

# **2001 LEGISLATIVE DEVELOPMENTS**

## **Starting All Over Again**

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©

By

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- “A Guide to Planning and Administering Estates & Trusts,” 1996 & 1997 American Bar Association Annual Conventions (Panelist).
- “Probate Practice in Travis and Surrounding Counties,” Travis County Probate and Trust Law Section, 1996.
- “WHAT’S HOT: GRATS, GRUTS, PRTS, QPRTS & FLPS,” ANNUAL TAX CONFERENCE, Travis County CPA Association. 1995.
- "The 706 for Country Lawyers and Other Simple People," Travis County Probate and Trust Law Section, 1994.
- "DEATH AND TAXES: An Introduction To Taxes Concerning A Probate Attorney," prepared for the University of Texas Legal Assistant Program--1993.
- "Estate Planning for PWAs (Persons With AIDS)," State Bar of Texas, 16th Annual Advanced Estate Planning and Probate Course 1992.
- "Divorce: Effect Upon Life Insurance and Non Probate Assets," 1988, Probate & Property, magazine of the Real Property, Probate and Trust Section, American Bar Association.
- "Non - Probate Assets and Miscellaneous Items; The Difference Between Writing a Will and Planning an Estate," Travis County Probate and Estate Planning Conference - 1986.

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**Introduction.** The Governor did not veto any of the bills discussed in this paper. The full text of all bills and all of the legislative history can be found at:

<http://www.capitol.state.tx.us/>

The bills can be printed directly or downloaded in WordPerfect or Word format.

### 1. **PROBATE**

a. **Jurisdiction** There are several bills that continue to clean up jurisdictional questions regarding statutory probate courts. Most are set out in the Government Code, below.

HB 536 amends Probate Code Sections 5 and 606. It makes clear that in counties without a statutory probate court, original jurisdiction is in the county court or the county courts at law and not the district courts.

The bill also says that statutory probate courts have jurisdiction over all matters “regarding probate and administration ... unless otherwise provided by law.”

Judge Guy Herman testified that the statutory probate judges were unanimous in wanting this clarifying language which they believe does not make any real change.

b. **Section 42 and SGDs** HB 920 enacts the Uniform Parentage Act, see Family Code below. That statute amends Probate Code Section 42(b)(1) (Section 2.18 of the bill).

i. **SGDs.** Traditionally there has been a biological mom and a biological father. The biggest complications were children born out of wedlock and adopted children. Now there are scientifically generated descendants who can have one or more of the following persons who have some of the elements of a traditional parent:

(1) Sperm donor,  
 (2) Egg donor  
 (and here there can be a nucleus donor and an albutin donor),  
 (3) Gestation  
 mother, and,  
 (4) Intended  
 father, and  
 (5) Intended  
 mother.

ii. **Section 42 & Biological Parents.** The Probate Code talks in terms of “biological” mothers and fathers. A phrase that is not very helpful with the advent of the list of parent types set out above. The amendment to Section 42(b)(1) now cause it to read,

For the purpose of inheritance, a child is the child of his biological father if the child is born under circumstances described by Section 160.201, Family Code...

iii. **Section 160.201.** Section 160.201(b) says the father child relationship is established by  
 (1) an un rebutted presumption of paternity under Section 160.204 (a child born during marriage)  
 (2) an acknowledgment of paternity,  
 (3) an adjudication of paternity,  
 (4) an adoption,  
 or  
 (5) a man consenting to assisted reproduction by his wife under Sections 160.701 et seq.

iv. **Possible Intestacy Issues:**

(1) **Moms: Egg Donors.** Section 42(a) regarding a mother was not amended. Section 160.702 says a “donor” is not a parent. However, that section and all of Chapter 160 is for purposes of child support and conservatorship. It remains for the courts to decide if this is imported into Section 42(a).

(2) **Moms: Gestation.** Are you a biological mother if you give birth to a child? (See Family Code Section 160.201(a)(1)) Should it make a difference if she is the intended mother? (Section 160.102(9).

(3) **Dads.** As noted above Section 160.702 “donors” are not parents for purposes of the Family Code, but we will have to see if that is imported into our inheritance rights.

c. **Determination of Heirship.** HB 2731 now requires in all heirships  
 i. Citation by publication (Section 50(b)); and  
 ii. The appointment of an ad litem (Section 53(c)).

The bill prohibits waiver of citation for any child who is “at least 12 years of age but younger than 19.”

d. **Void Bequests to Scriveners.** The class of lawyers writing wills who can be beneficiaries is expanded under amended Section 58B(b). Now lawyers can be beneficiaries of wills written for the spouse of the testator or any ascendant or descendant of the testator.

Also the lawyer may now be related within the 3<sup>rd</sup> degree of consanguinity rather than just the 2<sup>nd</sup>.

e. **Social Security Numbers and Muniments of Title.** SB 723 eliminates the requirement of social security numbers in applications to probate a will as a muniment of title (Section 89A(a)). This session the social security requirement for temporary guardians was also removed, see below. Now all sections requiring social security numbers have been removed from the code.

f. **Court for Rejected Claims.** SB 723 amends Section 313 and requires that suits on rejected claims be filed in the court where the estate is pending.

g. **Livestock Commission.** SB 1407 amends Section 335 which limits the amount of commission for the sale of livestock to 3%. This bill increases it to 5%.

h. **Non Testamentary Arrangements: Mutual Fund Account.** SB 1640 amends Section 450 to add mutual fund accounts to the list of assets that are non testamentary in nature. Other current, listed examples are life insurance, employment contracts, bonds, mortgages etc.

## 2. GUARDIANSHIP

### a. Continued Jurisdiction.

i. HB 1037 extends the jurisdiction of a probate court after a ward

reaches 18, dies or is recappeditated. Currently the court can only do those things necessary to approve a final account or bring a guardian and his surety to task, Section 606. This amendment to Section 606(e), spells out and expands the courts continued jurisdiction. In particular it says the court continues to have jurisdiction to hear

(1) Subsection (1): An action by (or on behalf of) the former ward against the former guardian for misconduct in office. Unfortunately it does not clearly say that includes an action against the guardian's surety. Probably such claims are picked up under subsections (3) and (4) below which includes actions under Section 668.

(2) Subsection (2): Action by a surety against the former guardian when a claim is asserted against the surety.

(3) Subsection (3): Any claims for administrative expenses (attorneys fees, compensation, court costs) or "...any other matter set out in Subpart H of Part 2..." That is Sections 665 through 669.

(4) Subsection (4): Any matter arising out of the final accounting and discharge (Subpart C of Part 4, Sections 745 through 758).

(5) Subsection (5): Any other matter "related or appertaining to a guardianship estate..." This subsection is new and the most significant part of this amended statute.

ii. This statute does not tell us if a statutory probate court continues to have the broad jurisdiction and transfer powers.

iii. It is not clear if subsection 5 is limited to actions that were pending on the date the ward died (etc.) Does the probate court have jurisdiction on matters brought after that date? The court probably has to have jurisdiction on compulsory claims, but beyond that it could extend the probate court's jurisdiction without clear boundaries.

iv. Some have argued that subsection 5 is very limited in scope because "appertaining to" requires a guardian to be a party. The "any other matter related... to a guardianship estate" may be the saving phrase.

v. This statute does not make clear who is the party at the point that the guardianship would otherwise be closed. The more reasoned answer is the former ward, or his estate. To allow the former guardian to continue to be a party might produce litigation that the former ward does not wish to pursue.

**b. Guardianships Are Settled Not Closed.** In drafting the changes to Section 606(e) above, it became necessary to fix the language of several other sections dealing with the closing of guardianships (HB 1037). The statutes said things like "the guardianship...is settled and closed when..." the ward dies (Section 745(a)(1)). That suggested it came to a complete and sudden halt. The amendments to Sections 694G, 745, 746, 747(a) 749 and 752 all reflect a winding up period. These changes

make clear that a guardianship goes through a winding up process.

**c. Guardian Compensation.** There several amendments to Section 665.

**i. Other Funds Available.** Section 665 is amended by HB 1132 to allow a guardian's compensation to be paid out of "other funds available for that purpose." Currently a court can order guardian's compensation for persons serving solely as guardian of the person from the ward's estate. Now the court may authorize those payments from other sources. This would include county funds if budgeted as well as the grants established last session under Government Code § 531.125.

**ii. Fees At Approval of Accountings.** Section 665(b) says a guardian is entitled to fees when the annual or final account is approved (SB 1417). This amendment was intended to allow fees only upon approval of the accountings.

**iii. No Usual and Customary Charges.** SB 1417 also says a finding that the 5 and 5 standard is unreasonably low cannot be based on the guardian's "usual and customary charges." This means lawyers cannot claim their usual hourly rates.

**d. Designations of Guardian For Children.** Sections 676, 677, 677A, 677B, 679 and 679A are revised by HB 1132.

**i.** This statute allows a surviving parent to designate a guardian for a minor or incapacitated adult child, not only upon death of the surviving parent, but also upon the incapacity of that remaining parent.

ii. It provides for a self proving form that can be easily proved up like a self proved will.

iii. For holographic or attested designations it requires additional proof.

iv. The proof requirements are based on the will proof statutes.

v. A copy of the revised form is attached to this paper. The copy is redlined to easily show the changes. A copy can be downloaded and the redlining removed by going to the legislative website:

[\(http://www.capitol.state.tx.us/\)](http://www.capitol.state.tx.us/).

Type in HB 1032 and check the “text” box. That will take you to the bill and you can download a WordPerfect copy for editing.

e. **Filing Before Majority for Adult Incapacitated Children.** Amendments to Section 682A(a) were added to HB 1032. This section extends the time for filing an application for a guardianship for a minor who will be an adult incapacitated person. Currently the application can be filed 60 days before a minor turns 18. This bill extends that time to 180 days. Previously it was not clear that the application could be considered by the court before the child reached 18. Now it is clear that the hearing may occur before the child reaches 18, but the guardian cannot take the oath (Section 701) or assume his authority until the child reaches 18.

f. **Resident Agents.** Last session a bill on resident agents in decedents’ estates was passed. The

counterpart for guardianships was vetoed. Now those changes apply to guardianships.

i. **Change of Agent.** The guardian can replace the agent. Section 760A

ii. **Resignation.** Now there is a mechanism for a resident agent in a guardianship to resign. This new statute allows an agent to resign after giving notice to the guardian and filing with the court. The resignation is effective upon entry of the court order. Section 760A

iii. **Removal.** To give the court a way to deal with a guardian who no longer has a resident agent, Section 761 was also amended. A court may remove a guardian if a new resident agent is not appointed.

g. **Mental Exam.** HB 3144 amends Section 687(b) and requires at least 4 days notice to the ward and the ad litem before a hearing to determine the necessity of a physician’s examination.

h. **Joint Guardians’ Divorce.** HB 1132 adds subsection (9) to Section 761(c) to allow a court to remove a co-guardian when there is a divorce. However, it appears that removal is not mandatory and occurs only if it is in the best interest of the ward. This may give rise to the only place in code where joint guardians are not married to each other. The amendment to Section 761(e) supports this read when it says “If a joint guardian is removed...” the other shall continue to serve as sole guardian.

i. **Permissive Notice to Creditors.** HB 3144 amends Sections

784(e) and 786(a). These provisions permit, but do not require, a guardian to give notice to creditors that they must make their claims within 120 days or be barred. This is the counterpart to Section 294 for decedents' estates.

j. **Inspection of Estate Planning Documents.** HB 1132 adds Section 865A. A guardian may now obtain access to a will, trust or other estate planning document if

- i. The guardian first shows good cause for an in camera inspection;
- ii. The purpose of the examination is for tax motivated gifts under Section 865;
- iii. And after the in camera inspection, if the court determines that good cause exists to permit release of the document for purposes of tax motivated gifts.

The bill also provides that an attorney is authorized to deliver the document to the court and such delivery is not a breach of the attorney client privilege.

k. **867 Trusts.** HB 628 made changes to Section 867 governing "Guardianship Trusts" or "867 Trusts."

i. **Guardians Ad Litem May Apply.** Now a guardian ad litem may apply to the court for a trust (Section 867(b)). Many have argued that it is more in keeping with the role of a guardian ad litem, than an attorney ad litem, to seek an 867 trust. Guardians and attorney ad litem continue to have the right to seek a trust. The requirement for a guardian even, if just of the person continues, in place.

ii. **Individual Trustees.** Now individuals may serve as trustees of guardianship trust, if the amount is less than \$50,000. If the amount is greater than \$50,000 the court may appoint an individual but only if

(1) No financial institution is willing to serve; the statute requires the judge to "check any list of corporate fiduciaries." This list is to be maintained by the presiding statutory probate judge and the Texas Bankers Association.

(2) And, if the court find that the appointment is in the ward's best interest.

The new statute does not tell us what happens if the trust grows to an amount greater than \$50,000.

iii. **Bonds for Individual Trustees.** Previously an 867 trustee did not have to post bond. Now it is clear that a corporate trustee still does not have to post a bond, but an individual will, Sections 868(a)(4) and 868B. The amount of the bond is the trust's principal plus a year of projected income. Notice it is all of the trust's principal not just the personal property requirement for a guardian of the estate under Section 703(d).

l. **Social Security Numbers in Temporary Guardianships.** This oversight is finally fixed. HB 1132 amends Section 875(c) and eliminates the requirement of social security numbers in applications for temporary guardianships.

m. **Community Administrators.** HB 1132 takes the existing Section 883, which is one paragraph, and

turns it into Sections 883, 883A, 883B, 883C, 883D, 884 and 884A. These sections spell out the rules when one spouse is incapacitated and the other spouse becomes the community administrator or a third party becomes the guardian.

i. **Removal.** Section 883C sets the grounds for removal of the spouse as community administrator;

ii. **Accounting and Inventory.** Section 883B allows for an inventory and accountings upon a showing of good cause;

iii. **Attorney Ad Litem.** Section 883D provides for the appointment of an attorney ad litem;

iv. **Lawsuit Information.** Section 884A provides that a spouse who is serving as community administrator must inform the court of any suits for divorce or in which the incapacitated person is named as a defendant. Oddly it does not include actions in which the incapacitated person is named as a plaintiff or in any other capacity other than a defendant. It also says this applies to a spouse who is managing “the entire community estate under Section 883.”

v. **Third Party Guardians.**

(1) If a third party is appointed guardian, the court (after considering the financial and other relevant factors) may order the non incapacitated spouse to deliver up to ½ of the joint management community property to the guardian, Section 883(c)(2).

(2) That third party guardian shall also be entitled to administer (Section 883(c)(3)):

(a) The incapacitated spouse’s separate property,

(b) The joint community to be managed by the guardian by order of the court;

(c) The sole management community property (Family Code Section 3.102) and

(d) Any income earned by these assets.

vi. **Non Incapacitated Spouse’s Right to Manage.** The non incapacitated spouse shall continue to have the right to administer his or her separate and sole community property as well as its income and any joint community authorized by the court, Section 883(d).

vii. **Duties of the Spouses.** The duties between the spouses, including the duty of support, is not effected by who manages the community property, Section 883(c).

viii. **Repealing Inconsistent Family Code Provisions.** This bill also repeals the provisions of the Texas Family Code Sections 3.301, 3.307, 5.002 and 5.101 which also refer to incapacitated persons. After September 1, 2001, there will be no alternate relief in the family law courts.

n. **Avoiding Guardianships: Ceiling Raised To \$100,000.** Three bills passed (HB 898, 1132 and 3144) which increase one or more of the statutes that deal with an incapacitated person’s property when the amount is small. With one

exception they all increased the amount to \$100,000. HB 1132 increased Section 745(c) to \$50,000. It appears that HB 1132 was the last bill passed, thus Section 745(c) is unfortunately still at \$50,000. Those sections and their current limits are

i. Section 745(c) allows terminating a guardianship with cash and cash equivalents of less than \$25,000.

ii. Section 887 allows a debtor to pay up to \$50,000 of unliquidated amount into the court registry for an incapacitated person who has no guardianship.

iii. Section 889(a) allows the sale of a minor's interest in property up to \$50,000 without a guardianship and the proceeds are then deposited into the court registry; and ,

iv. Section 890 allows guardians of the person only, where there is no guardian of the estate, to apply to the court to sell the ward's property if it is less than \$50,000. Again the proceeds would be held in the registry of the court.

o. **Interstate Guardianships.** HB 952 governs Interstate Guardianships. This bill, which creates Section 891-893, allows for applications for guardianship and transfer of guardianship before a ward or his assets are actually moved from one state to another. The bill provides for communication and co-ordination between the old and new states.

p. **Sports and Entertainment Contracts.** HB 539 creates new Sections 901-905 governing contracts with minors in the sports, arts, entertainment and advertising area.

i. **The Reasons for the Statute.** This statute is in response to several problems:

(1) Record companies, movies studios, advertisers and sports franchises often makes substantial up front investments in their performers. They do not want to make that investment only to have the child take the benefits of that investment elsewhere when they turn 18.

(2) Minors can void contracts made by their parents when the minor turns 18;

(3) Texas courts have been reluctant to approve personal service contracts that extend beyond the minors 18<sup>th</sup> birthday;

(4) The parties in many instances can apply to the courts in other states, most notably California, for approval of these agreements;

(5) The current law says these earnings are the community property of the parents;

(6) There have been instances of the parents misapplying or consuming the earning of these child prodigies

ii. **Application.** This statute only applies to contracts involving sports, arts, entertainment and advertising.

iii. **7 Year Limitation.** This statute says the contract is not binding on the minor beyond the seventh anniversary of contract's date, Section 902. This does not prohibit a court from further limiting the time of these service contracts.

iv. **Requires a Guardian of the Estate.** The statute only allows a

guardian of the estate of the minor to apply for approval of the contract.

v. **Notice to All Parties to the Contract.** A hearing on the petition to approve the contract cannot be held until all parties to the contract are given notice and an “opportunity to request a hearing...”

vi. **Not Voidable Because of Minority.** Section 903(d) says the contract is not voidable solely because the child was a minor.

vii. **Parents Are Necessary Parties.** Section 903(e) says the parents are necessary parties.

viii. **Portion of Net Earnings Into Trust.** Section 904(b) allows the court to require that a portion of the “net earnings” be set aside for the benefit of the minor in an 867 trust.

(1) The court can withhold approval of the contract until the guardian (and presumably the parents) have agreed to a portion of the earnings being held in trust.

(2) The net earnings are the earnings less (a) Taxes of the minor.

(b) A reasonable sum for support, care, maintenance, education, and training of the minor. It is not made clear if this is intended to be a deviation from the normal duty of support that a parent has. It is assumed it just recognizes those situations where the parents income and resources are not sufficient to support the child.

(c) Fees and expenses associated with the contract or employment of the minor.

(d) And, attorneys fees in connection with the contract “or other business of the minor.”

ix. **Issues.** There are several issues that are not clear from the statute:

(1) What does the court consider in deciding the portion of the net earnings to turn over to the 867 trustee?.

(2) How does the court determine, up front, the amount of the deductions.

(3) Who holds the expense money? Who pays the expenses: The guardian? The parent? The trustee?

(4) Who holds the amount not used for expenses? The trustee? The parent? Or the guardian?

3. **TRUSTS.** There were no bills passed this session that amended the Texas Trust Code, Sections 111.001 et seq of the Texas Property Code. However, there were a couple of bills affecting trusts that were passed.

a. **Eleemosynary Trusts.** HB 1316 increases the amount that can be held in trust for a patient in a state supported facility. This bill amends Section 534.0175(a) and Section 552.018(a) of the Health and Safety Code and increases the amount from \$50,000 to \$250,000. That means that a trust cannot be charged with the costs of maintaining the patient until the trust exceeds \$250,000.

b. **Individual Trustees of 867 Trusts.** See amendment to Guardianship Code Section 867, supra.

#### 4. **POWERS OF ATTORNEY**

Durable powers of attorney are becoming more prevalent and are more readily accepted by third parties. That third party reliance has been a key to their acceptance and the statute was written to encourage that third party acceptance. However, along with frequent use has come abuse.

a. **Temporary Guardianship Does Not Revoke.** HB 1132 includes an amendment to Section 485. This bill provides that the appointment of a temporary guardian does not automatically revoke a durable power of attorney. The court may suspend the power during the pendency of the temporary guardianship. Upon its termination the power is restored, unless a permanent guardian is appointed. If a permanent guardian is appointed the old rules continue to apply and the power is automatically revoked.

b. **Bankruptcy** HB 1083 amends Section 487A and says that a power of attorney continues even though the principal has filed for bankruptcy. However, the power of attorney holder is subject to the same limits and restrictions of the bankruptcy proceeding as the principal.

c. **Duty To Account and To Inform.** HB 1883 went through three separate incarnations. Finally it created new Section 489B (Note: That this may actually be renumbered as 489A since there is no A)

First it required a bond and notice. Then it eliminated everything from the original version and provided for a new form, recording and several other matters. As it finally passed it established a statutory right to an accounting and to be informed.

##### i. **Duty to Inform.**

Section 489B (a) and (b) require the agent to timely inform the principal of all actions taken. The failure to inform does not effect the validity of the actions taken.

##### ii. **Duty to Keep**

**Records.** Section 489B(c) require the agent to keep records. Section 489B(e) requires the agent to give the principal all documentation when providing an accounting. Section 489B(f) requires the agent to maintain the records until delivered to the principal, released by the principal or discharged by a court.

##### iii. **Right To An**

**Accounting.** Section 489B(d) sets out statutory requirements for an accounting. It was taken from the Trust Code and added the Probate Code requirement of all other facts and information needed to give the principal a full and complete understanding of the actions taken and knowledge of the agent. Thus an agent who learns information that impacts the principal's property clearly has a duty to report. If the agent does not provide an accounting within 60 days (or such longer or shorter time that the principal may provide), the principal can bring an action for the accounting, to deliver the assets or terminate the power.

##### iv. **Not A Limitation on**

**Principal's Rights.** Section 489B(h) makes clear that this section does not limit the right

of the principal to terminate a power of attorney, to make additional requirements or to give additional instructions.

v. **Designees and Successors.** Section 489B(i) says whenever this chapter gives a principal a right it includes not only the principal but also any person designated by the principal, a guardian or other personal representative of the principal.

vi. **Rights Cumulative.** Section 489B(j) makes clear this statute is in addition to the rights a principal has at common law or other applicable statute and not in derogation of those rights.

vii. **Effective Date.** The statute is effective September 1, 2001. That probably means it applies to all existing powers of attorney whether they are executed on or after that date.

d. **Criminal Offense.** Section 32.45(a)(1) of the Penal Code was amended to add power of attorney holders to the list of fiduciaries. Now it is explicitly clear that misappropriation of funds under a power of attorney is a criminal offense.

## 5. FAMILY CODE

a. **Repeal: Community Administration.** HB 1132 repealed all references to incapacitated spouses in the Family Code, especially Sections 3.301, 3.307, 5.002 and 5.101. See Probate Code, Community Administration above.

b. **Claims for Economic Contribution** Last session the legislature

passed an “equitable claims” statute. It was virtually unworkable. In the interim a group of probate and family lawyers drafted a new improved statute. HB 1245 amends Sections 3.401 et seq of the Family Code. Claims between marital estates are now called “claims for economic contribution.” The statute provides a formula. The application of the formula is mandatory. See attached article.

c. **Uniform Parentage Act.** HB 920 (the Uniform Parentage Act) amends Chapter 160 of the Family Code. This act updates the laws of Texas to deal with the scientific developments concerning the parent child relationship. SGDs (scientifically generated descendants) have six possible parents (sperm donor, egg donor (and this can be divided in two for nucleus and albutin), gestational mother, intended father and intended mother).

The bill controls reproduction without sexual intercourse.

This bill also amends Section 42 of the Probate Code, see discussion supra..

A separate bill, HB 1246, was offered to cover gestation agreements where a woman carries a child for another. Whoever thought this would be controversial was right, it did not pass, even though it was a uniform act, However, the practice of gestation agreements exists and continues, Texas just does not have any rules to govern the practice.

d. **Child Support.** HB 1365 was proposed by the Attorney General’s Office. It is a 65 page bill that amends

many of the Family Code provisions controlling child support. Some of its provisions which amends Family Code Sections 154.013 et seq deal with the death of the obligee. The Attorney General and the other agencies around the state hold millions of dollars for dead obligees. Most of these accounts are no more than a few hundred dollars and do not justify a probate proceeding. The current law does not authorize them to distribute the funds. This bill allows these agencies to forward the funds to a person who has actual or legal possession of the child.

- i. The child support obligation does not terminate as a result of the death of the obligee but continues as an obligation.
- ii. This statute controls :
  - (1) Funds held by the Title IV-D agency; or
  - (2) Funds held by a local registry; or
  - (3) Funds held by a state disbursement agency; or
  - (4) An uncashed check; or
  - (5) A warrant.
- iii. Those payments are not a part of the decedent's (obligee's) estate.
- iv. Those payments are not subject to the claims of creditors of the decedent.
- v. Those payments are to be made to
  - (1) the person who becomes the managing conservator;

- (2) the surviving parent if they assume actual possession of the child.
- (3) the county clerk, as provided by Probate Code Section 887;
- (4) A guardian for the child;
- (5) The child if he is an adult.
- vi. Upon presentation of a death certificate the court shall enter an order directing payments as set out above.
- vii. The statute sets out who must be given a copy of the order and the requirements of the order.

6. **GOVERNMENT CODE.** There are several bills that deal with statutory probate judges.

a. **Powers of Assigned Judges.** HB 534 (amending Government Code Section 25.0022(n)) says a statutory probate judge assigned to a case under Section 25.0022 of the Government Code has the powers given by Probate Code Sections 5, 5A, 5B, 606, 607 and 608. When a statutory probate judge is assigned a contested matter out of a constitutional county court, that judge will now have his full range of powers and not be limited to the powers of the constitutional county judge.

b. **One Oath.** Currently a visiting or assigned judge has to sign an oath and file it in each proceeding that he sits. HB 535 amends Section 25.0018 of the Government Code and allows a judge to sign one oath and have the clerk file it in an administrative file.

c. **Transfers at Loss of Jurisdiction.** HB 537 amends Section 25.00221(b) of the Government Code. In 1999 the statute was amended to allow statutory probate courts, when they lost jurisdiction (ward dies, ward turns 18, estate is settled and closed or estate is dismissed as a party), to transfer the cause of action. Unfortunately that amendment only allowed the court to transfer the cause to a court in the same county as the statutory probate court.

This amendment will allow the court, if it transferred the action into its court pursuant to Probate Code Section 5B or 608, to return the cause of action to the original court.

d. **Out of County Hearings.** HB 538 amends Government Code Section 25.0022. Currently if a statutory probate judge is assigned to hear a matter in another county he must travel to that county for each hearing. Getting the judge to that county sometimes slows the process. With this bill, the assigned judge can hear the matter in his or her own county with the agreement of the lawyers. The statute makes an exception for a “trial on the merits.” What is a “trial on the merits” in a probate or guardianship matter may be a problem phrase.

e. **Limiting Jurisdiction.** HB 689 (amending Government Code Section 25.0021) limits the jurisdiction of statutory probate courts to jurisdiction given it under the Probate Code and certain items under the Health and Safety Code. A specific exception is made for Denton County until May 1, 2002. Other than that, statutory probate courts will no longer be able to hear eminent domain, family law, or other civil or

criminal or juvenile matters. This clearly has an impact in Bexar, Travis, Galveston and Denton Counties all of which had additional jurisdiction.

f. **Collin County.** SB164, amends Government Code Section 25.0451 and creates a statutory probate court for Collin County beginning January 1, 2003.

g. **Hidalgo County.** HB 3696 creates another new statutory probate court for Hidalgo County. The judge of the County Court at Law # 3 is to be the initial judge of the new court. The act takes effect September 1, 2001.

h. **Statutory Probate Courts Administration.** HB 900 amends Government Code Section 25.0022. It specifies the duties of the presiding statutory probate judge. Originally this bill had a provision for local presiding statutory probate judges. That was dropped and is not a part of the final bill.

7. **PRACTICE OF LAW. Area Agency on Aging and Advance Directives.** HB 1420 would add Section 81.101(d) to the Government Code. It exempts from the practice of law trained personnel with the Area Agency on Aging who provide “advice, consultation or assistance” on filling out medical powers of attorney, living wills and designations of guardian.

8. **ELECTRONICS.** SB393 creates Chapter 43 of the Business and Commerce Code. This chapter governs electronic transactions. In 2000 the US Congress enacted the Electronic Signatures in Global

and National Commerce Act. That act authorized states to adopt the Uniform Electronic Transactions Act.

9. **THE FUTURE.** The following can be anticipated in 2003.

a. **Durable Powers of Attorney.** The Real Estate, Probate and Trust Law Section of the State Bar is committed to reviewing the durable power of attorney statutes and seeing what additional safeguards can be created to protect Texans from abuse.

b. **Uniform Trust Code.** The Real Estate, Probate and Trust Law Section of the State Bar is currently studying the newly drafted Uniform Trust Code. They anticipate proposing this statute in 2003

c. **Uniform Principal and Income Act and Uniform Prudent Investor Act.** Again the Real Estate, Probate and Trust Law Section of the State Bar is studying these uniform acts. No decision has been made on whether or not they will be proposed in 2003.

d. **Tortious Interference.** A bill was proposed this session to resolve the question of whether or not the filing of a will for probate (or the contesting of a will) was an act that would support a claim for tortious interference. The author of that bill says he plans to offer it again in 2003.

e. **Sunset.** The State Bar is subject to Sunset in 2003.

f. **Practice of Law.** The State Bar drafted statutes to revise the definition of the practice of law. It met with substantial criticism but many thought it would be offered at this past legislature. It may be proposed in 2003.

**Appendix A: Designation of Guardian**

DECLARATION OF APPOINTMENT OF GUARDIAN FOR MY CHILDREN  
IN THE EVENT OF MY DEATH OR INCAPACITY

I, \_\_\_\_\_, make this Declaration to appoint as guardian for my child or children, listed as follows, in the event of my death or incapacity:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(add blanks as appropriate)

I designate \_\_\_\_\_ to serve as guardian of the person of my (child or children), \_\_\_\_\_ as first alternate guardian of the person of my (child or children), \_\_\_\_\_ as second alternate guardian of the person of my (child or children), and \_\_\_\_\_ as third alternate guardian of the person of my (child or children).

I direct that the guardian of the person of my (child or children) serve (with or without) bond.

(If applicable) I designate \_\_\_\_\_ to serve as guardian of the estate of my (child or children), \_\_\_\_\_ as first alternate guardian of the estate of my (child or children), \_\_\_\_\_ as second alternate guardian of the estate of my (child or children), and \_\_\_\_\_ as third alternate guardian of the estate of my (child or children).

If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes guardian of my (child or children).

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_[19\_\_\_\_].

\_\_\_\_\_  
Declarant

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

SELF-PROVING AFFIDAVIT

Before me, the undersigned authority, on this date personally appeared the declarant, and \_\_\_\_\_ and \_\_\_\_\_ as witnesses, and all being duly sworn, the declarant said that the above instrument was his or her Declaration of Appointment of Guardian for the Declarant's Children in the Event of Declarant's Death or Incapacity and that the declarant had made and executed it for the purposes expressed in the declaration. The witnesses declared to me that they are each 14 years of age or older, that they saw the declarant sign the declaration, that they signed the declaration as witnesses, and that the declarant appeared to them to be of sound mind.

\_\_\_\_\_  
Declarant

\_\_\_\_\_  
Affiant

\_\_\_\_\_  
Affiant

Subscribed and sworn to before me by the above named declarant and affiants on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ [~~19\_\_~~].

\_\_\_\_\_  
Notary Public in and for the  
State of Texas  
My Commission expires:

## Appendix B: Claims for Economic Contribution

### CLAIMS FOR ECONOMIC CONTRIBUTIONS HOUSE BILL 1245

By

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of Counsel

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1. **Background.** The Texas Supreme Court (Anderson v. Gilliland, 684 S.W.2d 673 (Tex. 1985) and Penick v. Penick, 763 S.W.2d 194 (Tex. 1988) has held that that upon death or divorce one estate is entitled to reimbursement from another. Members of the Family Law bar complained that the rules were not being uniformly applied. As a result in 1999 the Texas Legislature passed a bill that created Sections 3.401 *et seq* of the Texas Family Code (Subchapter E of Chapter 3). After enactment it was determined that the statute was not workable. Rep. Toby Goodman formed an interim committee of Probate Lawyers and Family Lawyers to study the statute.
2. **Current Legislation.** That committee drafted a statute that Rep. Goodman included in House Bill 1245. That bill has passed both houses and is before the governor.
3. **Purpose.** This statute gives us clear and mandatory rules for claims when one estate makes a contribution that benefits another estate. Over the years there have been several different measurements of reimbursement:
  - a. Costs. The contributing estate gets a dollar back for every dollar contributed.
  - b. Value of Enhancements. If a structure is erected with community funds on a separate lot, then the community is reimbursed for the value of the structure.
  - c. The lesser of Enhancements or Contribution. The dollar amount contributed is calculated and the value of the improvements is calculated, then the contributing estate gets the lesser of the two.
  - d. The greater of Enhancements or Contributions. Here the contributing estate gets the greater.
  - e. A Participation Interest. The contributing estate gets an interest proportionate to its contribution in relation to the contribution of the benefitted estate.

4. **A Participating Interest.** The statute adopts a participation standard. If at the moment of marriage wife's separate real estate is worth \$100,000 but she owes \$50,000 and the \$50,000 is all paid off with community funds and the property is worth \$200,000 at death, then the community has a \$100,000 interest.

5. **Economic Contributions.** Economic Contributions are only the dollar amount of

a. Principal debt reduction; this includes loans incurred outside of the marriage for any purpose but only those loans taken during the marriage for purchase or improvements.

i. In particular they are

(1) Reduction of any debt secured by a lien to the extent the lien existed at the time of marriage.

(2) Reduction of any mortgage on inherited or gifted property to the extent of the lien at the time the property was received.

(3) Reduction of any mortgage (whether separate or community debt) incurred during the marriage only if incurred for acquisition of, or capital improvement to property

(a) This means any property

(b) If you pledge real estate A to purchase B, it is still an economic contribution.

(4) Refinancing of the principal amount of (1), (2), or (3).

ii. This does not include accrued interest at the time of marriage.

iii. It is not an economic contribution if wife borrows against her separate rent house to take the family to Europe. Not even if she did it to try to save the marriage.

and

b. Improvements to property. Economic contributions includes the dollar amount of all capitol improvements to property other than by incurring debt.

6. **Not Economic contributions.** Economic contributions do not include

a. Interest

b. Taxes

c. Insurance

d. Time, toil and labor (see below).

7. **No Offsets.** There are no offsets for use and enjoyment.

8. **Death, Dissolution or Disposition.** The application of the formula and the calculation is done at the death or divorce of the parties. However, if the property is disposed of prior to that time, the time of disposition controls. What is done with those funds after that time is not considered.

9. **Not Covered: Time, Toil and Labor.** This statute does not purport to deal with improvements resulting from community time, toil and labor. As a result Jensen v. Jensen, 665 S.W.2d 107 (Tex. 1984) still controls those situations. Section 3.402(b)(2) says time, toil and labor is not an economic contribution. Section 3.408 (b), which acknowledges that certain common law claims for reimbursement still exists, says,

(b) A claim for reimbursement includes: ...(2) inadequate compensation for the time, toil, talent and labor of a spouse by a business entity under the control and direction of that spouse.

While not intended, some have argued that this limits the reach of Jensen to situations where a spouse is working for himself and has complete control. It suggests that if the spouse was, for example, one of four brothers running a separate property business that he would not have control. Does that mean, as a result of this statute, that there is no Jensen claim? What if one spouse works for inadequate compensation in the other spouse's separate property business. Does Jensen apply after this statute? Did Jensen ever apply to that situation?

10. **The Formula.** To calculate the claim, multiple the equity at death (or divorce or disposition) times the economic contribution divided by all contributions. See the attached for an expression of the formula and several examples.

11. **Limits.**

a. **The Ceiling.** The contributing estate shall never be entitled to more than the equity.

b. **The Floor.** If the property drops in equity, the formula may result in the contributing estate getting less than its economic contributions. However, there is a floor, the contributing estate will never owe the benefitted estate.

12. **Inception of Title.** The statute acknowledges the inception of title rule that controls in Texas. It makes clear that this estate merely creates a claim, as provided in case law, not an ownership interest.

13. **Claim Matures.** Further, the statute says the claim only matures on death or dissolution. It does not mature on disposition of the property.

14. **Not Effect Management Rights.** The claim does not effect the management rights a spouse has under the Family Code and other law to manage, control or dispose of the property.

15. **No Fiduciary Duties.** While not in the statute, in testimony before the legislature, it was stated that this statute did not create any fiduciary duties or modify any existing duties. This is supported by the statute where the claim only arises at death or dissolution; it does not give the other spouse any rights during the marriage.

16. **Equitable Lien.**

a. **Divorce.** Upon dissolution of the marriage, the statute requires a court to impose a lien to secure the economic contribution.

b. **Death.** Upon death, upon application of a surviving spouse, a personal representative or any interested person the court shall impose a lien. It does not arise automatically on death and does not create a cloud on the title.

c. **Offsetting Claims.** A court shall offset the claims of one estate against the claims of another estate in a specific asset.

d. **Imposed on Any Property.** The lien may be imposed upon any or all of the property of the benefitted estate.

17. **Other Common Law Claims.**

a. **Statute Controls.** This statute only abrogates common law claims for reimbursement that would cover the same situation as this statute. When there is a conflict between this statute and common law claims, this statute controls.

b. **Other Common Law Claims Continue.** This statute does not abrogate other common law claims. The statute specifically provides that reimbursement claims for payment of unsecured liabilities and Jensen claims.

c. **Non Reimbursable Claims.** The statute does eliminate certain types of claims even though not otherwise covered by the statute. They are

- i. Payment of child support, alimony or spouse maintenance;
- ii. Payment of living expenses of a spouse or child of a spouse;
- iii. Contributions of property of a nominal value;
- iv. Payment of a liability of a nominal value;
- v. Payment of a student loan of a spouse.

18. **Marital Agreements.** Marital agreements which waived, released, assigned or partitioned a common law claim for reimbursement apply to these statutory claims for economic contribution. The statute specifically applies to agreements executed before the effective date of this statute, September 1, 2001, as well as agreements executed before the 1999 predecessor statute which was effective September 1, 1999.

19. **Double Dip Issue.** In the death setting there is some concern that the surviving spouse might enjoy a double dip if the spouse inherited (whether by will or intestacy) the same property in which that surviving spouse also has a claim for economic contribution. Clearly the intent of the statute was not to give a double award. One lawyer has suggested that an election doctrine is appropriate. It is also reasonable to construe the statute to mean the claim is merely a part of the bequest or inheritance of the particular property.

20. **The Constitutional Question.** Opponents of the predecessor statute (and possibly of this statute) contend that it is unconstitutional. Under Eggemeyer v. Eggemeyer, 554 S.W. 2<sup>nd</sup> 137 (Tex. 1997) the legislature may not enact a law that will take a person's separate property from them. The argument in support of the statute is that the statute does not take any property, it merely imposes a lien as is at least implied under several supreme court opinions.

21. **Effective Date.** The effective date is September 1, 2001. The statute says it applies to all suits for dissolution of a marriage filed on or after that date. It makes no specific provision for claims arising at death. To avoid a constitutional challenge for depriving someone of a vested right, the statute probably only applies to persons dying on or after September 1.

CLAIMS FOR ECONOMIC CONTRIBUTION  
THE FORMULA

&

EXAMPLES

by

Jerry Frank Jones

©

$$\text{CLAIM} = \text{Eq}^{\text{DOD}} * \frac{\text{EC}^{\text{CE}}}{(\text{EC}^{\text{CE}} + \text{EC}^{\text{BE}} + \text{Eq}^{\text{1stC}})}$$

WHERE

Equity<sup>DOD</sup> = Equity at dissolution, death or termination [Fam C §3.403 (a)(1)]

Economic Contribution<sup>CE</sup> = The economic contributions by the contributing estate  
[Fam C §3.403 (a)(2)(A) and (a)(2)(B)(i)]

Economic Contribution<sup>BE</sup> = The economic contributions by the benefitted estate  
[Fam C §3.403 (a)(2)(B)(ii)]

Equity<sup>1stC</sup> = The equity at the time of the first contribution [Fam C §3.403  
(a)(2)(B)(iii)]

$$\text{CLAIM} = E_q^{\text{DOD}} * \frac{EC^{\text{CE}}}{(EC^{\text{CE}} + EC^{\text{BE}} + E_q^{\text{1stC}})}$$

**EXAMPLE 1:** Husband comes into the marriage with a house with a fair market value of \$100,000 and he owes \$60,000. Husband and wife live in this house during the marriage and use community funds to pay off the debt. Then wife dies (and leaves her estate to her children by a prior marriage) and the house is worth \$300,000 and there is no debt. The community claim for economic contribution is \$180,000; one half of which passes to wife's estate.

$$\$300K * (\$60K / (\$60K + 0 + \$40K)) = \$180,000$$

The statute allows wife's executor to apply for a lien to be imposed upon husband's property for \$90,000. The result is husband leaves the marriage with his separate property, subject to a \$90,000 lien.

In a divorce setting the lien is mandatory and the amount is subject to the just and equitable allocation.

**EXAMPLE 2:** Same as above, but husband pays \$20,000 of the note with his separate property. Then the community claim for economic contribution is \$ 120,000; \$60,000 is payable to the wife's estate

$$\$300K * (\$40K / (\$40K + 20K + \$40K)) = \$120,000$$

**EXAMPLE 3:** Husband and wife live in wife's separate property home. During the marriage they spend \$30,000 community dollars to add a new room and a swimming pool. Immediately before these improvements the house is worth \$100,000. At the time of death the house is worth \$200,000. The community claim for economic contribution is \$ 46,153.85. The statute does not consider the value of the improvements at the time the marriage ends. Also, the initial equity is calculated at the time of the improvements, not at the date of the marriage.

$$\$200K * (\$30K / (\$30K + 0 + \$100K)) = \$ 46,153.85$$