At this writing (July 15, 2009), the deadline for vetoing legislation from the 2009 regular legislative session has passed. Therefore, this writing discusses only those measures which passed and were not vetoed. Already there has been one special session of the 81st Legislature. Nothing directly affecting probate, guardianship or trust law was enacted in the special session. If the governor calls

additional special sessions, then other legislation affecting probate and trust practitioners may be enacted. See the Texas Legislature Online website (www.capitol.state.tx.us) or the Texas Probate website (texasprobate.com) for reports on relevant legislation enacted in a special session.

1. The New Estates Code

When is a code not a code? Despite its name, the Texas Probate Code is not a "code," at least as far as the Texas Legislative Council is concerned. That state agency is required by Section 323.007 of the Government Code to "plan and execute a permanent statutory revision program for the systematic and continuous study of the statutes of this state and for the formal revision of the statutes on a topical or code basis." All codes enacted by the Texas Legislature since 1963 are part of the codification program. The Probate Code was enacted in 1955.

Legislative Council action and REPTL response. In the fall of 2006, REPTL learned that the Legislative Council had decided to codify the Probate Code beginning in June, 2007. Representatives of REPTL met with the staff attorneys at the Legislative Council who were assigned the task of supervising the codification. This resulted in a cooperative working arrangement that assured REPTL of input. At REPTL's request, the Legislative Council decided to work on the decedents' estates portion of the new Estates Code for the 2009 session. The guardianship portion of the code is slated for consideration in the 2011 session. Since the Legislative Council wanted there to be a regular session of the Legislature after adoption of the Code before it became effective, and since REPTL asked that the entire code become effective at the same time, the legislation proposed by the Legislative Council provides for a January 1, 2014 effective date. Thus, the timetable for enactment of the new Estates Code is:

Enact the decedents' estates portion of the code	***81st Legislature (2009)***
Enact the remainder of the code, including the guardianship portion	***82nd Legislature (2011)***
Make technical changes and adjustments to the code	***83rd Legislature (2013)***
Effective date of new Estates Code	***January 1, 2014***

Substantive versus non-substantive changes. The Legislative Council is prohibited from making any substantive changes when codifying statutes. REPTL persuaded the staffers at the Legislative Council that a few parts of the Probate Code needed a clean-up involving some substantive changes. Therefore, the Legislative Council left these areas alone when codifying the decedents' estates provisions:

- Jurisdiction.
- Venue.

- Independent administration.

Therefore, the Legislative Council's codification bill that passed in 2009 (HB 2502) included 63 chapters of the new Estates Code but was silent on jurisdiction, venue and independent administration. REPTL tried to pass codifications of these subjects.

Jurisdiction passes, venue and independent administration do not. Of REPTL's proposed legislation in those areas, only the jurisdiction changes (SB 408) passed. There was no controversy about REPTL's proposed changes affecting independent administration. Rather, that bill (HB 3085) failed to pass solely because of end-of-session procedural problems. REPTL's proposed venue changes were deleted from the jurisdiction bill when it became clear that keeping those changes in the bill threatened its passage. REPTL's proposed changes included a clarification of the extent of the transfer power of statutory probate courts under Section 5B in the wake of *Gonzales v. Reliant Energy, Inc.*, 159 S. W. 3d 615 (Tex. 2005). The Texas Civil Justice League opposed the REPTL approach, preferring a much more restrictive transfer power.

2009 codification in a nutshell. The upshot of all this work on codification of the Probate Code in the 2009 session is:

- The new Estates Code now has 63 chapters affecting decedents' estates. While these chapters were enacted by the 81st Legislature, they will not be effective until January 1, 2014. Therefore, these changes are not explained in detail in this report. To see these provisions, go to the Texas Legislature Online website (www.capitol.state.tx.us) or to the author's Texas Probate Website (texasprobate.com).

- The provisions of the current Probate Code governing jurisdiction of decedents' estates and trusts (Sections 4 through 5A) were completely rewritten. While this rewrite was undertaken so that these changes would be found in the new Estates Code, SB 408 provides that they are effective September 1, 2009. These changes are discussed in detail below.

- REPTL's changes on probate venue and independent administration did not pass.

2. A Complete Rewrite of Probate Jurisdiction Statutes

Get out your pencils. SB 408 repealed Sections 4, 5 and 5A of the Probate Code and replaced them with new Sections 4A, 4B, 4C, 4D, 4E, 4F, 4G and 4H. (This numbering/lettering of the changes is the handiwork of the Legislative Council.) In addition, SB 408 amended the definition of "probate proceeding" in Section 3(bb) and made minor conforming changes to Sections 5B of the Probate Code, Section 123.005 of the Property Code and various sections of Chapter 25 of the Government Code. Remember, these changes become effective September 1, 2009.

No more appertaining or incident to estates. The key to understanding the new jurisdiction provisions is to realize that the phrase "appertaining to an estate" and "incident to an estate" are deleted in favor of the concept of a "probate proceeding." In most cases probate jurisdiction will be based on whether or not a matter is a "probate proceeding" or a "matter related to a probate proceeding." Under the new definition in Section 3(bb), a "probate proceeding" means "a matter or proceeding related to the estate of a decedent" and includes:

1. the probate of a will, with or without administration of the estate;

2. the issuance of letters testamentary and of administration;

3. an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;

4. an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;

5. a claim arising from an estate administration and any action brought on the claim;

6. the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate; and

7. a will construction suit.

Different rules for three different types of counties. New Section 4A provides that all "probate proceedings" must be filed and heard in a court exercising original probate jurisdiction. These are the same courts that exercised probate jurisdiction under prior law – constitutional county courts in counties with no county court at law or statutory probate court, constitutional county courts and county courts at law in counties having no statutory probate court, and statutory probate courts in counties having such courts. In addition to having jurisdiction to hear "probate proceedings," those courts also have jurisdiction "of all matters related to the proceeding" as specified in Section 4B for that type of court. Section 4B states what are "matters related to a probate proceeding." As with the former statute, a court's jurisdiction broadens as one moves up the ladder in counties with these types of courts.

Counties with no county court at law or statutory probate court. The most narrow list of "matters related to a probate proceeding" applies to those counties with only a constitutional county court. The list of matters that those courts can hear is drawn from prior law, but there is an interesting twist: the constitutional county court can hear "a claim brought by a personal representative on behalf of an estate" and "an action brought against a personal representative in the representative's capacity as personal representative." New Probate Code Section 4B(a) (2) and (3). This was taken from old Section 5A(a), which defined "appertaining to estates" and "incident to an estate" for purposes of actions in counties without a statutory probate court as including "all claims by or against an estate." While at first glance the new language looks like a mere clean-up of the old language (we all know that claims are brought by or against *the personal representative of* an estate, not against the estate), the new language looks very similar to the so-called "by or against" jurisdiction of statutory probate courts under the old scheme. *See, e.g.*, Sections 5A(b) and 5B(a).[1]

So can I try my $10,000,000 breach of contract case in a constitutional county court? This appears to mean that *any* type of action involving a claim brought on behalf of an estate or against the personal representative of an estate can be heard in a constitutional county court. For example, a multi-million-dollar breach of contract action to which the personal representative of an estate is a party may be eligible to be heard in a county court with a non-lawyer judge. True, in the case of a contested

1 In a way, it will be sad to leave behind the old Probate Code, where one may make an absurd reference like "*See, e.g.*, Sections 5A(b) and 5B(a)" with a straight face.

proceeding any party can request the appointment of a statutory probate judge to hear the case or the transfer of the case to a district court – that scheme under prior law remains essentially unchanged. *See* new Sections 4D and 4E. Still, this raises the possibility of entering agreed judgments in constitutional county courts for amounts which otherwise would exceed the court's jurisdictional limits so long as one of the parties is the personal representative of a decedent's estate.

Counties with county court at law but no statutory probate court. A somewhat broader list of "matters related to a probate proceeding" applies to counties with a county court at law but with no statutory probate court. In addition to all of the actions over which counties with no county court at law may exercise jurisdiction, the constitutional county court and the county court at law in counties with a county court at law but no statutory probate court may hear matters involving the interpretation and administration of an inter vivos or testamentary trust created by the decedent. New Section 4B(b)(2) and (3). REPTL asked the Legislature to add this limited trust jurisdiction to those medium-sized counties to avoid the jurisdictional dilemma of having to probate a will in the constitutional county court or county court at law but having to file an action involving a trust created under that will in the district court.

Trust matters to be heard in county courts at law – and some constitutional county courts. This change will allow both the traditional probate aspects and the trust construction or modification action to occur in the same court – the constitutional county court or the county court-at-law. While the intent of the change was to permit this result in cases before county courts at law in medium-sized counties, note that the statute permits the same result in the constitutional county courts of those counties. In many counties, the constitutional county court hears a significant number of probate cases. This change will permit those courts to approve agreed judgments modifying trusts created by a decedent whose estate is pending in that court. (Contested matters likely will draw the assignment of a statutory probate judge or transfer to a district court – see new Sections 4D and 4E.) Note that this does *not* give these courts the same broad jurisdiction over trusts that statutory probate courts have. Statutory probate courts may hear matters involving any trust whether or not it is related to a pending probate proceeding, while constitutional county courts and county courts at law in counties with no statutory probate courts may hear trust matters only if they relate to a pending probate.

Counties with statutory probate court. At the top of the ladder are the counties with statutory probate courts. The statutory probate courts of those counties may hear any cases that the courts in other counties may hear, plus they may hear:

- any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative. New Section 4B(c)(2) (compare with Section 4B(a)(2) and (3), discussed above).

- An action by or against a trustee and an action involving an inter vivos trust, testamentary trust, or charitable trust. New Section 4G(1) and (2) (taken from old Section 5(e)).

- An action against an agent or former agent under a power of attorney and an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney. New Section 4G(3).

New power of attorney jurisdiction. The jurisdiction of statutory probate courts with respect to

powers of attorney is new. Under prior law, many power of attorney disputes ended up in statutory probate courts because they arose in connection with a guardianship proceeding or a decedent's estate. Under the new law, statutory probate courts will have direct jurisdiction over power of attorney disputes even if no guardianship or estate is pending.

Concurrent jurisdiction remains. Statutory probate courts also retain concurrent jurisdiction with district courts in trust matters and in personal injury, survival or wrongful death actions by or against a person in the person's capacity as a personal representative of a decedent's estate. New Section 4H(1).

New provisions do not apply to guardianships – yet. The 2009 codification bills only applied to decedents' estates. Therefore, the changes to probate jurisdiction made by SB 408 apply only to decedents' estates (with a few extras like powers of attorney and trusts), not to guardianships. The effort to codify the guardianship statutes will be made in 2011.

Effective date issues. On January 1, 2014, the new jurisdiction statutes will become effective as Chapters 31 and 32 of the new Estates Code. In the meantime, they apply "an action filed or a proceeding commenced on or after" September 1, 2009. While SB 408 is unclear on this point, the author believes this means that, for an estate that already is subject to administration on September 1, 2009, the new rules will apply to any "probate proceeding" or "matter related to a probate proceeding" filed on or after September 1, 2009, with respect to that estate.

3. *In Terrorem* Provisions in Wills and Trusts

When does a no contest clause go too far? Previously, Texas had no statute expressly addressing the enforceability of in terrorem, or no-contest, provisions in wills and trusts. Certain provisions of the Trust Code could be read as having some bearing on the issue, but the Texas cases on enforceability of these provisions usually came down to common law precedents and public policy considerations.

New statutes on forfeiture clauses. That changed on June 19, 2009, when HB 1969 took effect. (Note that this was one of the few bills that does not become effective on September 1. It became effectively immediately upon being signed by the governor.) HB 1969 adds Section 64 to the Probate Code and Section 112.038 to the Trust Code. The two sections are virtually identical – one applies to wills and the other applies to trusts. Here's what new Section 64 of the Probate Code says:

> A provision in a will that would cause a forfeiture of a devise or void a devise or provision in favor of a person for bringing any court action, including contesting a will, is unenforceable if:
>
> (1) probable cause exists for bringing the action; and
>
> (2) the action was brought and maintained in good faith.

What does that mean? While the new statute is short and sweet, many questions remain about what effect it will have on the use and enforceability of forfeiture clauses. Here are a few:

- What is the effect, if any, of the amendments to HB 1969? As introduced, the bill would have provided that a provision in a will that "purports to penalize an interested person for contesting the will" is unenforceable if probable cause exists for "commencing the contest" and if "the contest was brought in good faith." During its trip through the legislature, the applicability of Section 64 was broadened to include "bringing [not commencing] any court action, including contesting a will." On the other hand, the broad "purports to penalize an interested person" for contesting a will was narrowed to "cause a forfeiture of a devise or void a devise or provision in favor of a person" for bringing a court action. Perhaps most significantly, Section 64(2) was amended so that, to avoid forfeiture, the action must be "brought *and maintained*" in good faith.

- What about forfeiture provisions applicable to actions other than contesting a will? For example, what if the forfeiture clause purports to apply if a beneficiary merely questions the actions of a fiduciary or if the beneficiary testifies in favor of the party contesting the will but does not bring the action? Since the beneficiary in these cases did not "bring an action," is the provision enforceable? The Texas Supreme Court recently has shown a tendency to rule that the existence of a statutory provision on a given subject eliminates any common law right or duty on the same subject. See, e.g., *Texas Commerce Bank v. Grizzle*, 96 S. W. 2d 240 (Tex. 2002) (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, leading to legislative changes to address the issues raised) and *Kappus v. Kappus*, ___ S. W. 3d ___ (Tex. May 15, 2009) (since conflict of interest was not listed as a grounds for removing an independent executor in Probate Code Section 149C, court could not remove the independent executor for conflict of interest, absent other grounds meeting the bases for removal listed in the statute). Perhaps a court will read Section 64 as the exclusive basis for finding a forfeiture provision to be unenforceable even if sound public policy reasons exist for finding the provision to be unenforceable.

- How should practitioners change the forfeiture clauses placed in their documents in light of HB 1969? Presumably, including the limitations of the statute in the forfeiture clause will make it less likely that a court will find that the clause is too broad. Previously, the conventional wisdom was that forfeiture clauses should be used very sparingly so that the contestant could not point to their inclusion in every will drafted by the practitioner as a basis for avoiding enforcement. This may no longer be the case.

- What effect does the new statute have on forfeiture clauses which purport to apply to the contestant and his or her descendants? In many cases a contestant will not be deterred by a forfeiture clause if its enforcement means that the contestant's children will receive what the contestant otherwise would receive. Since Section 64 only applies to persons "bringing an action," what happens to the interests of that person's descendants?

- Ultimately, does the new statute make it easier or harder to avoid enforcement of a forfeiture clause? At first glance, the new statute seems to favor will contestants. Upon further review, there are gems here for will proponents and fiduciaries. Perhaps the most likely result of the enactment of Section 64 is that virtually every forfeiture clause will be an issue for the jury.

4. Other Changes Affecting Decedents' Estates

No need to list old divorces on probate applications. For applications to probate wills filed on

or after September 1, 2009, it is no longer necessary to list divorces of the decedent which occurred prior to the date of his or her will. HB 1460 amends Section 81 of the Probate Code, which is applicable when letters testamentary are sought. HB 1461 amends Section 89A of the Probate Code, applicable with probating a will as a muniment of title. Any dissolution of a marriage occurring after the testator made his or her will must be listed since the dissolution may affect who receives estate property and who serves as fiduciaries. *See* Probate Code Section 69. Divorces occurring after the making of a will must be listed since there is no change to Section 49, which applies to determination of heirship proceedings and which requires each marriage of the decedent to be listed, including information regarding its termination. The new provisions apply only to decedents who die testate.

5. Changes Affecting Guardianships

A single-signature alternative for guardianship declarations. Sections 667A and 669 of the Probate Code were amended by HB 3080 (as part of REPTL's 2009 legislative package) to permit a single-signature alternative for declarations of guardian by parents for minor and incapacitated children (Section 677A) and for declarations of guardian by adults for themselves before the need for a guardianship arises (Section 669). Previously, the statutory form for these declarations required the principal and two witnesses to sign the declaration and a self-proving affidavit. That method still is permitted. However, beginning with declarations made on or after September 1, 2009, a new form may be used which, in essence, combines the declaration and self-proving affidavit so that the principal and two witnesses may sign just once. REPTL also proposed a similar change to Section 59 of the Probate Code to permit testators and witnesses to sign only once when executing a will, but that bill failed to pass in the end-of-session chaos.

Guardians may qualify for pay-as-you-go compensation. Under prior law, a guardian usually had to wait until his or her annual account was approved prior to receiving compensation for serving as guardian. This made sense, since compensation usually is based on five percent of income plus five percent of disbursements under Section 665 of the Probate Code. This often created a hardship for the guardian of limited means or who depended upon a steady flow of income. HB 3080, which was part of REPTL's 2009 legislative package, amended Section 665 to permit an interested person (presumably the guardian) to apply to the court to be paid in quarterly installments in an "estimated amount the court finds reasonable" if the court finds that delaying the payment of compensation until the filing of the annual accounting "would create a hardship" for the guardian. Section 665(c)(1). Section 665(c) also permits the court to modify the guardian's compensation if the court finds that compensation based on the 5%-in/5%-out formula in Section 665(a) is "unreasonably low when considering the services rendered as guardian. . . ." Thus, the quarterly payments of a reasonable estimated amount approved by the court can exceed the probable 5%-in/5%-out amount if it is likely (or certain) that this formula will yield an amount of compensation that is unreasonably low. The quarterly payments will be particularly useful in cases where there is little or no property held by a guardian of the estate but where there is another source of funds (such as a trust) from which the guardian of the estate may be paid. Note, however, that the court retains the power to reduce or eliminate the guardian's compensation if, on review of the annual account, the court finds that the guardian received excessive compensation or did not adequately perform his or her duties. Section 665(d). In that case, the guardian and his or her surety are liable to the guardianship estate for return of any excess compensation received. Section 665(d-1).

Payment of attorneys' fees. Section 665B of the Probate Code was amended by HB 3080 to

permit the court to approve the payment of attorneys' fees for a person who applies for creation of a guardianship management trust under Section 867 regardless of whether an 867 trust is created. That same section also was amended by HB 587 to provide that attorneys' fees may be paid from the county treasury only if the court is satisfied that the attorney to whom the fees will be paid will not receive additional compensation from another source. HB 3080 also adds Section 665D to the Probate Code, which requires attorneys serving as guardian to provide the court with a detailed description of time spent on "guardianship services" and time spent on "legal services." Guardianship services are compensated under Section 665, which generally provides for compensation on a 5%-in/5%-out basis. The guardian may be paid for legal services at appropriate rates for attorneys' fees in accordance with Sections 665A, 665B and 666.

Compensation of guardians for recipients of medical assistance. SB 2435 added Section 670 to the Probate Code to permit compensation of guardians for a recipient of government-paid medical assistance in an amount not to exceed $175 per month and to permit reimbursement for "costs directly related to establishing or terminating the guardianship" in an amount not to exceed $1,000 (although the court is permitted to order reimbursement of costs exceeding $1,000 in some cases).

Changes to physicians' certifications. In a bill that was carefully negotiated to address subtleties beyond the scope of this paper, Section 687 was amended to tweak the contents required in a physician's certificate as a prerequisite to granting an application to appoint a guardian. The changes made by SB 2344 apply both to the certificates required of persons whose alleged incapacity is based on mental retardation and persons whose alleged incapacity is not based on mental retardation. The new certificate requirements apply to applications for creation of a guardianship filed on or after September 1, 2009.

Other guardianship changes. Other guardianship changes include specifying when the Department of Aging and Disability Services (DADS) may be appointed as a successor guardian (SB 271) and changes affecting private professional guardians, public guardians and persons required to be certified by the Guardianship Certification Board (SB 1055),

6. Guardianship Management Trusts and Pooled Trust Subaccounts

HB 3080 made significant changes affecting guardianship management trusts created under Section 867 of the Probate Code, and, in particular, small 867 trusts and special needs trusts.

Non-financial-institution trustees. HB 3080 makes it easier to have a trustee of an 867 trust who is not a bank or trust company. The court may appoint an individual, a non-profit corporation qualified to serve as guardian or a guardianship program as trustee of an 867 trust in these circumstances:

1. The court must find that appointing the individual, non-profit corporation or guardianship program is in the ward's or incapacitated person's best interests; and

2. If the value of the trust's principal is more than $150,000, the court also must find that the applicant for the creation of the trust, after the exercise of due diligence, has been unable to find a financial institution in the geographic area willing to serve as trustee.

Probate Code Section 867(c), (d) and (e). The key changes are (1) increasing the floor for the additional finding from $50,000 to $150,000; (2) requiring the applicant to show that he or she, with "due diligence," could not find a bank or trust company "in the geographic area" willing to serve; and (3) permitting non-profit corporations eligible to serve as guardian and guardianship programs to serve as trustee of 867 trusts.

Pay-as-you-go compensation possible. Since the basis for compensation of trustees of 867 trusts is Section 665, which applies to guardianship compensation, the changes to Section 665 discussed above also apply to compensation of trustees of 867 trusts. This means that the trustee may apply to the court for quarterly compensation of an estimated reasonable amount, subject to the possibility that the court will reduce or deny compensation upon review of the trustee's annual account. Quarterly compensation requires a finding that delaying the compensation until after the filing of the annual account "would create a hardship" for the trustee. Section 665(c)(2). The trustee's compensation may exceed the 5%-in/5%-out formula set forth in Section 665(a) if, upon application to the court, the court finds that the compensation determined by that formula "is unreasonably low when considering the services rendered" by the trustee. Section 867(c)(1). Therefore, upon a finding that the 5%-in/5%-out formula is likely to be unreasonably low and a finding that delaying compensation would create a hardship, the court can set the quarterly compensation of the trustee in an estimated amount, subject to later adjustment.

Pooled trust subaccounts. One alternative to using a Section 867 trust for a small special needs trust is to establish a subaccount in a "pooled trust" meeting the requirements of 42. U.S.C. Section 1396p(d)(4)(C). The most popular pooled trust in Texas is administered by the ARC of Texas. That pooled trust typically can accept subaccounts with a much smaller balance than most corporate trustees can effectively administer as an 867 trust. However, until now there was no express statutory authority for transferring an incapacitated person's property to a pooled trust. HB 3080 adds Subpart I to Chapter 13 of the Probate Code (new Sections 910 through 916) and adds Section 868C to the provisions governing 867 trusts. These statutes permit:

- transfer to a pooled trust subaccount from a guardianship;
- transfer to a pooled trust subaccount from an 867 trust; and
- transfer to a pooled trust subaccount when no guardianship or 867 trust previously existed.

The new provisions require the appointment of an attorney ad litem for the person (Section 912), set forth the required terms of the subaccount (Section 914) and address the compensation of the manager or trustee of the pooled trust (Section 916). These provisions permit application for the establishment of a pooled interest subaccount on or after September 1, 2009.

7. Changes Affecting Trusts

Ah, what could have been. . . . This was a relatively light session for changes affecting the Trust Code. Two potentially significant changes were proposed but did not pass. First, the Texas Bankers' Association (TBA) backed HB 990, which would have amended Trust Code Section 112.036 to permit trusts to last up to 200 years. This attempt to lessen the effects of the rule against perpetuities in Texas got further than prior efforts – the bill got out of committee in the House – but it failed to pass. Second, REPTL and TBA had jointly urged passage of provisions contained in the REPTL Trust Code

bill (HB 2368) to address the problem of trustees directed to act by trust protectors or trust advisors, but disagreements with the bill's author, Rep. Will Hartnett of Dallas, caused those provisions to be dropped.

Discretionary powers; tax savings. REPTL's HB 2368 added Section 113.029 to the Trust Code to protect drafters of trusts from unintentionally causing tax problems for the trustee. Section 113.029(b)(1) provides that, if a trustee has the power to make distributions to himself or herself or for his or her benefit, that power will be limited by the familiar "health, education, support or maintenance" ascertainable standard within the meaning of Sections 2041(b)(1)(A) and 2514(c)(1) of the Internal Revenue Code. This keeps the property in the trust from being subject to a general power of appointment for tax purposes. Section 113.029(b)(2) prohibits the trustee exercising a power to make discretionary distributions to satisfy the trustee's legal obligation to support another person. The new statute permits the remaining co-trustees to exercise the powers prohibited by Section 113.029(b). It also carves out exceptions for certain marital deduction trusts, trusts which are revocable or amendable by its settlor and trusts established under Section 2503(c) of the Internal Revenue Code. The settlor may override the restrictions imposed by Section 113.029(b), but only by including terms in the trust which "expressly indicate that a requirement provided by this subsection does not apply. . . ." Merely stating that the trustee has "absolute," "sole," or "uncontrolled" discretion does not override the statute; rather, trustees with such discretion still must "exercise a discretionary power in good faith and in accordance with the terms and provisions of the trust and the interests of the beneficiaries." Section 113.029(a). This subsection could have consequences beyond the tax savings goals of Section 113.029, although its requirements largely are consistent with case law. These new requirements – and the potential tax savings benefits – apply only to trusts which are created or become irrevocable on or after September 1, 2009.

Relocation of administration of charitable trust. SB 666 adds "another" Section 113.029 to the Trust Code to restrict the ability of the trustee of a charitable trust to move the grant-making function of the trust from a location in Texas to a location outside Texas. For these purposes, a "charitable trust" is a trust benefiting "only one or more charitable entities." Section 113.029(a)(2). Thus, the new statute will not apply to trusts with both charitable and non-charitable beneficiaries. The statute requires the trustee desiring to move the grant-making function from Texas must consult with the settlor, if living, and must submit the proposal to the attorney general. The relocation requires a court proceeding which may be initiated by the trustee or the attorney general. The trustee may not move the grant-making function from Texas unless (1) the court finds that the charitable purposes of the trust would not be impaired if the grant-making function is moved and (2) the court approves the relocation. SB 666 becomes effective September 1, 2009, but it applies to existing trusts and pending probate administrations as well as trusts created and persons dying after September 1, 2009.

Other Trust Code changes. REPTL's HB 2368 amends Section 115.014 to permit a court to appoint an attorney ad litem. Previously the statute permitted the appointment of only guardians ad litem. That bill also amends Section 116.172, making technical changes to the income allocation rules for deferred compensation plans. It permits or requires the allocation of principal and income to be based on performance of a separate fund in certain cases. HB 3635 amends Section 113.085 to address what happens when a co-trustee is suspended or disqualified. HB 1969, discussed above, adds Section 112.038 regarding the limitations on enforceability of a trust contest clause.

8. Homesteads Held in Trust

Homestead protection retained, or is it? Estate planning practitioners long have worried that some or all of the homestead protection afforded Texans could be lost if the homestead was transferred to a revocable inter vivos trust. The homestead exemption for ad valorem tax purposes can be preserved by compliance with the "qualifying trust" requirement found in Section 11.13(j) of the Tax Code. Questions about the homestead protection from creditors and the homestead right of occupancy remained.

Enter HB 3767. HB 3767 attempts to extend homestead protection from creditors to property placed in a "qualifying trust" by enactment of Section 41.0021 of the Property Code. The qualifying trust definition was adapted from Section 11.13(j) of the Tax Code. A "qualifying trust" for purposes of Section 41.0021 means a trust where the settlor or beneficiary has the right to (A) revoke the trust, (B) exercise an inter vivos general power of appointment over the homestead property in the trust, or (C) use and occupy the residential property as his or her principal residence at no cost other than payment of taxes or other costs or expenses. Section 41.0021(a). Compliance with the section means that the property in the qualifying trust "is considered the homestead of the settlor or beneficiary under Section 50, Article XVI, Texas Constitution, and Section 41.001" of the Property Code. This is intended to protect the homestead property from seizure by a creditor of the settlor or beneficiary during his or her lifetime, so long as the property otherwise qualifies as a homestead.

Spousal consent required to transfer into trust, but not to transfer out of trust. Section 41.0021(c) provides that a married person who transfers property into a qualifying trust must comply with the requirements relating to the joinder of the person's spouse in the transfer of homestead property provided in Chapter 5 of the Family Code. However, once the property is properly in a qualifying trust, the trustee may sell, convey or encumber the property without the joinder of either spouse unless expressly prohibited by the trust instrument. Section 41.0021(d).

What about homestead occupancy rights? Section 41.0021(e) provides that the new section "does not affect the rights of a surviving spouse or surviving children under Section 52, Article XVI, Texas Constitution, or Part 3, Chapter VIII, Texas Probate Code." It is unclear what happens to the rights of the surviving spouse and surviving children to occupy the so-called probate homestead when the homestead is not in the probate estate. Use of a qualifying trust may cause the loss of those rights.

Title insurance on homestead property in trust. HB 3768 adds Subsection (g) to Section 2703.101 of the Insurance Code to extend title insurance coverage to a person who inherits residential real property, to a spouse who receives residential property in a divorce, to a trustee and successor trustee of a trust to which residential real property is transferred and to a beneficiary of such a trust.

9. Repeal of Claim for Economic Contribution

The return of equitable right of reimbursement. Back in 1999 the Legislature created a statutory claim for economic contribution to replace equitable right for reimbursement previously available to spouses. Tex. Fam. Code §3.401 *et seq.* The 1999 change came from the family law bar, and probate attorneys had to adjust to the new scheme. In 2009, the family bar decided it liked rights

for reimbursement better than statutory claims for economic contribution, so SB 866 rids our statutes of the statutory claims for economic contribution in favor of good ol' rights of reimbursement. Amended Section 3.402 lists the elements of a claim for reimbursement. Under Section 3.406, an equitable lien may be imposed when the marriage ends (whether by death or divorce), but imposition of the lien is not mandatory. Section 3.410 makes it clear that marital property agreements executed under the prior law which waived statutory claims for economic contribution shall be read to waive the corresponding rights of reimbursement.

10. Written Authorization of Nonparent Relative to Act for Child

A new planning tool for parents with minor children. Planners have a new tool in their toolbox for parents with minor children. SB 1598 enacts new Chapter 34 of the Family Code, which permits either or both parents to enter into an "authorization agreement" with a grandparent, adult sibling or adult aunt or uncle of a minor child. Under the agreement, the relative is authorized to:

- Authorize medical treatment and release of medical information.
- Obtain health and automobile insurance.
- Enroll the child in day-care or school.
- Authorize participation in extracurricular activities.
- Authorize obtaining a driver's license.
- Authorize employment.
- Apply for and receive public benefits.

Section 34.002.

Authorization agreement survives death or incapacity of parent. Section 34.003 sets forth the required contents of an authorization agreement, including a statement that the authorization agreement is valid until revoked and continues in effect after the death or during any incapacity of the parent. If these agreements survive the parent's death or incapacity, this becomes a possible alternative to a designation of guardian under Section 677A of the Probate Code. A guardian's authority is broader, he or she must be bonded and there is closer court supervision, but it requires a court procedure that can be expensive. The authorization agreement does not require court action in order for the named relative to act.

Limited to grandparents, adult siblings and adult aunts and uncles. The most significant factor limiting the use and effectiveness of authorization agreements is likely to be that they may be used only with caregivers who are grandparents, adult siblings, adult aunts or adult uncles of the child. They cannot be used with caregivers who are not related to the child or who are a more distant relative than that permitted by the statute.