

**WILLS, PROBATE, AND TRUST DRAFTING IN LIGHT OF
THE ESTATES CODE**

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I. Introduction

On January 1, 2014 the new Texas Estates Code went into effect. This process was intended as a non-substantive re-codification of Texas probate law. Of course, in the process of the initial adopted draft in 2009, and changes made over the course of the following two legislatures in 2011 and 2013, a number of significant changes were introduced. Some were introduced into the Probate Code in parallel with the changes to the Estates Code, and some were introduced in the final Estates Code with which we are now living.

This article reviews the drafting and practice implication of these changes and other selected provisions. In addition, it briefly discusses the more strategic planning implications of the changes to our probate process.

All emphases in statutory materials and explanatory materials in [] are added by the author.

II. General observations and new provisions

A. General observations

Having been steeped in the Probate Code for the past 35 years, I find the organizational and structural changes implemented by the Estates Code problematic. Although we clearly have no choice but to live with it, it is more difficult to read, associated provisions are frequently rearranged to be conceptually rather than functionally grouped, and changes in language and associative context are likely to introduce litigable ambiguities for the foreseeable future.

Although tedious, I strongly suggest that anyone practicing in the estate planning and probate area read the entire Estates Code. In addition to the drafting and practice related sections included in this article, a number of changes that are outside the scope of this article have been made to jurisdictional provisions and other procedural provisions.

B. Unintended changes caused by drafting guidelines

An example of unintended introduction of ambiguity:

122.005 Power to Provide Method of Disclaimer

Sec. 122.005. Power to Provide Method of Disclaimer. [TPC §37A(j)]

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A will, insurance policy, employee benefit agreement, or other instrument may provide for the making of a disclaimer by a beneficiary of an interest receivable under that instrument and for the disposition of disclaimed property in a manner different than provided by this chapter.

This language is reasonably susceptible to the interpretation that was clear under the related Probate Code provision, §37A(j), that a drafter can take into account the possibility of a disclaimer, and make dispositive provision for such an event.

Unfortunately, both the section title “Power to Provide *Method* of Disclaimer” and a parsing of the actual section raise the possibility that not only may an alternative disposition be provided, but that the governing document may provide the *method* by which a disclaimer may be made. Of course, this raises serious questions under both federal transfer tax law and with respect to how a disclaimer must be evidenced.

While this section is an egregious example, others occur to a lesser extent throughout the Estates Code.

The lesson: while much of the Estates Code is drawn verbatim from the Probate Code, much is not. The fragmentation of the relevant prior Probate Code provisions often changes context. Review carefully before assuming that no change has been made.

C. Chapter 152 Emergency Intervention

One good addition to the Code that might be very useful in the right situation is Chapter 152, a very short form proceeding. This proceeding allows a person qualified to serve as administrator to obtain funds to pay funeral and burial expenses and to take possession of personal property held in a rental residence, without the need for a full application for administration or where collection of a small estate on affidavits might not be available.

CHAPTER 152. EMERGENCY INTERVENTION SUBCHAPTER A. EMERGENCY INTERVENTION APPLICATION (§§152.001 - 152.004)

Sec. 152.001. Application Authorized. [TPC §108, 109, 110]

(a) Subject to Subsection (b), a person qualified to serve as an administrator under Section 304.001 may file an application requesting emergency intervention by a court exercising probate jurisdiction to provide for:

- (1) the payment of the decedent’s funeral and burial expenses; or
- (2) the protection and storage of personal property owned by the decedent that, on the date of the decedent’s death, was located in accommodations rented by the decedent.

(b) An applicant may file an application under this section only if:

- (1) an application or affidavit has not been filed and is not pending under Section 256.052, 256.054, or 301.052 or Chapter 205 or 401; and
- (2) the applicant needs to:
 - (A) obtain funds for the payment of the decedent’s funeral and burial expenses; or
 - (B) gain access to accommodations rented by the decedent that contain the decedent’s personal property and the applicant has been denied access to those accommodations.

Keep this provision in mind if you have a decedent renting a residence at the time of death, and landlord is not cooperative in allowing removal and storage of the decedent’s property.

D. Request by Court for Identifying Information

A number of probate courts have begun asking for additional information regarding applicants and fiduciaries in addition to that required as part of an application. While many courts are not distinguishing between independent administrations and other proceedings, the Code does.

Sec. 351.351. Applicability. [TPC §145(q), 154A(i)]

This subchapter does not apply to:

- (1) the appointment of an independent executor or administrator under Section 401.002 or 401.003(a); or
- (2) the appointment of a successor independent executor under Section 404.005.

Sec. 351.355. Identifying Information. [TPC §36(b)]

- (a) The court may request an applicant or court-appointed fiduciary to produce other information identifying an applicant, decedent, or personal representative, including a social security number, in addition to identifying information the applicant or fiduciary is required to produce under this title.
- (b) The court shall maintain any information required under this section, and the information may not be filed with the clerk.

E. Removal of Independent Executor

In line with developments of the last 30 years related to court supervision of independent administrations discussed in more detail below, a new provision allowing removal of an Independent Executor has been added.

Sec. 404.0035. Removal of Independent Executor with Notice. [new]

(a) The probate court, on the court's own motion, may remove an independent executor appointed under this subtitle after providing 30 days' written notice of the court's intent to remove the independent executor, by certified mail, return receipt requested, to the independent executor's last known address and to the last known address of the independent executor's attorney of record, if the independent executor:

- (1) neglects to qualify in the manner and time required by law; or
- (2) fails to return, before the 91st day after the date the independent executor qualifies, either an inventory of the estate property and a list of claims that have come to the independent executor's knowledge or an affidavit in lieu of the inventory, appraisal, and list of claims, unless that deadline is extended by court order.

(b) The probate court, on its own motion or on motion of any interested person, after the independent executor has been cited by personal service to answer at a time and place fixed in the notice, may remove an independent executor when:

- (1) the independent executor fails to make an accounting which is required by law to be made;
- (2) the independent executor fails to timely file the affidavit or certificate required by Section 308.004;
- (3) the independent executor is proved to have been guilty of gross misconduct or gross mismanagement in the performance of the independent executor's duties;
- (4) the independent executor becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause becomes legally incapacitated from properly performing the independent executor's fiduciary duties; or

(5) the independent executor becomes incapable of properly performing the independent executor's fiduciary duties due to a material conflict of interest.

This provision vastly broadens the discretion of the court, and it is noteworthy that the court may take action on its own motion, with no aggrieved party. While (a)(2), (b)(1) and (b)(2) are reasonably determinable, significant drafting questions are raised by the unconditional drafting of the section in the context of interaction of exculpatory provisions in a Will with (b)(3), gross misconduct or gross mismanagement, and (b)(5), development of a material conflict of interest.

Are gross misconduct or gross mismanagement the equivalent of gross negligence? What is misconduct? What is the standard for management? Is a material conflict of interest equivalent to a breach of the fiduciary duty of loyalty, and by what standard will materiality be determined?

Can language in a will set a standard for management or define when a conflict is material? Pending resolution of these questions through litigation, where questions may arise in this area, language dealing with standard of care and grants of authority should explicitly reference this section.

Sample language:

LIABILITY OF EXECUTOR LIMITED

12.8. If an individual, my Independent Executor shall be liable only for gross negligence, fraud, defalcation, or other dishonesty. My Independent Executor shall not be personally liable for any loss to my estate or to any beneficiary resulting from his decision made in good faith with respect to the exercise of any and all elections, options, and determinations of whatever kind available under the law to my estate, regardless of whether the exercise affects the benefit received or receivable by a particular beneficiary. No action permitted or required under powers granted by this Will shall constitute "gross misconduct or gross mismanagement" or constitute a "material conflict of interest" within the meaning of Sec. 404.0035 of the Texas Estates Code.

GOOD FAITH

12.10. My Independent Executor shall be conclusively presumed to have acted in good faith in making any decision or taking any action unless he or she receives a direct or indirect financial benefit from that decision or action.

F. Decanting provisions

Well-drafted trusts have for many years contained limited powers of appointment, trust protectors, trust committees and other measures designed to provide flexibility in the face of future changes. Without such provisions, however, court action was required to modify or distribute the trust other than by its express terms, and many trusts are not well-drafted.

While on the boundaries of the scope of this article, it is noteworthy that what have come to be called "decanting provisions" have been added to the Trust Code in sections 112.071-112.087. These provisions allow a trustee with discretion to transfer property held in trust to a different trust under certain defined parameters and procedures, without court action unless invoked by opposed parties. Section 112.084(a) permits restrictions on decanting "if the distribution is expressly prohibited by the terms of the governing instrument of the trust."

These provisions allow shift of beneficial interest, within the terms of the trust. Given this change, consideration should be given to whether provided flexibility provisions are sufficient, should be exclusive, or may be omitted with reliance on the default provisions provided by this change. I strongly recommend inclusion of appropriate flexibility provisions. My preference is for provisions that provide for decision making by someone who is not a fiduciary within the context of the trust, to allow full flexibility within a designated class of potential recipients.

A sample of special power of appointment language used for this purpose:

SPECIAL POWER OF APPOINTMENT

8. XXXXX shall have the limited power to appoint to the Grantor, the Named Beneficiary, the named beneficiary's descendants, or any trust created by the Grantor or Named Beneficiary all or any part of the corpus of any trust created by this instrument. If exercised in favor of the named beneficiary's descendants, this power shall be non-exclusive, unless all descendants with legal capacity at the time of appointment shall agree to the contrary. No exercise of this power may fulfill any obligation of Grantor or holder of this power to support any individual. Each holder of this power is authorized and empowered by writing delivered to the Trustee to designate a successor holder of this power. This power shall not be exercisable by a Named Beneficiary or Trustee of this trust.

If XXXXX is unable to act in the sole opinion of the Trustee, XXXXX may exercise this limited power of appointment.

The drafter should consider carefully the question of whether such specific provisions should be exclusive in the context of each client's situation.

III. Changes requiring amendment

A. Determination of heirship

1. When required for distribution of trust

A proceeding to determine heirship is now not only available in a probate proceeding, but if needed to determine distribution of property held in trust.

Sec. 202.001. General Authorization for and Nature of Proceeding to Declare Heirship. [TPC §48(a)]

In the manner provided by this chapter, a court may determine through a proceeding to declare heirship:

- (1) the persons who are a decedent's heirs and only heirs; and
- (2) the heirs' respective shares and interests under the laws of this state in the decedent's estate or, if applicable, in the trust.

2. Notice provisions

Direct notice by citation, defined in Sec. 51.003, is now required to all potential distributees in a proceeding to determine heirship.

Sec. 51.003. Contents of Citation or Notice. [TPC §33(c)]

(a) A citation or notice must:

- (1) be directed to the person to be cited or notified;
- (2) be dated;
- (3) state the style and number of the proceeding;
- (4) state the court in which the proceeding is pending;

- (5) describe generally the nature of the proceeding or matter to which the citation or notice relates;
- (6) direct the person being cited or notified to appear by filing a written contest or answer or to perform another required action; and
- (7) state when and where the appearance or performance described by Subdivision (6) is required.

[subsections (b) through (d) omitted]

In this context, it is uncertain what the prescribed requirements under subsections (6) and (7) mean. I suggest contacting the court in which the proceeding is pending to determine their interpretation of these requirements.

Oddly, since a minor cannot personally legally act, and waiver by an adult responsible for a minor over 12 is forbidden, children must be served if between the age of 12 and 18.

Sec. 202.051. Service of Citation by Mail When Recipient's Name and Address Are Known or Ascertainable. [TPC §50(a)]

Except as provided by Section 202.054, citation in a proceeding to declare heirship must be served by registered or certified mail on:

- (1) each distributee who is 12 years of age or older and whose name and address are known or can be ascertained through the exercise of reasonable diligence; and
- (2) the parent, managing conservator, or guardian of each distributee who is younger than 12 years of age if the name and address of the parent, managing conservator, or guardian are known or can be reasonably ascertained.

Sec. 202.056. Waiver of Service of Citation. [TPC §50(e)] A parent, managing conservator, guardian, attorney ad litem, or guardian ad litem of a minor distributee

who:

- (1) is younger than 12 years of age may waive citation required by this subchapter to be served on the distributee; and
- (2) is 12 years of age or older may not waive citation required by this subchapter to be served on the distributee.

Entry of an order determining heirship is prohibited unless proof of the required citation is filed with the court.

Sec. 202.057. Affidavit of Service of Citation. [new] (a) A person who files an application under Section 202.005 shall file with the court:

- (1) a copy of any citation required by this subchapter and the proof of delivery of service of the citation; and
- (2) an affidavit sworn to by the applicant or a certificate signed by the applicant's attorney stating:
 - (A) that the citation was served as required by this subchapter;
 - (B) the name of each person to whom the citation was served, if the person's name is not shown on the proof of delivery; and
 - (C) the name of each person who waived citation under Section 202.056.

(b) The court may not enter an order in the proceeding to declare heirship under Subchapter E until the affidavit or certificate required by Subsection (a) is filed.

B. Contents of Application for Probate of Will and Grant of Letters Testamentary

Minor changes were made to the information required in an Application for Probate of Will and Grant of Letters Testamentary. They are emphasized in bold in the copy of the section below.

Sec. 256.052. Contents of Application for Probate of Will. [TPC §81(a)]

(a) An application for the probate of a will must state and aver the following to the extent each is known to the applicant or can, with reasonable diligence, be ascertained by the applicant:

- (1) each applicant's name and domicile;
- (2) the testator's name, domicile, and, if known, age, on the date of the testator's death;
- (3) the fact, time, and place of the testator's death;
- (4) facts showing that the court with which the application is filed has venue;
- (5) that the testator owned property, including a statement generally describing the property and the property's probable value;
- (6) the date of the will;
- (7) the name, state of residence, and physical address where service can be had of the executor named in the will or other person to whom the applicant desires that letters be issued;**
- (8) the name of each subscribing witness to the will, if any;**
- (9) whether one or more children born to or adopted by the testator after the testator executed the will survived the testator and, if so, the name of each of those children;
- (10) whether a marriage of the testator was ever dissolved after the will was made and, if so, when and from whom;
- (11) whether the state, a governmental agency of the state, or a charitable organization is named in the will as a devisee; and
- (12) that the executor named in the will, the applicant, or another person to whom the applicant desires that letters be issued is not disqualified by law from accepting the letters.

(b) If an applicant does not state or aver any matter required by Subsection (a) in the application, the application must state the reason the matter is not stated and averred.

C. Contents of Application for Probate of Will as Muniment of Title

Note that the Application for Probate of Will as Muniment of Title has remained the same, and therefore is now different from the application for Letters Testamentary.

Sec. 257.051. Contents of Application Generally. [TPC §89A(a)]

(a) An application for the probate of a will as a muniment of title must state and aver the following to the extent each is known to the applicant or can, with reasonable diligence, be ascertained by the applicant:

- (1) each applicant's name and domicile;
- (2) the testator's name, domicile, and, if known, age, on the date of the testator's death;
- (3) the fact, time, and place of the testator's death;
- (4) facts showing that the court with which the application is filed has venue;
- (5) that the testator owned property, including a statement generally describing the property and the property's probable value;
- (6) the date of the will;

(7) the name and residence of:

(A) any executor named in the will; and

(B) each subscribing witness to the will, if any;

(8) whether one or more children born to or adopted by the testator after the testator executed the will survived the testator and, if so, the name of each of those children;

(9) that the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate;

(10) whether a marriage of the testator was ever dissolved after the will was made and, if so, when and from whom; and

(11) whether the state, a governmental agency of the state, or a charitable organization is named in the will as a devisee.

(b) If an applicant does not state or aver any matter required by Subsection (a) in the application, the application must state the reason the matter is not stated and averred.

D. Permissive Notice to Unsecured Creditors

While a small change, it is essential to update your forms to reflect the changed period for presentation of a claim in the permissive notice to trigger a short statute of limitations on the claim. The required language was changed from "within four months" to "before the 121st day after the date of the receipt of the notice." Substantial compliance is not sufficient. While whether to give notice is within the discretion of the personal representative, a defective notice would likely give rise to a valid malpractice claim with determinable damages.

Note also in this context, changing point of view to that of the creditor, the provisions discussed in item "G" below, that significantly change the notice that must be provided to an Independent Executor for there to have been a valid presentation of a claim.

Sec. 308.054. Permissive Notice to Unsecured Creditor. [TPC §294(d)]

(a) At any time before an estate administration is closed, a personal representative may give notice by certified or registered mail, return receipt requested, to an unsecured creditor who has a claim for money against the estate.

(b) Notice given under Subsection (a) must:

(1) **expressly state** that the creditor must present the claim **before the 121st day after the date of the receipt of the notice** or the claim is barred, if the claim is not barred by the general statutes of limitation; and

(2) include:

(A) the date the letters testamentary or of administration held by the personal representative were issued to the representative;

(B) the address to which the claim may be presented;

(C) and an instruction of the representative's choice that the claim be addressed in care of:

(i) the representative;

(ii) the representative's attorney; or

(iii) "Representative, Estate of _____" (naming the estate).

E. Affidavit in Lieu of Inventory, Appraisal, and List of Claims

Due to concerns about increased ease of online access to information contained in the Inventory, Appraisal, and List of Claims, the option of filing an Affidavit in Lieu was added to the Code. In accord with the original rationale of the Inventory filing requirement—notice to creditors of assets available to satisfy a claim—the Affidavit is permissible where there are no unpaid debts except for secured debts, taxes, and administration expenses at the time the Inventory is due. Since (b) allows the decedent’s will to preclude the filing of an Affidavit in Lieu, consideration should be given whether to require the filing of an Inventory in the course of the client’s estate administration.

An Inventory must be prepared in any case, and provided to beneficiaries. If only provided to the beneficiaries, it will be lost over time. If filed, it will be permanently available. While not of great consequence if only personal property and liquid assets are in the decedent’s estate, where real property, whether surface or minerals, is involved, filing is strongly preferable so that those in the future can determine the property that devolved through the estate. (For this same reason full legal and common descriptions should be included in the Inventory.) I have planned and settled many estates where the tasks involved would have been vastly more difficult or impossible had Inventories not been filed in prior generations.

Under some circumstances, the facts of the case may make the non-disclosure the appropriate choice. Care should be taken, however, in light of the strong, long-term utility of a filed Inventory.

Sec. 309.056. Affidavit in Lieu of Inventory, Appraisal, and List of Claims. [TPC §250(c), (d), (e)]

(a) In this section, “beneficiary” means a person, entity, state, governmental agency of the state, charitable organization, or trust entitled to receive property:

- (1) under the terms of a decedent’s will, to be determined for purposes of this section with the assumption that each person who is alive on the date of the decedent’s death survives any period required to receive the bequest as specified by the terms of the will; or
- (2) as an heir of the decedent.

(b) Notwithstanding Sections 309.051 and 309.052, or any contrary provision in a decedent’s will that does not specifically prohibit the filing of an affidavit described by this subsection, if there are no unpaid debts, except for secured debts, taxes, and administration expenses, at the time the inventory is due, including any extensions, an independent executor may file with the court clerk, in lieu of the inventory, appraisal, and list of claims, an affidavit stating that all debts, except for secured debts, taxes, and administration expenses, are paid and that all beneficiaries have received a verified, full, and detailed inventory and appraisal. The affidavit in lieu of the inventory, appraisal, and list of claims must be filed within the 90-day period prescribed by Section 309.051(a), unless the court grants an extension.

(c) If the independent executor files an affidavit in lieu of the inventory, appraisal, and list of claims as authorized under Subsection (b):

- (1) any person interested in the estate, including a possible heir of the decedent or a beneficiary under a prior will of the decedent, is entitled to receive a copy of the inventory, appraisal, and list of claims from the independent executor on written request;
- (2) the independent executor may provide a copy of the inventory, appraisal, and list of claims to any person the independent executor believes in good faith may be a person interested in the estate without liability to the estate or its beneficiaries; and

(3) a person interested in the estate may apply to the court for an order compelling compliance with Subdivision (1), and the court, in its discretion, may compel the independent executor to provide a copy of the inventory, appraisalment, and list of claims to the interested person or may deny the application.

(d) An independent executor is not liable for choosing to file:

(1) an affidavit under this section in lieu of filing an inventory, appraisalment, and list of claims, if permitted by law; or

(2) an inventory, appraisalment, and list of claims in lieu of filing an affidavit under this section.

F. Penalty for Failure to Timely File Inventory, Appraisalment, and List of Claims or Affidavit in Lieu Of

In the course of the continued extension of court supervision discussed in part IV below, a section allowing fines to be imposed for failure to file an Inventory or Affidavit has been added to the Code.

Sec. 309.057. Penalty for Failure to Timely File Inventory, Appraisalment, and List of Claims or Affidavit in Lieu Of. [new]

(a) This section applies only to a personal representative, including an independent executor or administrator, who does not file an inventory, appraisalment, and list of claims or affidavit in lieu of the inventory, appraisalment, and list of claims, as applicable, within the period prescribed by Section 309.051 or any extension granted by the court.

(b) Any person interested in the estate on written complaint, or the court on the court's own motion, may have a personal representative to whom this section applies cited to file the inventory, appraisalment, and list of claims or affidavit in lieu of the inventory, appraisalment, and list of claims, as applicable, and show cause for the failure to timely file.

(c) If the personal representative does not file the inventory, appraisalment, and list of claims or affidavit in lieu of the inventory, appraisalment, and list of claims, as applicable, after being cited or does not show good cause for the failure to timely file, the court on hearing may fine the representative in an amount not to exceed \$1,000.

(d) The personal representative and the representative's sureties, if any, are liable for any fine imposed under this section and for all damages and costs sustained by the representative's failure. The fine, damages, and costs may be recovered in any court of competent jurisdiction.

G. Notice by Creditor to Independent Executor and Claims Procedure

Provisions have now been added to clarify the application of claims notices and procedure in the course of Independent Administration.

In general, prior to recent changes in the Code, the Independent Executor simply "stood in the shoes" of the decedent with respect to claimants. No formal claims procedure was invoked upon grant of Letters Testamentary to an Independent Executor. The limitations period applicable to the claim simply continued to run, with suit required to be filed within that period. Categorization of claims as matured secured claims or preferred debt and lien claims were not clearly applicable to independent administration proceedings. This has now changed.

Sec. 403.052 makes the election of matured secured claim status applicable to independent administrations, with the failure to elect resulting in preferred debt and lien status.

Sec. 403.055 bars unsecured claims where no valid claim is made before the 121st day after the permissive notice of Sec. 308.054.

To be valid, Sec. 403.056 requires that the notice requirements of Sec. 403.052 and 403.055 meet the requirements of an authenticated claim under Sec. 355.004.

These changes, particularly the latter, require a significant change from prior practice in representing creditors seeking to recover in the course of an independent administration.

Sec. 403.052. Secured Claims for Money. [TPC §146(b)]

Within six months after the date letters are granted or within four months after the date notice is received under Section 308.053, whichever is later, a creditor with a claim for money secured by property of the estate must give notice to the independent executor of the creditor's election to have the creditor's claim approved as a matured secured claim to be paid in due course of administration. In addition to giving the notice within this period, a creditor whose claim is secured by real property shall record a notice of the creditor's election under this section in the deed records of the county in which the real property is located. If no election to be a matured secured creditor is made, or the election is made, but not within the prescribed period, or is made within the prescribed period but the creditor has a lien against real property and fails to record notice of the claim in the deed records as required within the prescribed period, the claim shall be a preferred debt and lien against the specific property securing the indebtedness and shall be paid according to the terms of the contract that secured the lien, and the claim may not be asserted against other assets of the estate. The independent executor may pay the claim before maturity if it is determined to be in the best interest of the estate to do so.

Sec. 403.053. Matured Secured Claims. [TPC §146(b 1)]

(a) A claim approved as a matured secured claim under Section 403.052 remains secured by any lien or security interest against the specific property securing payment of the claim but subordinated to the payment from the property of claims having a higher classification under Section 355.102. However, the secured creditor:

- (1) is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances; and
- (2) during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval.

(b) Subsection (a) may not be construed to suspend or otherwise prevent a creditor with a matured secured claim from seeking judicial relief of any kind or from executing any judgment against an independent executor. Except with respect to real property, any third party acting in good faith may obtain good title with respect to an estate asset acquired through a secured creditor's extrajudicial collection rights, without regard to whether the creditor had the right to collect the asset or whether the creditor acted improperly in exercising those rights during an estate administration due to having elected matured secured status.

(c) If a claim approved or established by suit as a matured secured claim is secured by property passing to one or more devisees in accordance with Subchapter G, Chapter 255, the independent executor shall collect from the devisees the amount of the debt and pay that amount to the claimant or shall sell the property and pay out of the sale proceeds the claim and associated expenses of sale consistent with the provisions of Sections 355.153(b), (c), (d), and (e) applicable to court supervised administrations.

Sec. 403.055. Certain Unsecured Claims; Barring of Claims. [TPC §146(b 3)]

An unsecured creditor who has a claim for money against an estate and who receives a notice under Section 308.054 shall give to the independent executor notice of the nature and amount of the claim before the 121st day after the date the notice is received or the claim is barred.

Sec. 403.056. Notices Required by Creditors. [TPC §146(b 4), (b 5)]

(a) Notice to the independent executor required by Sections 403.052 and 403.055 must be contained in:

(1) a written instrument that **complies with Section 355.004** [Affidavit Authenticating Claim for Money in General] and is hand-delivered with proof of receipt, or mailed by certified mail, return receipt requested with proof of receipt, to the independent executor or the executor's attorney;

(2) a pleading filed in a lawsuit with respect to the claim; or

(3) a written instrument that **complies with Section 355.004** [Affidavit Authenticating Claim for Money in General] or pleading filed in the court in which the administration of the estate is pending.

(b) This section does not exempt a creditor who elects matured secured status from the filing requirements of Section 403.052 [section grants election to creditor to opt out of preferred debt and lien], to the extent those requirements are applicable.

Sec. 403.057. Statute of Limitations. [TPC §146(b 6)]

Except as otherwise provided by Section 16.062, Civil Practice and Remedies Code, the running of the statute of limitations shall be tolled only by a written approval of a claim signed by an independent executor, a pleading filed in a suit pending at the time of the decedent's death, or a suit brought by the creditor against the independent executor. In particular, the presentation of a statement or claim, or a notice with respect to a claim, to an independent executor does not toll the running of the statute of limitations with respect to that claim.

Sec. 403.058. Other Claim Procedures Generally Do Not Apply. [TPC §146(b 7)]

Except as otherwise provided by this subchapter, the procedural provisions of this title governing creditor claims in supervised administrations do not apply to independent administrations. By way of example, but not as a limitation:

(1) Sections 355.064 [Suit on Rejected Claim] and 355.066 [effect of Judgment in Suit on Rejected Claim] do not apply to independent administrations, and consequently a creditor's claim may not be barred solely because the creditor failed to file a suit not later than the 90th day after the date an independent executor rejected the claim or with respect to a claim for which the independent executor takes no action; and

(2) Sections 355.156, 355.157, 355.158, 355.159, and 355.160 [related to non-judicial foreclosure proceedings] do not apply to independent administrations.

H. Statutory Durable Power of Attorney

For no apparent reason, the legislature (over the opposition of the Real Property, Probate, and Trust Section of the Bar) revised the Statutory Durable Power of Attorney. Bolded material in the material set out below has been added under the Code. Primary among the potential problematic changes is the requirement that all granted powers must be initialed (although a choice of "All of the powers listed..." is given). At the same time, the form retains the inconsistent requirement that the principal strike the choice not made of a present or springing power.

Much of the addition is information related to the duties of an attorney in fact as fiduciary.

Sec. 752.003. Prescribed Form Not Exclusive. [TPC §490(a)] The form prescribed by Section 752.051 is not exclusive, and other forms of power of attorney may be used.

Sec. 752.051. Form. [TPC §490(a)]

The following form is known as a “statutory durable power of attorney”: STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

You should select someone you trust to serve as your agent (attorney in fact). Unless you specify otherwise, generally the agent’s (attorney in fact’s) authority will continue until:

- (1) you die or revoke the power of attorney;**
- (2) your agent (attorney in fact) resigns or is unable to act for you; or**
- (3) a guardian is appointed for your estate.**

I, _____ (insert your name and address), appoint _____ (insert the name and address of the person appointed) as my agent (attorney in fact) to act for me in any lawful way with respect to all of the following powers **that I have initialed below.**

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (M).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD

- ____(A) Real property transactions;
- ____(B) Tangible personal property transactions;
- ____(C) Stock and bond transactions;
- ____(D) Commodity and option transactions;
- ____(E) Banking and other financial institution transactions;
- ____(F) Business operating transactions;
- ____(G) Insurance and annuity transactions;
- ____(H) Estate, trust, and other beneficiary transactions;
- ____(I) Claims and litigation;
- ____(J) Personal and family maintenance;
- ____(K) Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service;
- ____(L) Retirement plan transactions;
- ____(M) Tax matters.
- ____(N) **ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (N).**

SPECIAL INSTRUCTIONS: Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

I grant my agent (attorney in fact) the power to apply my property to make gifts **outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me**, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES **BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN**:

- (A) This power of attorney is not affected by my subsequent disability or incapacity.
- (B) This power of attorney becomes effective upon my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

If Alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, I name the following (each to act alone and successively, in the order named) as successor(s) to that agent: _____.

Signed this _____ day of _____, _____ (your signature)
State of _____

County of _____ This document was acknowledged before me on _____ (date)
by _____ (name of principal) _____ (signature of
notarial officer) (Seal, if any, of notary) _____ (printed name) My
commission expires: _____

IMPORTANT INFORMATION FOR AGENT (ATTORNEY IN FACT)

Agent's Duties

When you accept the authority granted under this power of attorney, you establish a “fiduciary” relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to:

- (1) act in good faith;**
- (2) do nothing beyond the authority granted in this power of attorney;**
- (3) act loyally for the principal's benefit;**
- (4) avoid conflicts that would impair your ability to act in the principal's best interest; and**
- (5) disclose your identity as an agent or attorney in fact when you act for the principal by writing or printing the name of the principal and signing your own name as “agent” or “attorney in fact” in the following manner:**

(Principal's Name) by (Your Signature) as Agent (or as Attorney in Fact)

In addition, the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code) requires you to:

- (1) maintain records of each action taken or decision made on behalf of the principal;**
- (2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and**
- (3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include:**
 - (A) the property belonging to the principal that has come to your knowledge or into your possession;**
 - (B) each action taken or decision made by you as agent or attorney in fact;**
 - (C) a complete account of receipts, disbursements, and other actions of you as agent or attorney in fact that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;**
 - (D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset's current value, if known to you;**
 - (E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;**
 - (F) each known liability;**
 - (G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and**
 - (H) all documentation regarding the principal's property. Termination of Agent's Authority**

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. An event that terminates this power of attorney or your authority to act under this power of attorney includes:

- (1) the principal's death;**
- (2) the principal's revocation of this power of attorney or your authority;**
- (3) the occurrence of a termination event stated in this power of attorney;**
- (4) if you are married to the principal, the dissolution of your marriage by court decree of divorce or annulment;**

(5) the appointment and qualification of a permanent guardian of the principal's estate; or (6) if ordered by a court, the suspension of this power of attorney on the appointment and qualification of a temporary guardian until the date the term of the temporary guardian expires. Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (Subtitle P, Title 2, Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under Chapter 32 of the Texas Penal Code.

THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Added by Acts 2011, 82nd Leg., R.S., Ch. 823, Sec. 1.01, eff. January 1, 2014. Amended by Acts 2013, 83rd Legislature, Ch. ____ (HB 2918), effective January 1, 2014.

Sec. 751.058. Effect of Revocation of Durable Power of Attorney on Third Party. [TPC §488]

Unless otherwise provided by the durable power of attorney, a revocation of a durable power of attorney is not effective as to a third party relying on the power of attorney until the third party receives actual notice of the revocation.

The author does not use the statutory durable power of attorney. Why? One, it is very long and confusing. Two, it contains precatory language. Three, it is not a general power of attorney. Four, it does not allow unlimited gifts. Five, it provides no revocation mechanism other than actual notice to one dealing with the attorney in fact, which present both practical difficulties and significant proof problems in real world applications.

The form used by the author is the following:

Durable General Power of Attorney for Property

I, **Principal**, of the County of Dallas, State of Texas, hereby constitute and appoint **Attorney-in-fact** the lawful attorney for me in my name, place, and stead to do anything for me including but not limited to the power to buy, sell, or partition any of my property, both real and personal, whether surface or mineral interests or both; to make gifts on my behalf of any size; to borrow and pledge; to purchase and sell stocks and bonds, including United States Treasury Bonds; to sue, defend, or compromise; to hire counsel and agents; to ask, demand, recover, and receive any sums of money, debts, dues, property or effects due or belonging to me from any person whatsoever; and to execute all necessary legal documents, receipts, releases, and discharges; giving and granting unto my attorney full power and authority to do and perform all and every act and thing that I might or could do if I were personally present, deemed by him requisite to effectuate this general power of attorney. My attorney in fact shall have no power to make gifts that would cause the power granted under this power of attorney to be a general power of appointment. This general power of attorney shall include, but not be limited to, the power to act for me in any lawful way with respect to real property transactions; tangible personal property transactions; stock and bond transactions; commodity and option transactions; banking and other financial institution transactions; business operating transactions; insurance and annuity transactions; estate, trust, and other beneficiary transactions; claims and litigation; personal and family maintenance; benefits from Social Security, Medicare, Medicaid, or other governmental programs or civil or military service; retirement plan transactions; and tax matters; all as described and directed to be construed in Chapter 752 of the Texas Estates Code. I indemnify and hold harmless any third party relying in good faith on this power.

This power of attorney may be voluntarily revoked only by my written revocation filed of record in Dallas County, Texas.

This power of attorney shall not terminate on or be affected by my disability or incapacity and the powers granted my attorney by this document shall be exercisable even if I become disabled or incompetent. All acts

done by my said attorney pursuant to this power of attorney, during any period of my disability or incompetence, shall have the same effect and shall inure to the benefit of and bind me as if I were not disabled or incompetent.

If **Attorney-in-fact** shall die or fail or refuse to serve or be disqualified, I appoint **Alternate Attorney-in-fact** my lawful attorney for me in my name, place and stead to have all of the power and authority granted above.

Date: _____.

Signature and Acknowledgement

To date, no greater problems with acceptance have been encountered than problems recounted by those seeking to use a statutory durable power of attorney.

I. Attempted disclaimer by certain child support obligors ineffective

Sec. 122.107 now provides that a disclaimer by an obligor whose child support obligation has been determined by a final Title IV-D proceeding or judgment is ineffective.

IV. Changes permitting (or suggesting) amendment

A. Self-Proving Wills

1. Simultaneous Execution, Attestation, and Self-proving

Falling into the “is this really necessary” category, the Code adds provision authorizing the execution of a Will with one set of signatures sufficient for attestation and self-proving.

Sec. 251.1045. Simultaneous Execution, Attestation, and Self-proving. [TPC §59(a 1)]

(a) As an alternative to the self-proving of a will by the affidavits of the testator and the attesting witnesses as provided by Section 251.104, a will may be simultaneously executed, attested, and made self-proved before an officer authorized to administer oaths, and the testimony of the witnesses in the probate of the will may be made unnecessary, with the inclusion in the will of the following in form and contents substantially as follows:

I, _____, as testator, after being duly sworn, declare to the undersigned witnesses and to the undersigned authority that this instrument is my will, that I have willingly made and executed it in the presence of the undersigned witnesses, all of whom were present at the same time, as my free act and deed, and that I have requested each of the undersigned witnesses to sign this will in my presence and in the presence of each other. I now sign this will in the presence of the attesting witnesses and the undersigned authority on this _____ day of _____, 20____.

Testator

The undersigned, _____ and _____, each being at least fourteen years of age, after being duly sworn, declare to the testator and to the undersigned authority that the testator declared to us that this instrument is the testator’s will and that the testator requested us to act as witnesses to the testator’s will and signature. The testator then signed this will in our presence, all of us being present at the same time. The testator is eighteen years of age or over (or being under such age, is or has been lawfully married, or is a member of the armed forces of the United States or of an auxiliary of the armed forces of the United States or of the United States Maritime Service), and we believe the testator to be of sound mind. We now sign our

names as attesting witnesses in the presence of the testator, each other, and the undersigned authority on this _____ day of _____, 20_____.

_____ Witness _____ Witness

Subscribed and sworn to before me by the said _____, testator, and by the said _____ and _____, witnesses, this _____ day of _____, 20_____.

(SEAL)

(Signed) _____

(Official Capacity of Officer)

(b) A will that is in substantial compliance with the form provided by Subsection (a) is sufficient to self-prove a will.

2. Self-Proved Holographic Will

Also falling into the “is this really necessary” category, since the author has in 35 years of practice never encountered a self-proved holographic Will, the Code adds provision authorizing the self-proving of a holographic will by affidavit of the testator only.

Sec. 251.107. Self-proved Holographic Will. [TPC §60]

Notwithstanding any other provision of this subchapter, a will written wholly in the testator’s handwriting may be made self-proved at any time during the testator’s lifetime by the attachment or annexation to the will of an affidavit by the testator to the effect that:

- (1) the instrument is the testator’s last will;
- (2) the testator was 18 years of age or older at the time the will was executed or, if the testator was younger than 18 years of age, that the testator:
 - (A) was or had been married; or
 - (B) was a member of the armed forces of the United States, an auxiliary of the armed forces of the United States, or the United States Maritime Service at the time the will was executed;
- (3) the testator was of sound mind; and
- (4) the testator has not revoked the will.

B. Valuation of Property Distributed in Kind in Satisfaction of Pecuniary Gift

Absent direction in the governing instrument, in-kind distributions in satisfaction of a pecuniary gift are at the property’s fair market value at time of distribution.

Sec. 124.051. Valuation of Property Distributed in Kind in Satisfaction of Pecuniary Gift. [TPC §378A(b)]

Unless the governing instrument provides otherwise, if a will or trust contains a pecuniary devise or transfer that may be satisfied by distributing assets in kind and the executor, administrator, or trustee determines to fund the devise or transfer by distributing assets in kind, the property shall be valued, for the purpose of funding the devise or transfer, at the value of the property on the date or dates of distribution.

Consideration should be given to whether this is the desired outcome, or discretion should be granted to the controlling fiduciary. Sample language for an executor’s power granting such discretion follows:

EXECUTOR MAY SATISFY IN CASH OR IN KIND

12.11. My Independent Executor shall have full power and the sole discretion to satisfy bequests (other than specific bequests) wholly or partly in cash or in kind, to partition assets, to distribute property subject to any indebtedness which may be secured by the property, and to select which assets shall constitute a bequest. My

Independent Executor shall have discretion to choose a valuation date other than the date of distribution when valuing property to be distributed in-kind in satisfaction of a bequest.

C. Income Determination and Distribution

A provision has been added regarding estate income determination and distribution.

Sec. 310.004. Income Determination and Distribution. [TPC §378B(b), (c), (d)]

(a) Unless a will provides otherwise, income from the assets of a decedent's estate that accrues after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be:

- (1) determined according to the rules applicable to a trustee under the Texas Trust Code (Subtitle B, Title 9, Property Code); and
- (2) distributed as provided by Subsections (b) and (c) and by Chapter 116, Property Code [the Uniform Principal and Income Act].

(b) Income from property devised to a specific devisee shall be distributed to the devisee after reduction for:

- (1) property taxes;
- (2) other taxes, including taxes imposed on income that accrues during the period of administration and that is payable to the devisee;
- (3) ordinary repairs;
- (4) insurance premiums;
- (5) interest accrued after the testator's death; and
- (6) other expenses of management and operation of the property.

(c) The balance of the net income shall be distributed to all other devisees after reduction for the balance of property taxes, ordinary repairs, insurance premiums, interest accrued, other expenses of management and operation of all property from which the estate is entitled to income, and taxes imposed on income that accrues during the period of administration and that is payable or allocable to the devisees, in proportion to the devisees' respective interests in the undistributed assets of the estate.

As with trusts, consideration should be given to whether it is advisable to grant the personal representative discretion to determine principal and income, and alter the appropriate distribution of income. Sample language of one possible choice follows:

INDEPENDENT EXECUTOR DECIDES INCOME AND PRINCIPAL

10.8. My Independent Executor shall determine what is income or principal, and shall apportion and allocate all receipts, credits, disbursements, expenses and charges to income or principal as he shall deem proper. My Independent Executor shall allocate the net income of my estate accruing during the year following my death to the residue of my estate.

V. Changes suggested by the evolving law

A. Revocation by operation of law

There has been a marked expansion in revocation by operation of law upon the dissolution of the marriage of an individual. This revocation now extends not only gifts to the spouse, but to gifts to, fiduciary appointments of, and grants of powers of appointment to relatives of the former spouse, not only under the Will and life insurance policies, but certain trusts.

Careful consideration should be given to whether the governing document should provide to the contrary, continuing the gift even were the marriage to be dissolved. Particular circumstances that might suggest such continuation include fiduciary appointments of relatives of the former spouse for the benefit of children of the individual and former spouse, or where gifts are independent of the marriage relationship.

1. Designation in Wills, Trusts, and Other Non-Testamentary Transfers

Sec. 123.001. Will Provisions Made Before Dissolution of Marriage. [TPC §69(a), (b)]

(a) In this section, “relative” means an individual related to another individual by:

- (1) consanguinity, as determined under Section 573.022, Government Code; or
- (2) affinity, as determined under Section 573.024, Government Code.

(b) If, after the testator makes a will, the testator’s marriage is dissolved by divorce, annulment, or a declaration that the marriage is void, all provisions in the will, including all fiduciary appointments, shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator, unless the will expressly provides otherwise.

Sec. 123.051. Definitions. [TPC §471]

In this subchapter:

- (1) “Disposition or appointment of property” includes a transfer of property to or a provision of another benefit to a beneficiary under a trust instrument.
- (2) “Divorced individual” means an individual whose marriage has been dissolved by divorce, annulment, or a declaration that the marriage is void.
- (2-a) “Relative” means an individual who is related to another individual by consanguinity or affinity, as determined under Sections 573.022 and 573.024, Government Code, respectively.
- (3) “Revocable,” with respect to a disposition, appointment, provision, or nomination, means a disposition to, appointment of, provision in favor of, or nomination of an individual’s spouse that is contained in a trust instrument executed by the individual before the dissolution of the individual’s marriage to the spouse and that the individual was solely empowered by law or by the trust instrument to revoke regardless of whether the individual had the capacity to exercise the power at that time.

Sec. 123.052. Revocation of Certain Nontestamentary Transfers; Treatment of Former Spouse as Beneficiary under Certain Policies or Plans. [TPC §472(a)]

(a) The dissolution of the marriage revokes a provision in a trust instrument that was executed by a divorced individual before the divorced individual’s marriage was dissolved and that:

- (1) is a revocable disposition or appointment of property made to the divorced individual’s former spouse or any relative of the former spouse who is not a relative of the divorced individual;
- (2) confers a general or special power of appointment on the divorced individual’s former spouse or any relative of the former spouse who is not a relative of the divorced individual; or
- (3) nominates the divorced individual’s former spouse or any relative of the former spouse who is not a relative of the divorced individual to serve:
 - (A) as a personal representative, trustee, conservator, agent, or guardian; or
 - (B) in another fiduciary or representative capacity.

(b) Subsection (a) does not apply if one of the following provides otherwise:

(1) a court order;

(2) the express terms of a trust instrument executed by the divorced individual before the individual's marriage was dissolved; or

(3) an express provision of a contract relating to the division of the marital estate entered into between the divorced individual and the individual's former spouse before, during, or after the marriage.

(c) Sections 9.301 and 9.302, Family Code, govern the designation of a former spouse as a beneficiary of certain life insurance policies or as a beneficiary under certain retirement benefit plans or other financial plans.

Sec. 123.053. Effect of Revocation. [TPC §472(b)]

(a) An interest granted in a provision of a trust instrument that is revoked under Section 123.052(a)(1) or (2) passes as if the former spouse of the divorced individual who executed the trust instrument and each relative of the former spouse who is not a relative of the divorced individual disclaimed the interest granted in the provision.

(b) An interest granted in a provision of a trust instrument that is revoked under Section 123.052(a)(3) passes as if the former spouse and each relative of the former spouse who is not a relative of the divorced individual died immediately before the dissolution of the marriage.

2. Designation in Durable Power of Attorney

Currently, revocation of a designation as attorney-in-fact extends only to the spouse. I would expect this revocation to be extended to relatives of the former spouse at some point in the future.

Sec. 751.053. Effect of Principal's Divorce or Marriage Annulment If Former Spouse Is Attorney in Fact or Agent. [TPC §485A]

Unless otherwise expressly provided by the durable power of attorney, if, after execution of a durable power of attorney, the principal is divorced from a person who has been appointed the principal's attorney in fact or agent or the principal's marriage to a person who has been appointed the principal's attorney in fact or agent is annulled, the powers of the attorney in fact or agent granted to the principal's former spouse terminate on the date the divorce or annulment of marriage is granted by a court.

VI. Strategic observations

Texas probate law has been remarkably stable since the days of the Republic. For over 150 years independent administration, the great innovation of Texas probate law, provided an efficient, economical way to administer and distribute decedents' estates where a decedent chose to relieve the personal representative of court supervision (or interference, depending on one's point of view). Indeed, until approximately the early 1980s the probate court was generally without jurisdiction to take any further action once an independent executor qualified. While remedies were provided to third parties who might be affected if the independent executor failed to take a required action (such as publishing the notice to creditors or Inventory, Appraisal, and List of Claims), court supervision could not be invoked.

This lack of jurisdiction also made Texas unique in that where an independent administration was granted, a testamentary trust was not subject to supervision by the

probate court, putting testamentary trusts on the same footing in most cases with inter vivos trusts.

The initial breach in the boundary around independent administration came in the early 1980s, with the introduction of a provision allowing the court jurisdiction to require an accounting and distribution if after two years the estate settlement process had not been completed. Unfortunately, the expansion of oversight continued as the probate courts (primarily in the larger counties) and legislature worked to expand accountability of the independent executor to the courts over the next thirty years. A great deal of this expansion has occurred over the last three legislatures, concurrent with the codification process.

For many years the practitioner could comfortably advise a client that an independent administration imposed little more overhead, and at a later date, than use of a revocable inter vivos trust as the primary dispositive tool. No action was needed simply to avoid probate.

Given the increasing burden on independent executors regarding notice provisions, penalties for non-performance, the ability of the court in which the proceeding is pending to initiate actions against an independent executor on its own motion, and the apparent trend of expansion of these supervisory actions, this conclusion is increasingly called into question. Each added requirement adds to the expense and inconvenience of the probate process. Each intervention by the court is expensive for the client, in both time and legal expense.

The balance is gradually shifting, and the reflective practitioner will continue to consider carefully when the balance tips and use of revocable inter vivos trusts as a primary dispositive tool is appropriate.