

2021 Legislative Update

Trusts, Estates, Guardianship, Powers of Attorney & Advanced Directives

Presented by:

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Osborne Helman Knebel & Scott, LLP

July 23, 2021

Face Masks, Zoom, and Quarantines: Welcome to... The 2021 Texas Estate and Trust Legislative Update

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

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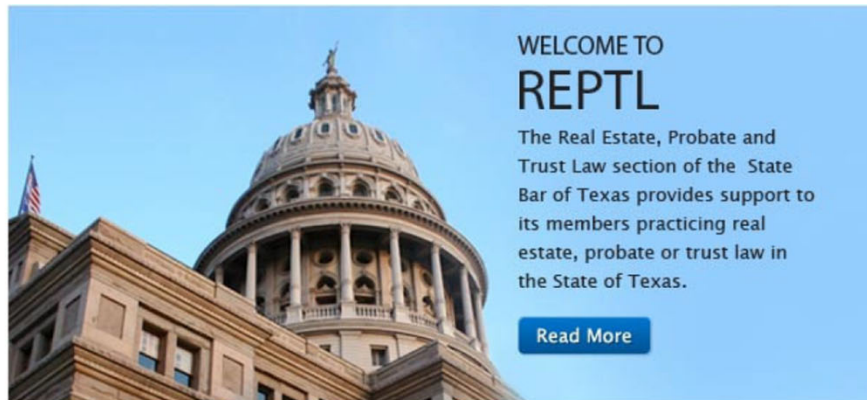
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(See the note on page 1 about hyperlinking to the online version of this paper.)

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ESTATE & TRUST LEGISLATIVE UPDATES

Estate and Trust Legislative Updates

2021 SESSION

- 2021 "Estate and Trust" Legislative Update
- 2021 "Estate and Trust" Legislative Update Statutory Language Supplement

PRIOR SESSIONS

- 2019 "Estate and Trust" Legislative Update
- 2019 "Estate and Trust" Legislative Update Statutory Language Supplement
- 2017 "Estate and Trust" Legislative Update
- 2015 "Estate and Trust" Legislative Update
- 2013 "Estate and Trust" Legislative Update
- 2011 "Estate and Trust" Legislative Update
- 2009 "Estate and Trust" Legislative Update

PRE-2009 SESSIONS

- 2007 "Estate and Trust" Legislative Update
- 2005 "Estate and Trust" Legislative Update
- 2003 "Estate and Trust" Legislative Update
- 2001 "Estate and Trust" Legislative Update
- 1999 "Estate and Trust" Legislative Update
- 1997 "Estate and Trust" Legislative Update
- 1995 "Estate and Trust" Legislative Update
- 1993 "Estate and Trust" Legislative Update
- 1991 "Estate and Trust" Legislative Update
- 1989 "Estate and Trust" Legislative Update
- 1983 "Estate and Trust" Legislative Update

Who is REPTL and Why Does it Matter?

**Real Estate, Probate & Trust Law Section of the State Bar
("REPTL")**

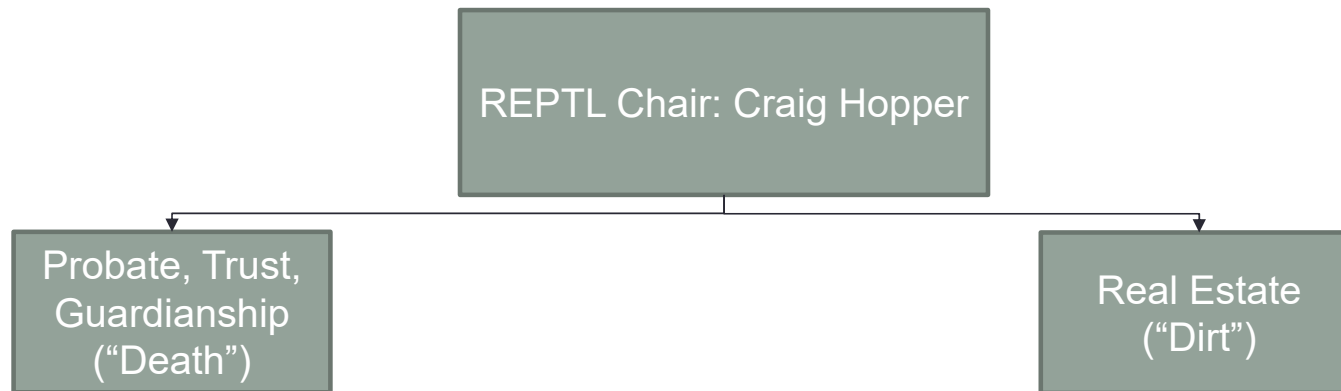
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Who is REPTL and Why Does it Matter?

- **Mission:** support attorneys practicing in real estate, probate, trust and guardianship law
- **Support:**
 - CLE Library
 - REPTL Reporter (case law updates and articles)
 - CLE Discounts (\$50 off Building Blocks, Intermediate, Advanced & Drafting)
 - REPTL Leadership Academy
 - **Legislative Activity**
- **Cost:** \$30

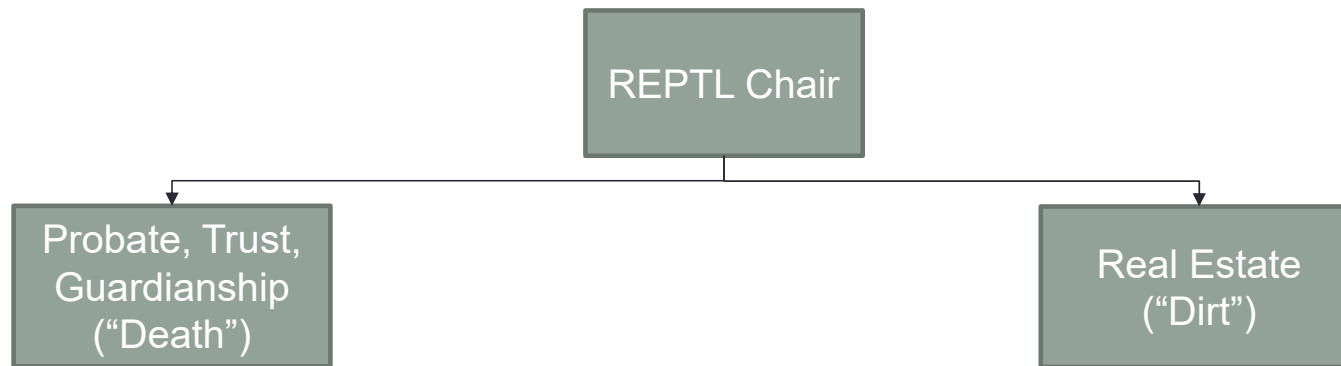
Who is REPTL and Why Does it Matter?



Council Members:

- Don Totusek
- Gene Wolf
- Greg Kimmel
- Elisa Rainey
- Amanda Gyeszly
- Dyann McCully
- Chris Hodge
- Arielle Prangner

Who is REPTL and Why Does it Matter?



"Death" Side Committees:

- Decedent's Estates
- Trusts
- Guardianship
- Powers of Attorney & Advanced Directives
- Fiduciary Litigation
- Estate and Trust Legislative Affairs

REPTL Efforts During COVID-19

REPTL Efforts During COVID-19

- Allow traditional notaries to notarize documents via two-way audio/video conference (i.e. Zoom, FaceTime etc.)

Remote Notarization

The April 8, 2020 Governor's Order

- Suspends requirement of physically appearing before a notary for execution of:
 - Self-proving affidavit for a will
 - Financial powers of attorney
 - Medical powers of attorney
 - Directive to physicians
 - Oath of executor or administrator
 - Oath of a guardian

Remote Notarization

The April 8, 2020 Governor's Order

- Notary must verify identity of signor
 - Personal knowledge of person OR government-issued photo ID
- Signor must send Notary legible copy of signed document by fax/email
- Notary notarizes the transmitted copy and sends back to signor by fax/email
- **Send/sign documents during the two-way video and audio conference (use Adobe Scan or other scanning apps)**

Remote Notarization

The April 8, 2020 Governor's Order

- Order lasts until:
 - Governor terminates order or
 - March 13, 2020 disaster declaration lifted/expires.
- “A Guide to Executing Estate Planning Documents in Uncertain Times”
 - <https://snpalaw.com/resources>

REPTL Remote Notarization Bill

Would have allowed continued remote notarization by two-way audio and video conference

REPTL Remote Notarization Bill (that never was)



Legislative Session

2021 Co-Chairs of Estate and Trust Legislative Affairs:

Craig Hopper, chopper@hoppermikeska.com

Lauren Davis Hunt, ldhunt@ohkslaw.com

REPTL Legislation Rules

- REPTL cannot support or oppose legislation that is controversial among our members
- REPTL cannot take an official position on a bill without approval of the State Bar Board of Directors

Overview of 87th Legislative Session

Hurdles:

- New Speaker of the House
- New Sponsors
- Unusually busy session

Our Strategy:

- Lean and easy to pass bills







REPTL GUARDIANSHIP BILL

Dyann McCully
Chair of REPTL Guardianships Committee
dmccully@theblumfirm.com

REPTL Guardianship Bill SB 626

Guardianships and Trust Cases

Allows county courts at law to hear trust cases related to guardianship proceedings or incapacitated beneficiaries

REPTL Guardianship Bill SB 626

Unsworn Declarations

A guardian may qualify by taking an oath, or filing a declaration

Declaration must be substantially in the form shown in new Sec. 1105.051(d)

REPTL Guardianship Bill SB 626

Ward's Bill of Rights

To investigate modification/termination of g'ship, court can appoint (1202.054):

- court investigator or
- guardian ad litem

Ward's Bill of Rights: To investigate modification/termination of g'ship, court can appoint (1151.351(b)):

- court investigator or
- guardian ad litem, or
- **Attorney ad litem**

Bill removes "attorney ad litem" from Sec. 1151.351(b)

Statute amended: EC 1151.351(b)

REPTL Guardianship Bill SB 626

Notice of Guardianship Proceeding

Proper newspaper for notice of guardianship proceeding is a **newspaper of general circulation in the county** (instead of “printed in the county”)



REPTL Guardianship Bill SB 626

Personal Property and Real Property Sales Procedures

- Statutes regarding sale of real property and personal property in guardianship cleaned up
- Clarifies sale by public auction versus private contract

REPTL Guardianship Bill SB 626

Ch. 1301 Management Trusts & Notice:

Notice for application to create management trust

- Same as for guardianship application.
- Must serve a then-serving guardian with application

Annual accounting

- Must send to both guardian of estate and of person

REPTL Guardianship Bill SB 626

Ch. 1301 Management Trusts

Section 1301.101 – Required Trust Terms

The terms of the Management Trust **must** provide the trust termination date according to the termination rules in Section 1301.203

REPTL Guardianship Bill SB 626

Ch. 1301 Management Trusts:

Trust Termination Date § 1301.203

Current Termination Dates:

For minor's trust, trust terminates on:

- death or
- 18th birthday,
- unless court extends trust to 25th birthday.

For adult's trust, trust terminates on:

- death,
- court finding that trust no longer in beneficiary's interests, or
- removal of incapacity.

New addition:

- If minor has incapacity other than being a minor, trust terminates on:
 - death or
 - removal of incapacity

REPTL Guardianship Bill SB 626

Sale of Property by Nonresident Guardian

Clarifies procedures when a non-resident guardian sells property in Texas

Provides that funds held in court registry can be withdrawn and paid to such nonresident guardian

Statutes amended: EC 1355.002 and 1355.105

OTHER Guardianship Bills

Attorney Certification

Any attorney representing any person in guardianship proceeding must obtain guardianship education certification

Guardianship Application Requisites

Application for guardianship must include:

- Applicant's former name
- Approximate value of proposed ward's liquid assets (instead of "property")

OTHER Guardianship Bills

Waivers of Guardianship Training

If Order appointing guardian waives training requirement, it must contain a **finding** that the waiver is in accordance with rules adopted by Supreme Court

Attendance at Legal Proceedings

Guardian cannot be excluded from a legal proceeding in which ward is a party or witness

OTHER Guardianship Bills

Temporary Guardianship: Citations

Citation in temporary guardianship must notify a person interested in the estate or welfare of ward that they may file a request to be notified of filings

Temporary Guardianship: Final Report

Requires a temporary guardian to file a final report

OTHER Guardianship Bills

Non-Resident Guardians: Criminal History

Current law: Proposed guardians from Texas must provide a name-based criminal background record

New law: Proposed non-resident guardians must provide fingerprint-based criminal history record

OTHER Guardianship Bills

Incapacitated Guardians

On court's own motion or application of an interested person

A court can appoint an AAL, GAL or court investigator to investigate whether a guardian should be removed due to incapacity.

Court may appoint physicians to examine guardian

OTHER Guardianship Bills

Transfers of Guardianships- SB 1129

Adds ability to transfer if Ward has lived in another county at least 6 months

In determining if transfer is in best interest of ward, court may consider:

- The interests of justice
- The convenience of the parties, and
- The preference of the ward if over 12 years old

OTHER Guardianship Bills

Guardianship Mediation - SB 1129

- Can mediate issue of incapacity, HOWEVER applicant must still prove to Court proposed ward is incapacitated under Ch. 1101
- At mediation, all parties must evaluate alternatives to g'ship and supports & services
- Cost of mediation paid by parties unless court orders otherwise

OTHER Guardianship Bills

Guardianship Mediation Training Course- SB 1129

- Office of Court Administration is to establish a guardianship mediation training course
- 24 hours of training for mediators of g'ship disputes
- Mediators are not required to be certified under the guardianship training course

OTHER Guardianship Bills

Associate Judges

Authorizes appointment of associate judges to hear guardianship and protective services proceedings
in courts other than statutory probate courts

Elder Law Bills

Visitation Rights

Residents of long-term care facilities (or their guardian or other representative) can designate an essential caregiver for visitation

Abuse of Elder/Disabled Person Bills

Financial Abuse of Elderly Persons

New offense: person knowingly engages in financial abuse of an elderly person

Includes financial exploitation by a person in relationship of confidence or trust with the elderly person

Abuse of Elder/Disabled Person Bills

Continuous Sexual Abuse of Disabled Person

New offense: continuous sexual abuse of disabled person

Includes: 2 or more acts of sexual abuse during period of 30 or more days, regardless of whether acts committed against one or more victims

Abuse of Elder/Disabled Person Bills

Hold on Account of Vulnerable Adult

A financial institution can place a hold on any transaction in vulnerable adult's account if suspect financial exploitation

Institution must submit report to DFPS

“Vulnerable adult” includes:

- Elderly person
- Person with disability
- Individual receiving protective services

Fraudulent Securing Document Execution

- New offense: fraudulently securing document execution
- A person, with the intent to defraud, causes another person to execute a document affecting property, a service or pecuniary interest without the person's effective consent
- Includes causing public servant to file/record purported judgment of a court without public servant's effective consent

Fraudulent Securing Document Execution

Consent is not effective if it is:

(1) induced by deception or coercion,

(2) given by person who due to

- youth,
- mental disease or defect,
- intoxication,
- diminished capacity to make informed/rational decisions

is known by actor to be unable to make reasonable property dispositions

NON-REPTL TRUSTS BILLS

Non-REPTL Trust Bills

Rule Against Perpetuities

Perpetuities period extended to a fixed 300-year time limit

Measured from the “effective date” of the trust, *i.e.*, the date the trust becomes irrevocable

Settlor cannot direct a real property asset be retained longer than 100 years

Non-REPTL Trust Bills

Rule Against Perpetuities

Applies to:

- Trusts with effective date after 9/1/21, and
- Trusts where the interests vest under the statutory provision applicable to trusts on the date the interest vests

NON-REPTL DECEDENTS' ESTATES

Non-REPTL Decedents' Estates Bills

Expedited Death Certificate for Religious Purposes

In a county with a medical examiner, if the commissioner's court allows this, then:

An individual can request expediting the death certificate if:

1. the expedited certificate is necessary for religious purposes;
2. the decedent's remains will be interred, entombed, buried or cremated in a foreign country, and
3. the requestor is authorized to receive a copy of the certificate

Non-REPTL Decedents' Estates Bills

Disclaimers and Child Support

- Current TEC 240.151(g) bars a disclaimer by a child support obligor if the obligor is in arrears on child support
- New law requires ALL disclaimers to have a **sworn** statement regarding whether the disclaimant is a child support obligor in arrears
- HOWEVER, at REPTL's request, failure to include the required statement does not invalidate a disclaimer if the disclaimant isn't a child support obligor

Non-REPTL Decedents' Estates Bills

Notice of Appointment of Temporary Administrator

Current law: A temporary administrator must notify decedent's known heirs by certified mail of the appointment of the TA

New law: the temporary administrator must file proof of service in the manner required for service by mail under 51.103.

Non-REPTL Decedents' Estates Bills

Recording Non-English Foreign Wills

- If authenticated copy of foreign will and its probate are recorded in the deed records,
- If any portion is not in English
- Then... it must be accompanied by an English translation, the accuracy of which is sworn to.

Statutory Probate Judges SB 615

Applicant's SSN and Driver's License Requirement

Requires last 3 numbers of party's driver's license number and SSN in:

- Probate or guardianship proceedings
- Filed in:
 - District court
 - County court
 - Statutory county court
 - Statutory probate court

Amends Civ. Prac. & Rem. Code 30.014(a)

Non-REPTL Decedents' Estates Bills

Juries in Probate Proceedings

Parties in a trial proceeding in Statutory Probate Court may agree to try cases with “fewer than 12 jurors”

Non-REPTL Decedents' Estates Bills

Service in Will Contests or Will Construction Suits

Requires a party (rather than the court) to provide service on an institution of higher education or charitable organization that is a necessary party in a will contest or will construction suit.

Non-REPTL Decedents' Estates Bills

2nd Statutory Probate Court in Denton County



Non-REPTL Decedents' Estates Bills

Service of Citation in Heirship Proceeding

If a court requires personal service of citation on a distributee in an heirship proceeding,

and if distributee is absent from or is not a resident of Texas:

**Any disinterested person competent to make an oath
may serve the citation**

REPTL DECEDENTS' ESTATES BILL

Greg Kimmel
Chair of REPTL Decedents' Estates Committee
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REPTL Decedents' Estates

- Alternative to Certified Mail-Return Receipt Requested
 - **Current law:** Multiple sections in Estates Code require notice be given by “**registered or certified mail**”
 - **The Problem:** difficulty getting green cards returned



REPTL Decedents' Estates

- Alternative to Certified Mail-Return Receipt Requested
 - **Solution:** Replace “registered or certified mail” with “qualified delivery method”
 - “Qualified delivery method” will include:
 - a) hand delivery with proof;
 - b) CM-RRR; or
 - c) “any private delivery service”
 - **Private Delivery Service:**
 - Is available to general public
 - Is as timely and reliable on a regular basis as the U.S. Mail; and
 - Keeps an electronic database of deliveries

REPTL Decedents' Estates

“Private Delivery Service” (as of 2/22/21):

DHL Express:

1. DHL Express 9:00
2. DHL Express 10:30
3. DHL Express 12:00
4. DHL Express Worldwide
5. DHL Express Envelope
6. DHL Import Express 10:30
7. DHL Import Express 12:00
8. DHL Import Express Worldwide

FedEx:

1. FedEx First Overnight
2. FedEx Priority Overnight
3. FedEx Standard Overnight
4. FedEx 2 Day
5. FedEx International Next Flight Out
6. FedEx International Priority
7. FedEx International First
8. FedEx International Economy

UPS:

1. UPS Next Day Air Early AM
2. UPS Next Day Air
3. UPS Next Day Air Saver
4. UPS 2nd Day Air
5. UPS 2nd Day Air A.M.
6. UPS Worldwide Express Plus
7. UPS Worldwide Express.

REPTL Decedents' Estates

Unsworn Declarations in Lieu of Sworn Oath

- **Current Law:** CPRC 132.001: unsworn declarations don't apply to "an oath of office"
- **2023 Bill:**
- Allow an unsworn declaration in lieu of a sworn oath to qualify as personal representative.

REPTL Decedents' Estates

List of Property in Heirship Proceeding

2023 Proposal:

Clarifies that you only have to list property subject to court's jurisdiction in proceeding to declare heirship

REPTL Decedents' Estates

New procedures for serving minors 12+ years of age

Current Law:

- Minors 12 or older must be personally served in a guardianship (no waiver allowed);
- Minors under 12: parents can waive service.

2023 Proposal:

- Certain persons can waive personal service on behalf of minor under age of 16
- Minors 16+ can waive personal service
- **Statutes amended:** EC 202.056 (Heirships) and 258.002 (probate of lost will)

REPTL Decedents' Estates

Affidavit of Heirship as Evidence

Current Law:, testimony regarding a decedent's heirs must be taken from two disinterested and credible witnesses

Problem: In heirship proceeding, some practitioners think testimony of the disinterested witnesses can only be by live testimony or a deposition on written questions.

2023 Proposal: clarify that an affidavit of heirship or judgment complying with 203.001 can serve as "testimony" of disinterested witnesses

REPTL Decedents' Estates

Sales of Personal Property in Dependent Administration

- **2019 Session:** Updated language in statutes for sale of real property in **dependent administrations** to make more user-friendly (no substantive change)
- **2023 Proposal:** Update language in statutes for sale of personal property in **dependent administrations** to make more user-friendly (no substantive change)

REPTL TRUSTS BILL

Gene Wolf
Chair of REPTL Trusts Committee
gene.wolf@kempsmith.com

REPTL Trusts

Homesteads and Revocable Trusts

2023 Proposal

Harmonizes the provisions of the Tax Code and the Property Code re: a homestead held in a revocable trust.

- Response to *In re Cyr*
- The court said “rent free and without charge” (Tax Code) and “at no cost” (Prop Code) had different meanings.
- The proposal changes the wording of Property Code 41.002(a)(1) to better conform with the homestead exemption language of Tax Code 11.13(j).

REPTL Trusts

Spendthrift Provisions and Testamentary GPOAs

2023 Proposal

Clarifies that trust property subject to a testamentary general power of appointment is not subject to claims of the powerholder's creditor, UNLESS the power is exercised.

REPTL Trusts

Appointing Attorney ad Litem to Trust Proceeding

2023 Proposal

Before court can appoint an attorney ad litem, court must determine that representation of the minor or incompetent beneficiary would otherwise be inadequate

REPTL Trusts

Decanting

2023 Proposal

Tweaks a 2019 revision to clarify that assets can be decanted into a second trust with the same name and EIN of the first trust.

POWERS OF ATTORNEY AND ADVANCED DIRECTIVES (PAAD)...

Don Totusek
Chair of REPTL Powers of Attorney &
Advanced Directives Committee
don.Totusek@fftlplaw.com

REPTL PAAD Proposals

Anatomical Gifts

2023 Proposal

Statement of anatomical gift, or revocation of same, or statement of refusal to make anatomical gift, may be executed before two witnesses **or a notary**

REPTL PAAD Proposals

Removal of Remains

2023 Proposal

The order and identity of persons who must consent to remove decedent's remains is the same as the persons who have right to control initial disposition of remains

REPTL PAAD Proposals

Statutory Durable Power of Attorney

2023 Proposal

Clarifies that where an agent has power over “Business Operation Transactions,” the agent can act with respect to business interests other than just partnerships

REPTL MPOA Proposals

- **2023 Proposal**
- Statutory form permissible, not mandatory.
- Valid medical power must:
 - be in writing;
 - be signed by the principal (or another person at principal's direction) before two witnesses or notary; and
 - contain principal's name, date of execution, and designation of agent.

REPTL MPOA Proposal (cont.)

- In the past, Texas Medical Association and Texas Hospital Association strongly opposed making form optional.
- **45 states have optional forms**, yet TMA and THA argue use of any form other than mandatory form would create confusion.

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