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Recent Developments Affecting Estate Planning

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I. Summary of 2021 Legislative Changes

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1. **That's pretty much describes the situation!** As for legislative changes relating to the Estates Code and the Trust Code, there are virtually none to report. Statutes proposed by the Real Estate, Probate and Trust Law Section died an unnatural death. Only the REPTL Guardianship bill made it to the governor's desk. As for what happened, Bill Pargaman put it this way in his 2021 Legislative Update: "REPTL's Decedents' Estates bill did not pass. It was on the Senate's Local & Uncontested Calendar for May 26th, the last day for Senate consideration. Had it passed, it would have gone to the Governor since no amendments to the House-passed version were made in the Senate. We have no reason to believe that there were any objections to REPTL's bill. The REPTL bill appears to have been one of the many innocent victims of a dispute between the lieutenant governor and the House over the latter's failure to pass some of the former's legislative priorities. REPTL's Trusts and Financial Power of Attorney bills suffered the same fate."
2. **Bills that were not enacted.** The proposed Estates Code changes that died (and which are virtually certain to be proposed in 2023) were relatively minor and/or clean-up provisions. One useful provision would have expanded qualified delivery methods (currently by certified or registered mail) to include hand delivery by a courier or a private delivery service such as FedEx or UPS. Estates Code §202.151 would have provided that an affidavit could be used as evidence in an heirship proceeding, as an alternative to testimony from two disinterested witness. A new Estates Code §53.108 would have permitted the conduct of guardianship and probate proceedings using remote technology; teleconference and video-conference hearings would be considered to be in open court. Paying homage to Baylor Professor Tom Featherston, references in §453.003 and related sections would replace references to "community debts" with "debts for which some community property is liable for payment." (As I said, these were largely minor and/or clean-up provisions.)
 - a. However, a proposed Trust Code provision, relating to homestead protection in a revocable trust, was rather important. The situation is discussed more fully later in the outline.
2. **Statement in disclaimer regarding child support.** One statute that did make it to the governor's desk relates to disclaimers. Under Property Code §240.151(g), a disclaimer by a child support obligor is barred if the obligor is in arrears on child support payments. New §240.009(e) provides that the disclaimer instrument must contain a statement under penalty of perjury that the disclaimant is in not arrears on child support obligations. Responding to a REPTL request, the statute makes it clear that failure to include the required statement will not invalidate a disclaimer if the disclaimant was not a child support obligor.

II. Rule Against Perpetuities

1. **So long (more precisely, soooooo long) to Rule against Perpetuities.** In nearly every legislative session since 1999, the Texas Bankers Association has been behind bills that would effectively repeal the Rule against Perpetuities as applied to trusts. In the 2021 legislative session, the bankers were successful. Under Property Code §112.036 as amended, the period of the Rule has been changed from “lives in being plus 21 years” to “**lives in being plus 300 years.**” Austin attorney Steve Saunders, joined in recent years by his associate Reid Powers, was at the forefront of efforts to dissuade the legislature from enacting the bill (successful in the past, but not this time), followed this year by unsuccessful efforts to persuade the governor to veto the bill.
 - a. The new rule applies only to interests created in a trust. Other transfers (*e.g.*, an outright disposition “to Albert for life, and on Albert’s death to such of his children who live to attain the age of 30” is subject to the traditional “lives in being plus 21 years” rule. (If you don’t know why this example violates the Rule—subject to the *cy pres* perpetuities reform statute—get out your first-year Property notes.)
 - b. What policies support the statute as amended? While the TBA may have given various rationales, the likely explanation appears to be: “We are losing the dynastic trust business to Delaware and Alaska!”
 - c. 300 years? That’s quite a few years! Looking back 300 years in time from 2021, what did the United States look like in 1721? (Oops! There *was* no United States in 1721!) Looking forward, what will the world be like in 2321?
 - (1) Assume that an irrevocable trust established in 2021, slated to last for 300 years, gives the trustee authority to make discretionary distributions “to the settlor’s descendants who may be living from time to time.” Assume further that when the story begins the settlor has two descendants, that a generation lasts 25 years, and that descendants in each generation each produces two new descendants. In Year 2421 there will be 4,095 descendants. Wouldn’t it be fun to be the trustee of that trust? An astute draftsman of such a dynastic trust (I think that may be an oxymoron) would no doubt divide the trusts into subtrusts at each generational level, but still.... Bonum deus!
 - d. **Is the statute constitutional?** More than a few members of the REPTL section and professors at several of the state’s law schools are of the opinion that the statute is unconstitutional. Bill Pargaman has given a detailed analysis of the constitutional issue in his 2021 Legislative Update. Article I, §26 of the Texas constitution states: “Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.” However, the Constitution does not define “perpetuities.” While the

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