

Presented:15th Annual Estate Planning, Guardianship, and Elder Law ConferenceAugust 8–9, 2013
Galveston, Texas

Out With the Old [Probate Code] and In With the New [Estates Code]

2013 Texas Estate and Trust Legislative Update

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

WILLIAM D. PARGAMAN

This version was updated **July 15, 2013**. Updates will be posted as warranted at:

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2013 Texas Estate and Trust Legislative Update

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

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1. The Preliminaries.

1.1 Introduction and Scope. The 83rd Regular Session of the Texas Legislature spans the 140 days beginning January 8, 2013, and ending May 27, 2013. This paper presents a summary of the bills relating to probate (*i.e.*, decedents' estates), guardianships, trusts, powers of attorney, and several other areas of interest to estate and probate practitioners. Issues of interest to elder law practitioners are touched upon, but are not a focus of this paper.

1.2 See Attachment 1 for the Rest of the Preliminaries. The version of this paper I have prepared for previous sessions (2009 and 2011) began with lots of preliminary information – acknowledgments, a list of the stakeholders, the process for generating the legislative package of the Real Estate, Probate, and Trust Law Section (“REPTL”), other sources of legislative information and key dates of interest. While I still think all of this is important – and that each of you should read through it at least once every few years – I also realize that most of you are anxious to get to the substantive changes made by the legislature. Therefore, I’ve moved most of the preliminary matters to **Attachment 1**.

1.3 CMA Disclaimer. But there’s still one preliminary item I’m going to keep up front. While I’ve made every reasonable attempt to provide accurate descriptions of the contents of bills, their effects, and in some cases, their background, despite rumors to the contrary, I am human. And have been known to make mistakes. I figuratively juggle many balls during the legislative session, and I often work on this paper late at night, past my normal bedtime, perhaps, even, under the influence of medicinal amounts of Johnnie Walker Black (donations of Red, Black, Green, Gold, Blue, or even Swing happily accepted!). Also, the descriptions of bills contained in this paper, while hopefully accurate at the time they were written, may no longer accurately reflect the contents of a bill at a later stage in the legislative session. Therefore, **Attachment 1** also includes directions for downloading copies of the actual bills themselves so you may review and analyze them yourself before relying on any information in this paper.

2. The New Estates Code.

2.1 January 1, 2014. That’s the date our new Estates Code will go into effect, and our beloved Probate Code that’s been with us for almost six decades, will fade away. These changes were enacted

into law in 2009 and 2013. Now, it’s just a matter of waiting until the end of 2013/

2.2 See Attachment 2 for More Background on the Estates Code. Rather than clutter the beginning of this paper with background material relating to the reasons why replacement of the Probate Code was necessary, and how the Estates Code was drafted,¹ you’ll find that material in **Attachment 2**.

3. The REPTL Bills.

3.1 The Original REPTL Legislative Package. Originally, the REPTL 2013 legislative package consisted of three bills: the Decedents’ Estates bill, the Guardianship bill, and the Trusts bill. However, Sec. 35(a), Article III, of the Texas Constitution contains the “one-subject” rule:

No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject.

Because of this rule, several provisions of the three proposed bills were stripped out of those three main bills by the Texas Legislative Council staff when they drafted the actual bills to be introduced.

3.2 The “Main” REPTL Bills. The “main” REPTL bills in the 2013 legislative session still consist of the following three bills:

(a) The Decedents’ Estates Bill. The 2013 REPTL Decedents’ Estates bill was filed as [HB 2912](#) (Thompson) and [SB 911](#) (Rodriguez).

[HB 2912 was signed by the Governor on June 14th.](#)

The Guardianship Bill. The 2013 REPTL Guardianship bill was filed as [HB 2080](#) (Thompson | Naishtat | Anchia) and [SB 647](#) (Rodriguez).

[HB 2912 was signed by the Governor on June 14th.](#)

(b) The Trusts Bill. The 2013 REPTL Trusts bill was filed as [HB 2913](#) (Thompson) and [SB 648](#) (Rodriguez).

[HB 2913 was signed by the Governor on June 14th.](#)

¹ All of which was already included in my 2009 and 2011 legislative updates. You can download copies of those updates at www.snpalaw.com/resources. Scroll down to the section titled “For Professional Advisors.”

3.3 The “Small” REPTL Bills. The “small” REPTL bills that were carved out of the “main” REPTL bills consist of the following three bills:

(a) The Title Insurance Bill. The 2013 REPTL Title Insurance bill was filed as [HB 2079](#) (Thompson) and [SB 650](#) (Rodriguez).

Neither bill passed this session.

(b) The Medical Power of Attorney Bill. The 2013 REPTL Medical Power of Attorney bill was filed as [HB 2124](#) (Thompson) and [SB 651](#) (Rodriguez).

SB 651 was signed by the Governor on May 24th.

(c) The Exempt Property Bill. The 2013 REPTL Exempt Property bill was filed as [HB 2081](#) (Thompson) and [SB 649](#) (Rodriguez).

SB 649 was signed by the Governor on May 18th.

3.4 Consolidation Into the REPTL Bills. As hearings began, several legislators asked interested parties to try to consolidate as many of the various bills on similar subjects as possible, in order to reduce the number of bills that would need to move through the legislature. Pursuant to this request, REPTL representatives and the statutory probate judges agreed to consolidate all or a portion of a number of other bills into the REPTL Decedents’ Estates, Guardianship, and Medical Power of Attorney bills. Several of these bills include the results of this consolidation effort, “improvements” by REPTL, and negotiations (primarily between REPTL and the statutory probate judges).

4. Decedents’ Estates.

4.1 The REPTL Decedents’ Estates Bill. The REPTL 2013 Decedents’ Estates bill contains a large number of mostly minor changes. References to the changes can be found throughout this paper. Here are some of them.²

(a) No More References to “Written” Wills. The 2007 REPTL Decedents’ Estates bill repealed oral, or “nuncupative,” wills. This year’s bill cleans up the Estates Code by eliminating numerous references to “written” wills, since there is now no other kind of will.

(b) No Unsworn Declarations for Self-Proving Affidavits (Sec. 21.005). The broad use of unsworn declarations was enacted in 2011 – to the surprise of REPTL and almost everyone else. A revised Chapter 132 of the Civil Practice and Remedies Code allows the use of an unsworn written declaration

made under penalty of perjury in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law (except for an oath of office or an oath required to be taken before a specified official other than a notary). REPTL studied all of the provisions in the Estates Code in which jurats or verifications are called for and determined that the only situation in which the use of unsworn declarations should be eliminated was a self-proving affidavit for a will or codicil. This change makes the provisions of the aforementioned Chapter 132 inapplicable to the self-proving provisions in the Estates Code.

(c) Heirship Changes. A number of changes are made that relate to heirship proceedings.

(i) Inheritance Rights of “Intended” Parents (Secs. 201.051 and 201.052). These changes incorporate references to maternal and paternal inheritance in situations where a child has “intended” parents under a valid gestational agreement under Family Code Secs. 160.751, *et seq.*

(ii) No Statute of Limitations for Determinations of Heirship (Sec. 202.0025). This reverses a 2010 Supreme Court ruling that applied the residual four-year limitations period to an heirship proceeding.

(iii) Initiation of Heirship Proceedings (Secs. 202.004(2)). Unsecured creditors are added to the list of persons who may initiate heirship proceedings.

(iv) Ad Litem in Heirships (Sec. 202.009). This change requires appointment of an attorney ad litem in an heirship proceeding to represent heirs whose names or locations are unknown, and preserves discretion to appoint an ad litem for an incapacitated heir.

(v) Waiver of Citation for Minor in Heirships (Sec. 202.056). Clarifies that citation may be waived for a minor distributee in an heirship proceeding (by a parent, managing conservator, guardian, attorney ad litem, or guardian ad litem) only if the minor is under 12, and may not be waived for a minor age 12 or older.

(vi) No Heirship Determination Until Affidavit or Certificate of Notice Filed (Sec. 202.057). A court may not enter an order determining heirs until the applicant files a copy of the notice sent to interested parties along with an affidavit of the applicant or the applicant’s attorney stating that

² Section references are to the Texas Estates Code unless otherwise noted.

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First appeared as part of the conference materials for the

15th Annual Estate Planning, Guardianship and Elder Law Conference session

"Legislative Update: Out with the Old (Probate Code) and In with the New (Estates Code)"