

Know When to Hold 'Em; Know When to Fold 'Em...

The 2017 Texas Estate and Trust Legislative Update

(Including Decedents' Estates, Guardianships, Trusts,
Powers of Attorney, and Other Related Matters)

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Selected Legislative Changes Effective Before, On, or After September 1st (www.snpalaw.com/resources/Selected2017LegislativeChanges)

September 1st has now come and gone, and that's when most of the legislation passed in Austin earlier this year went into effect. For those of you who practice on the probate side, here's a reminder of selected changes that may affect your pleadings or forms.

This isn't meant to be an exhaustive list of everything that's changing – just most of the changes that will affect how pleadings and forms are drafted.

The list is grouped first by when changes go into effect. Then, within each group, it's mostly organized in the same order as bills are discussed in Bill Pargaman's legislative update. You can access the full update through the legislative update page on the REPTL website, or directly at www.snpalaw.com/resources/2017LegislativeUpdate.

Before September 1st:

- **Election to Receive Information About Ward** – Effective immediately, the citation issued to a relative of a proposed ward must notify the relative that they must make a written election to receive information from the guardian about changes in the ward's health and residency. For existing guardianships where the election is not currently necessary, the guardian must notify the relatives of the need to make that election by September 1, 2019.
- **Designation of Caregiver for Aftercare Instructions** – Effective immediately, a hospital must allow a patient or the patient's surrogate decision-maker the opportunity to designate a caregiver who will be consulted regarding responsibilities following the patient's discharge.

On September 1st:

- **References to Last Will and Testament** – References throughout the Estates Code to "last will and testament," or something similar have been shortened to just "will." **This includes references in the form of self-proving affidavit itself!**
- **DL's and SSN's in Probate Applications** – Applications for the probate of wills or for the issuance of letters of administration filed on or after September 1st must include the last three numbers of each applicant's driver's license and social security numbers, if applicable, and, if known at the time the application is filed, the last three numbers of the decedent's driver's license and social security numbers. An application for letters that omits either of the decedent's numbers must state the reason the numbers aren't included.

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- **Minor's Waiver of Heirship Proceeding** – If someone waives service on behalf of a minor younger than 12 in an heirship proceeding filed on or after September 1st, both the name of the minor and the person waiving service, and the latter's relation to the minor, must be included in the affidavit or certificate of service on heirs.
- **Small Estate Affidavits** – These are now available for estates valued at \$75,000 or less (up from \$50,000) for affidavits filed on or after on or after September 1st.
- **County of Publication of Notice to Creditors** – These should be published in any paper of general circulation in the county of the decedent's residence, rather than a paper *printed* in that county.
- **"Distributees"** – References to "beneficiaries" (mostly in the independent administration chapters) have been changed to "distributees."
- **Penalty for Inaccurate Affidavit in Lieu** – If an affidavit in lieu of inventory for a decedent dying on or after September 1st misrepresents that all beneficiaries have received a copy of the inventory, a court may fine the executor up to \$1,000 and hold the executor liable for any damages caused by the misrepresentation.
- **Intervention in Guardianships** – A person entitled to receive notice of the initial guardianship application need not file a motion seeking permission of the court to intervene in the guardianship proceeding.
- **Omission of Addresses** – If a person named in a guardianship application was previously protected (not just currently protected) by a protective order under the Family Code, that person's address may be omitted from the application.
- **SDMA's** – A supported under a supported decision-making agreement is expressly made a fiduciary with respect to the principal, and the statutory form is modified to include a notice of these fiduciary duties.
- **Reformation of Trusts** – Trusts may be modified or reformed to include language qualifying a distributee for governmental benefits or to correct a scrivener's error.
- **Broader Decanting** – The broader authority to decant authorized for a trustee with "full discretion" is now available to any trustee whose distribution authority isn't limited by an ascertainable standard such as health, education, support, or maintenance.
- **Financial Powers of Attorney** – Beginning September 1st, in most cases, third parties will be required to provide reasonable grounds to refuse to recognize an agent's authority under a financial power of attorney. Other changes going into effect at that time:
 - If co-agents are named, each may act independently of the other unless the power provides otherwise.
 - A named agent's fiduciary duties will not arise until the agent has accepted appointment. Successor agents are not considered agents until no predecessor agents can or will act.
 - Agents are entitled to expense reimbursement and reasonable compensation unless the power provides otherwise.

Selected Legislative Changes Effective Before, On, or After September 1st

- Certain “hot powers” must be expressly authorized in the power of attorney (if signed on or after September 1st).
- Numerous references to “attorney-in-fact or agent” have been shortened to “agent,” including in the statutory form itself.
- **Guardianship Declarations** – A guardianship declaration for oneself (but not for minor children) will be considered self-proved if the declarant’s signature is acknowledged before a notary, eliminating the need for two witnesses. However, two witnesses will still be required if the declaration is used to *disqualify* anyone, in which case the standard self-proving affidavit is still advisable.
- **Declaration for Mental Health Treatment** – A declaration for mental health treatment may be signed by the principal and acknowledged before a notary, instead of being signed before two witnesses. (Similar to the change made to medical powers of attorney and directives to physicians back in 2009.)
- **Beneficiary Designation for Motor Vehicles** – A vehicle title may designate a sole beneficiary to take title to the vehicle upon the owner’s death. If there are two owners with rights of survivorship, the designation is effective upon the survivor’s death.. (While this change is effective September 1st, it will likely take a while for new title forms to become available.)
- **Digital Assets** – The Revised Uniform Fiduciary Access to Digital Assets Act goes into effect. This involves changes to the statutory durable power of attorney form, and changes to your will and trust forms may be advisable. See the full legislative update for more details.
- **Deposit of Wills** – Attorneys and other persons in possession of someone’s will may deposit the will with the county clerk of the testator’s last known residence (for a \$5 fee) if unable to maintain custody or find the testator.

On January 1st:

- **Medical Powers of Attorney** – The separate mandatory disclosure statement is moved into the statutory form itself. (Since the statutory form remains mandatory, and the changes don’t go into effect until January 1, 2018, it may not be prudent to change these forms early.)

Enjoy changing your documents – and remember to change any outdated references to the Texas Probate Code (or even the Texas Trust Act!), if you haven’t already.

Bill Pargaman is a partner with the Austin law firm of Saunders, Norval, Pargaman & Atkins, L.L.P., is certified as a specialist in estate planning and probate law by the Texas Board of Legal Specialization, and is a fellow in the American College of Trust and Estate Counsel. He was chair of REPTL’s Estate and Trust Legislative Affairs Committee (ETLAC) for the 2009-2013 legislative sessions, and served as REPTL’s 2015-2016 chair. Thanks should also be extended to Austin attorney Craig Hopper, who took over as ETLAC chair beginning with the 2015 legislative session.