

2007 TEXAS LEGISLATIVE UPDATE: INTESTACY, WILLS, TRUSTS, AND RELATED MATTERS

by

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This article reviews the legislation enacted by the 2007 Texas Legislature relating to the Texas law of intestacy, wills, estate administration, trusts, and other estate planning matters. The reader is warned that not all recent legislation is presented and not all aspects of each cited statute are analyzed. You must read and study the full text of the legislation before relying on it or using it as authority.

I. INTESTACY

A. Disqualification of “Bad” Parent

Under certain circumstances, a bad parent will not be able to inherit from his or her minor child or, in some cases, from any minor child under new Probate Code § 41(e) & (f) effective only with regard to an intestate who dies on or after September 1, 2007. Acts 2007, 80th Leg., ch. 1412, § 2.

1. Conditions triggering “disinheritance”

a. Court order

Even if all of the conditions of disinheritance are met, the disinheritance is not automatic. It must be declared by the court.

b. Deceased child under age 18

If child lives until age 18, disinheritance does not occur regardless of the parent’s bad acts. The reason underlying this condition is that once the child reaches age 18, the child may now write a will.

c. Evil acts triggering disinheritance

The statute provides three types of evil acts which may act to support a court judgment disinheriting a parent.

- The parent voluntarily abandoned and failed to support the child in accordance with the parent’s obligation or ability for at least three years before the date of the child’s death and had not yet resumed support by time of the child’s death.
- The parent voluntarily and with knowledge of the pregnancy, abandoned the mother and did not provide adequate support or medical care for the mother during the period of abandonment before the birth of the child and has remained apart from and has failed to support the child since birth.
- The parent was criminally responsible for death or serious injury to “a” child according to a laundry list of penal statutes.

d. Evil acts proved by clear and convincing evidence

The parent’s evil acts must be proved by more than preponderance of the evidence but do not need to be demonstrated beyond a reasonable doubt.

2. *Effect of disinheritance*

The evil parent will be treated as having predeceased the child.

3. *Potential problems with statute*

a. Unconstitutional

Article I, § 21 of the Texas Constitution provides that “[n]o conviction shall work * * * forfeiture of estate.” Accordingly, it is arguable that this new provision is unconstitutional. Note that Texas does not have a slayer statute applicable to an intestate heir or will beneficiary who murders the intestate or testator to accelerate receiving the property. Instead, the Texas courts prevent unjust enrichment by imposing a constructive trust so that title to the ill-gotten property actually passes to the murderer who then holds the property as a constructive trustee for the individuals who are “rightfully” entitled to it.

b. Too narrow

Disqualification occurs only if the bad acts are done by a parent. Thus, if another heir such as a grandparent or sibling engages in the evil acts, the heir may still be able to inherit.

c. Too broad

Section 41(e)(3) references “a child,” not “the child” like § 41(e)(1) and (e)(2). Accordingly, a person could be precluded from inheriting from a child for conduct that did not involve the intestate child.

II. WILLS

A. Nuncupative Wills

As of September 1, 2007, Texans may no longer make nuncupative, that is, oral, wills of personal property under the very limited circumstances previously allowed. Acts 2007, 80th Leg., ch. 1170, § 5.05 (repealing Probate Code §§ 64 & 65).

B. Divorce

Prior to the 2007 amendments to Probate Code § 69, only will provisions in favor of the ex-spouse were read as if the ex-spouse predeceased the testator. See *Estate of Nash*, 220 S.W.3d 914 (Tex. 2007). This gave rise to two problems.

1. Gifts conditioned on survival

Assume that Harry’s will contained a provision stating, “I leave \$100,000 to Wanda, my wife. If she does not survive me, I leave this \$100,000 to Sammy, my son. I leave the remainder of my estate to the American Red Cross.” Harry and Wanda were divorced and Harry died without changing his will. The gift to Wanda is read as if she predeceased Harry so she does not receive the legacy. However, the condition on Sammy’s gift, that is, that Wanda not survive Harry, was not satisfied and thus Sammy would not have received the legacy and it would have passed to the American Red Cross.

Revised § 69 provides that “all provisions in the will * * * shall be read as if the former spouse * * * failed to survive the testator” and thus Sammy would now receive the legacy. Acts 2007, 80th Leg., ch. 1170, § 4.02.

2. Gifts to other ex-relatives

Assume that Harry’s will contained the following provision, “I leave \$100,000 to Wanda, my wife. I leave another \$100,000 to her son, my step-son, Sammy. I leave the remainder of my estate to the American Red Cross.” Although Wanda’s gift would not have been effective under prior law, Sammy would still have received his legacy.

Section 69 now provides that the will is read as if “the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator.” Acts 2007, 80th

Leg., ch. 1170, § 4.02. Accordingly, other ex-relatives (step-children, parents-in-law, etc.) will not continue to be beneficiaries after divorce.

C. Deposit of Will With County Clerk

The fee to deposit a will with the county clerk for safekeeping under Probate Code § 71 was increased from \$3 to \$5. Acts 2007, 80th Leg., ch. 275, § 1.

III. DECEDENT'S ESTATES GENERALLY

A. Voidable Marriages

The 2007 Legislature added Probate Code § 47A to authorize a court, under certain circumstances, to deem a decedent's current marriage void for lack of mental capacity even after the decedent has died. Acts 2007, 80th Leg., ch. 1170, § 4.01. This section was designed to "undo" marriages entered into due to the actions of conniving and/or abusive caregivers.

1. Types of voidable marriages

a. Proceeding pending at time of death

If a Family Code proceeding to void a marriage based on lack of mental capacity is pending at the time of death (or if the court has been asked to do so in a pending guardianship proceeding), the court may declare the marriage void despite the death of the decedent. The court must apply the same standards as for an annulment under the Family Code.

b. Proceeding not pending at time of death

If a proceeding to void a marriage based on lack of mental capacity is not pending at the time of death, the court may nonetheless deem the marriage void if all of the following conditions are met:

- The decedent entered into the marriage within three years of the decedent's death.
- An interested person files an application to void the marriage on the basis of lack of mental capacity within one year of the decedent's death.
- The court finds that the decedent lacked the mental capacity to consent to the marriage and understand the nature of any marriage ceremony that might have occurred.
- The court does not determine that after the date of the marriage, the decedent gained the mental capacity to recognize the marriage relationship and actually recognized the relationship.

2. Result if marriage deemed void

The surviving partner of the void marriage is not considered as the decedent's surviving spouse for any purpose under Texas law. For example, the surviving partner would not be able to receive an intestate share of the estate or claim homestead rights.

3. Effective date

The new statute applies not only a decedent who dies on or after September 1, 2007, but also to decedents who died earlier if the probate or administration is pending on September 1, 2007 or is commenced on or after September 1, 2007.

B. Child from Alternative Reproduction

The Legislature added Family Code § 160.7031 to provide a mechanism for a sperm donor to be considered the father of the resulting child despite §§ 160.702 and 160.703 which provide that a non-husband donor is not the child's father. Acts 2007, 80th Leg., ch. 972, § 40.

Here are the requirements which must be met for the sperm donor to be treated as the child's father:

- The sperm donor must be unmarried.
- The donee must be unmarried.
- The donor must intend to be the father of the resulting child.
- The donor must consent to be the father.
- The consent must be (1) signed by the donor, (2) signed by the donee, and (3) kept by a licensed physician. Neither the donor nor the donee may retain the consent.
- The donor must provide the sperm to a licensed physician. Accordingly, "do-it-yourself" artificial inseminations will not cause the donor to be the father, even if the man so intends.

IV. ESTATE ADMINISTRATION

A. Notice of Probated Will

The 2007 Legislature made enormous changes to the responsibilities of the personal representative (both dependent and independent) to give notice to the beneficiaries under Probate Code § 128A that the court has admitted the testator's will to probate. Acts 2007, 80th Leg., ch.

801, § 1. Prior to the change, only charitable beneficiaries were entitled to notice. Now, virtually all beneficiaries are entitled to notice.

The new notice duties apply only if the testator died on or after September 1, 2007.

1. Timing of notice

The personal representative must give any required notice not later than the 60th day after the date of an order admitting the testator's will to probate.

If the personal representative becomes aware of the identity and address of a beneficiary after the 60 day period, the personal representative must give notice to that beneficiary as soon as possible thereafter.

2. Beneficiaries entitled to notice

Unless an exception applies (see subsection 3, below), the personal representative must give notice to the beneficiaries as described in this section.

a. Status

The term "beneficiary" includes the following recipients of property named in the testator's will:

- Person
- Entity
- State
- Governmental agency of the state
- Charitable organization
- Trust

b. Survival presumed

If the beneficiary is alive on the date of the decedent's death, it will be assumed for purposes of giving notice that the person will outlive any survival period stated in the testator's will. Thus, the personal representative does not need to give notice to contingent or alternative beneficiaries who would take if the beneficiary fails to survive.

c. Ascertainable identity and address

The personal representative must give notice to each beneficiary whose identity and address the personal representative knows or could ascertain through reasonable diligence.

d. Trust

The personal representative normally satisfies the notice duty if a beneficiary is a trust by giving notice to the trustee of the trust.

However, if the personal representative is also the trustee, the personal representative must give notice to the beneficiaries of the trust who are first eligible to receive the trust income as if the trust were in existence (funded) on the date of the testator's death.

e. Beneficiary with guardian

If the beneficiary has a court-appointed guardian or conservator, the personal representative must give notice to that guardian or conservator.

f. Minor without guardian

If the beneficiary is a minor who does not have a court appointed guardian or conservator, the personal representative must give notice to one (not both) of the minor's parents. Prudent practice may be to give notice to both parents even though it is not required.

g. Charity

If the beneficiary is a charity that cannot be directly notified, the personal representative must give notice to the attorney general.

3. Beneficiaries not required to be noticed

a. Made an appearance

A beneficiary who has already made an appearance in the proceeding with respect to the testator's estate before the will was admitted to probate does not need to be given the notice as it is obvious the beneficiary already has knowledge of the probate proceeding.

b. Executed a waiver

The personal representative does not need to give notice to a beneficiary who has already received a copy of the probated will and has waived the right to receive notice in an instrument that (1) acknowledges the receipt of the copy of the testator's will, (2) is signed by the beneficiary, and (3) is filed with the court.

Note that the copy of the will which the beneficiary receives does not need to be a certified copy and the beneficiary does not need to receive a copy of the order admitting the will to probate. In addition, the waiver does not need to be acknowledged and thus notarization of the waiver is not necessary.

4. Contents of notice

The notice must contain the following:

- The name and address of the beneficiary and, if one of the special rules described in 2(d)-(g) above applies, the name and address of the person to whom the personal representative is giving notice.
- The testator's name.
- A statement that the testator's will has been admitted to probate.
- A statement that the beneficiary is named as a beneficiary in the will.
- The personal representative's name and contact information.
- A copy of the testator's will which was admitted to probate.
- A copy of the order admitting the testator's will to probate.

5. Service of notice

The personal representative must send the notice by registered or certified mail, return receipt requested. No other method (e.g., hand delivery, Federal Express, or fax) is allowed.

6. Proof of compliance

The personal representative must prove compliance with the duty to notify beneficiaries.

a. Timing

The personal representative must prove compliance not later than the 90th day after the date of order admitting a will to probate.

b. Filing of affidavit or certificate

The personal representative must file with the clerk of the court in which the testator's estate is pending a sworn affidavit. Alternatively, the personal representative's attorney may file a signed certificate.

The affidavit or certificate may be included with any other pleading or document filed with the clerk of the court such as the inventory, appraisal, and list of claims. Any such "coupled" filing must still comply with the timing requirement for the proof of notice.

c. Contents of affidavit

The affidavit or certificate must contain the following:

- The name and address of each beneficiary to whom the personal representative gave notice and, if one of the special rules described in 2(d)-(g) above applies, the name and address of the person to whom the personal representative gave notice.
- The name and address of each beneficiary who filed a waiver of notice.
- The name of each beneficiary whose identity or address the personal representative could not ascertain despite the exercise of reasonable diligence.
- Any other information necessary to explain why the personal representative could not give the required notice.

7. Forms

The following websites provide suggested forms for complying with the notice duties:

- <http://www.texasprobate.com/07leg/2007.htm> [authored by Glenn Karisch of TexasProbate.com]
- <http://www.texasprobate.com/forms/128APackage.doc> [authored by Judge Steve King of Tarrant County]

8. Ramifications and uncertainties

a. Increased cost and inconvenience

The new notice duties will increase the cost in terms of both time and money for many probates in Texas. The Legislature reasoned that this increased cost and inconvenience will help protect beneficiaries from unscrupulous personal representatives who probate wills and then use estate funds for their own unauthorized purposes.

b. The class gift problem

Many wills designate beneficiaries by class, such as “my children” or “my grandchildren.” The new law requires the personal representative to give notice to “each beneficiary named in the will.” It is thus uncertain whether class gift members are “named” so that they are entitled to notice. But, later in the same provision, the personal representative is required to ascertain the “identity” of the beneficiaries. Thus, it is arguable that the personal representative must use reasonable diligence to ascertain the membership of class gifts and provide the notice. Despite the ambiguity in the statute, prudent practice is to give notice to ascertainable class gift members.

c. What constitutes “reasonable diligence”?

The personal representative must use reasonable diligence to ascertain the identity and address of each beneficiary. The statute lacks guidance as to what actions constitute reasonable diligence. The personal representative should probably ask other beneficiaries, look in the telephone book, and use Google or some other Internet search engine. But, whether the personal representative needs to take further actions such as hiring a private investigator is uncertain.

d. No exception for nominal gifts

The personal representative must give the notice to beneficiaries even if they are only receiving nominal gifts. Thus, the cost of giving notice could be greater than the value of a beneficiary’s gift.

e. No exception for gifts to personal representative

If the personal representative is also a beneficiary as is often the case, the personal representative must either give him-/herself notice or file a waiver. Although this seems ridiculous, the statute contains no exception for gifts to the personal representative.

f. Probate as muniment of title

A court-appointed personal representative has the duty to give notice. When a will is probated as a muniment of title, the court does not appoint a personal representative. Accordingly, the notice duties do not apply when a will is probated as a muniment of title.

B. Lost Wills

Controversy exists over whether a copy of a lost will is sufficient to prove its contents. Until being amended by the 2007 Legislature, the statute provided that the contents must be proved “by the testimony of a credible witness who has read [the original] or heard it read.” Several recent cases focused on this issue including *Garton v. Rockett*, 190 S.W.3d 139 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.) (copy insufficient) and *In re Estate of Jones*, 197 S.W.3d 894 (Tex. App.—Beaumont 2006, pet. denied) (copy sufficient).

The addition of a supposed third method of proof to Probate Code § 85 by the 2007 Legislature, that is, by identification of a copy, does not appear to actually add a new method because of the difficulty of a person testifying that the document is “a copy of the will” if the person never read the original or heard the original read. Acts 2007, 80th Leg., ch. 1170, § 6.01.

C. Qualified Community Administration Abolished

The qualified community administration procedure under Probate Code §§ 161-167 and 169-176 was used when someone besides the surviving spouse had an interest in the community property, e.g., the deceased spouse has descendants who are not also the descendants of the surviving

spouse. The procedure was available if the will named no executor, the named executor failed to serve, or the decedent died intestate. The surviving spouse obtained powers akin to those of an independent executor but only with respect to community property. In many ways, the procedure was a “mini” independent administration in that the surviving spouse had to formally qualify, complete an inventory, appraisal, and list of claims, etc.

The 2007 Legislature completely abolished this procedure. Acts 2007, 80th Leg., ch. 301, § 7. The underlying reason for the abolition was that the procedure was not frequently used and thus there was no reason to retain it.

D. Waiver of Probate Fees for Certain Military Deaths

If a military servicemember dies while in active service in a combat zone, new Probate Code § 11A provides that the clerk of a county court may not charge the estate various probate fees for testate or intestate deaths. Acts 2007, 80th Leg., ch. 940, § 1.

E. Emergency Intervention Proceedings

The requirement of including the applicant’s social security number in emergency intervention proceedings for (1) funeral and burial expenses and (2) access to personal property were removed. Acts 2007, 80th Leg., ch. 1170 §§ 8.01 & 8.02 (amending Probate Code §§ 111 & 112).

F. Genetic Testing in Determination of Heirship Actions

The 2007 Legislature added a detailed procedure for genetic testing to assist the court in determining the proper heirs of an intestate decedent. Acts 2007, 80th Leg., ch. 566, § 1 (adding Probate Code §§ 53A-53E).

1. Who may request genetic testing?

The court *may* order genetic testing on its own motion and *must* do so upon the request of a party to the proceeding. Probate Code § 53A(a).

2. Number of individuals to be tested

The court may order genetic testing of one or more specified individuals. The court may order that the testing of multiple individuals be done concurrently or sequentially. Probate Code § 53A(a).

3. Cost of genetic testing

Unless otherwise assessed under Rule 131 of the Texas Rules of Civil Procedure, the cost of the genetic testing must be advanced (1) by a party to the proceeding who requests the testing, (2) as agreed by the parties and approved by the court, or (3) as the court orders. Probate Code § 53A(b).

4. Additional genetic testing

If a party contests the results of the genetic testing and requests additional testing, the court must order additional genetic testing. Probate Code § 53A(c). However, if the party is contesting a positive finding of an individual as an heir of the decedent, the court may order the additional testing only if the contesting party pays in advance for the additional testing. Probate Code § 53A(d).

5. Obtaining genetic material

a. Enforcement of genetic testing court order

If a person refuses to submit to genetic testing as ordered by the court, the court may enforce the order by contempt. Probate Code § 53A(a).

b. Testing relatives

If genetic material of the individual to be tested is not available, the court may order the testing of the individual's family members (e.g., parent, sibling, child, or other relative) if the court (1) makes a finding of good cause and (2) determines that the need for genetic testing outweighs the legitimate interest of the individual to be tested. Probate Code § 53A(e).

c. Testing decedents

If good cause is shown, the court may order the genetic testing of a deceased individual and order the removal (disinterment) of the deceased individual's remains to facilitate the testing. Probate Code § 53A(f).

6. Unauthorized use of genetic material

A person may be found guilty of a Class A misdemeanor if the person intentionally releases an identifiable sample of genetic material for a purpose not related to the proceeding to declare heirship unless the release was (1) ordered by the court or (2) done in accordance with the written permission of the individual who provided the sample. Probate Code § 53A(g).

7. Admissibility of genetic testing report

Assuming the report of the genetic testing complies with Family Code § 160.504, the report is admissible as evidence of the truth of the facts asserted in the report. Probate Code § 53B(a).

The rules in Family Code § 160.505 regarding the interpretation of genetic tests and how to rebut the results of the tests apply in the determination of heirship context. Probate Code § 53B(b).

A party who contests the results may call genetic testing experts to testify in person or by other means (e.g., telephone, videoconference, or deposition) but must bear the cost of the expert testifying unless the court orders otherwise. Probate Code § 53B(c).

8. Use of results of genetic testing

a. Heirship actions in which results may be used

The court may use the results of the genetic testing only with respect to an individual who (1) petitions the court for a determination of the right of paternal (*not* maternal) inheritance under Probate Code § 42(b) and (2) claims to be a biological child of the decedent (or to inherit through a biological child of the decedent) where there has been no parent-child relationship established under Family Code § 160.201. Probate Code § 53C(a).

b. Impact of results of genetic testing

Unless there is sufficient rebuttal evidence, the court shall find that the person who is determined by the genetic test to be (or not be) the parent or other ancestor to actually be (or not be) the parent or other ancestor for inheritance purposes. Probate Code § 53C(b), (c).

If the genetic tests do not identify or exclude a tested individual as an ancestor, then the court (1) may not dismiss the proceeding to declare heirship and (2) must admit the results of the genetic testing in the proceeding. Probate Code § 53C(d).

If the court finds good cause, the court may grant a person determined to be an heir a name change and may also order the bureau of vital statistics to issue an amended birth record. Probate Code § 53D.

9. Proceedings and records are public

A proceeding which involves genetic testing is open to the public. In addition, all papers and records in the proceeding are available for public inspection. Probate Code § 53E.

10. Caveats

The genetic testing procedure appears to be applicable only to establish inheritance through a man because of the wording of Probate Code § 53C(a)(1). Thus, genetic testing might not be available as a method to establish maternity.

The genetic testing procedure appears to be limited to determining that the individual claiming the right to inherit is a descendant of an ancestor. See Probate Code § 53C(b), (c). Thus, the procedure may not be available if a parent wishes to inherit from a child or a brother from a sister.

G. Venue for Determination of Heirship

Venue for a determination of heirship proceeding is now in the same county in which venue would be proper to open an administration of the decedent's estate under Probate Code § 6. No longer is venue proper just because the decedent owned real property in the county. Acts 2007, 80th Leg., ch. 1170, § 2.02 (amending Probate Code § 48(a)). The primary venue section, Probate Code § 8, was also amended to conform with this change. Acts 2007, 80th Leg., ch. 1170, § 2.01.

H. Necessity of Administration

A good reason or, as the Probate Code § 178(b) calls it, a “necessity” must exist before the court is authorized to issue letters of administration (unlike for letters testamentary where no necessity is required). Historically, there have been two situations giving rise to a necessity, that is, the existence of two or more debts or when a partition of the estate among the distributees is needed. The 2007 Legislature added a third situation, that is, “if the administration is necessary to receive or recover funds or other property due the estate.” Acts 2007, 80th Leg., ch. 1170, § 7.02.

I. Excuse for Executor Who Presents Will to Probate Late

Under the prior wording of Probate Code § 178(b), a named executor of a will who does not present the will for probate within thirty days after the testator's death may have lost priority to someone seeking to be appointed as an administrator with will annexed. The courts, however, did not take this approach. For example, in *Alford v. Alford*, 601 S.W.2d 408, 410 (Tex. Civ. App.—Houston [14th Dist.] 1990, no writ), the court explained that even if an executor waited more than the thirty days, “the court has no discretionary power to refuse to issue letters to the named executor” unless the executor would be otherwise disqualified. The 2007 Legislature somewhat codified this holding by requiring the court to find that there was no good cause for the executor not presenting the will for probate during the thirty day period before denying the named executor letters testamentary. Acts 2007, 80th Leg., ch. 1170, § 7.02. Conforming amendments were also made to Probate Code §§ 83(c) (second applications) & 190(b) (oath). Acts 2007, 80th Leg., ch. 1170, §§ 7.01 & 7.04.

J. Nuncupative Wills

As of September 1, 2007, Texans may no longer make nuncupative (oral) wills of personal property under the very limited circumstances previously allowed. Acts 2007, 80th Leg., ch. 1170, § 5.05 (repealing Probate Code §§ 64 & 65). Conforming amendments were made to Probate Code §§ 82, 91, 128(b), and 128A(a) (prior version) and Probate Code §§ 81(c), 86, and 89A(c) were repealed. Acts 2007, 80th Leg., ch. 1170, §§ 5.01-5.05.

K. Opposition to Grant of Letters of Administration

Under prior law, anyone had the ability to oppose an application for the grant of letters of administration even if the person had no interest in the decedent's estate. The legislature amended Probate Code § 179 so that only an interested person, as defined in Probate Code § 3(r), has standing to oppose an application for a grant of letters of administration. Acts 2007, 80th Leg., ch. 1170, § 7.03.

L. Exempt Property Expanded

A religious bible or other book containing sacred writings of a religion was added to the list of exempt property which is not included in the usual dollar limitations. However, the exemption does not apply if the creditor is the lessor of real property who is exercising the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement or abandons the property. Acts 2007, 80th Leg., ch. 444, § 1 (amending Property Code § 42.001).

M. Sale of Real Property in Dependent Administration

The 2007 Legislature simplified the process of selling real property in a dependent administration: Probate Code § 343 (setting of hearing on application) was repealed, Probate Code § 345A was added, and conforming amendments were made to Probate Code §§ 344 (citation), 345 (opposition to application), and 346 (order of sale). Acts 2007, 80th Leg., ch. 1170, §§ 9.01-9.05.

1. Citation

The citation which is issued after the personal representative applies to sell real property must inform the recipients of their right to file an opposition to the sale during a period of time set by the court. Probate Code § 344.

2. Procedure if no opposition filed

If no opposition is filed in a timely manner, then no hearing on the application to sell real property is required. However, the court has the discretion to require a hearing even if no opposition was filed. Probate Code § 345A(b).

3. Procedure if opposition filed

If an interested person files a timely opposition to the application to sell real property, the clerk must immediately call the judge's attention to the opposition. The court is then required to hold a hearing on the application. Probate Code § 345A(a).

4. Hearing

If a hearing is necessary, the court shall designate in writing a date and time to hear the application and the opposition, if any. The clerk must issue a notice to the applicant and to each person who filed an opposition to the sale which provides the date and time of the hearing. Probate Code § 345A(c). "The judge may, by entries on the docket, continue a hearing * * * from time to time until the judge is satisfied concerning the application." Probate Code § 345A(d).

N. Business Operation in Dependent Administration

Probate Code § 238 was substantially modernized to make it easier for a dependent personal representative to run the decedent's business, farm, ranch, or factory without the necessity of obtaining court permission for every action. Acts 2007, 80th Leg., ch. 668, § 1.

1. Prerequisites to order

The court may make an order granting the dependent personal representative powers to operate the decedent's business only if the following prerequisites are satisfied:

- All interested persons receive notice.
- The court conducts a hearing.
- The court considers the following factors:
 - The condition of the estate and the business,
 - The necessity that may exist in the future to sell the business or its assets to pay debts, claims, or other lawful estate expenditures,
 - The effect of the order on the speedy settlement of the estate, and
 - The best interests of the estate,
- The business was not specifically gifted in the decedent's will.
- It is not necessary to sell the business at this time to pay debts or for other lawful purposes.

- The court determines that it is in the best interest of the estate for the personal representative to operate the business.

Probate Code § 238(b), (f).

2. Powers granted to the personal representative

The personal representative will receive the following powers to operate the decedent's business:

- The powers which a dependent personal representative may traditionally exercise without court order under Probate Code § 234(b) unless the court specifically limits those powers. Probate Code § 238(c).
- The powers from the following list which the court specifically grants to the personal representative:
 - To hire, pay, and terminate the employment of the business's employees.
 - To incur debt on behalf of the business and to secure that debt by liens against business assets or the estate.
 - To purchase and sell property in the ordinary course of the operation of the business; the order may include this power for real property if the court finds that the principal purpose of the business is the purchase and sale of real property.
 - To enter into leases or contracts including those that may extend beyond the settlement of the estate if doing so appears consistent with the speedy settlement of the estate.
 - Any other power the court finds is necessary with respect to the operation of the business.

Probate Code § 238(d).

If the order grants the personal representative the power to purchase, sell, lease, or otherwise encumber real or personal property, the order governs such action and the personal representative does not need to comply with other Probate Code provisions regarding the purchase, sale, lease, or encumbrance of estate property, including provisions requiring citation or notice. Probate Code § 238(e).

3. Duties of personal representative who obtains order

A personal representative who obtains an order to operate the decedent's business has the following duties under Probate Code § 238(g) & (h):

- All of the same fiduciary duties as a personal representative who does not operate a business that is part of the estate.
- To consider the following facts in operating the business:
 - The condition of the estate and the business,
 - The necessity that may exist in the future to sell the business or its assets to pay debts, claims, or other lawful estate expenditures,
 - The effect of the order on the speedy settlement of the estate, and
 - The best interests of the estate.
- To report to the court with respect to the operation and condition of the business as part of the normal annual and final accountings unless the court orders more frequent reports or a different type of report.
- Prior to purchasing, selling, leasing, or otherwise encumbering any real property of the business, to file a notice in the real property records of the county in which the real property is located. This notice must contain (1) the name of the decedent, (2) the county of the court in which the decedent's estate is pending, (3) the cause number assigned to the pending estate, (4) notice that the court has entered one or more orders under Probate Code § 238, and (5) a description of the real property.

4. Protection of third parties

A third party who deals in good faith with a personal representative with respect to a transaction involving a purchase, sale, lease or other encumbrance of real property of a business may rely on the notice which the personal representative must file and any order which is entered under Probate Code § 238 and filed as part of the estate records maintained by the clerk of the court in which the estate is pending. Probate Code § 238(i).

O. Bond

The judge now has the authority to require a new bond without first giving notice to the personal representative or conducting a hearing. Acts 2007, 80th Leg., ch. 683, § 1 (amending Probate Code § 205). The order must state the reasons for the new bond, the amount of the new bond, and time within which the new bond must be given. The new bond may not be required sooner than the tenth day after the date of the order. If the personal representative objects, the personal representative may demand a hearing. The court must conduct the hearing before the expiration of the time within which the new bond must be given. Acts 2007, 80th Leg., ch. 683, § 1 (amending Probate Code § 206).

P. Administration of Community Property

Probate Code § 155 was amended to make it clear that the existence of special procedures for administering community property does not prohibit the administration of community property via other techniques. Acts 2007, 80th Leg., ch. 301, § 1.

Q. Acceleration of Child Support Obligation

If a person owing child support dies before the child support obligation terminates, the remaining unpaid balance of the child support obligation now becomes payable on the date of the person's death. Family Code § 154.015. The claim falls within Class 4 under Probate Code § 322. Acts 2007, 80th Leg., ch. 1404.

1. Determination of amount

The family court must determine the amount of the unpaid child support by applying the following factors:

- The present value of the total amount of child support payments that would have become due between the month the decedent died and the month the child turns 18.
- The present value of the total amount of health insurance premiums payable for the benefit of the child from the month the decedent died until the month the child turns 18.
- If the decedent owed support for a disabled minor child or an adult disabled child, then the court must consider any enhancements of support provided by Family Code 154.306.
- The nature and amount of any benefit to which the child may be entitled because of the decedent's death such as life insurance proceeds, annuity payments, trust distributions, social security death benefits, and retirement survivor benefits.
- Any other financial resource available for the support of the child.

If the court finds that the child support obligation has not been satisfied, the court must render a judgment in favor of the obligee, for the benefit of the child, in the amount of the unpaid child support. This obligee may then present this claim following the usual Probate Code procedures.

2. Problems

Despite the seeming public policy supporting this new statute, the statute is fraught with potential problems. Here are a few of them.

a. Child obtains windfall

Application of this statute may result in a child who is entitled to child support receiving a better deal, that is, a windfall, as compared to a child whom the decedent was supporting but who was not receiving child support. For example, assume that Mother has two children, A and B. Child A lives with her father and Mother pays child support. Child B lives with Mother. Mother dies unmarried and intestate. Father will have a claim against Mother's estate for the present value of the future child support. After paying this claim and her other creditors, Mother's remaining property, if any, is split equally between Child A and Child B. As a result, Child B gets a comparatively worse position because of the accelerated amount of child support for Child A.

b. Custodial parent obtains windfall

No provision is made for a refund to the decedent's estate if the child dies prior to reaching age 18. Thus, the custodial parent may receive a considerable windfall upon the child's death.

c. Custodial parent may misuse funds

The custodial parent receives a lump sum and thus may be tempted to misuse the funds. For example, the parent could spend the money immediately rather than investing it prudently for the child and taking just enough each month to substitute for the missing child support payment.

V. TRUSTS

A. Trustee's Duty to Keep Beneficiary Informed

The 2007 Legislature made changes to the trustee's duty to keep the beneficiaries informed of the trust and its activities. To place the changes into perspective, it is important to appreciate how this duty has been treated in the past under Texas law.

1. Prior to January 1, 2006

Prior to January 1, 2006, trustees had a duty to disclose information to the beneficiaries either (1) upon request or (2) if the trustee was going to take some material and unusual action. See Trust Code § 113.151 (beneficiary's right to an accounting) and *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984) (trustee has "duty of full disclosure of all material facts * * * that might affect [beneficiary's] rights"). The existence of this duty was well accepted and did not cause significant problems for trustees.

2. January 1, 2006 through June 15, 2007

a. Basic duty codified

The 2005 Legislature codified the duty to keep the beneficiary informed when it enacted Trust Code § 113.060. This section provided that the trustee had a duty to keep the beneficiaries

reasonably informed regarding (1) trust administration, and (2) the material facts necessary for the beneficiaries to protect their interests.

b. Permitted limitation by settlor

At the same time, the Legislature enacted Trust Code § 111.0035(a)(5)(A) which authorized the settlor to limit this duty but only if either (1) the beneficiary was under age 25, or (2) the beneficiary was not eligible for current distribution or for a distribution if the trust were to terminate now.

c. Problems

The codification of the duty to inform raised significant concerns for trustees including the following:

- What does “reasonably” mean?
- Do the beneficiaries need to be told about all trustee actions, even day-to-day activities, because notice of virtually all actions may be necessary if the beneficiaries want to protect their interests?

These problems and others were triggered by the way the Legislature carved § 113.060, a very short and undetailed provision, out of Uniform Trust Code § 813 which includes an extensive explanation of the duty and how it may be satisfied.

3. Starting June 15, 2007

The 2007 Legislature repealed the statutory duty (Trust Code § 113.060) and restored the common law duty. Acts 2007, 80th Leg., ch. 451, § 21 (“The common-law duty to keep a beneficiary informed that existed immediately before January 1, 2006, is continued in effect.”).

However, under new Trust Code § 111.0035(c), the settlor may limit the duty to keep the beneficiary informed under the following conditions:

- The trust is revocable,
- The beneficiary is under age 25, or
- The beneficiary is not eligible for current distributions or a distribution if the trust were to terminate now.

4. Recommendations

It the words of Glenn Karisch, the time has come for the “mother of all disclosures” so that a trustee may gain maximum protection for the potential enhanced duty to disclose that existed during the 17½ month window. He also recommends disclosing “everything the trustee can

think of to disclose, and disclose it to every beneficiary [who] can be located, regardless of remoteness.” Glenn M. Karisch, *2007 Legislative Update*, www.texasprobate.com (2007). By doing so, the trustee will lessen the chance of being removed by the court and delaying the start of the running of statutes of limitations which begins upon full disclosure.

B. Self-Dealing Waivers for Corporate Trustees

Under prior law, settlors and beneficiaries were prohibited from waiving or approving certain self-dealing conduct of corporate trustees such as purchasing trust property for themselves, selling their own property to the trust, and borrowing funds from the trust. The 2007 Legislature removed these restrictions and thus settlors and beneficiaries may now waive these duties for both individual and corporate trustees. Acts 2007, 80th Leg., ch. 451, § 2 (amending Trust Code §§ 111.0035 & 114.005).

C. Definition of “Person” Expanded

The type of entities that come within the purview of the term “person” under Trust Code § 111.004(10) was expanded to include limited liability companies, joint ventures, governments (including subdivisions, agencies, and instrumentalities), public corporations, and other legal and commercial entities. Acts 2007, 80th Leg., ch. 451, § 3.

D. Definition of Trustee Clarified

The term “trustee” as defined in Trust Code § 111.004(18) was modified to clarify that the term includes “an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court.” Acts 2007, 80th Leg., ch. 451, § 3.

E. Spendthrift Trusts

Trust Code § 112.035(d) was amended to clarify the situations in which a settlor will not be deemed to be a beneficiary of a spendthrift trust which would otherwise make the trust available to the settlor’s creditors. The settlor will not be deemed a beneficiary “solely because a trustee who is not the settlor is authorized under the trust instrument to pay or reimburse the settlor for, or pay directly to the taxing authorities, any tax on trust income or principal that is payable by the settlor under the law imposing the tax.” Acts 2007, 80th Leg., ch. 451, § 4. The risk of losing spendthrift protection when the settlor creates an intentionally defective grantor trust is now minimized.

F. Termination of Uneconomic Trust

Under new Trust Code § 112.059, the trustee may terminate an uneconomic trust if these conditions are satisfied. Acts 2007, 80th Leg., ch. 451, § 5.

- Notice is given to the following beneficiaries:
 - Current distributees of trust income or principal,
 - Permissible distributees of trust income or principal, and
 - Future distributees, or permissible distributees, if the trust were to terminate and no powers of appointment were exercised.
- The total value of trust property is less than \$50,000.
- “[T]he trustee concludes after considering the purpose of the trust and the nature of the trust assets that the value of the trust property is insufficient to justify the continued cost of administration.”
- The trustee’s possession of the power would not cause trust assets to be included in the trustee’s estate for federal estate tax purposes.
- The trust does not involve an easement for conservation or preservation.

When the trust terminates, the trustee must distribute the property “in a manner consistent with the purposes of the trust.”

G. Bond

The 2007 Legislature made several changes to the rules governing the bonding of trustees. Acts 2007, 80th Leg., ch. 451, § 6 (amending Trust Code § 113.058).

- The court may no longer waive bond if the settlor did not waive bond in the trust.
- The court may, for cause shown, require a noncorporate trustee to post bond even if the settlor waived bond in the trust.
- The court may order the bond to be payable to the trust estate or the registry of the court as well as the beneficiaries.
- An interested party may bring an action to require a bond, not just to increase or decrease the amount of an existing bond.

H. Actions by Co-Trustees

Trust Code § 113.085(a) was amended so that a majority of the cotrustees may act without the necessity of first showing that they are unable to reach a unanimous decision as was previously required. Acts 2007, 80th Leg., ch. 451, § 7.

I. Protection of Third Parties Dealing with Trustee

The 2007 Legislature made a major overhaul of the provisions which provide protection to third parties who deal with trustees by amending Trust Code § 114.081. Acts 2007, 80th Leg., ch. 451, § 9.

1. Third party provides value to the trust

A person who deals with a trustee is not liable to the trustee or the beneficiaries if the trustee exceeded the scope of the trustee's authority in dealing with the person if the person (1) deals with the trustee in good faith and (2) the trust receives fair value. Trust Code § 114.081(a).

2. Third party deals with the trust

A non-beneficiary who deals with the trustee is not required to inquire into the extent of the trustee's powers or the propriety of the trustee's exercise of those powers if the person (1) deals with the trustee in good faith and (2) obtains either a copy of the trust instrument or a "certification of trust" as described in § J. Trust Code § 114.081(b)

3. Trustee's use of property

A person who delivers money or other assets to a trustee is not required to make certain that the trustee properly uses the money or other assets as long as the person made the payment or delivery in good faith. Trust Code § 114.081(d).

4. Dealing with ex-trustee

A non-beneficiary who assists an ex-trustee or for value deals with an ex-trustee is protected from liability as described above just as if the ex-trustee were still in office as long as the person is (1) in good faith and (2) without knowledge that the ex-trustee is no longer a trustee. Trust Code § 114.081(d).

5. Correlation with other protections

"Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail" over the protections described above. Trust Code § 114.081(e).

J. Certification of Trust

When a non-beneficiary asks for a copy of the trust, the trustee now has the option of providing a "certification of trust" rather than the trust instrument. Acts 2007, 80th Leg., ch. 451, § 10

(adding Trust Code § 114.086). This new provision enhances the privacy of the terms of inter vivos trusts.

1. Contents of certification

The certification of trust must contain the following information:

- A statement that the trust currently exists.
- The date the settlor executed the trust instrument.
- The name of the settlor.
- The name and mailing address of the current trustee.
- A description of one or more powers of the trustee or a statement that the trustee has at least all of the default powers provided by the Trust Code.
- Whether the trust is revocable or irrevocable.
- The name of any person holding a power to revoke the trust. (Query: Does the certification need to list *all* persons with the power to revoke or just one?)
- The authority of the cotrustees to sign or otherwise authenticate and whether all or less than all of the cotrustees are required to exercise trustee powers.
- The manner in which title to trust property should be taken.
- A statement that the trust has not been revoked, modified, or amended in any way which would cause the representations made in the certification to be incorrect.
- Any additional information which the trustee elects to supply.

The certification of trust does *not* need to contain the dispositive terms of the trust such as the names of the beneficiaries and the conditions on their receipt of trust property.

2. Authentication of certification

Any trustee may sign or otherwise authenticate the certification. It is not necessary for all cotrustees to join.

3. Proof of certification's contents

A person who receives a certification of trust may require the trustee to provide copies of the portions of the trust instrument and any amendments to the trust that (1) designate the trustee and (2) confer on the trustee the power to act in the pending transactions.

4. Reliance protection

A person who relies on a certification of trust and who is without knowledge that the certification is incorrect will not be liable to any person for the action. The person may also assume without inquiry the existence of the facts in the certification. But, if the person has actual knowledge before entering into the transaction that the trustee is acting outside the scope of the trust, the transaction will not be enforceable against the trust.

A person who in good faith enters into a transaction relying on a certification of trust may enforce the transaction against the trust property as if the statements in the certification are true. The statute makes it clear that a person is not presumed liable merely because a certification lacks one or more of the required elements. A person's failure to demand a certification does not impact protections otherwise available to the person nor does it create an inference as to whether the person has acted in good faith.

5. Other provisions

A person who demands to see the trust instrument or for additional excerpts from the trust instrument is liable for damages if the court determines that the person did not act in good faith in making the demand.

This new procedure does not (1) limit the rights of a beneficiary against the trustee or (2) limit the right of a person to obtain a copy of the trust in a judicial proceeding involving the trust.

K. Jurisdiction

Trust Code § 115.001 was amended to make it clear that the courts with jurisdiction over trusts have the power to hear "all proceedings by or against a trustee" even if the action does not involve one of the matters contained in § 115.001's laundry list. Acts 2007, 80th Leg., ch. 451, § 11. This amendment has the effect of overruling cases that held that the district court did not gain jurisdiction over a case merely because one of the parties was a trustee.

L. Uniform Principal and Income Act

The following revisions were made to the Texas version of the Uniform Principal and Income Act.

1. Definitions of “person” and “trustee”

The detailed definitions of “person” and “trustee” were removed from the definitional section of the UPIA, Trust Code § 116.002. Instead, the definitions contained in the Trust Code’s overall definitional section, § 111.004, apply. Acts 2007, 80th Leg., ch. 451, § 12.

2. Deferred compensation and annuities

A few changes were made to Trust Code § 116.172 so that in some instances the key date for allocation is now based on when a payment is “received” by a trustee rather than when it was “made” by the payer. In the proration subsection, the time period of a “year” was changed to an “accounting period.” Acts 2007, 80th Leg., ch. 451, § 13.

3. Mineral property rentals and rent

Trust Code § 116.174 was amended so that delay rentals and annual rent on a mineral lease are always allocated to income. Under prior law, these amounts were allocated to income only if the amounts were nominal. Acts 2007, 80th Leg., ch. 451, § 14.

M. Notice to Attorney General

In 2005, the Legislature amended Property Code § 123.003 to remove the requirement of notice to the attorney general in certain cases where it is unlikely the AG’s involvement would be necessary to protect the interest of the charity. Because of ambiguity with some of the language used in creating this exception to the notice requirement, the 2007 Legislature further revised the provision so that notice is not needed if the proceeding (1) is an uncontested action to admit the will to probate and (2) is not subject to Probate Code § 83 which applies when multiple wills are being offered for probate.

N. Section 867 Trusts

Probate Code § 867 was clarified to make it clear that the court which has the authority to create a management trust is a court “exercising probate jurisdiction.” Acts 2007, 80th Leg., ch. 281, § 1.

O. Chapter 142 Trusts

The 2007 Legislature made a variety of enhancements to Chapter 142 trusts. Acts 2007, 80th Leg., ch. 451, § 20. Several changes are technical in nature such as creating definitions for the terms “beneficiary” and “financial institution” and then tightening up the language of the section accordingly. The most important of the substantive changes are as follows:

- The trustee may conclusively presume that any medicine or treatment that a licensed physician approves are appropriate for the health of the beneficiary.
- The first page of the trust instrument must contain this notice: NOTICE: THE BENEFICIARY AND CERTAIN PERSONS INTERESTED IN THE WELFARE OF THE BENEFICIARY MAY HAVE REMEDIES UNDER SECTION 114.008 OR 142.005, PROPERTY CODE. Note that this requirement applies even to Chapter 142 trusts which were created prior to the statute's effective date.
- The court is granted extensive power to omit or modify any of the required trust terms if the court determines that the omission or modification is necessary or appropriate to allow the beneficiary to be eligible to receive welfare benefits, either state or federal.
- If the beneficiary's parent, next friend, guardian, conservator, guardian ad litem, or attorney ad litem petitions the court, the court may appoint a guardian ad litem to investigate and report to the court whether the trustee should be removed for failing or refusing to make distributions for the beneficiary's health, education, support or maintenance as required under the terms of the trust. The petitioning person must be reimbursed from the trust for reasonable attorney's fees in bringing the petition, but not more than \$1,000.
- If the value of the trust's principal is \$50,000 or less, the court may appoint a non-financial institution as the trustee if the court finds that such appointment would be in the beneficiary's best interests.
- If the value of the trust's principal is over \$50,000, the court may appoint a non-financial institution as trustee only if the court finds that (1) no financial institution is willing to serve as the trustee and (2) the appointment of the non-financial institution would be in the beneficiary's best interests.

VI. OTHER ESTATE PLANNING MATTERS

A. Disclaimers

Probate Code § 37A was modernized in several ways. First, the section was divided into more subsections for ease of readability and reference. Second, several substantive changes were made to make the statute operate smoother. Acts 2007, 80th Leg., ch. 1170, § 3.01. These substantive changes include:

- An agent appointed under a durable power of attorney authorizing disclaimers now has the authority to disclaim for the principal. Note that if the principal used the statutory form in Probate Code § 490, the power to disclaim is deemed included by virtue of Probate Code § 499(1).

- If the beneficiary is a charitable organization or a governmental agency of Texas, the time to disclaim (as well as the time to file the notice of the disclaimer) was lengthened from nine months after the decedent's death to the later of (1) one year after the beneficiary receives the § 128A notice and (2) six months after the personal representative files the inventory, appraisal, and list of claims.

B. Uniform Transfers to Minors Act

The 2007 Legislature made several changes to the Texas Uniform Transfers to Minors Act. Acts 2007, 80th Leg., ch. 451, §§ 16-19.

1. Retirement plan benefits

Several enhancements to the TUTMA make it easier to obligors under benefit plans such as employee trusts, IRAs, retirement accounts, retirement annuity contracts, and simplified employee pensions to pay those benefits to a custodian for a minor beneficiary. Property Code §§ 141.0902(2), 141.004(a), & 141.008.

2. Distribution to Qualified Minor's Trust

Property Code § 141.015(b-1) was added to permit the custodian to deliver custodial property to a qualified minor's trust created in compliance with I.R.C. § 2503(c). This change is significant because once the minor reaches age 21, he or she is entitled to the property. If, however, the custodian transfers the property to a qualified minor's trust, ultimate distribution can be delayed until a future date stated in the trust as long as the minor is given the power to withdraw the property for a limited period after reaching age 21.

C. Uniform Prudent Management of Institutional Funds Act

The 2007 Legislature enacted the Uniform Prudent Management of Institutional Funds Act (UPMIFA) replacing the Uniform Management of Institutional Funds Act passed in 1989. UPMIFA provides statutory guidelines for the management, investment, and expenditure of endowment funds held by charitable institutions. It expressly provides for diversification of assets, pooling of assets, and total return investment to implement whole portfolio management. This brings the law governing charitable institutions in line with modern investment and expenditure practice as is done in the trust context by the Uniform Prudent Investor Act. Acts 2007, 80th Leg., ch. 834 (enacting Property Code §§ 163.001 – 163.011).