# Legislative Update – 2001

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## Education

The University of Texas School of Law, Austin, Texas
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Barnes & Karisch, P. C., Austin, Texas, 1998 - Present
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The Texas Methodist Foundation, Austin, Texas, Vice President and General Counsel, 1989-1991
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## Professional Activities

Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
Fellow, American College of Trust and Estate Counsel
Member, Real Estate, Probate and Trust Law Council, State Bar of Texas, 1999-
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Chair, Estate Planning and Probate Section, Travis County Bar Association, 1996-97

## Legal Articles and Papers

Author and Editor, Texas Probate Web Site [www.texasprobate.com] and email mailing list [probate@io.com] (1995-2000).

"Multi-Party Accounts in Texas," 39 Real Estate, Probate and Trust Law Reporter No. 2 (January 2001).

"Modifying and Terminating Irrevocable Trusts," State Bar of Texas Advanced Estate Planning and Probate Law Course (1999).

"Protecting the Surviving Spouse," Southwestern Legal Foundation Wills and Probate Institute (1999).

"Legal Research on the Internet," (with Joseph G. Hodges, Jr., Denver, Colorado), American College of Trust and Estate Counsel 1999 Annual Meeting.

"Court-Created Trusts in Texas," State Bar of Texas Advanced Drafting: Estate Planning and Probate Law Course (1995), updated to reflect legislative changes.

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# Legislative Update – 2001

In 2001, the Texas Legislature considered making some significant changes to the laws affecting probate and trust law, but in the end passed only relatively minor legislation in this area. These changes, most of which took effect September 1, 2001, are summarized below.

## 1. What Could Have Been . . .

Here are some of the things the Legislature considered doing in 2001. These measures did **not** pass:

**a. Rule Against Perpetuities Legislation.** The Legislature considered legislation which would have amended the constitution to remove the prohibition against perpetual trusts and amended the Texas Trust Code to permit trusts to last for 1,000 (or at least 360) years. RAP legislation passed the Senate but failed to get to the floor for a vote in the House.

**b. Power of Attorney Legislation.** Among the proposals considered in 2001 regarding powers of attorney were proposals to:

- Require the principal to give certified mail notice of his or her execution of a power of attorney to each person related to him or her within the second degree of consanguinity.
- Require the agent to post a bond before performing certain transactions.
- Require powers of attorney to be recorded (as well as requiring revocations of powers of attorney to be recorded).
- Require agents to wait 11 days after recording a power of attorney before being empowered to act.
- Require a new form and disclosure statement.

In the end, three measures passed: (1) permitting an agent's authority to be resurrected following a temporary guardianship that is not made permanent; (2) permitting the agent to continue acting for a principal after the principal's bankruptcy; and (3) providing a statutory duty for an agent to account to his or her principal. For more information about these measures, see paragraph 3 below.

**c. Anti-Barcelo Legislation.** In *Barcelo v. Elliott,* 923 S. W. 2d 575 (Tex. 1996), the Texas Supreme Court held that an attorney representing a testator owed his duties to the testator and not to the estate beneficiaries, so a suit for malpractice by the estate beneficiaries against the attorney after the testator's death was barred due to the privity defense. There have

been similar holdings with respect to attorneys representing executors and/or trustees. Two bills which would have changed the *Barcelo* rule failed to pass.

If some of the above measures had passed, there would be much to discuss following the 2001 Legislative session. The measures which *did* pass were not earth-shattering, but they deserve a look.

## 2. Changes Affecting Decedents' Estates

**a. Inheritance Rights of Children.** The legislature enacted a version of the Uniform Parentage Act (HB 920). While most of the changes wrought by the UPA are in the Family Code, some affect probate procedures.

Advances in reproductive science have created a number of potential legal problems. Consider:

- Section 42(a) of the Texas Probate Code says that, for inheritance purposes, "a child is the child of his *biological* or adopted mother." Does "biological" mother include a surrogate mother? What about a woman who donates her egg for fertilization but does not carry the unborn child?

- What about a sperm-donor father?

The legislature considered, but did *not* adopt, the portion of the Uniform Parentage Act that addressed gestational agreements, so many of these issues remain unresolved under Texas law. The portion of the Uniform Parentage Act that *was* enacted included relatively minor changes to Section 42(b) of the Texas Probate Code intended to make that section consistent with the new Family Code provisions. Probably the most significant change is that a child is considered to be the child of a man who consents to "assisted reproduction" of his wife, if the "assisted reproduction" leads to the birth of a child.

This is an area that is ripe for additional legislative action.

**b. Heirship Proceedings.** HB 2731 requires the probate court to appoint an attorney ad litem for unknown heirs in every heirship proceeding and requires personal service of citation in an heirship proceeding on a child 12 years of age or older which cannot be waived by a parent or guardian.

Prior to enactment of HB 2731, some judges appointed an attorney ad litem for unknown heirs in every case, while others appointed an attorney ad litem only if requested to do so or if the judge considered the action warranted in a particular case. Judge Guy Herman, judge of Travis County Probate Court No. 1, believes that judges were required by the rules of civil procedure to appoint an attorney ad litem in every case prior to enactment of HB 2731, but Section 53(b) of the Probate Code provided that "the court may, in its discretion, appoint an attorney ad litem or

guardian ad litem." HB 2731 leaves the permissive language in Section 53(b) quoted above as it is, but it adds new subsection (c) to Section 53, stating plainly that "[t]he court shall appoint an attorney ad litem to represent the interests of unknown heirs."

**c. Bequests to Attorneys or Persons Related to Attorneys.** In 1997 the legislature enacted Section 58b of the Probate Code to correct the perceived injustice of an attorney who is not related to a testator drafting a will for the testator which makes a gift or bequest to the attorney or someone related to the attorney. It already was a violation of an attorney's ethics to do this, but Section 58b went further, making the gift or bequest void.

Like everything else in life, the devil in Section 58b is in the details – how far should the net be cast? The legislature didn't wish to void bequests to an attorney if he was the testator's child, for example, but how "related" to the testator did the beneficiary have to be in order to escape the harshness of Section 58b?

HB 2152 expanded the protected list to include gifts to the testator's spouse, an ascendant or descendant of the testator or someone related within the third degree of consanguinity or affinity to the testator.

**d. Authority of Personal Representative With Respect to Community Property.** Under prior law, Section 177(b) of the Probate Code authorized an "executor" to exercise certain rights with respect to community property. SB 723 broadened this term to "personal representative," which under Section 3 of the Probate Code includes executor, independent executor, administrator, independent administrator and temporary administrator. It is likely that most courts and attorneys already read Section 177(b) to apply to this broader list of fiduciaries, but now it clearly so applies.

**e. Suits on Rejected Claims Must Be Filed in Probate Court.** Under prior law, a claimant against a decedent's estate whose claim was rejected could institute suit on the rejected claim within 90 days in the court where the estate is pending *"or in any other court of proper jurisdiction."* SB 723 amended Section 313 of the Probate Code to eliminate the option of suing in another court of proper jurisdiction, thereby requiring all suits on rejected claims to be filed in the probate court.

**f. Social Security Number No Longer Required in Muniment Application.** SB 723 amended Section 89A of the Probate Code to eliminate the requirement that the applicant's and the decedent's social security numbers be included in an application to probate a will as a muniment of title. (HB 1132 made a similar change with respect to applications for temporary guardianship in Section 875.) These were the last two sections to require inclusion of social security numbers in probate pleadings.

**g. Mutual Funds Specifically Covered by Non-Testamentary Transfer Statute.** SB 1640 amends Section 450 of the Probate Code to specifically add "mutual fund accounts" to the list of types of property which can pass by non-testamentary transfer. Section 450 previously

listed (and still lists) "securities" as covered by the statute, and presumably mutual fund accounts are securities, but now they are separately listed as well.

**h. Commission on Sale of Livestock.** SB 1407 amends Section 335 of the Probate Code to increase the "3% of the sale price" cap on the fee paid to a bonded livestock commission merchant who is hired by a personal representative to sell the decedent's livestock to 5%.

### 3. Changes Affecting Powers of Attorney

**a. Suspension of Powers During Temporary Guardianship.** Under prior law, Section 485 of the Probate Code provided that, if a court appointed a "guardian of the estate" of the principal, the powers of the agent under the principal's power of attorney terminated upon qualification of the guardian. Prior law did not distinguish between temporary guardianships and "permanent" guardianships, so many courts read Section 485 to mean that any type of guardianship of the estate – temporary or permanent, full or restricted – terminated an agent's powers under a power of attorney.

Of course, in cases of agent misconduct – "bad agent" cases – it makes sense to terminate the agent's powers upon appointment of a guardian of the estate. In those situations, the guardian often is trying to clean up the mess that the agent made and perhaps recover property from the agent. In other cases, however – the "good agent" cases -- the agent under the power of attorney is not at fault and the reason for the guardianship proceeding is the need either to authorize an action which is not covered by the power of attorney or to deal with third party reluctance to accept the power of attorney.

HB 1132 provides some possible relief in the "good agent" case. It amends Section 485 to permit a court to "suspend," not "terminate," an agent's powers when a *temporary* guardian of the estate is appointed. The suspended powers are revived upon the expiration of the temporary guardianship if the guardianship is not made permanent. This offers some protection from ill-advised temporary guardianships of the estate (which can be granted *ex parte*). It also makes it possible to seek a temporary guardianship to address a particular action (such as making tax-motivated gifts or selling a particular asset) while possibly preserving the ability to administer the principal's assets with the power of attorney after the temporary guardianship is over.

**b. Duty to Inform and Account.** HB 1883 enacts new Section 489B, which provides that an agent under a power of attorney is a fiduciary with a duty to inform and to account and sets forth a statutory accounting scheme similar to the one in the Texas Trust Code applicable to trustees.

It has always been clear to probate and trust lawyers that an agent under a power of attorney is a fiduciary who is subject to common law fiduciary duties, including the duty to account to the principal. However, persons who are unfamiliar with fiduciary principles may use the statutory durable power of attorney form without an attorney's assistance. Section 489B makes clear that the statutory accounting scheme it prescribes is cumulative of the rights and

remedies available to principals under common law or other statute.

Section 489B requires the agent to maintain records of each action taken or decision made until delivered to the principal, released by the principal or discharged by a court. It specifies the contents of an accounting and allows the guardian or personal representative of the principal to step into the principal's shoes for accounting purposes.

**c. Effect of Principal's Bankruptcy.** HB 1083 adds new Section 487A to the Probate Code, making it clear that a principal's bankruptcy (voluntary or involuntary) does not revoke or terminate his or her agent's authority to act under a power of attorney, although the agent's actions are subject to the limitations and requirements of federal bankruptcy law.

### 4. Changes Affecting Guardianships

**a. Community Administrators.** Under prior law, the judicial determination that one spouse was incapacitated gave the other spouse (the "non-incapacitated spouse") the power to administer the entire community estate (including that portion of the community estate belonging to the incapacitated spouse) without the appointment of a guardian of the estate. If a guardian of the estate was appointed, he or she was entitled to administer only the separate property of the incapacitated spouse. Tex. Prob. Code §§ 883 – 884. This left the probate court with few options if the non-incapacitated spouse was guilty of (or suspected of) inappropriate actions.

HB 1132 makes significant changes to the right of the non-incapacitated spouse to administer the community estate. First, it adds a definition of "community administrator" to Section 601 of the Probate Code. The community administrator is a spouse who is authorized to manage, control and dispose of the entire community estate on the judicial declaration of incapacity of the other spouse.

Second, it replaces the non-incapacitated spouse's right to administer the entire community estate under old Section 883 with a presumption that the non-incapacitated spouse is suitable and qualified to serve as community administrator. If despite the presumption the probate court determines that the non-incapacitated spouse is not suitable or not qualified, or if after qualifying the community administrator is removed under new Section 883C, then the court-appointed guardian of the estate of the incapacitated spouse has the right to administer that spouse's sole management community property and up to one-half of the joint management community property, in addition of course to that spouse's separate property. Even if not suitable, not qualified or removed, the non-incapacitated spouse has the right to administer his or her separate property, his or her sole management community property and at least half of the joint management property.

Third, upon the showing of good cause the probate court can require the non-incapacitated spouse serving as community administrator to file an inventory and periodic accountings. In addition, the court is required to appoint an attorney ad litem, and the ad litem

may demand an inventory or accounting.

Finally, if the non-incapacitated spouse is serving as community administrator, he or she is required to report to the probate court the filing of a suit to dissolve the marriage or any lawsuit naming the incapacitated spouse as a defendant. It is in these cases – where the spouses are divorcing or are suing each other – where the need for the probate court to have the ability to rein in the non-incapacitated spouse is obvious.

**b. Parents' Designations of Guardians for Their Children.** Under prior law, the surviving parent of a minor child and the surviving parent of an adult incapacitated child both could designate a guardian for their child to serve in the event of the death of the surviving parent, but there were different rules for parents of minor children and parents of adult incapacitated children. Also, under prior law, there was no provision permitting the surviving parent to designate a guardian to serve in the event of the later incapacity of the surviving parent.

HB 1132 made the rules for guardianship designations the same for parents of minor children and parents of adult incapacitated children. At a minimum, the designations must meet requirements similar to a will – they either must be entirely in the parent's handwriting or attested by at least two credible witnesses. (Designations contained in the will of the surviving parent continue to be permitted.) The parent may, but is not required to, use the statutory form in Section 667A to make the designation, which is attested and includes a self-proving affidavit. HB 1132 amends Sections 676 and 677 to permit the surviving parent to designate a guardian for their children in the event the surviving parent later becomes incapacitated.

HB 1132 also amends Section 679 to provide that designations of guardian for oneself (not for one's children) in the event of later incapacity are valid if entirely in the designator's handwriting or attested by two credible witnesses. Persons wishing to designate guardians for themselves can continue to use the statutory form set forth in Section 679, which is attested and self-proved.

**c. Guardianship Management Trusts (867 Trusts).** HB 628 made two changes in the procedure for creating and administering guardianship management trusts. These trusts, established under Section 867 of the Probate Code, provide an alternative to guardianship.

Under prior law, only a guardian or an attorney ad litem appointed under Section 646 of the Probate Code could apply for creation of a guardianship management trust. As amended by HB 628, Section 867 now permits the guardian, a guardian ad litem or an attorney ad litem appointed under Section 646 or another provision of the Probate Code to apply for creation of a guardianship management trust.

Since their original enactment in 1993, guardianship management trusts had to have a corporate fiduciary. Occasionally it is desirous to create a guardianship management trust when the trust corpus is so small that corporate fiduciaries are uninterested in serving or unwilling to serve as trustee. This sometimes happens when the trust is intended as a "supplemental care

trust" under 42 U.S.C.A. § 1396(d)(4)(a). HB 628 permits the court to name a non-corporate trustee of a guardianship management trust, provided that the non-corporate trustee posts a bond pursuant to new Section 868B. If the value of the trust's principal is $50,000 or less, the court merely has to find that the appointment of a non-corporate trustee is in the ward's best interest. If the value of the trust's principal is more than $50,000, the court must also find that no financial institution is willing to serve as trustee. Before making the finding that no financial institution is willing to serve as trustee, the court "must check any list of corporate fiduciaries located in the state that is maintained at the office of the presiding judge of the statutory probate courts or at the principal office of the Texas Bankers Association."

**d. Minors' Sports, Arts and Entertainment Contracts.** HB 539 adds new Sections 901 through 905 to the Probate Code to give probate courts the ability to approve contracts entered into by minors for sports, arts and entertainment purposes. A similar bill in 1999 was vetoed by Governor Bush.

Under prior law:

- There was no clear way to safeguard a portion of the contract proceeds for the minor, since under the Family Code parents were entitled to manage the earnings of their minor children.

- While it isn't entirely clear, minors may have been able to void contracts which attempted to bind the minor beyond his or her 18th birthday when they attained their majority, jeopardizing the investment of third parties. For example, a record company may spent money promoting an artist on a multi-album deal, only to have the artist repudiate the contract when he or she turns 18).

Section 904 permits the court to safeguard "a portion" of the "net proceeds" in a trust established under Section 867 of the Probate Code or similar trust. "Net proceeds" do not include taxes, care expenses, attorneys fees and fees related to the contract, so presumably the court cannot safeguard this portion of the proceeds. Since the court is permitted to safeguard "a portion" of the "net proceeds," does this mean that the court can protect only a portion of what is left *after* these excluded expenses are taken into account? The court probably can obtain parental and guardian approval of the proceeds split it wants by withholding its approval of the contract, so perhaps this will not be a problem.

Section 902 provides that the court-approved contract can bind the minor for up to 7 years. Thus a 17-year-old could be bound to a contract until he or she is 24, but not longer.

**e. Depositing Funds With Clerk as Guardianship Alternative.** There are four sections of the Probate Code that relate to permitting funds to be deposited with the county clerk as an alternative to guardianship. In 1999, Sections 887, 889 and 890 were amended to raise the limit for this alternative from $25,000 to $50,000. In 1999, the legislature neglected to change the fourth section – Section 745(c) – from $25,000 to $50,000. So for two years Texas law has

permitted avoiding guardianships from scratch if the amount in controversy was less than $50,000 (under Sections 887, 889 or 890) but permitted termination of existing guardianships only if the funds drop below $25,000 (under Section 745(c)).

This is the kind of thing that the Real Estate, Probate and Trust Law Section of the State Bar of Texas loves to fix. REPTL was all over this one, proposing an amendment to Section 745(c) to raise its threshold to $50,000 to match the 1999 changes. This change was included in HB 1132 and was enacted into law. Unfortunately (or fortunately, depending upon one's perspective), a separate bill (HB 3144) passed the legislature as well. HB 3144 raised the threshold in all four sections, including Section 745(c), to $100,000. Sadly, the different changes to Section 745(c) were not rectified. HB 898 was signed by the Governor on May 16, 2001, while HB 1132 was signed by the Governor on May 22, 2001. Therefore, based upon the author's understanding of how these conflicts are resolved, HB 1132 trumps HB 898 since it was signed into law last, so the limit in Section 745(c) for terminating a small guardianship is $50,000 while the limit for avoiding a guardianship under Sections 887, 889 and 890 is $100,000. Oh, well.

**f. Compensation of Guardians.** Section 665 of the Probate Code, governing the compensation paid to a guardian of the estate, was amended by two bills, one making it easier for guardians to get paid and one making it harder. By far the most significant was SB 1417, which makes it harder for guardians to get paid.

SB 1417 imposes a reasonableness standard on the 5% in/5% out formula found in Section 665. The 5% in/5% out fee is considered reasonable if the court finds that the guardian or temporary guardian has taken care of managed the estate in compliance with the standards of the Probate Code. SB 1417 excludes money loaned, invested or paid over on the settlement of the guardianship or a tax-motivated gift made by the ward from the 5% in/5% out compensation.

In addition, SB 1417 appears to provide that application for compensation of a guardian must be made at the time of court approval of an annual account or final account. The proponents of SB 1417 see this as a way to cut down on the practice of some courts that permit a guardian to be paid on an ongoing basis during the year. However, the language of the bill could present some problems. First, few practitioners apply for compensation at the time the court *approves* an account; rather, they apply for compensation at the same time the account is *filed*, expecting the court to act on the compensation application at the same time as the annual account. Surely this approach is permitted, but it may not comply literally with the new language. Second, some guardians don't ask for compensation on each annual account but choose to seek compensation at the end of the guardianship administration or at some other time. Again, surely this approach is permitted, even though the new language calls this practice into question. Finally, the new language does not appear to bar a guardian from asking a court to approve prospective compensation on an ongoing basis, so long as the application for such compensation is filed "at the time the court approves any annual accounting."

SB 1417 also permits the court on its own motion or the motion of any interested party to

"review and modify" the amount of compensation yielded by the 5% in/5% out formula if the court finds it to be "unreasonably low when considering the services rendered as guardian or temporary guardian." However, the bill provides that a finding of unreasonably low compensation may not be established solely because the amount of compensation is less than the usual and customary charges of the person or entity. The proponents of SB 1417 intend this to prevent, for example, lawyers seeking a finding of unreasonably low compensation for serving as guardian because the amount is less than their hourly rate for legal services.

Finally, SB 1417 amends Section 666 of the Probate Code to make it clear that a guardian is entitled to be reimbursed for "reasonable attorney's fees necessarily incurred in connection with the management of the estate or any other guardianship matter" and amends Section 667 to provide that a guardian's expense charges shall be "paid only if the payment is authorized by court order."

HB 1132 makes a relatively modest change to Section 665 to make it easier for a guardian of the person of an indigent person to be paid, providing that the guardian may be compensated out of "other funds available." This enables the use of public or charitable funds in some cases.

**g. 120-day Bar Notice to Creditors.** Since 1995 the personal representative of a decedent's estate has been permitted to send a notice to known unsecured creditors, informing them that if they do not file their claims within 120 days of the notice, their claims will be barred. See Tex. Prob. Code §294(d). HB 3144 amends Sections 784 and 786 of the Probate Code to provide essentially the same thing for guardianships. It remains to be seen how well this notice will work in the guardianship context, which is inherently different from administration of a decedent's estate. When administering a decedent's estate, there is a need to wrap things up and distribute the estate, while a guardianship is an ongoing administration.

**h. Interstate Guardianships.** The increased mobility of persons in society makes it more and more common for a ward and/or his or her guardian to move from state to state. HB 952 enacts new Sections 891 – 893, which establish a procedure for inbound and outbound guardianships. The inbound guardianship statute, Section 892, requires the Texas court to give full faith and credit to the provisions of the foreign guardianship order concerning the determination of the ward's incapacity and the rights, powers and duties of the guardian. However, the court is required by Section 893 to hold a hearing within 90 days of the transfer to consider modifying the administrative procedures or requirements of the transferred guardianship in accordance with local and state law.

**i. Guardianships for Incapacitated Persons About to Turn 18.** Section 682A was enacted in 1999 to permit the application for a guardianship for a minor who also is an incapacitated person to be filed not earlier than 60 days before his or her 18th birthday. This was useful for parents of incapacitated children, since it permitted them to get a head start on a guardianship before their rights as natural guardians of the person of the child ended on his or her 18th birthday. HB 1132 moves the early filing threshold to 180 days before the 18th birthday and permits the court to hold the hearing on the guardianship before the 18th birthday so that there is

no gap in authority when the child turns 18.

**j. Resident Agents and Removal of Guardians.** HB 1132 adds Sections 760A and 760B to provide a means for a nonresident guardian's resident agent to resign or be changed. A similar change was made with respect to nonresident personal representatives of decedent's estates in 1999. HB 1132 also amends Section 761 to permit removal of a nonresident guardian who does not have a resident agent.

In cases where a two married persons are serving as joint guardians of a ward, HB 1132 amends Section 761 to permit removal of one of the joint guardians if the joint guardians' marriage is terminated and the court determines that continuation of only one of the joint guardians is in the best interest of the ward.

**k. Hearings Before Required Physician Examinations.** Section 687 permits the court to order a physician examination of a proposed ward. HB 3144 amends Section 687 to require a hearing before the court may order such an examination and to require at least four days written notice to the proposed ward and the attorney ad litem before the hearing.

**l. Inspection of Documents for Tax-Motivated Gifts.** Section 865 permits the court to approve tax-motivated gifts from a ward's estate to, among others, "a devisee under the ward's last validly executed will, trust, or other beneficial instrument if the instrument exists."

HB 1132 enacts new Section 865A, allowing a guardian of a ward's estate to apply to the court for an order which compels the individual in possession of the ward's will to forward a copy to the court for inspection. However, in light of the concern that a guardian may use this opportunity to determine the contents of a ward's will, the guardian would have the burden of showing just cause exists for the inspection.

**m. Service of Citation on Spouse.** Section 633 previously required personal service of citation of an application for appointment of a guardian on a proposed ward's spouse, regardless of whether or not the spouse's whereabouts were known. This worked a hardship (an impossibility?) in cases where no one knew where the proposed ward's spouse was located. HB 3144 makes personal service on the spouse mandatory only if his or her whereabouts are known or can be reasonably ascertained.

**n. Prepaid Funeral Contracts.** HB 1233 adds the purchase of a prepaid funeral contract to the list of powers a guardian may exercise with court order in Section 774.

## 5. Changes to the Texas Trust Code

There were no changes to the Texas Trust Code in 2001. However, see paragraph 4.c above regarding changes affecting guardianship management trusts (867 trusts). Also, the Real Estate, Probate and Trust Law Section of the State Bar of Texas is studying the new Uniform Trust Code (which includes the Uniform Prudent Investor Act) and the Uniform Principal and

Income Act and may seek adoption of these acts (or some Texas hybrid) in 2003.

### 6. Changes Affecting Probate Jurisdiction

The jurisdiction of courts hearing probate cases has been the subject of legislation in seven of the last nine sessions, and 2001 was no exception.

**a. New Statutory Probate Courts.** The 2001 legislature established two new statutory probate courts. HB 3696 established the Probate Court of Hidalgo County, which began operating on September 1, 2001. SB 194 creates Collin County Probate Court No. 1, effective January 1, 2003.

**b. Visiting Statutory Probate Judges.** HB 534 gives a visiting statutory probate judge use of his or her full toolbox – including the power to transfer cases under Probate Code Sections 5B and 608 – when he or she hears cases in non-statutory-probate-court counties. (Government Code Section 25.0022.) Also, HB 538 permits the statutory probate judge assigned to a case in another county to hear all judicial proceedings in a different county, except the trial on the merits and unless a party objects. Thus, if Judge King of Tarrant County is assigned a case in Brewster County, he could hear all preliminary motions in Tarrant County, unless one of the parties objects, in which case presumably he would have to hear those motions in Brewster County. (Government Code Section 25.0022.)

**c. "Reversing" a 5B or 608 Transfer.** HB 537 fixes a problem with bill passed in 1999. The 1999 bill permits a statutory probate court to transfer a case to another court in the same county if the statutory probate court ever loses jurisdiction because the case is no longer appertaining or incident to an estate. This could happen, for example, if the court used Section 5B or 608 to transfer to itself a case in which an administrator or guardian is a party (making it appertaining to an estate under Section 5A or 607) and the administrator or guardian is nonsuited or released as a party. At that point, the case would no longer be appertaining to or incident to an estate, so the statutory probate court would lose jurisdiction of it. Unfortunately, the 1999 act limited the court's ability to transfer the case to a court in the *same county*. Transfers under 5B and 608 often occur with respect to cases from different counties. The bill expressly permits the transfer to "the court from which the cause of action was transferred to the statutory probate court under Section 5B or 608." Thus, the statutory probate court now will be able to send a 5B or 608 case back where it came from. (Government Code Section 25.00221.)

**d. Continuing Jurisdiction in Guardianship Matters.** HB 1037 amends Section 606 to permit the probate court in a guardianship to continue to hear matters in the guardianship proceeding after the ward dies, regains capacity or becomes an adult. Under prior law, the probate court's continuing jurisdiction applied only to very narrow wrap-up matters. Now the court can continue to hear many types of cases after the ward dies or turns 18, specifically including "any ... matter related or appertaining to a guardianship estate that a court exercising original probate jurisdiction is specifically authorized to hear" under the guardianship chapter of the Probate Code.

**e. Filings in Counties With Statutory Probate Courts.** HB 536 requires that all probate and guardianship matters filed in counties with statutory probate courts (Bexar, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant, Travis and [beginning in 2003] Collin) be filed in the statutory probate court rather than in the constitutional county court or a county court at law. Of course, the usual local practice has been to file all probate and guardianship matters in statutory probate courts, but this makes it mandatory. (Probate Code Sections 5 and 606).

**f. Jurisdictional Loose Ends.** HB 689 cleans up some jurisdictional loose ends for statutory probate courts in an attempt to rid certain courts of non-probate-related business. HB 900 clarifies and expands the duties of the presiding judge of the statutory probate courts. SB 941 requires a former or retired statutory probate judge who wishes to be assigned cases to certify that he or she is willing not appear, plead in or accept certain appointments from any court in the county of the judge's residence for two years.

## 7. Other Changes

**a. Community Enhancements.** In 1999, "community enhancement" legislation was basically rammed down probate lawyers' throats (although perhaps the family lawyers do not see it that way). The goal was to more fairly compensate a spouse when community property was used to enhance separate property. There are two classic cases. In one, community property is used to pay debt secured by separate real property. In the other, a spouse's uncompensated personal services are used to enhance the value of a separate property business.

The 1999 legislation was ill-conceived and hard to understand. Rep. Toby Goodman, who sponsored the 1999 legislation, asked a group of family lawyers to work on this legislation between sessions. A couple of probate lawyers joined the group. HB 1245 is the result. While most probate lawyers probably would like to see the whole notion of a statutory "community enhancements" right go away so that they could return to traditional equitable rights of reimbursement in all cases, that did not happen. HB 1245 is probably as good as it is going to get.

HB 1245 confines itself to situations where money or property from one estate (usually the community estate) is used to enhance the other estate either by paying down debt or adding improvements. In such cases, the legislation establishes a formula to calculate the amount of the enhancement right. The bill does not attempt to address the situation where separate property is enhanced by the personal services of a spouse.

One major improvement over 1999 is that the right created is not called an "equitable interest" in property. Rather, it is called a "claim for economic contribution." Probate lawyers are much more comfortable with the concept of a "claim" for something, rather than an "interest" in something. Use of the word "claim" more accurately reflects what is going on -- the inception of title rule still applies, but the injured estate has a claim which may be addressed.

Another major improvement is that, in the case of a decedent's estate, the interest isn't

created automatically. Rather, the personal representative, the surviving spouse or a person interested in the estate must assert the claim, whereupon it is adjudicated. That will make estate administrations much cleaner.

Another change is an attempt to clarify that premarital agreements which waived rights of reimbursement are effective to waive these statutory rights. The problem, of course, is that competent attorneys doing prenupts before 1999 could not reasonably have been expected to provide for the waiver of "statutory equitable interests" or "statutory claims for economic contribution" when those things didn't exist. (Family Code §§3.401 et seq.)

**b. Child Support Obligations Continue When Recipient Dies.** HB 1365 amended Tex. Fam. Code §154.013 to provide that an obligation to pay child support continues on the death of the party entitled to receive the payments notwithstanding any provision of the Probate Code.

**c. Increasing the Personal Needs Allowance.** HB 154 requires the Department of Human Services (DHS) to set the personal needs allowance for certain Medicaid nursing home recipients at a minimum of $60 per month, up from $30 per month. (Human Resources Code Section 32.024.)

**d. Trust Assets Affecting Eligibility For Certain Benefits.** HB 1316 increases the floor of what trusts must be considered as a resource affecting eligibility of trust beneficiaries for certain state-supported mental health services from $50,000 to $250,000. (Health and Safety Code Section 534.0175.)

**e. Aging Volunteers May Assist in Preparing Medical Powers, Etc.** HB 1420 excludes from the definition of the practice of law assistance offered by employees or volunteers of area agencies on aging in preparing medical powers of attorney, directives to physicians and declarations of guardian. Medical powers of attorney and directives to physicians don't have much bearing on the types of family feuds probate lawyers occasionally see, since rarely do family members hire lawyers and go to court over medical decisions. However, declarations of guardian can impact family court fights, particularly because they enable the declarant to disqualify someone from serving as guardian. It may not have been wise for the legislature to entrust non-lawyer volunteers with giving advice on declarations of guardian.

**f. Nursing Home Retaliation.** HB 482 adds family members and guardians to the list of persons against whom nursing homes and intermediate care facilities cannot retaliate and gives such persons a cause of action for retaliatory acts. (Chapters 242 and 252 of the Health and Safety Code.)

**g. Agent is "Fiduciary" Under Penal Code.** HB 1813 amends Section 32.45(a)(1), Penal Code, to add an attorney-in-fact or agent under a durable power of attorney to the definition of "fiduciary" for purposes of the misapplication by fiduciary statute.