

2009 Legislative Update

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Unwrapping the Presents

- The goodies
- The lumps of coal
- Probate Code: The Sequel
- Go to: texasprobate.com/articles
 - Karisch paper
 - Pargaman paper with statutory changes
 - Forms in Word format

The Goodies

- Things you can use now* to improve your practice
- Other useful changes

* All changes became effective on or before September 1, 2009, unless otherwise noted

Improving the signing ceremony

- Medical Power of Attorney and Directive to Physicians may be notarized with no witnesses
 - Health and Safety Code §§166.032 and 166.154
 - HB 2585 also permits signing advance directives electronically
 - Look for an online repository for directives soon

Improving the signing ceremony

- Declarations of Guardian
 - May use combined declaration and self-proving affidavit on Declarations of Guardian
 - Declarant and witnesses only sign once
 - Adult: Probate Code §679
 - Minor/Adult Incapacitated Child: §877A

Improving the signing ceremony

- Possible supplement (or alternative?) to Declaration of Guardian for Minor Children
 - Family Code Chapter 34 – Authorization Agreement for Nonparent Relative
 - Grandparent, Aunt, Uncle, Adult Sibling
 - Decisions on health care, schooling, driving, extracurricular activities, employment
 - Apply for and receive public benefits
 - May survive death or incapacity of parent
 - **Warning: Not a cookie-cutter form**

Improving the signing ceremony

- First, sign in private with attorney/notary:
 - Inter Vivos Trust
 - Statutory Durable Power of Attorney
 - Directive to Physicians
 - Medical Power of Attorney
 - HIPAA Authorization
 - Funeral Directive
 - Authorization of Nonparent Relative
 - Most beneficiary designations

Improving the signing ceremony

- Then, sign with two witnesses and attorney/notary:
 - Will (testator and witnesses must sign twice)
 - Declaration of Guardian (declarant and witnesses may sign only once)
- **Remember: Be consistent**

Improving the probate process

- Probate Code §§ 81, 89
 - No need to list divorces occurring before the date of the will in application to probate will
- Probate Code §4B
 - In counties with no statutory probate court, county courts at law have trust jurisdiction *while probate estate is pending*
 - Testamentary and inter vivos trusts

Homesteads in Trust

- Property Code §41.0021
 - Some homestead protection retained if homestead is held in “qualifying trust”
 - “Qualifying trust” concept borrowed from Tax Code §11.13(j)
 - Typical revocable trusts qualify
 - Some irrevocable trusts qualify
 - If settlor or beneficiary has right to occupy at no cost
 - Protection extends to non-settlor beneficiary, too

Homesteads in Trust

- Property Code §41.0021
 - Both spouses must sign conveyance of homestead into qualifying trust
 - Trustee may convey homestead out of trust *without the joinder of either spouse* unless the trust expressly provides otherwise
 - Malpractice trap
 - Require joinder of spouses in every case?
 - What about divorce?

Homesteads in Trust

- Property Code §41.0021
 - Gives creditor protection under Constitution Art. XVI, §50 and under Property Code §41.001
 - Does not affect the rights of surviving spouse and children under Constitution Art. XVI, §52 or Part 3, Chapter VIII of the Probate Code
 - Is there a “probate homestead” if the homestead is in a trust?
- Bottom Line: Tread Carefully

Title Insurance and Trusts

- Insurance Code §2703.101(g)
 - Extends owner's title insurance protection to:
 - Property conveyed into trust
 - Property distributed to beneficiary from trust or estate
 - Property received in divorce
 - Residential property only
 - Commissioner to promulgate regulations – effective date?

Forfeiture Provisions

- Probate Code §64, Trust Code §112.038
 - Forfeiture provision in will or trust for bringing an action is not enforceable if
 - Probable cause exists for bringing the action
 - The action is brought *and maintained* in good faith
 - Effective for:
 - §64: Decedent dying on or after June 19, 2009
 - §112.038: Trust existing on or created on or after June 19, 2009
 - Intended to “clarify existing law”

Special Needs Trust Planning

- Probate Code §867 Trusts
 - Trustee may be an individual, a non-profit corporation qualified to serve as guardian or guardianship program if:
 - Trust value is under \$150,000
 - Trust value is over \$150,000 and applicant proves that no corporate trustee in geographic area is willing to serve

Special Needs Trust Planning

- Probate Code §867 Trusts
 - Trustee may receive quarterly estimated compensation on hardship showing
 - Trustee still must file annual account
 - Trustee may have to return compensation
- Probate Code §§ 910 – 916:
Transfers to Pooled Interest Trusts

Other Trust Code Changes

- Trust Code §113.029
 - HEMS standard imposed to prevent trustee/beneficiary from having general power of appointment
 - Applies only to trusts becoming irrevocable on or after September 1, 2009
 - Settlor may opt out, but specific reference required

Other Trust Code Changes

- Trust Code §113.029 (part two)
 - Relocation of grant-making function of charitable trusts outside of state
- Trust Code §116.172
 - Deferred compensation principal and income rule tweaked
- Trust Code §115.014
 - Attorneys ad litem may be appointed

Other Changes

- Family Code §§3.401 *et seq.*
 - Statutory Claim for Economic Contribution Repealed
 - Back to equitable reimbursement claims
 - Marital property agreement references to statutory claim still work
- Probate Code §687
 - Medical certificate requirement for guardianships strengthened

Codification of the Probate Code

- Legislative Council is codifying the Probate Code, to be effective January 1, 2014
 - Probate Code is not a “code”
 - New code will be the “Estates Code”
 - Decedents’ estates provisions enacted in 2009
 - Guardianship and power of attorney provisions to be considered in 2011
 - Fixes to be imposed in 2013

Codification of the Probate Code

- REPTL is tackling independent administration, jurisdiction and venue
 - 2009's independent administration bill failed to pass in late-session confusion
 - Venue provisions stripped for political reasons
- Jurisdiction provisions passed
 - Effective September 1, 2009

Jurisdiction Changes

- ***Decedents' estates only – guardianship jurisdiction provisions not yet changed***
 - Wait until 2011 for guardianship changes
- Sections 4, 5 and 5A repealed, replaced by Sections 4A, 4B, 4C, 4D, 4E, 4F, 4G and 4H

Jurisdiction Changes

- “Appertaining and incident to estates” replaced by “probate proceedings” and “matters related to probate proceedings”
- County courts at law in non-statutory probate court counties have ancillary trust jurisdiction during pendency of estate proceeding
- Statutory probate courts have jurisdiction over powers of attorney
- ***Changes apply to “actions filed or proceedings commenced” on or after September 1, 2009***

Discussion/Questions
