

**LEGISLATIVE  
PROPOSALS - ONLY THE GOOD, NO BAD, OR UGLY**

**CRAIG HOPPER, *Austin***  
Hopper Mikeska

State Bar of Texas  
**44<sup>TH</sup> ANNUAL**  
**ADVANCED ESTATE PLANNING AND PROBATE**  
June 3-5, 2020

**CHAPTER 20**



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### **AREAS OF PRACTICE**

Probate litigation, probate administration, guardianship administration, trust administration, and estate planning law.

### **EDUCATION**

Juris Doctor degree, Duke University School of Law, 1995.

Bachelor of Arts degree with high honors, Plan II program, University of Texas at Austin, 1990

### **PROFESSIONAL HISTORY**

Hopper Mikeska, PLLC, 2012-Present

Hopper & Associates, P.C., 2005 - 2012

Shareholder, Graves, Dougherty, Hearon & Moody, 1998 - 2005

Law Clerk, Honorable Guy Herman, Travis County Probate Court No. 1, 1996-1998

### **PROFESSIONAL AFFILIATIONS**

Board Certified in Estate Planning and Probate Law, Texas Board of Legal Specialization

Fellow, American College of Trusts and Estates Counsel

Member, Austin Bar Association

Member, State Bar of Texas

Member, SBOT Real Estate, Probate and Trust Law (REPTL) Section Council Member 2010-2014; Chair of Estate and Trust Legislative Affairs Committee 2014-Present; Treasurer-2019-Present

Member, Estate Planning Council of Central Texas; Director 2008-2014; Chair 2012-2013

Member, Travis County Bar Association Probate and Estate Planning Section; Director, 1999- 2004; Chair, 2003

### **PUBLICATIONS**

O'Connor's Texas Probate Law Handbook, co-author, 2018-Present

Texas Guardianship Manual, State Bar of Texas, Manual Committee, co-author, 2013-Present

O'Connor's Estates Code Plus, co-author, 2012-Present

### **SELECT RECENT PRESENTATIONS/PAPERS**

–Speaker, 2019 Trusts and Estates Legislative Update, numerous locations in 2019

–Speaker, 2017 Trusts and Estates Legislative Update, numerous locations in 2017-2018

–Author/Moderator, “How 2015 [Guardianship] Changes Are Affecting Your Practice,” SBOT Advanced Guardianship Course 2016, Dallas

–Panelist, “Peace Treaties: Considerations when Negotiating, Drafting & Enforcing Settlement Agreements and Releases,” SBOT Estate Planning and Probate Drafting Course, Houston 2015

–Speaker, 2015 Trusts and Estates Legislative Update, numerous locations in 2015-2016

–Author/Speaker, “Extraordinary Remedies in Probate Proceedings,” SBOT Probate and Estate Planning Drafting Course 2014, Dallas

–Author/Speaker, “Whack-a-Mole: Handling Problem Litigants and the Occasional Overzealous Ad Litem,” SBOT Advanced Guardianship Course 2014, Dallas;

–Speaker, “Mock Guardianship Hearing—How and When to Put Your Ward on the Stand,” SBOT Advanced Guardianship Course 2014, Dallas; Tarrant County Bar Association Probate Litigation Seminar 2014, Ft Worth

–Speaker, “Basic Guardianship,” Docket Call in Probate Court, San Antonio, Texas 2014

–Speaker, “Ask the Experts” panel, University of Texas Estate Planning, Guardianship and Elder Law Conference, Galveston 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019

–Course Director, SBOT Advanced Guardianship and Elder Law Courses, Houston, 2013

–Author/Speaker, “Drafting the Estate and Trust Distribution Documents,” SBOT Advanced Drafting Course, Dallas 2011

–Speaker, “Contested Guardianships,” SBOT Advanced Guardianship Course 2011, Houston; South Texas College of Law 26<sup>th</sup> Annual Wills and Probate Institute, Houston 2011

–Author/Speaker, “Extraordinary Preparation for Mediation in Guardianship Disputes,” SBOT Advanced Guardianship Course 2009, Houston

– Author/Speaker/Panel Member, SBOT Building Blocks of Probate and Estate Planning: Probate Administration, 2004-2013, 2018



# 2021 Legislative Proposals

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## Only the Good, No Bad, or Ugly\*

(\*Title determined pre-COVID 19)

Craig Hopper  
HOPPERMIKESKA, PLLC

May 19, 2020

**PRELIMINARIES...**

## People to Thank/Blame!

- Eric Reis, REPTL Chair; [eric.reis@tklaw.com](mailto:eric.reis@tklaw.com)
- Greg Kimmel, Chair of REPTL Decedents' Estates Committee; [greg@allenlottmann.com](mailto:greg@allenlottmann.com)
- Gene Wolf, Chair of REPTL Trusts Committee; [gwolf@kempsmith.com](mailto:gwolf@kempsmith.com)
- Don Totussek, Chair of REPTL Powers of Attorney & Advanced Directives Committee; [don.totusek@ftllplaw.com](mailto:don.totusek@ftllplaw.com)
- Catherine Goodman, Chair of REPTL Guardianships Committee; [cgoodman@cgoodmanlaw.com](mailto:cgoodman@cgoodmanlaw.com)

## People to Thank/Blame!

- Craig Hopper, Co-chair of the Estate and Trust Legislative Affairs Committee for REPTL; [chopper@hoppermikeska.com](mailto:chopper@hoppermikeska.com)
- Lauren Davis Hunt, Co-chair of the Estate and Trust Legislative Affairs Committee for REPTL; [ldhunt@ohkslaw.com](mailto:ldhunt@ohkslaw.com)
- Bill Pargaman, Past REPTL Chair, Pandemic Resource, Legislative Guru; [bpargaman@snpalaw.com](mailto:bpargaman@snpalaw.com)

## Our Timeline

- Fall 2019-Spring 2020: The substantive topic committees consider new legislative proposals and present/revise them to the Council over the course of three Council meetings.
- May 2020-June 2020: REPTL package, including draft bills, is complete and circulated to all State Bar sections and committees for consideration.
- June 29, 2020: Deadline for final submission to State Bar of proposed legislation.

## Our Timeline (cont.)

- Mid-August 2020: Legislative Policy Subcommittee meets and REPTL presents its packages.
- September 11, 2020: Legislative Policy Subcommittee provides recommendations to Board of Directors.
- September 25, 2020: Board of Directors meet to consider recommendations and approve legislative packages.

## Our Timeline (cont.)

- November 9, 2020: Prefiling of bills for the 87<sup>th</sup> Legislative Session.
- January 12, 2021: 87<sup>th</sup> Legislative Session begins.
- May 31, 2021: 87<sup>th</sup> Legislative Session ends.

## REPTL “Disclaimer”

- These proposals have not been finalized or submitted to the State Bar for consideration by its Legislative Policy Subcommittee.
- Final versions of these proposals have not yet been circulated to the other sections and committees of the State Bar for comment.
- The SBOT Board of Directors have not met to consider and adopt the 2021 State Bar Legislative Program.



# DECEDENTS' ESTATES...

## REPTL Decedents' Estates Proposals

- Adding an alternative to Certified Mail-Return Receipt Requested.
  - Revising citation provisions in the Estates Code to replace “registered or certified mail” with “qualified delivery method.”
  - Qualified delivery method will include: a) hand delivery with proof; b) CM-RRR; or c) “any private delivery service designated by the United States Secretary of the Treasurer under authority of Section 7502 of the Internal Revenue Code of 1986.”
  - Allows services that are available to the general public, as timely and reliable on a regular basis as US mail; and records delivery dates.

## REPTL Decedents' Estates Proposals

- Clean up Estates Code Section 101.052 and Chapter 453 to eliminate the term “community debt” and to clarify that only the decedent’s share of community property is subject to decedent’s creditors’ claims.
- Clarification that effects of divorce on trust dispositions found in the Property Code are also applicable to the same situations in the Estates Code.
- Clarification that the required listing of estate property in an heirship proceeding only applies to property that would be governed by the judgment in the proceeding (and not, for example, real property assets outside of Texas).

## REPTL Decedents' Estates Proposals

- Allow a Court to accept an affidavit of heirship as evidence regarding the decedent’s heirs and family history.
- Clean up provision regarding sales of personal property in a dependent administration to clarify obligation of reporting to Court.
- Remove requirement for an applicant to list the last three digits of her social security number and driver’s license.

## REPTL Decedents' Estates Proposals

- New procedures for serving minors 12 years of age or older.
  - Currently, minors 12 or older must be personally served in an heirship; parents can waive on behalf of younger minors.
  - Proposal would allow a) parents to waive for any minor under age of 16; and b) minors over the age of 16 to waive personal service.

## GUARDIANSHIPS...

## REPTL Guardianship Proposals

- Clarifies Sec. 1021.001 concerning matters related to guardianship proceeding.
  - Allows county courts at law to hear trust cases related to guardianship proceedings or incapacitated beneficiaries
  - Former subsection (a) applied to all counties without statutory probate court.
  - Now, subsection (a) will apply to counties without **either** a statutory probate court or a county court at law.
  - New subsection (a-1) will apply to counties **with** county court at law but **without** statutory probate court.
  - Subsection (b) still applies only to counties with statutory probate court.

## REPTL Guardianship Proposals

- Amends ward's bill of rights to conform to actual statutory procedure.
  - Sec. 1202.054 - appointment of court investigator or guardian ad litem to investigate modification or termination of guardianship.
- Publish notice to creditors in newspaper of **general circulation** (same as 2017 decedents' estates change).
- Personal Property and Real Property Sales procedures are revised to be more intuitive and to be consistent with similar 2019 revisions to the sale of real property in decedent's estates.

## REPTL Guardianship Proposals

- Ch. 1301 Management Trusts:
  - Application notice provisions made identical for guardianship application. And serving guardian must be served.
  - Termination provisions for minor's trust must require termination on death or 18<sup>th</sup> birthday, unless court extends trust to 25<sup>th</sup> birthday.
  - Termination provisions for adult's trust must require termination on death, upon court finding that trust no longer in beneficiary's interests, or when beneficiary regains capacity.
  - Both guardian of estate and guardian of person must receive copy of annual account.

## REPTL Guardianship Proposals

- Clarifies procedures applicable when a sale of property is made by a nonresident guardian and provides that funds held in registry can be withdrawn and paid to such nonresident guardian.

# TRUSTS...

## REPTL Trust Proposals

- Harmonizes the provisions of the Tax Code and the Property Code relating to a homestead held in a revocable trust.
  - The court in *In re Cyr*, No. 18-50102-CAG, 2019 WL 3213053 (Bankr. W.D. Tex., July 16, 2019) determined that a revocable trust did not meet the creditor protection homestead test because it tracked occupancy rights language of the Tax Code instead of the creditor protection provision of the Property Code. The court basically said that “rent free and without charge” and “at no cost” had different meanings.
  - The proposal changes the wording of Property Code 41.002(a)(1) to better conform with the homestead exemption language of Tax Code 11.13(j).

## REPTL Trust Proposals

- Amends Property Code spendthrift trust provisions to clarify that trust property subject to a testamentary general power of appointment is not subject to claims of the powerholder's creditor, UNLESS the power is actually exercised.
  - Historically, Texas has followed common law and Restatement Second of Property.
  - Restatement Third of Property and the Uniform Power of Appointment Act diverged to provide that appointive property is subject to creditor claims against the powerholder regardless of whether the power was exercised.
  - Amendment to Property Code 112.035 will clarify that we follow the Restatement Second approach on creditor exposure.

## REPTL Trust Proposals

- Amends Property Code Section 115.014, regarding appointment of attorneys or guardians ad litem to require the appointing court to determine that representation of the minor or incompetent beneficiary would otherwise be inadequate before appointing an attorney ad litem.
  - Same standard as currently exists before appointment of guardian ad litem in a trust proceeding.
- Tweaks a 2019 revision to better clarify that assets can be decanted into a second trust with the same name and EIN of the first trust.

## POWERS OF ATTORNEY AND ADVANCED DIRECTIVES (PAAD)...

### REPTL PAAD Proposals

- Anatomical gift, or revocation of same, may be executed before notary instead of two witnesses.
- Revision to removal of remains statute to include agent for disposition of remains to have first priority for decisionmaking, and a qualified personal representative to have last priority.
- Amend statute providing guidance for an agent under a statutory durable power of attorney given power over Business Operation Transactions.
  - Clarifies that the agent shall have the power to act on behalf of the principal's business interests for more than just partnerships.
  - Current language dates back to 1993, prior to common use of LLCs.
  - Proposed language based on Uniform Power of Attorney Act (2006).



## REPTL MPOA Proposals

- Statutory form permissible, not mandatory.
- Valid medical power must:
  - be in writing;
  - be signed by the principal (or another person at principal's direction) before two witnesses or notary; and
  - contain principal's name, date of execution, and designation of agent.
- In event of disagreement among co-agents, agents have authority to act as sole agent in order in which names are listed, unless medical power provides a different method of resolving disagreement.
- Health care providers specifically absolved from liability for decisions regarding whether to follow directives of co-agents.

## REPTL MPOA Proposal (cont.)

- In the past, Texas Medical Association and Texas Hospital Association have strongly opposed making form optional.
- Despite fact that **45 states have optional forms**, TMA and THA argue use of any form other than mandatory form would create too much confusion.
- Requirement of form over substance shown especially problematic during pandemic.
- REPTL hopes to work with stakeholders to finally make this helpful bill become law.

# PANDEMIC PROPOSALS

## REPTL Pandemic Proposals

- Unsworn Declarations
  - Proposal providing that unsworn declarations may be used for oaths of personal representatives and other probate filings.
  - Addresses concerns of clerks and courts related to wording of the current unsworn declaration language.
  - CPRC 132.001 currently provides that unsworn declarations don't apply to "an oath of office required to be taken before a specified official other than a notary public."

## REPTL Pandemic Proposals

- Clarify that durable powers of attorney and declarations of guardian may be signed and acknowledged electronically under our existing remote notary statutes.
  - Already allowed for medical powers of attorney and directives to physicians under Health & Safety Code Sec. 166.011.
  - Unclear whether Texas Uniform Electronic Transactions Act allows remote notarizations for financial powers of attorney.

## REPTL Pandemic Proposals

- Broader proposal to allow remote signatures.
  - Similar to Governor's order.
  - Notary must verify identify person using two-way audio and video technology.
  - Signing person must send a copy of the signed document by fax or email to the notary.
  - Notary may notarize the transmitted copy and send it back by fax or email; notarization is then valid.
  - No requirement of recording.
  - More details to work out.

## REPTL Pandemic Proposals

- Approval of routine, uncontested probate applications by written submission, with no requirement of hearing.
- Electronic Wills
  - Inevitable, but few states currently allow.
  - Lucrative for commercial will-kit providers.
  - Uniform Act is from July 2019; no state has yet adopted.
  - Many, many concerns about implementation; REPTL prefers that Texas not be the testing ground.
  - Issues are being studied so that we can respond quickly with expedited approval if we need to oppose bad legislation and/or provide a better counterproposal.

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