

LAUREN DAVIS HUNT
Osborne, Helman, Knebel & Scott, LLP
301 Congress Avenue, Ste. 1910
Austin, TX 78701
(512)542-2000; (512)542-2011 (fax)
ldhunt@ohkslaw.com

EDUCATION

- Baylor University School of Law, J.D., 2007
- Rhodes College, B.A. Memphis, TN, 2001
 - *Major:* International Studies
 - *Honors:* Cum Laude, Phi Beta Kappa

BAR ADMISSIONS

- Texas, 2007
- U.S. District Court, Northern District of Texas, 2010

PROFESSIONAL ACTIVITIES & HONORS

- Co-Chair, Estate and Trust Legislative Affairs Committee, State Bar of Texas, Real Estate, Probate & Trust Law Section, 2019
- Council Member, State Bar of Texas, Real Estate Probate & Trust Law Section, 2016-2020
- Chair, Fiduciary Litigation Committee, State Bar of Texas, Real Estate Probate & Trust Law Section, 2017-2019
- Texas Rising Star, Texas Monthly Magazine and Texas Rising Star Magazine: 2016 - 2018
- Trust Code Committee, State Bar of Texas, Real Estate Probate & Trust Law Section, 2011 - 2013
- Texas Bar Foundation

CLE PRESENTATIONS AND PAPERS

- *Strategies for Suing and Defending Fiduciary Decision Making*, State Bar of Texas Fiduciary Litigation Course, December 2018, Author and Presenter
- *Case Development Strategies*, State Bar of Texas, 11th Annual Fiduciary Litigation Course, December 2016, Panelist
- *Standing and Capacity to Sue in Estate and Trust Litigation*, State Bar of Texas, Tarrant County Probate Litigation Seminar, September 2016, Author and Presenter
- *Standing and Capacity to Sue in Estate and Trust Litigation*, State Bar of Texas, 10th Annual Fiduciary Litigation Course, December 2015, Author and Presenter
- *The Client is Incapacitated – What do you do next?*, State Bar of Texas, 38th Annual Advanced Estate Planning and Probate Course, June 2014, Author and Presenter
- *Decanting with No Sour Grapes*, State Bar of Texas, 24th Annual Estate Planning & Probate Drafting Course, October 2013, Panelist
- *Capacity, Standing and Jurisdiction*, State Bar of Texas, 37th Annual Advanced Estate Planning and Probate Course, June 2013, Author and Presenter
- *Informal Demand or Formal Discovery: The Debate on Obtaining Information from Fiduciaries Under Their Duty to Disclose*, State Bar of Texas, Fiduciary Litigation Beyond the Basics, 2011, Moderator
- *Exculpatory Clauses*, State Bar of Texas, Trial of a Fiduciary Litigation Case, December 2009, Co-Author and Co-Presenter

Is There Meat in Those Beans?

The 2019 Texas Estate and Trust Legislative Update

(Including Probate, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)

<p>William D. Pargaman SALINDERS NORVAL PARGAMAN & ASSOCIATES LLP</p>	<p>Craig Hopper HOPPER/MESEKA PLLC</p>
<p>Lauren Davis Hunt OSBORNE HEYMAN KNEEL & SCOTT LLP</p>	

September 9, 2019

1

PRELIMINARIES...

SALINDERS NORVAL PARGAMAN & ASSOCIATES LLP

2

Who is REPTL?


- Real Estate, Probate & Trust Law Section of the State Bar
- www.reptl.org
- Probate & Trust Committees:
 - Decedent's Estates
 - Trusts
 - Guardianship
 - Powers of Attorney & Advanced Directives
 - Fiduciary Litigation
 - Estate and Trust Legislative Affairs

SALINDERS NORVAL PARGAMAN & ASSOCIATES LLP

3

Legislative Process for REPTL Bills


- REPTL committees work on legislation
- REPTL council vets proposals
- State Bar Board of Directors approves
- Legislative Counsel drafts bills
- Legislator picks up and runs with it



4

REPTL “Disclaimer”

- Once bill is introduced, it's no longer a “REPTL bill.”
- REPTL bills end up with provisions that were not originally REPTL proposals.
- Most non-REPTL provisions added to REPTL bills will be noted in the paper.



5


After Session Is Over

- Read the paper! Or at least the main part of the paper (Parts 7 – 16).

<http://www.snpalaw.com/resources/2019LegislativeUpdate>

- Download a supplement containing the actual language of bills marked to show what has been added to or deleted from statutes.


www.snpalaw.com/resources/2019LegislativeSupplement



6

The 2019 REPTL "Big" Bills


- Decedents' Estates
- Guardianships
- Trusts
- Medical Powers of Attorney
- Substantive Code Updates (Maybe Not So "Big")
 - Updates outdated references in other codes to former Probate Code



7


The 2019 REPTL "Small" Bills

- Both repeats from 2017 session
 - **Anatomical Gifts (didn't pass)**
 - Allows use of one notary in lieu of two witnesses
 - **Disposition of Remains (passed)**
 - Revokes authority of spouse upon divorce
 - Court with jurisdiction of probate proceedings has jurisdiction over disposition dispute (even if probate hasn't commenced).
 - But dispute over removal of remains is in county where cemetery located.



8


DECEDENTS' ESTATES...



9

REPTL Decedents' Estates Bill

- Testator May Delegate Appointment of Administrator
 - Testator can grant a named executor or other person designated by name, office or function the authority to name one or more persons to serve as administrator
 - By default, designees would act only if all named successors cannot or will not act.
 - But will provision can give powerholder authority to override order of succession in will.




10

REPTL Decedents' Estates Bill

Will modification and reformation proceedings:

- "Probate proceeding" includes will modification or reformation.
- Allows removal of will reformation in constitutional county court to statutory county court, or if none, to district court, or assignment of statutory probate judge if no statutory county court.




11

REPTL Decedents' Estates Bill

Personal Representatives and Nonprobate Assets

- PR entitled to information about nonprobate assets even if estate has no post-death interest.
- Clarifies PR has no duty to pursue nonprobate assets absent written demand by surviving spouse, creditor, or person acting for decedent's minor child.




12

REPTL Decedents' Estates Bill

Transfer on Death Deeds

- Recorded memorandum of conveyance voids TODD.
- Repeal of statutory TODD forms.
 - But see separate bill requiring Supreme Court to promulgate TODD forms.




13


REPTL Decedents' Estates Bill

Intestacy Provisions

- Clarifies community property intestacy provisions.
 - Where decedent married + has children from outside current marriage
 - THIS IS NOT A CHANGE TO THE ACTUAL INTESTACY LAWS!!!**



- Two disinterested witnesses required in heirship unless court finds only one can be found.
 - Witnesses (e.g., genealogy expert) need not have known decedent.




14

REPTL Decedents' Estates Bill

Anti-Lapse and Charities

- Anti-lapse provisions regarding failed devise made inapplicable to charitable gifts. (Non-REPTL)




15

REPTL Decedents' Estates Bill

- **Muniments** can be converted if later need for administration arises.
 - Must be filed before original deadline for application to probate


Waiver of Bonds: Distributees may waive independent PR's bond if not waived in will.



16

REPTL Decedents' Estates Bill


- **Inventories:** extension of time to file inventory applies to affidavit in lieu. (Non-REPTL)
- Even independent PR can get court order granting **access to digital assets**
- Separate \$15,000 limits for Class 1 **funeral expenses** and **expenses of last illness**.



17

REPTL Decedents' Estates Bill

- **Contingent Fee Agreements:** Court approval of contingent fee agreement required **only** for fees in excess of 1/3rd of property sought to be recovered.
- **Attorney's Fees in Will Contests:** Allows (but doesn't require) award of costs (including attorney's fees) to successful will contestant without offer of alternative will.




18

REPTL Decedents' Estates Bill

Clarifies sales procedures in dependent administrations.


- Public "sales" are now called public "auctions."
 - Auction completed upon bid of highest bidder.
 - Auction held in county where real estate is located, unless probate court orders it held in county of probate.
 - Other procedural changes designed to conform to standard foreclosure provisions.
- Private "sales" refer to contract entered into by PR.
 - "Successful bid or private contract," not "sale," is reported to court.
 - Court "approves," rather than "confirms," sale.



19

REPTL Decedents' Estates Bill

- **Recusal:** Clarifies recusal procedures for presiding judge of statutory probate courts.
- Clarifies procedures for 2015 requirement that **secured creditors** act promptly.



20

Other Decedents' Estates Bills


- **Unclaimed Property:** Adopts Property Code procedures for recovery of unclaimed property from Comptroller.
- **Decedent's Leases:** Early termination of residential leases following tenant's death.
 - Estate representative provides landlord written notice of termination
 - Tenant's property is removed
 - Representative signs inventory of removed property, if required



21


Other Decedents' Estates Bills

- Permits release of deceased state hospital patient's medical records to descendant after 50 years.



22


GUARDIANSHIPS...



23

REPTL Guardianship Bill


- The REPTL Guardianship bill contained a number of miscellaneous provisions that are described in the paper.
- Vetoed by the Governor on June 15th.
- Veto was based on a non-REPTL provision that would have allowed counties to establish an Office of Public Guardian.
- The paper still describes the vetoed provisions.



24

Other Bills Related to Persons With Disabilities


- **Compensation of guardians** of Medicaid recipients increased from \$175 to \$250/month.
- **Delivery of notices** in Mental Health Code proceedings by constable or sheriff.
- Establishment of **electronic database** for settlement agreements involving minors and incapacitated persons.
- Guardianship Abuse, Fraud, and Exploitation Deterrence Program.



25

Other Bills Related to Persons With Disabilities

- **Task force** on best practices for detention of persons with disabilities.
- Signature authority of legal guardian over **ABLE account**.
- **Child support** for child with disability may be ordered paid to SNT for child.
- Court may triple actual damages for **phishing** against elderly.



26


Other Bills Related to Persons With Disabilities

Exam of Sexual Assault Victim Without Guardian's Consent

- Health care facilities must provide forensic exam and treatment to adult sexual assault survivor who has guardian, *without the guardian's consent*, if survivor understands nature of exam and treatment
- Ward's Bill of Rights now includes right to make decisions related to sexual assault crisis services

Mental Health Services and Emergency Detention

- Prompt discharge following admission for voluntary mental health services unless patient meets standards for inpatient mental health services.
- More relatives with actual custody of minor for six months may seek order for temporary inpatient mental health services.
- Peace officer can make emergency detention without warrant, *regardless of age*.



27

Other Bills Related to Persons With Disabilities

- Revised procedures for court-ordered mental health services for criminal defendants.
- Permissive release of person with intellectual or developmental disability to group home or intermediate care facility in lieu of arrest.
- Expanded procedures for early identification or release of defendant suspected of mental illness.
- No death penalty for person with intellectual disability.

SALINDERS
BORGESON
ATKINS

28

TRUSTS...

SALINDERS
BORGESON
ATKINS

29

REPTL Trust Bill

Mandatory Rules Re: Trust Terms

- Trust terms can't restrict Court's ability to deny or order return of trustee's fees and to make "equitable and just" award of costs and attorney's fees

Revocable Trusts

- Rules relating to (1) construction and interpretation of wills (e.g., pretermitted children, advancements, lapsed gifts, class closing, and more), and (2) abatement of gifts are made applicable to revocable trusts.

SALINDERS
BORGESON
ATKINS

30

REPTL Trust Bill

- Trust **reformations** (as opposed to modifications) are effective as of creation of trust.
- “Clarifies” that assets can be decanted into trust under same instrument.
 - Designed to reduce need to retitle assets and to obtain new TIN.



31

REPTL Trust Bill

Divorce and Revocable Trusts

- Estates Code rules regarding effect of divorce on spousal provisions in revocable trusts are copied to Trust Code.

Ch. 142 Trusts

- If minor beneficiary is disabled, Court can allow Trust to terminate later than 18th birthday (so don't risk losing government benefits)


Pooled trust subaccounts (and transfers from Ch. 142 management trust to pooled subaccount) are authorized if initial trustee can no longer serve and no suitable replacement for unpooled trust can be found.



32


REPTL Directed Trust Bill

- Clarifies that person with authority to direct, consent to, or disapprove trustee's decisions **is** an “advisor,” and **is** a fiduciary.
 - But power solely to remove and appoint trustees, advisors, trust committee members, or other protectors, is exception to fiduciary rule if advisor does not exercise power to appoint self.
 - Nor does fiduciary requirement prohibit exercise of power that must be exercised in nonfiduciary capacity for someone to be treated as owner of trust for income tax purposes.



33


DISABILITY DOCUMENTS...



34

REPTL Financial Power of Attorney Bill

- There is no REPTL bill this session affecting financial powers of attorney.




35

REPTL Medical Power of Attorney Bill

Bill did NOT pass

It would have provided that:


- Statutory form no longer 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.



36


But REPTL MPOA Bill Did Not Pass

- Texas Medical Association and Texas Hospital Association 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.



37


EXEMPT PROPERTY



38

REPTL Exempt Savings Plan Bill


- No real substantive change.
- Property Code provisions providing creditor exemption for retirement plans are clarified and reorganized to be more readable.
- Provisions in separate section relating to creditor exemption for college savings plans are incorporated (and separate section is repealed).



39

Disciplinary Rules Regarding Clients with Diminished Capacity

- Not a legislative matter, but see the discussion in the paper regarding proposed changes to our disciplinary rules regarding our duties with respect to clients with diminished capacity.
- Based on ABA's Model Rule 1.14.
- More to come...



43

Is There Meat in Those Beans?

The 2019 Texas Estate and Trust Legislative Update

(Including Probate, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)

William D. Pargaman
SAUNDERS ABBOTT PARGAMAN ATKINS LLP


Craig Hopper
HOPPER/MESSKA RLC

Lauren Davis Hunt
OSBORNE, HERMAN, WHEELER & SCOTT LLP

44

BONUS SLIDES

(If there's extra time remaining...)



45

Non-REPTL Decedents' Estates Provisions Added to REPTL Guardianship Bill

(The following provisions were added to the REPTL Guardianship bill from SB 1975.)

- Personal service by any disinterested person upon absent or nonresident heir.
- Several references to "independent executor" changed to "independent administrator."
- Proof of notice to heirs of appointment of temporary administrator.
- English translation of non-English portion of foreign wills and probate recorded in deed records.



46

REPTL Guardianship Bill

- Clarifies Sec. 1021.001 concerning matters related to guardianship proceeding.
 - 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.



47

REPTL Guardianship Bill


- 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).
- Court may **order** party to reimburse certain attorney's fees, rather than **requiring** reimbursement.
- Costs of guardianship proceeding paid out of estate **if** guardianship of estate created and in ward's best interests.



48

REPTL Guardianship Bill


- 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 18th birthday, unless court extends trust to 25th 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.



49

REPTL Guardianship Bill

- Clarifies that upon sale by nonresident guardian, proceeds held in registry are paid to guardian, not ward.
- Criminal history record of *proposed guardian*, not *applicant*.
 - Required of all nonresident guardians, even if liquid assets ≤ \$50,000.




50

Non-REPTL Guardianship Provisions Added to REPTL Guardianship Bill

(The following non-REPTL provisions were added to the REPTL Guardianship bill from SB 1975.)

- Certification required of attorneys representing any party in guardianship proceeding.
- Application must include any former name of applicant, and liquid assets of proposed ward.
- Order waiving training requirement must contain finding waiver is in accordance with Supreme Court rules.



51

Non-REPTL Guardianship Provisions Added to REPTL Guardianship Bill

(More non-REPTL provisions that were added to the REPTL Guardianship bill from SB 1975.)

- Clerk may not charge \$10 fee for criminal history check of private professional guardian or employees.
- Guardian may not be excluded from legal proceedings involving ward.
- Court may transfer guardianship to foreign jurisdiction where ward has permanently moved on its own motion.



52

Non-REPTL General Provisions Added to REPTL Guardianship Bill

(More non-REPTL provisions that were added to the REPTL Guardianship bill from SB 1975.)

- Extension of "last three digit" requirement to probate and guardianship proceedings, and to statutory probate courts.
- Transfer of clerk's file in either electronic or paper form.
- Bond coverage of sitting judge extended to visiting judge.



53

Non-REPTL Guardianship Provisions Added to REPTL Guardianship Bill

(The following non-REPTL provision was added to the REPTL Guardianship bill from SB 1426.)


- The commissioners court of a county may create an "office of public guardian."
- SB 1426 was originally introduced at the request of Harris County.
- ***This is the provision that led the Governor to veto the REPTL Guardianship bill!***
 - His veto statement cited the lack of necessity for the "expense of a new bureaucracy" when private attorneys are capable of handling these matters.
 - ***This ignores the fact that the aggregate payments by the county to those private attorneys may be far more than the cost of a new Office of Public Guardian.***
- The Legislative Budget Board's fiscal analysis was that there would have been **NO** significant fiscal implications to the state or to local governments.



54

Rule Against Perpetuities

- Constitutional RAP can be found in Art. I, Sec. 26:
 - "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed..."
- Statutory RAP first enacted as Trust Code Sec. 112.036 effective Jan. 1, 1984.
- HB 3744 would have extended statutory RAP period to 300 years from "effective date" of trust.
 - Identical to 2017 bill.
 - Constitutional?
- All prior attempts to repeal or modify statutory RAP – every session since 1999 (except 2007 and 2015) – have failed.
- **Add 2019 to list of unsuccessful attempts.**



55

Is There Meat in Those Beans?

—————

The 2019 Texas Estate and Trust Legislative Update

(Including Probate, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)

William D. Pargaman SAUNDERS NORVAL PARGAMAN WATKINS LLP	Craig Hopper HOPPER/MESSKA RLC
Lauren Davis Hunt OSBORNE, HERMAN, WHEELER & SCOTT LLP	

56
