THE STORY OF THE TEXAS ESTATES CODE

by William D. Pargaman[*]

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I. INTRODUCTION

On January 1, 2014, our new Estates Code replaced Texas' beloved Probate Code, which has been with us for almost six decades—these changes were enacted into law in 2009, 2011, and 2013, and they went into effect on January 1, 2014.[1] But, the story of the Texas Estates Code goes back more than half a century.[2]

Here's what this article will attempt to discuss: Texas' fifty-year-old continuing statutory revision program; the backstory behind our Probate Code; the reasons why Texas replaced the Probate Code with the Estates Code; the process of drafting the Estates Code; the organization of the Estates Code; construction issues related to the replacement of the Probate Code; some of the substantive changes that were included with the enactment of the Estates Code; and a few free resources the reader may find helpful.[3]

Portions of this article have been adapted from legislative updates that I have previously written for the 2009 through 2013 legislative sessions.[4] In addition, while not cited directly, an article by T. Aaron Dobbs aided in the writing of, and provided a number of authorities cited in, this article.[5]

II. WHEN (AND WHY) DID ALL THIS BEGIN?

Texas became the 28th state when President James K. Polk signed a Joint Resolution to admit Texas as a state on December 29, 1845.[6] This really is not the beginning, as Texas already had laws enacted during its ten years as the independent Republic of Texas.[7] But this article will treat it as the beginning. The first unofficial "compilation" of Texas laws appears to have been Paschal's Digest, published by George Paschal in 1866, but this compilation was a

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1. *See infra* Parts X–XIII, XVIII.
2. *See infra* Part II.
3. *See infra* Parts II–XXII.
4. *See* William D. Pargaman, *2009 Texas Estate and Trust Legislative Update (Including Probate, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)*, SAUNDERS, NORVAL, PARGAMAN & ATKINS, LLP, *available at* www.snpalaw.com/resources/2009LegislativeUpdate (last revised Dec. 31, 2013); William D. Pargaman, *What Has the Legislature Done to Us Now? (Don't Worry – It's Not Too Bad!): 2011 Texas Estate and Trust Legislative Update (Including Probate, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)*, SAUNDERS, NORVAL, PARGAMAN & ATKINS, LLP, *available at* www.snpalaw.com/resources/2011LegislativeUpdate (last revised May 20, 2013); William D. Pargaman, *Out With the Old [Probate Code] and In With the New [Estates]: 2013 Texas Estate and Trust Legislative Update (Including Probate, Guardianships, Trusts, Powers of Attorney, and Other Related Matters)*, SAUNDERS, NORVAL, PARGAMAN & ATKINS, LLP, *available at* www.snpalaw.com/resources/2013LegislativeUpdate (last updated Apr. 18, 2014).
5. *See* T. Aaron Dobbs, *It's Going To Be Ok: Transition to the New Estates Code*, FORD + BERGNER LLP (2013), http://www.fordbergner.com/downloads/CLE%20Paper%20Estates%20Code%202013%2008%2004.pdf.
6. *Texas Law Timeline*, LEGIS. REFERENCE LIBR. OF TEX. (Jan. 25, 2013), http://www.lrl.state.tx.us/legis/TexasLawTimeLine.cfm.
7. *Id.*

publication of existing statutes in a rearranged and renumbered form.[8] It did not involve any legislative action—it was merely a publisher's attempt to present statutes in their last-amended versions and omit expressly repealed statutes.[9]

On the other hand, a "revision" involved redrafting statutes, repealing the existing ones, and enacting the new ones.[10] A revision could be substantive, but if it was not substantive, it was characterized as a "formal" revision.[11] A formal revision involved everything in a "compilation, plus the elimination of unconstitutional, impliedly repealed, and duplicated provisions."[12] Revisions were initiated by legislative action, and the governor appointed a commission of three to five members to perform the drafting.[13] Texas' first formal revision was enacted by the legislature in 1879.[14] There were three more—at approximately sixteen-year intervals—in 1895, 1911, and 1925.[15]

The 1925 revision adopted by the 39th Texas Legislature—the Revised Statutes of Texas, 1925—began with "accountants" and ended with "wrecks," and spanned from Article 1 to Article 8324.[16] "Laws enacted after 1925 that did not amend [existing Articles were] arranged unofficially and assigned an article number by a private publisher, West."[17] Because the 1925 revision did not leave any room for expansion, the publisher was forced to add a suffix—either a letter or a number—to a whole number when assigning the different article numbers.[18] For example, "between Articles 5159 and 5160, the editors added Articles 5159a [through] 5159c."[19]

In 1936, The Vernon Law Book Company published an unannotated compilation of the 1925 Revised Civil and Criminal Statutes, updated with changes through January 1, 1936—these were known as the "Black Statutes" to those of us old enough to have practiced with the hard copies of these volumes.[20] Between 1936 and 1948, this was updated with non-cumulative biennial supplements.[21] In 1948, a new compilation was published, and biennial updates continued.[22] Due to "this history, the user of Vernon's Texas Civil Statutes must wade through numerous printed statutes that are legally

8. *Id.*
9. Robert E. Freeman, *The Texas Legislative Council's Statutory Revision Program*, 29 TEX. B.J. 1021, 1021 (1966).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1022.
14. *Id.*
15. *Id.*
16. TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL, at 147 (2012) [hereinafter 2012 DRAFTING MANUAL], http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf.
17. *Id.* (noting that West is now the West Publishing division of Thomson Reuters).
18. *Id.*
19. *Id.*
20. *Texas Law Timeline*, *supra* note 6; Freeman, *supra* note 9, at 1071.
21. *Texas Law Timeline*, *supra* note 6.
22. *Id.*

ineffective, must sort out surplus from substance, must adapt to confusing inconsistency of expression, capitalization, spelling, and punctuation, and must try to comprehend an alphabetical arrangement and often bizarre numbering scheme."[23]

When the 1925 Revised Statutes were enacted, the last section of Title 125 (Trial of Right of Property), was Article 7425, Levy on Other Property.[24] The first article of Title 126 (Trusts—Conspiracies Against Trade) was Article 7426 ("Trusts").[25] In that same legislative session, the legislature enacted House Bill 143 (H.B. 143).[26] Sections 1 and 2 of that act added provisions, the substance of which is now found in Texas Property Code §§ 101.001 and 101.002 (just before the beginning of our current Texas Trust Code).[27] These laws protected persons dealing with trustees.[28] Since there was no designated place for these sections in the 1925 Revised Statutes, the publisher assigned the articles enacted by H.B. 143 the numbers 7425a and 7425b, so they would appear before Title 126.[29] Again, the publisher, not the legislature, assigned these numbers.[30]

After a multi-year effort, private practitioners assembled the laws relating to trusts into a somewhat coherent format.[31] Senate Bill 251 (Texas Trust Act) was signed into law on April 19, 1943, effective immediately.[32] By that time, Articles 7425a and 7425b had made their way into Title 125A (Trusts and Trustees).[33] Sections 1 through 47 of the Texas Trust Act were published as Articles 7425b-1 through 7425b-47 of Vernon's Revised Statutes.[34]

III. THE 1955 ENACTMENT OF THE TEXAS PROBATE CODE

"In the natural order of things, property must in a generation pass through the death chute symbolized by our probate courts."[35] By 1955, "[m]ost of our

23. 2012 DRAFTING MANUAL, *supra* note 16.

24. 1925 TEX. REV. CIV. STAT. art. 7425.

25. *Id.* art. 7426 (noting that Article 7426 ("Trusts") was in the antitrust sense).

26. Act of Mar. 28, 1925, 39th Leg., R.S., ch. 120, 1925 Tex. Gen. Laws 305 (current version at TEX. PROP. CODE ANN. §§ 101.001–.002 (West 2007)).

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. GERRY W. BEYER, TEXAS TRUST LAW: CASES AND MATERIALS 7–8 (2d. ed. 2009) [hereinafter BEYER, TEXAS TRUST LAW].

32. Act of Apr. 19, 1943, 48th Leg., R.S., ch. 148, 1943 Tex. Gen. Laws 232 (reenacted at TEX. REV. CIV. STAT. ANN. arts. 7425b–1 to 7425b–47 (repealed 1984)).

33. Act of Mar. 28, 1925, 39th Leg., R.S., ch. 120, 1925 Tex. Gen. Laws 305 (current version at TEX. PROP. CODE ANN. §§ 101.001–.002 (West 2007)).

34. TEX. REV. CIV. STAT. ANN. arts. 7425b–1 to 7425b–47 (1943) (repealed 1984).

35. WILLIAM STEWART SIMKINS, THE ADMINISTRATION OF ESTATES IN TEXAS, at V (Von Boeckmann-Jones Co. 1908). "Colonel" Simkins wrote the first comprehensive treatise on Texas probate law. *See id.* Fellow graduates of the University of Texas School of Law will, of course, recall that Professor Simkins' equity class was credited around 1900 with the birth of the law school's mascot, the Peregrinus, and that Russell Savage, class of 1902, first drew the "beast." *A to Z: A comprehensive look at UT History*, UT HIST.

present statutes of decedents' estates and wills, descent and distribution, and guardianship [had been] enacted by the Texas Legislature in 1848 and . . . [had] survived to [that] day."[36] Numerous amendments and additions had caused conflicts, uncertainties, and inconsistences.[37]

The first evidence of an initiative to revise and codify these statutes arose out of the State Bar's standing Committee on Real Estate, Probate, and Trust Law (now the State Bar's Real Estate, Probate, and Trust Law Section (REPTL)) in 1944, the year after the enactment of the Texas Trust Act.[38] Actual work on the proposed revisions apparently began in 1946.[39] The Committee on Probate Reform of the Trust Section of the Texas Bankers Association joined the effort by 1949.[40] Additionally, a probate reform committee of the Texas Civil Judicial Council, along with independent attorneys throughout the state, joined in the effort.[41]

Following several legislative sessions, Texas viewed Senate Bill 97 in January of 1955, which eventually became the Texas Probate Code.[42] The bill included a 103-page "Summary of the Proposed Texas Probate Code" prepared by the R. Dean Moorhead of Austin, who had been hired in 1952 as "codifier and reporter" for the project, probably because of his previous experience with the enactment of the Texas Trust Act.[43] After passing the Senate by unanimous vote, the bill was considered by a subcommittee of the House Judiciary Committee over five hearings and was overwhelmingly passed by the House with twenty-one minor amendments.[44] The Senate quickly passed the amended bill by unanimous vote, and it was signed into law on April 4, 1955.[45] The Probate Code went into effect on January 1, 1956.[46]

Because of the lack of expansion room in the Black Statutes, noted previously, the publisher inserted the Probate Code between Title 110—Principal and Surety, which ended with Article 6252—and Title 110A—Public

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CENT., http://www.texasexes.org/uthistory/atoz.aspx?letter=P (last visited June 5, 2014). Simkins achieved the rank of colonel as a member of the Confederate Army in the Civil War. *SIMKINS, WILLIAM STEWART*, TEX. ST. HIST. ASS'N, http://www.tshaonline.org/handbook/online/articles/fsi12 (last visited June 5, 2014). In fact, prior to moving to Texas in 1873, Simkins may have been among the first to fire on Union forces at Fort Sumter in April of 1861 as a cadet at the Citadel. *Id.* Until 2010, Simkins Hall, a University of Texas dormitory along Waller Creek near the law school, was named for Professor Simkins. *Id.* However, the dormitory was renamed Creekside Residence Hall when Simkins' role in founding the Florida Ku Klux Klan resurfaced. *Id.*

36. John Anthony, *The Story of the Texas Probate Code*, 2 S. TEX. L. J. 1, 2 (1955) (noting that this is now the South Texas Law Review).

37. *Id.*

38. *Id.* at 3.

39. *Id.*

40. *Id.* at 11.

41. *Id.* at 11–12.

42. *Id.* at 19.

43. *Id.* at 18–19.

44. *Id.* at 19.

45. *Id.*

46. *Id.* at 21.

Offices, which began with Article 6252-1.[47] At the time, Volume 17 of the 1948 version of Vernon's Texas Statutes included Title 94—Militia through Title 111—Quo Warranto.[48] Therefore, the Probate Code was published as Volumes 17A, 17B, and 17C (Volume 18 began with Title 112— Railroads).[49]

The editors of the new Probate Code gathered provisions from eleven volumes of the Revised Statutes, the Model Probate Code, and the Uniform Probate of Foreign Wills Act.[50] Some of the changes were a result of combining provisions; for example, the editors consolidated definitions that were scattered throughout the Revised Statutes into Probate Code Section 3.[51] Previously, only thirty-nine out of sixty-nine places where citation or notice was required indicated the kind of citation or notice to be used.[52] The Probate Code merged all of the general rules relating to citations and notices into Section 33 of the Probate Code.[53] Compilers clarified and consolidated the rules governing the sale of real estate in dependent administrations and guardianships.[54] The compilers and editors also revised and consolidated the statutes relating to oil, gas, and mineral leases.[55] Similarly, the editors combined many of the provisions applicable to the estates of decedents and guardianships, such as bonds and venue.[56]

In addition to revisions of existing laws through combination and elimination of duplication, the editors added new provisions, including the small estates provisions found in Sections 137 through 144, procedures for closing independent administrations, procedures relating to the recognition of foreign wills, and Section 69 making provisions in favor of a spouse void upon divorce.[57] However, thanks to John Anthony, the new provision with the greatest practical future benefit was probably the self-proving affidavit, found in Section 59.[58] Before prior laws in New York and West Virginia were

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47. *See* discussion *supra* Part II.

48. *See* discussion *supra* Part II.

49. *See* discussion *supra* Part II.

50. Anthony, *supra* note 36, at 22.

51. *Id.*

52. *Id.* at 26. *See also* George M. Irving, Address, *Texas Probate Code*, 19 TEX. B.J. 11, 11 (1956); Maurice R. Bullock, Comment, *Salute to Directors*, 18 TEX. B.J. 368, 373 (1955).

53. Anthony*, supra* note 36.

54. *Id.*

55. *Id.* at 31. This was a pet project of Mr. Anthony, who complained of the "evil burdens and discriminations" of existing mineral statutes. *Id.*

56. *Id.* Thirty-eight years later, the original organization of the guardianship provisions was undone. *Id.* Recent editors extracted and moved the guardianship provisions to the new Chapter XIII of the Probate Code. *Id.*

57. *Id.* at 39–43; *see also* Irving *supra* note 52, at 42 – 44. The legislature subsequently repealed § 144 in 1993 and moved its substance to § 887, as part of the enactment of Chapter XII. *See* Alvin J. Golden, *1993 Texas Legislative Update*, ST. B. TEX., ADVANCED ESTATE PLANNING AND PROBATE COURSE (1993).

58. Anthony *supra* note 36, at 42; Irving *supra* note 52. A self-proved will is sometimes referred to as a John Anthony will. Irving *supra* note 52, at 42.

discovered, many estate planning professionals believed that Texas was the first state to enact an alternative method for proving due execution of a will.[59]

"A standing-room-only crowd of 1,700 lawyers flocked to Dallas the day before the [State Bar] convention began [June 29, 1955] to attend a daylong institute on the new Texas Probate Code."[60] According to Dean Moorhead, "the Texas Probate Code is a codification, rather than a measure designed to make any sweeping changes in our present probate law."[61] Other speakers included W. O. Huie of Austin, former Judge Atwood McDonald of Fort Worth, and Frank J. Scurlock of Dallas.[62]

IV. SUBSEQUENT SIGNIFICANT PROBATE CODE REVISIONS

Since its passage in 1955, the Probate Code has undergone numerous significant changes. While the revisions and additions listed below are by no means an exhaustive list of such changes, they include a number of changes that are taken for granted by estate planning professionals today.[63]

On January 25, 1961, the Supreme Court of Texas held that § 46 of the Probate Code, which authorized rights of survivorship, could not extend to survivorship rights between spouses in community property.[64] Prior to 1961, spouses could not change the characterization of their marital property by mere agreement.[65] The court applied contract principles, and it concluded that, since each spouse furnished community property as consideration, the "fruits" of the contract would be community, so upon the death of the first spouse, the surviving spouse still owned a community interest in the property.[66] The court reasoned that this change in the passage of title was equitable because intestacy effectuates the same result.[67] The legislature attempted to respond to the *Hilley* case by making § 46 of the Probate Code specifically applicable to community property.[68] The legislature added § 58a, which allowed a testator to devise property to a revocable trust created before or concurrently with the execution of the will; such property would be governed by the terms of the trust, including any amendments made after will execution.[69] The legislature also added the muniment of title procedure.[70]

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59. Anthony, *supra* note 36, at 42; Irving, *supra* note 52.

60. Bullock *supra* note 52. It is an anomaly for 1,700 lawyers to attend this convention—not yet known as the "Annual Meeting." *Id.*

61. *Id.* at 373.

62. *Id.*

63. *See infra* notes 64–132 and accompanying text.

64. Hilley v. Hilley, 342 S.W.2d 565, 571 (Tex. 1961).

65. *Id.* at 568.

66. *Id.* at 569.

67. *Id.* at 69–71.

68. *See* C. M. Hudspeth & James K. Nance, *A Synopsis of Recent Texas Legislation*, 24 TEX. B.J. 817, 818 (1961).

69. *See id.* at 878.

70. *See id.* at 880.

The 1961 legislative attempt to get around the *Hilley* decision was subsequently ruled unconstitutional in *Williams v. McKnight*, and in 1969, the legislature gave up its quest to provide for community property survivorship agreements, at least for the time being.[71] During the 1969 legislative session, the legislature also eliminated a reference to spouses in § 46.[72] Additionally, it made a number of other changes to reflect the state's lowering of the age of majority to eighteen; for example, an eighteen-year-old could now execute a will.[73]

In 1971, after a six-year study by REPTL, the legislature added § 36A, which provided for durable powers of attorney, as well as § 149A, which allowed an interested person to demand an accounting from an otherwise independent executor.[74] The REPTL bill included a number of other miscellaneous revisions.[75] That same year, the legislature enacted § 37A, which was proposed by the Texas State Bar's Taxation Section, which, for the first time, codified a provision that allowed beneficiaries to disclaim a testamentary gift.[76]

Until 1973, original probate jurisdiction rested with county courts, and district courts had appellate jurisdiction.[77] That year, the legislature submitted a constitutional amendment to authorize statutory redistribution of probate jurisdiction, and it approved a statutory redefinition of the probate jurisdiction of district courts.[78] "The legislature eliminated the district court's appellate jurisdiction under article V, [§] 8 of the constitution and [§] 5 of the Probate Code, but" because it failed to eliminate the district court's "probate review by appeal, certiorari, bill of review, and mandamus[,]" the legislature's reform effort was marred.[79] Nevertheless, as a result of the 1973 legislation, district courts, for the first time, had concurrent original probate jurisdiction with county courts in counties lacking a statutory county court exercising probate jurisdiction, thereby eliminating the need for de novo trials on appeal.[80] In addition, the new § 5 expanded the probate jurisdiction of county courts,

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71. Williams v. McKnight, 402 S.W.2d 505, 508 (Tex. 1966).

72. *See* Charles A. Saunders, *Legislation 1969: Real Estate, Probate and Trust Law*, 32 TEX. B.J. 584, 584 (1969).

73. *Id.*

74. William E. Remy, *Effective Dates of AMENDMENTS to the PROBATE CODE and a Brief Summary of the CHANGES Made*, 34 TEX. B.J. 885, 885–86 (1971).

75. *See id.* at 885.

76. *Id.* at 886.

77. Boone Schwartzel & Doug Wilshusen, Comment, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEX. L. REV. 323, 323 (1975) [hereinafter Schwartzel & Wilshusen I].

78. *Id.*

79. *Id.* at 723–24 (footnotes omitted) ("[T]his reform effort was marred either by careless draftsmanship or by the legislature's unwillingness to place adequate restrictions on politically powerful county court judges.").

80. *See id.* at 324–26, 355.

giving them jurisdiction "to hear all matters 'incident to an estate[,]'" including a nonexclusive list of incidental matters.[81]

Many of the deficiencies in the 1973 legislation were addressed in the 1975 legislation.[82] The legislature passed Senate Bill 534, which "promote[d] the legislative goal of destroying de novo review[,]" and it also enacted a mandatory transfer mechanism for contested probated matters, which allowed any party, upon motion, to transfer the matter from a constitutional county court to a district court.[83] The legislature also lengthened the nonexclusive list of matters "incident to an estate."[84]

Following the 1977 legislative session, the following interim charge was issued to the House Judiciary Committee, chaired by the Honorable Ben Z. Grant: "A review of the probate laws of Texas, including a study of the advantages and disadvantages of enacting, in whole or in part, the Uniform Probate Code. This study should also include recommendations as to the need for further recodification of the existing probate laws."[85]

The 1955 codification had not been intended "to make radical changes in the former probate law but rather to eliminate conflicts, clarify ambiguities, and modernize archaic language."[86] Therefore, "at least 95% of the 1955 [Probate] Code consist[ed] of a rearrangement and re-enactment of the former statutes."[87] In 1848, when many of those statutes were first adopted, Texas had a population of 200,000 and remained primarily a rural and agrarian state until after World War II.[88] But the years following the war were "marked by rapid urbanization and population growth" so that by 1978, Texas was the third most populous state in the nation, after California and New York.[89] Only three percent of the Texas population continued to live on farms—and presumably ranches.[90] A complete review of the probate statutes, originally designed for an agrarian society, was for what was now a relatively urban state.[91]

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81. *Id.* at 336.

82. *Compare* Schwartzel & Wilshusen I, *supra* note 77 (pointing out the deficiencies in the 1973 legislation), *with* Boone Schwartzel & Doug Wilshusen, Comment, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEX. L. REV. 372 (1976) [hereinafter Schwartzel & Wilshusen II] (discussing the 1975 legislation).

83. Schwartzel & Wilshusen II, *supra* note 82, at 377–81.

84. *Id.* at 383.

85. TEX. HOUSE COMM. ON THE JUDICIARY, 66TH LEG., INTERIM REPORT: PROPOSED REVISION OF THE TEXAS PROBATE CODE (1978) [hereinafter 1978 INTERIM REPORT], http://www.lrl.state.tx.us/scanned/interim/65/j898p.pdf.

86. *Id.* at 1.

87. *Id.*

88. *Id.*

89. *Id.* Texas passed New York as the second most-populous state sixteen years later, in early 1994. Sam Roberts, *A Rank That Rankles: New York Slips to No. 3; Now Texas Is 2d Most Populous State*, N.Y. TIMES (May 19, 1994), http://www.nytimes.com/1994/05/19/nyregion/a-rank-that-rankles-new-york-slips-to-no-3-now-texas-is-2d-most-populous-state.html.

90. *Id.* at 2.

91. *Id.* at 1–2.

Following one full committee hearing in Austin in 1977, and three subcommittee hearings the following year in Dallas, San Antonio, and Levelland, the Judiciary Committee concluded that overall the Texas Probate Code was superior to the Uniform Probate Code.[92] Texas introduced independent administration in 1845, and for over a century, it remained the only state with such type of simplified administration.[93]

> While the Uniform Probate Code offer[ed] two methods of administration—supervised and unsupervised [the latter being based largely on Texas' independent administration procedures]—the Texas Probate Code, in combination with common law, offered . . . [at least] seventeen possib[le] [methods of administration], depending on the individual needs of the estate.[94]

The Interim Report made thirty-six separate recommendations, only four of which recommended the adoption of Uniform Probate Code provisions.[95] The four recommendations related to "inheritance rights of children born out of wedlock, simultaneous death, children believed dead at the time of the writing of a will, and contracts to make or not revoke a will."[96] A fifth recommendation involved codifying existing Texas law relating to nontestamentary transfers along the structural lines of the corresponding Uniform Probate Code provisions, without enacting any of the provisions in the Uniform Probate Code that clashed with existing Texas law.[97]

As a result of the Judiciary Committee's Interim Report, in 1979, the legislature adopted what was described as the only comprehensive revision of the Probate Code since its 1955 enactment, except for the 1971 changes.[98] Among the numerous changes were amendments to the 1971 disclaimer statute to add the nine-month requirement found in Internal Revenue Code § 2518 and the simultaneous death provisions requiring a beneficiary to survive the decedent by 120 hours.[99] The legislature added the following new provisions: § 59A, which provided that contracts to make, or not to revoke, a will could only be established by a will provision stating the contract's material terms; § 149B, which provided a method for a court-ordered accounting and distribution by an independent executor; and § 149C, which provided for a fixed procedure to remove an independent executor under certain circumstances.[100] Additionally, the legislature added Chapter XI to the Probate

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92. *Id.* at 2.
93. *Id.*
94. *Id.* at 3.
95. *Id.* at 4.
96. *Id.*
97. *Id.* at 4–5.
98. Ben Z. Grant & Robert Whitehill, *The Revision of the Texas Probate Code*, 43 TEX. B.J. 892, 892 (1980).
99. *Id.* at 894.
100. *Id.* at 896, 898.

Code, which essentially codified existing Texas case law relating to nontestamentary transfers.[101]

In 1981, the legislature passed legislation stating that "a written agreement between spouses and a . . . financial institution may provide that existing funds or securities on deposit and funds and securities to be deposited in the future, and interest and income thereon, shall by that agreement be partitioned into separate property[,]" thus allowing the spouses to hold the property as joint tenants with rights of survivorship.[102] The "*Hilley* Rule," which was established in 1961, required this particular procedure before spouses could create rights of survivorship among themselves with their community property.[103]

In 1983, the most significant legislation affecting estate planning and probate practitioners was the legislature's enactment of the Texas Trust Code as part of the codification of the Property Code.[104] While the legislature made a number of minor amendments to the Probate Code, there were no significant changes.[105]

One little phrase—"in actions by or against a personal representative"—added in 1985 legislative session provided a significant clarification and expansion of statutory probate court jurisdiction; this expanded the list of causes of actions that were appertaining to or incident to an estate in statutory probate courts, giving them concurrent jurisdiction with district court in a wide variety of cases.[106]

In 1987, voters approved the new § 46(b) as an amendment to Article XVI, § 15, of the Texas Constitution, which authorized spouses to hold community property with rights of survivorship, thereby eliminating the procedure required by the *Hilley* rule.[107]

In 1989, the legislature further expanded the jurisdiction of statutory probate courts.[108] The Durable Power of Attorney Act (then § 36A) was redrafted (temporarily adding a witness requirement), and for the first time, a non-Probate Code change authorized statutory durable powers of attorney for

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101. *Id.* at 900.
102. Charles A. Saunders, *1981 Legislation: Real Estate, Probate and Trust Law*, 44 TEX. B.J. 1199, 1200 (1981).
103. *See* Hilley v. Hilley, 342 S.W.2d 565, 571 (Tex. 1961).
104. *See, e.g.*, Kent H. McMahan, *Recent Legislative Developments*, ST. B. TEX., ADVANCED ESTATE PLANNING AND PROBATE COURSE (1983).
105. *See* Charles A. Saunders, *1983 Legislation: Real Estate, Probate and Trust Law*, 46 TEX. B.J. 1215, 1216–19 (1983).
106. Charles A. Saunders, *1985 Legislation: Real Estate, Probate and Trust Law*, 48 TEX. B.J. 1322, 1325 (1985).
107. *See* Michael J. Cenatiempo, *Legislative Developments*, ST. B. TEX., ADVANCED ESTATE PLANNING AND PROBATE COURSE (1989).
108. *Id.*

health care decisions.[109] The language of § 46(b) was also further refined, and it was moved to new Part 3 of Chapter XI (§§ 451 through 462).[110]

Perhaps the most significant changes affecting probate practice in 1991 were not the Probate Code amendments; rather, the amendments to the Government Code removed statutory probate courts from the definition of statutory county courts, eliminated the probate jurisdiction of the latter in counties that contained the former, and added a provision listing the powers and duties of a statutory probate court or its judge.[111] In the Probate Code itself, a notable change was the enactment of the "anti-Boren" portion of § 59.[112] In *Boren v. Boren*, the Texas Supreme Court invalidated a will if the testator or witnesses inadvertently failed to sign the will itself, even though they had signed the self-proving affidavit.[113] After the 1991 amendment, a court could uphold a will by treating the signatures in the self-proving affidavit as signatures to the will—in such case, the will was no longer considered self-proved.[114] Also, an initial version of the Guardianship Code was introduced and withdrawn in 1991.[115]

In 1993, the legislature enacted three significant changes.[116] First, although it failed to pass in 1991, in 1993, new Chapter XII included a Texas version of the 1987 Uniform Durable Power of Attorney Act, which was prepared by a REPTL committee, headed by Houston attorney Charles W. Giraud, a past chair of the section.[117] Next, the guardianship provisions that were originally combined with decedents' estates provisions when the Probate Code was enacted in 1955 were extracted from Title 1 and placed in new Chapter XIII.[118] This was the culmination of a ten-year REPTL project led by Professor Thomas M. Featherston, Jr., the Mills Cox Professor of Law at Baylor Law School, as the chief scrivener and reporter.[119] Finally, the intestacy rules applicable to community property were changed so that for the first time, it was possible for the surviving spouse to inherit the deceased spouse's half of

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109. *Id.*
110. *Id.*
111. *See generally* Maria Luisa Flores, *Overview of State Bar and State Bar Section Sponsored Legislation – Final Disposition by the 72nd Legislature*, 54 TEX. B.J. 706 (1991) (discussing the various amendments to the Texas Government Code).
112. *See* STEVE R. AKERS ET AL., WILLS ROAD MAP: PRACTICAL CONSIDERATIONS IN WILL DRAFTING 14 (2011).
113. *Id.* (citing Boren v. Boren, 402 S.W.2d 728 (Tex. 1966)).
114. *Id.*
115. *See* Flores, *supra* note 111.
116. *See infra* notes 118–21.
117. *See* Charles A. Saunders, *1993 Update: Real Estate, Probate and Trust Law Legislation*, 56 TEX. B.J. 896, 899 (1993).
118. *Id.*
119. *Id.*

the community estate.[120] The legislature also added a new Chapter XII providing for a new type of estate administration called "informal probate."[121]

In 1995, the legislature enacted the product of a REPTL joint committee of real estate and probate lawyers (with input from judges and bankers), headed again by Professor Featherston.[122] The proposal provided some needed clarification of the creditors' claims procedures to be followed in independent administration and the handling of secured claims in any administration.[123] The legislature also tried to fix problems with the informal probate procedures it initially enacted two years earlier.[124]

In 1997, Senate Bill 504 added the Uniform Transfer on Death Security Registration Act as Part 4 of Chapter XI of the Probate Code.[125] The governor signed this provision on April 17th, with an effective date of September 1.[126] The legislature's enactment of the Uniform Transfer on Death Security Registration Act apparently motivated some people to actually read it; in response to perceived problems with this uniform act, the House amended Senate Bill 506 (S.B. 506) a month later, on the floor, repealing the Uniform Transfer on Death Security Registration Act before ever went into effect.[127] S.B. 506 also added securities and accounts with financial institutions to the list of properties in Probate Code § 450 covered by the provisions for payment or transfer at death.[128] Two important changes were made to the Durable Power of Attorney Act: (1) any power of attorney granted to a spouse would terminate upon divorce; and (2) the original opt-in method by initialing specific powers changed to a strikeout method of opting out.[129] The legislature also gave up on its attempt to clean up the informal probate provisions enacted four years earlier and just repealed them in their entirety.[130]

In 1999, the legislature continued its expansion of statutory probate court jurisdiction by expanding the transfer powers under §§ 5B and 608 to include any cause of action in which a personal representative is a party, regardless of

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120. *Id.* (noting that if the survivor was the other parent of all of the deceased spouse's children, then the surviving spouse could inherit).

121. *Id.* (noting that, with the addition of the Durable Power of Attorney Act, the Probate Code had two Chapter XIIs).

122. *See generally* Charles A. Saunders, *Real Estate, Probate and Trust Law*, 58 TEX. B.J. 938 (1995) (discussing the number legislative changes in 1995).

123. *Id.* at 942.

124. *Id.*

125. Jerry Frank Jones, *Texas Legislative Report 1997: Next to Last Stop Before the Millennium (The End is Near Report)*, ST. B. TEX., ADVANCED ESTATE PLANNING AND PROBATE COURSE, at 8 (1997), http://www.jerryfrankjones.com/articles/1997-legis-report.pdf.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 9. This change remained with us until it was switched back to the initialing method in 2013 by a non-REPTL bill. *See* Glenn M. Karisch, *New Statutory Durable Power of Attorney Form*, TEXASPROBATE.COM (Aug. 28, 2013), http://texasprobate.com/2013-legislation/new-statutory-durable-power-of-attorney-form.html.

130. Jones, *supra* note 125, at 10.

whether the action appertains to or is incident to an estate pending in the court.[131] The legislature also introduced a new certification requirement for court-appointed attorneys in guardianship proceedings, which requires that all court-appointed attorneys successfully complete a three-hour course of study to be certified.[132]

While this Part IV by no means constitutes an exhaustive discussion of all significant amendments to the Probate Code, the turn of the millennium will be used as the milestone that ends our discussion of post-1955 amendments. Let us trace our steps backward about fifty years.

V. THE NEED FOR STATUTORY REVISION

As noted in Part 2 above, intervals of about sixteen years separated the four revisions of Texas law between 1879 and 1925.[133] However, by 1963, it had been thirty-eight years since the last general revision of Texas laws, which occurred in 1925.[134] Meanwhile, the Probate Code was not the only topical revision that was enacted outside the framework of the 1925 revision; at least ten other topics were covered by codes or acts outside that numbering system.[135] Without the privately-published Black Statutes, finding statutory law would be almost impossible for the average lawyer.[136] Even the private compilations developed problems; the "131 alphabetically-arranged 'titles' covering 'subjects' of widely varying coherency and scope . . . [could not] accommodate growth of the statut[ory] law in a rational manner," and compilations still retained impliedly repealed legislation, replaced by a new law.[137] Many laws regulating business and occupations were located in the penal code, which was not the first place one would think to look.[138] Parts of many legislative acts were assigned to the civil statutes, while their penalty provisions were assigned to the penal code.[139] And when the legislature created a new state agency and gave it the powers and duties of an existing agency, it often failed to amend the prior statutes that referred to the old agency.[140] For example, the statutes contained references to "the Game, Fish and Oyster Commissioner[;] the Game, Fish and Oyster Commission[;] the Game and Fish Commission[;] and the State Parks Board[,]" even after the powers and duties

131. *See* Glenn M. Karisch, *Texas Legislative Update – 1999: Report on Probate- and Trust-Related Legislation in the 76th Texas Legislature*, TEXASPROBATE.COM, http://texasprobate.net/99leg/99update.htm (last modified Nov. 15, 1999).

132. *Id.*

133. *See supra* Part II.

134. Freeman, *supra* note 9, at 1022.

135. *Id.*

136. *Id.* at 1071.

137. *Id.* at 1072.

138. *Id.*

139. *Id.*

140. *Id.*

of these agencies had been transferred to the Parks and Wildlife Department.[141] Furthermore, there continued to be problems with the language used in many of the statutes—described as "archaic, verbose, obscure, or unnecessarily legalistic."[142]

Confusion and difficulty of using the Black Statutes "was reflected in H.S.R. No. 650, passed by the House of Representatives in 1961. The resolution requested the Texas Legislative Council to study the matter and report to the 58th Legislature."[143] The Legislative Council did so, and it recommended that the legislature direct a state agency, such as the Legislative Council, to prepare a formal, nonsubstantive revision of the Texas statutes on a topical basis.[144] It further recommended that the chair of the Legislative Council appoint seven members to an advisory committee to work and consult with the Legislative Council on the classification, arrangement, and numbering system of the statutes.[145]

The Legislative Council's report led the 58th Legislature to pass Senate Bill 367 (S.B. 367), which ordered the creation of a permanent, ongoing statutory revision program, including the creation of a "Statutory Revision Advisory Committee."[146] The Legislative Council was charged with making a complete, nonsubstantive revision of Texas statutes.[147]

The initial members of the advisory committee were as follows:

> Ruel C. Walker, Associate Justice, Supreme Court of Texas; Spurgeon E. Bell, Chief Justice, First Court of Civil Appeals, Houston, R. Dean Moorhead, Austin attorney; Angus Wynne, Sr., Dallas attorney; and Margaret Amsler, Carlos C. Cadena, and Millard H. Ruud, law professors at Baylor, St. Mary's, and [the University of] Texas law schools, respectively.[148]

With the assistance of the Legislative Council staff, the committee prepared a classification plan for Texas statutes, along with a consistent numbering and formatting system.[149] The original plan adopted in 1965 contemplated compiling all general and permanent statutes into twenty-six codes arranged by topic.[150] These twenty-six codes would later be expanded to

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141. *Id.*
142. *Id.*
143. *Id.* at 1074.
144. *Id.* at 1075.
145. *Id.* ("Such committee should include representatives of the State Bar of Texas, the judiciary[,] and leading law schools.").
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 1075–76.

twenty-seven.[151] The committee recommended "[t]hat the code sections be numbered decimally and in a manner designed to accommodate future expansion."[152] Each code would be divided "into 'titles,' 'subtitles,' 'chapters,' 'subchapters,' 'sections,' 'subsections,' and 'subdivisions.'"[153]

In November of 1965, the Statutory Revision Advisory Committee directed the Legislative Council staff to begin revisions to the first two codes selected for legislative enactment in 1967: the Business & Commerce Code and the Water Code.[154] Because the revision of the Water Code turned out to be a significantly larger task than anticipated, it was not ready for enactment in 1967.[155] The Legislative Council anticipated the entire program to take between ten and fifteen years—it has been a bit longer.[156]

Why did the Legislative Council need to revise the Probate Code when it had already been organized and codified in 1955? The Probate Code is not really a code.[157] Legislation enacting new code sections is generally based on a revisor's report, which contains the proposed language of the new code, the language of the old statutes, and brief notes.[158] The Probate Code was not really a "code" for purposes of the Code Construction Act because it was enacted before the Legislative Council's codification effort began and because it did not comply with the organizational and stylistic principles of modern Texas codes.[159]

The preparation of a new code is not a mere compilation of existing statutes; rather, it is a time-consuming process involving a complete redrafting of statutory language.[160] The Director of the Legislative Council's Legal Division appoints "a senior staff attorney as chief revisor . . . [who] is responsible for collecting the source law[,] . . . proposing an arrangement for the code, and assigning . . . work among" other the Legislative Council attorneys.[161]

In order to assure a completely nonsubstantive revision, the attorneys must review the source law in detail, analyze case law interpreting those statutes, identify invalid, duplicative, or ineffective provisions, and then, they must redraft all of the statutes into a single Code that is not only well-written and

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151. *See* House Comm. on State Affairs, Bill Analysis, Tex. H.B. 2502, 81st Leg., R.S. (2009) (engrossed version); House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2759, 82d Leg., R.S. (2011) (engrossed version).

152. Freeman, *supra* note 9, at 1075.

153. *Id.*

154. *Id.* at 1076.

155. *Id.*

156. *Id.*

157. *See* GERRY W. BEYER, TEXAS ESTATE PLANNING STATUTES WITH COMMENTARY 181 (2011–2013 ed. 2011) [hereinafter BEYER, ESTATE PLANNING STATUTES].

158. *See* 2012 DRAFTING MANUAL, *supra* note 16, at 148.

159. BEYER, ESTATE PLANNING STATUTES, *supra* note 157; *see also* TEX. GOV'T CODE ANN. §§ 311.001–.034 (West 2013).

160. *See* 2012 DRAFTING MANUAL, *supra* note 16, at 147.

161. *Id.*

well-organized but is also in a consistent format.[162] After extensive internal review, the drafts are circulated among other interested persons outside the Legislative Council.[163] Currently, the Criminal Procedure Code stands as the only proposed code that has not yet been enacted by the legislature, and the Special District Local Laws Code may not yet be complete.[164]

According to the chairs of the Probate Code Codification Committee, because of the anticipated disruption to our practice that would be caused by a codification project, many years ago, the leadership of REPTL convinced the Legislative Council to delay the project as long as possible, by placing the Probate Code at the end of the project list.[165] This "convincing" was likely made easier by the fact that the probate laws, unlike the rest of the Revised Statutes, were already somewhat organized through the 1955 enactment of the Probate Code.[166] But by 2006, the Legislative Council ran out of other codification projects and turned its attention to the Probate Code.[167]

VI. LEGISLATIVE COUNCIL'S CODIFICATION PROCESS

The Legislative Council's nonsubstantive revision process involves the following:

> [R]eclassifying and rearranging the statutes in a more logical order, employing a numbering system and format that will accommodate future expansion of the law, eliminating repealed, invalid, duplicative, and other ineffective provisions, and improving the draftsmanship of the law if practicable—all toward promoting the stated purpose of making the statutes 'more accessible, understandable, and usable' without altering the sense, meaning, or effect of the law.[168]

The Legislative Council "staff encourages examination and review of all proposed code chapters by any interested person."[169] The staff attempts to include in the "proposed code all source law assigned to the code and to ensure

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162. *Id.* at 147–48.
163. *Id.* at 148.
164. *Id.* at 150; *see also Special District Local Laws Code*, TEX. LEGIS. COUNCIL, http://www.tlc.state.tx.us/code_current_sddl.htm (last visited June 5, 2014).
165. *See* Barbara McComas Anderson & Thomas M. Featherston, Jr., *Probate Code Recodification Project Overview*, ST. B. TEX., 32ND ANNUAL ADVANCED ESTATE PLANNING AND PROBATE COURSE (June 11–13, 2009).
166. *See id.*
167. *See id.*
168. 2012 DRAFTING MANUAL, *supra* note 16, at 147.
169. *Code Projects*, TEX. LEGIS. COUNCIL, http://www.tlc.state.tx.us/code_overview.htm (last visited June 5, 2014).

that no substantive change has been made in the law."[170] A complete and thorough outside review is necessary, however.[171]

The two members of the Legislative Council legal staff primarily responsible for the production of the nonsubstantive revision of the Probate Code were Maria Breitschopf and Anne Peters.[172] Ms. Breitschopf was responsible for the decedents' estates revisions passed by the 81st (2009) Legislature, while Ms. Peters was responsible for the guardianship and power of attorney revisions passed by the 82nd (2011) Legislature.[173]

VII. REPTL'S PROBATE CODE CODIFICATION COMMITTEE

In the summer of 2006, when REPTL learned that the Legislative Council was going to codify the Probate Code, it began to work actively with the Legislative Council staff on the codification project.[174] REPTL established a Probate Code Codification Committee, which was co-chaired by Professor Featherston and Barbara McComas Anderson, a Dallas attorney, both of whom are former chairs of REPTL.[175] Through a series of meetings with the Legislative Council staff, it was ultimately decided that REPTL and the Legislative Council would cooperate in determining how the new code would be organized, and the Legislative Council would take the lead in drafting the new code, although REPTL's committee would work on substantive changes to some of the thorniest provisions, like jurisdiction, venue, and independent administration, where it was considered difficult or impossible to codify the current statutes without some tweaking.[176] The Legislative Council would first draft the chapters of the code governing decedents' estates—these were to be submitted to the Legislature for adoption in 2009; it would then draft the remaining chapters of the code, including those provisions governing guardianships and powers of attorney, after the 2009 session, with its goal to submit these chapters to the Legislature for adoption in 2011.[177]

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170. *Id.*

171. *See id.*

172. *See Estates Code*, TEX. LEGIS. COUNCIL, http://www.tlc.state.tx.us/code_current_estates.htm (last visited June 5, 2014).

173. *See id.* ("Questions, comments, or suggestions relating to the project may be directed to either Ms. Peters or Ms. Breitschopf at P.O. Box 12128, Austin, Texas 78711, at telephone number (512) 463-1155, or at anne.peters@tlc.state.tx.us or maria.breitschopf@tlc.state.tx.us.").

174. Letter from Glenn M. Karisch, to Maria Breitschopf (Mar. 8, 2007) [hereinafter Karisch Letter] (on file with author); *see also* Glenn M. Karisch, *Substantive Changes Related to Estates Code Enactment*, TEXASPROBATE.COM (Aug. 28, 2013) [hereinafter Karisch, *Substantive Changes*], http://texasprobate.com/2013-legislation/substantive-changes-related-to-estates-code-enactment.html.

175. Karisch Letter, *supra* note 174; *see also* Karisch, *Substantive Changes*, *supra* note 174.

176. *See* Glenn M. Karisch, *2009 Texas Probate, Guardianship and Trust Legislation*, TEXASPROBATE.NET, at 2–3 (2009) [hereinafter Karisch, *2009 Legislation*], http://texasprobate.net/09leg/09update.pdf.

177. *Id.* at 1–2.

REPTL assisted the Legislative Council during the entire legislative process by providing expert review of chapters as they are drafted and expert testimony about legislation before the Legislature.[178] The Probate Code Codification Committee consisted of the Probate Division of the REPTL Council, including then-current council members and past chairs.[179] From time to time, judges, professors, and other private practitioners were invited to participate in the meetings; Lisa Jamieson, a Fort Worth attorney and the REPTL chair for the 2013–2014 Bar year, agreed to be chair of the Jurisdiction and Venue Drafting Committee.[180] Later, Stephanie Donaho, a Houston attorney, took over the role of chair of the Independent Administration Drafting Committee.[181] And Jerry Frank Jones, an Austin attorney and a REPTL past chair, headed the Legislative Council Coordination Committee.[182] An organizational meeting of the Probate Code Codification Committee was held on April 13, 2007, at Baylor Law School, in Waco, Texas.[183] Topics for discussion included whether any of the similar rules for decedents' estates and guardianship should be combined or kept separate, appropriate jurisdiction and venue provisions for counties without a statutory probate court, and clarification of independent administration provisions, such as claims procedures and powers of sale.[184]

Professor Featherston first attempted to create the structure for the new code in 2007.[185] When the Legislative Council prepared its initial drafts of what it originally called the "Estates and Guardianships Code" that fall, the structure was remarkably similar to the one proposed by Professor Featherston.[186] By November, the Estates Code had been organized into the following titles:

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178. *Id.*

179. *See id.*; *see also* Memorandum from the REPTL co-chairs on Probate Code Codification Committee (Mar. 28, 2007) [hereinafter REPTL Memorandum] (on file with author).

180. REPTL Memorandum, *supra* note 179; *see also Lisa H. Jamieson*, SHANNON GRACEY, http://www.shannongracey.com/attorney-search/attorney/lisa-jamieson (last visited June 5, 2014).

181. *See Stephanie Donaho*, LOCKE LORD, http://www.lockelord.com/professionals/d/donaho-stephanie?lang=en (last visited June 5, 2014).

182. *See Jerry Frank Jones*, IKARD GOLDEN JONES, http://igjlaw.com/jerryfrankjones.html (last visited June 5, 2014).

183. *See* Agenda of the Probate Code Codification Organizational Meeting (Apr. 12, 2007) (on file with author).

184. *See id.*; *see also* William D. Pargaman, *Probate, Guardianship, and Trust Law*, 74 TEX. B.J. 712, 712–15 (2011). The rules were only separated twenty years ago, when the guardianship provisions were "extracted" from the decedents estates provisions and moved to new Chapter XIII. *See id.* (discussing the Texas Estates Code § 305.152).

185. REPTL Recodification Project Probate Code Structure Discussion Outline (Aug. 24, 2007) (on file with author). This document was later reproduced as the *Probate Code Recodification Project Overview*, which Barbara McComas Anderson & Thomas M. Featherston, Jr., the authors, presented at the Texas State Bar's 2008 Advanced Estate Planning and Probate Course. *See* source cited *supra* note 165 (containing the reproduced article that the authors presented).

186. *See* Anderson & Featherston, Jr., *supra* note 165. The Legislative Council researched other states' names for what they called the Probate Code. *How the 50 States Group & Label their Probate and Related Provisions* (June 15, 2007) (on file with author).

Title 1. General Provisions (§§ 22.001, *et seq.*)
Title 2. Estates of Decedents (§§ 31.001, *et seq.*); Durable Powers of Attorney (§§ 751.001, *et seq.*)
Title 3. Guardianship and Related Provisions (§§ 1001.001, *et seq.*)[187]

VIII. LEGISLATIVE COUNCIL'S FIRST DRAFTS

The Legislative Council provided REPTL with preliminary drafts of Title 1 and Title 2 at that time, but since it had not yet drafted the new power of attorney provisions, these initial drafts merely transferred the existing power of attorney provisions, found in Chapter XII of the Probate Code, to Title 2 of the Estates Code and renumbered them, without revision.[188] These drafts also transferred the independent administration, jurisdiction, and venue provisions of the Probate Code to a portion of Title 2 and transferred the guardianship provisions of the Probate Code, Chapter XIII, to Title 3 of the Estates Code, all without any revision.[189]

A number of esoteric issues were presented to the Legislative Council.[190]

(1) *Internal References to "This Code."* In drafting these provisions, the Legislative Council struggled with what most of us would consider an extremely minor matter: references in the general procedural provisions of the Probate Code to this code.[191] For example, they pointed to Probate Code § 22, which provides, "In proceedings arising under the provision of this Code, the rules relating to witnesses and evidence that govern in the District Court [should] apply so far as practicable."[192] As described above, when the original Probate Code was enacted in 1955, the legislature combined the provisions relating to decedents' estates and guardianships, so many of the general provisions applied to both.[193]

(2) *Separate Guardianship Provisions*. But as noted above, in 1993, the legislature separated the guardianship provisions from the decedents' estates provision.[194] New Chapter XIII, which contained the guardianship provisions, replicated many of those general procedural provisions; the applicability of those provisions was clearly limited to guardianship matters.[195] Further, § 603

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187. *See* Anderson & Featherston, Jr., *supra* note 165.

188. Memorandum from Maria Breitschopf, to REPTL (Oct. 31, 2007) (on file with author).

189. *See id.*

190. *See generally* TEX. LEGIS. COUNCIL, 81ST LEG., REVISOR'S REPORT: A NONSUBSTANTIVE REVISION OF THE TEXAS PROBATE CODE, DOC. NO. 82C95 MTB–D (2009) [hereinafter 2009 REVISOR'S REPORT], http://www.tlc.state.tx.us/legal/estatescode/81st_revisors_report.pdf. (containing an overview of the issues considered by the Legislative Council).

191. *See generally id.* (noting that several of the general procedural provisions throughout the revisor's report encompassed this issue).

192. *Id.* at 71.

193. *Id.* at 391–92.

194. *Id.* at 392.

195. *Id.*

provided that the laws and rules applicable to decedents' estates would continue to apply to guardianships to the extent they were not inconsistent with the guardianship provision.[196] However, while replicating many of these provisions to be applicable just to guardianship matters, the legislature failed to amend the original provisions to state that they applied only to decedents' estates.[197] The legislature still referred to proceedings under "this code."[198] This was not really necessary, however, since, if any of the existing general provisions applicable to the entire Probate Code conflicted with a more specific provision applicable to guardianship matters only, the general rules of statutory construction would make the more specific provisions control the general provisions.[199] So the older provisions purporting to apply to the entire Probate Code actually only applied to the non-guardianship portions, which, at that time, consisted only of the decedents' estates provisions, except to the extent those older provisions were made applicable to guardianship matters by virtue of § 603.[200]

(3) *Separate Power of Attorney Provisions*. During the same 1993 legislative session in which the guardianship provisions were moved to new Chapter XIII of the Probate Code, the legislature enacted the Durable Power of Attorney Act as new Chapter XII of the Probate Code.[201] While the Legislative Council recognized that the general procedural provisions referencing "this code" seemed to have little practical applicability to the power of attorney provisions, the Legislative Council was unable to conclude, based on legislative history, that limiting those general procedural provisions to decedents' estates would be a nonsubstantive revision of existing law.[202]

As a result, the Legislative Council combined the power of attorney provisions with the decedents' estates provisions in Title 2, and changed references to "this code" found in those general procedural provisions to "this title."[203]

Originally, the Legislative Council anticipated introducing a bill including Titles 1 and 2 in 2009, with an effective date of April of 2011, while a bill including Title 3 plus revision of the power of attorney provisions would be prepared for introduction in 2011, with an effective date of April of 2013.[204] The preliminary drafts were prepared to facilitate their review; each chapter included both the text of the proposed Estates Code provisions and the text of

196. *Id.* at 35–36.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *See* Tex. S.B. 176, 73d Leg., R.S. (1993) (enrolled version).
202. *See* 2009 REVISOR'S REPORT, *supra* note 190, at 9–12.
203. *Id.* at i.
204. *See generally Estates and Guardianship Code: Proposed Chapters*, TEX. LEGIS. COUNCIL, http://www.tlc.state.tx.us/legal/estatescode/Estates_proposed.html (last visited June 5, 2014) (containing links to view the proposals of the Legislative Council).

the current Probate Code provisions from which they were drawn.[205] If needed, a revisor's note was included to provide further explanation.[206]

IX. REVIEW OF PROPOSED CHAPTERS

In early 2008, Professor Featherston and Ms. Anderson distributed these general drafts to the Probate Code Codification Committee for preliminary review.[207] By July 1st, REPTL initiated the process of obtaining approval from the State Bar Board of Directors to "carry" both the nonsubstantive codification provisions and the substantive provisions dealing with independent administration, jurisdiction, and venue as "Bar bills."[208]

In July, Alvin J. Golden, an Austin attorney and a past chair of REPTL, emailed members of the Texas Academy of Probate and Trust Lawyers, seeking volunteers to review the drafts and compare them to current law; Golden emphasized the need to pay particular attention to the language of the drafts to determine whether such language might make an inadvertent substantive change to existing law.[209]

Beginning in August of 2008, Professor Featherston and Ms. Anderson parceled out chapters of the proposed code to volunteer reviewers.[210] During this review, Hurricane Ike hit the Gulf Coast, causing significant delays in the review process by the volunteers in that area of Texas.[211] Remember all of the flooded basements of office buildings and courthouses? That hurricane also led to the cancellation of the REPTL Fall Council meeting, at which these proposed chapters were going to be discussed.

During this review process, REPTL became concerned about the potential confusion created by the two-year difference in effective dates for the two parts of the Estates Code.[212] Eventually, it was agreed that both the 2009 and the 2011 enactments would have the same effective date; thus, the entire code would take effect at the same time.[213] Additionally, it was agreed that such date would not be until after the 2013 legislative session—that way there would be "a regular session of the [l]egislature after adoption of the Code[,] [but] before it became effective," so if any errors were identified in the adopted version, they could be corrected by the legislature before the Estates Code took actually took effect.[214] Since the codification was such a major change, January 1, 2014

205. *Id.*
206. *Id.*
207. *See* Anderson & Featherston, Jr., *supra* note 165.
208. *See id.*
209. E-mail from Al Golden, to members of the Texas Academy of Probate and Trust Lawyers (July 21, 2008) (on file with author).
210. *See* Anderson & Featherston, Jr., *supra* note 165.
211. *See id.*
212. Karisch, *2009 Legislation*, *supra* note 176, at 1–2.
213. *Id.* at 2.
214. *Id.*

was the effective date selected, rather than the more common effective date for legislation, September 1st.[215]

X. 2009 NONSUBSTANTIVE LEGISLATION

The editors eventually completed the review prior to the beginning of the 2009 legislative session; Representative Will Hartnett (Hartnett) of Dallas and Senator Duncan of Lubbock filed the proposed nonsubstantive revision of the decedents' estates portion of the Probate Code in the 2009 legislative session as House Bill 2502 (H.B. 2502) and Senate Bill 2071, respectively.[216] The House version passed both chambers with an effective date of January 1, 2014.[217]

But prior to passage of the bill in the House, Hartnett raised concerns about the title "Estates and Guardianship Code" being a mouthful; Hartnett was given a number of the alternate titles that the Legislative Council and the REPTL considered, but he ultimately chose to shorten the name of the new code to just the "Estates Code" when H.B. 2502 passed on the floor of the House.[218]

XI. 2009 SUBSTANTIVE LEGISLATION

As noted above, the Legislative Council did not attempt to make a nonsubstantive codification of the independent administration, jurisdiction, or venue provisions, leaving it up to REPTL to come up with substantive revisions for these provisions.[219] The REPTL substantive independent administration proposals were introduced as House Bill 3085, and the jurisdiction and venue proposals were introduced as House Bill 3086 (H.B. 3086).[220] Unfortunately, neither of these bills passed both chambers of the legislature; they fell victim to a last-minute logjam of bills in the Senate that had a multitude of causes, an explanation of which would substantially lengthen this paper.[221] But due to the hard work of Hartnett and the cooperation of Senator John Carona of Dallas, the language of the jurisdiction portions of H.B. 3086 was engrafted at the last minute onto the Conference Committee Report for Senate Bill 408 (S.B. 408), a bill otherwise dealing with judicial administration and passed on the last day of the session.[222]

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215. *See id.* at 1–2.

216. Tex. H.B. 2502, 81st Leg., R.S. (2009) (introduced version); Tex. S.B. 2071, 81st Leg., R.S. (2009) (introduced version).

217. Tex. H.B. 2502, 81st Leg., R.S. (2009) (enrolled version).

218. *See* House Comm. on State Affairs, Bill Analysis, Tex. H.B. 2502, 81st Leg., R.S. (2009) (analyzing the nonsubstantive recodification of the Estates Code). This author's preference expressed to Hartnett at the time was the "New Probate Code."

219. *See id.*

220. Tex. H.B. 3085, 81st Leg., R.S. (2009) (introduced version); Tex. H.B. 3086, 81st Leg., R.S. (2009) (introduced version).

221. *See* Tex. H.B. 3085; Tex. H.B. 3086.

222. *See* Conference Comm. Report, Tex. S.B. 408, 81st Leg., R.S. (2009).

The editors originally revised the jurisdiction and venue provisions with the goal of making them more streamlined and easier to understand; however, because of the different courts in Texas that have original probate jurisdiction based on which county you find yourself in, there is a limit to how much streamlining can be achieved.[223] The introduced version of H.B. 3086 included a version of these revisions, but due to opposition to some of the proposed venue changes from Texans for Lawsuit Reform and the Texas Civil Justice League, all of the venue provisions were stripped from the bill prior to its approval in the House.[224] And as noted, the stripped-down language was eventually added to S.B. 408 before it was passed.[225] These jurisdiction provisions were "double-billed," meaning that the substantive changes were made to the appropriate provisions of the Probate Code, effective September 1, 2009, and the same substantive changes were made to the corresponding provisions of the Estates Code, effective January 1, 2014.[226] What follows is a description of the substantive changes that have been in effect for over four years that were prepared as a part of the Estates Code project.

The legislature used the term "probate proceedings" to define the matters that must be brought in a court exercising original probate jurisdiction.[227] In addition to a court's power to exercise original probate jurisdiction over probate proceedings, the provisions set out each court's power to hear matters "related to a probate proceeding."[228] If a matter was merely related to a probate proceeding, then there was no requirement that the matter be brought in the court exercising original probate jurisdiction, unless that court was a statutory probate court.[229] All matters related to a probate proceeding had to "be brought in a statutory probate court unless the jurisdiction of the statutory probate court [was] concurrent with the jurisdiction of a district court" on the matter related to the probate proceeding.[230] The types of courts exercising original probate jurisdiction did not change; however, the probate jurisdiction of statutory county courts was expanded to include "the interpretation and administration of . . . testamentary trust[s] if the will creating the trust ha[d] been admitted to probate in [that] court."[231] The provisions outlining the transfer of a contested matter from a court with original probate jurisdiction were modified slightly, with the hope of alleviating some of the jurisdictional traps that had been associated with these transfer statutes.[232]

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223. *See Statutory Probate Code*, TEX. CTS. ONLINE, http://www.courts.state.tx.us/courts/probate.asp (last updated Aug. 13, 2010).
224. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 3086, 81st Leg., R.S. (2009).
225. Tex. S.B. 408, 81st Leg., R.S. (2009) (enrolled version).
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id*
232. *Id.*

If a contested matter was transferred from a county court to a district court, any matter related to the probate proceeding could be brought in the district court proceeding.[233] The district court, on its own motion or the motion of any party, could determine that the new matter was not contested and transfer the new matter back to the county court that had original jurisdiction of the probate proceeding.[234] In addition, the same district court would have jurisdiction for any other contested matters filed after the transfer of the original contested matter.[235] After the assignment of a contested matter to a statutory probate judge, the statutory judge assumes subsequently filed matters.[236]

In those counties with a statutory county court exercising original probate jurisdiction, a contested matter must be transferred to that court on motion of any party.[237] "In addition, the judge of the [constitutional] county court, on the judge's own motion or on the motion of a party to the proceeding, [could] transfer the entire proceeding to the [statutory] county court."[238] If only the contested portion of the proceeding was transferred to the statutory county court, it had to be returned to the county court for further proceedings once statutory county court resolved the matter.[239]

A new provision granted statutory probate courts concurrent jurisdiction with district courts over certain matters involving trusts and powers of attorney, and certain matters involving a personal representative in personal injury lawsuits.[240]

XII. 2011 NONSUBSTANTIVE LEGISLATION

After the 2009 legislative session, the Legislative Council turned its attention to the guardianship provisions and power of attorney provisions of the Probate Code.[241] REPTL appointed Deborah Green of Austin and Linda Goehrs of Houston as the co-chairs of its Guardianship Recodification Committee to deal with this aspect of the codification process.[242] This portion of the nonsubstantive recodification was introduced as House Bill 2759 (H.B.

233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *See, e.g.*, Karisch, *2009 Legislation*, *supra* note 176, at 2, 6; Glenn M. Karisch, *REPTL Bills Would Make Changes to Trusts, Guardianships and Powers of Attorney*, TEXASPROBATE.COM (Feb. 28, 2011), http://texasprobate.com/index/2011/2/28/reptl-bills-would-make-changes-to-trusts-guardianships-and-p.html.
242. *See* William D. Pargaman, *What Has The Legislature Done To Us Now? (Don't Worry – It's Not Too Bad!): 2011 Texas "Probate and Trust" Legislative Update*, ST. B. TEX., 35TH ANNUAL ESTATE PLANNING AND PROBATE COURSE, at 1 (June 8–10, 2011).

2759) and Senate Bill 1299.[243] The House version passed, the governor signed it, and it went into effect with the rest of the Estates Code on January 1, 2014.[244]

XIII. 2011 SUBSTANTIVE LEGISLATION

The substantive independent administration changes that failed to pass in 2009 were incorporated into REPTL's main decedents' estates bill in 2011.[245] Representative Hartnett and Senator Jose Rodriguez introduced these bills; Hartnett introduced House Bill 2046 (H.B. 2046), and Rodriguez introduced Senate Bill 1198 (S.B. 1198).[246] The 2011 revisions to the 2009 independent administration legislation were designed to clarify and simplify three areas of independent administration: (1) the authority of independent executors or administrators to sell assets in the absence of an express grant in the will; (2) the procedures for presenting and dealing with creditors' claims; and (3) the procedures for filing a notice that an independent administration has "closed," without the need for a full accounting of all receipts and disbursements.[247]

Provisions were added allowing parents of minor children and trustees to consent to independent administration by agreement where no conflict exists.[248]

The revisions confirmed that "independent executors have the same authority to sell estate property that dependent administrators have, but without the need for court approval and without the need to follow the procedural requirements applicable to dependent administrators."[249] In administrations without a will or where a will failed to expressly grant a power of sale, courts can grant independent administrators a power of sale over real property in the order of appointment if the beneficiaries who are entitled to receive the real property consent to the power—this would thereby avoid the later need to obtain their consent.[250] Perhaps more importantly from a practical standpoint, the revisions included a new concept, which was borrowed from the Trust Code, providing statutory protection for third parties who rely on an independent representative's apparent authority when a power of sale is granted in a will or when the representative provides an affidavit that the sale is

243. *See* Tex. H.B. 2759, 82d Leg., R.S. (2011) (introduced version); Tex. S.B. 1299, 82d Leg., R.S. (2011) (introduced version).

244. Tex. H.B. 2759, 82d Leg., R.S. (2011) (enrolled version).

245. *See* Glenn M. Karisch, *REPTL Bill Tweaks Independent Administration*, TEXASPROBATE.COM (Mar. 8, 2011) [hereinafter Karisch, *REPTL Bill*], http://texasprobate.com/index/2011/3/8/reptl-bill-tweaks-independent-administration.html.

246. Tex. H.B. 2046, 82d Leg., R.S. (2011) (introduced version); Tex. S.B. 1198, 82d Leg., R.S. (2011) (introduced version).

247. *See* Karisch, *REPTL Bill*, *supra* note 245.

248. *See* Tex. H.B. 2046; Tex. S.B. 1198.

249. Karisch, *REPTL Bill*, *supra* note 245.

250. *See* Tex. H.B. 2046; Tex. S.B. 1198.

necessary under the circumstances described in Probate Code § 341(1) (from H.B. 2046) and likewise Estates Code § 356.251(1) (from S.B. 1198).[251]

Over twenty-five years ago, the Texas Supreme Court ruled that secured creditor elections found in Probate Code § 306 applied to independent administrations.[252] However, the legislature never amended Probate Code to recognize this.[253] Therefore, the revisions paid special attention to providing guidance regarding the handling of secured claims.[254] Secured creditors electing matured, secured status must file a notice in the official records of the county in which the real property securing the indebtedness is located.[255] Those creditors must obtain either court approval or the administrator's consent to exercise any foreclosure rights.[256] Secured creditors electing preferred debt and lien status may not exercise any nonjudicial foreclosure rights during the first six months of the administration.[257]

When creditors notify independent executors of their claims, such notice must be contained in one of the following documents:

> (1) a written instrument that . . . 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 . . . or pleading filed in the court in which the administration of the estate is pending.[258]

"[T]he running of the statute of limitations [is] 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."[259] The mere presentment of a claim or notice does not toll the running of the statute of limitations.[260]

Other claims procedures generally do not apply; specifically, a claim is not barred merely because a creditor fails to file suit within ninety days following the rejection of a claim.[261] In addition to existing procedures for closing independent administrations, an administrator may elect to close an independent administration by filing an affidavit that states the following: (1) all known debts "have been paid or have been paid to the extent" the assets

251. Tex. H.B. 2046; Tex. S.B. 1198.
252. *See* Geary v. Tex. Commerce Bank, 967 S.W.2d 836, 839, 840 (Tex. 1998).
253. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 1198, 82d Leg., R.S. (2011).
254. *See id.*
255. Tex. S.B. 1198, 82d Leg., R.S. (enrolled version).
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*

of the estate will permit; (2) all remaining assets have been distributed; and (3) the names and addresses of the estate's distributees.[262] Once the administration is closed, third parties may deal directly with the distributees.[263] However, a new provision explicitly recognizes that independent representatives are not required to close an estate.[264]

Finally, the 2011 substantive legislation included provisions consolidating venue statutes in one place, including venue for heirship proceedings previously located in the heirship provisions.[265] At the request of certain probate judges, the Texas Legislature modified the then-current heirship proceeding provision, which allowed an heirship proceeding to be brought in a guardianship proceeding following the death of an intestate ward; the 2011 modification continued to allow venue in the county where the guardianship proceeding was pending, but it required that the heirship proceeding be brought as a separate cause.[266] The bill also clarified that, for suits brought by the attorney general's office related to breach of fiduciary duties by charitable organizations or their agents, the venue provisions of the Probate Code and the Estates Code were subordinate to the Travis County venue, as provided by Property Code § 123.005.[267]

XIV. GENERAL CODE UPDATE BILLS

While the nonsubstantive codification bills passed and went into effect, without further action, on January 1, 2014, the codification process is still not complete.[268] Substantive amendments to the Probate Code were made in both the 2009 and 2011 sessions that were not included in the nonsubstantive portions of the Estates Code enacted in those years.[269] Because the Estates Code is intended to be a nonsubstantive codification of the Probate Code as it existed immediately prior to 2014, there is a continuing need to make additional nonsubstantive revisions to incorporate changes to the Probate Code made before that time that were not incorporated into the Estates Code.[270] In addition, as mentioned above, one reason for the delayed effective date of the Estates Code was to provide time for "errors" to be discovered and corrected prior to the effective date.[271] These same issues apply not just to the Estates Code, but they also apply to other codes enacted as part of the nonsubstantive

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262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *See General Code Update Bill*, TEX. LEGIS. COUNCIL, http://www.tlc.state.tx.us/code_current_gcub.htm (last visited June 5, 2014).
269. *See* discussion *supra* Parts XI, XIII.
270. *See Estates Code*, *supra* note 172.
271. *See* discussion *supra* Part IX.

codification process.[272] The Legislative Council regularly prepares what it refers to as a "general code update bill."[273] In 2011, that bill was Senate Bill 1303 (S.B. 1303), a lengthy bill that made "nonsubstantive" revisions to a number of codes, including the Estates Code and the Trust Code.[274]

The stated purposes of this general code update bill were as follows:

> (1) codifying without substantive change or providing for other appropriate disposition of various statutes that were omitted from enacted codes;
> (2) conforming codifications enacted by the 81st Legislature to other Acts of that legislature that amended the laws codified or added new law to subject matter codified;
> (3) making necessary corrections to enacted codifications; and
> (4) renumbering or otherwise redesignating titles, chapters, and sections of codes that duplicate title, chapter, or section designations.[275]

The 2011 general code update bill passed, and the portions relating to the Estates Code were effective January 1, 2014.[276]

In 2013, the general code update bill was Senate Bill 1093 (S.B. 1093); it also contained numerous Estates Code provisions that took effect on January 1, 2014.[277] The revisions to the Probate Code during the 2013 legislative session had an effective date of September 1, 2013, only to be superseded by the Estates Code, which would take effect four months later.[278] REPTL did not think any of its decedents' estates or guardianship proposals were important enough to warrant that extra four months of effect.[279] Therefore, REPTL opted to keep its 2013 proposals simpler by only proposing changes to the Estates Code that became effective on January 1, 2014.[280]

Only two bills passed by the legislature in 2013 made changes to the Probate Code; in both bills, the revisions related to the Probate Code took effect on September 1, 2013.[281] First, House Bill 2380 amended the forfeiture clause enforceability provisions of the Probate Code that were enacted in 2009, and second, House Bill 789 (H.B. 789) increased the allowances in lieu of

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272. *See Statutory Revision*, LEGIS. REFERENCE LIBR. OF TEX., http://www.lrl.state.tx.us/legis/revisorsnotes.cfm (last visited June 5, 2014).
273. *See General Code Update Bill*, *supra* note 268.
274. Tex. S.B. 1303, 82d Leg., R.S. (2011) (enrolled version).
275. *Id.*
276. *Id.*
277. Tex. S.B. 1093, 83d Leg., R.S. (2013) (enrolled version).
278. *Id.*
279. *See generally id.* (noting that all of the revisions related to decedents' estates and guardianships had an effective date of January 1, 2014).
280. *Id.*
281. Tex. H.B. 2380, 83d Leg., R.S. (2013) (enrolled version); Tex. H.B. 789, 83d Leg., R.S. (2013) (enrolled version).

homestead and other exempt property.[282] Both of these bills made the same changes to the corresponding provisions of the Estates Code, §§ 254.005 and 353.053, respectively, with an effective date of January 1, 2014.[283]

However, it appears that there may be a few minor matters to clean up; as noted in Part XVII, below, in 2009, a number of Probate Code provisions were transferred to the Estates Code "as is and with all faults."[284] By the end of the 2013 legislative session, these provisions were all either repealed or moved and redesignated as different parts of the revised Estates Code.[285] But even though the actual statutes were no longer there, some of the "structural" provisions remained—subtitles, chapters, parts, and subparts.[286] While "empty," here's what remains to be cleaned up by repeal in 2015:

TITLE 2. ESTATES OF DECEDENTS; DURABLE POWERS OF ATTORNEY
    Subtitle X. Texas Probate Code: Scope, Jurisdiction, and Courts
        Chapter I. General Provisions
            [Empty—Reserved for Expansion][287]
TITLE 3. GUARDIANSHIP AND RELATED PROCEDURES
    Subtitle Y. Texas Probate Code: Scope, Jurisdiction, and Venue
        Part 1. General Provisions
            Subpart A. Proceedings In Rem
                [Empty—Reserved for Expansion]
        Part 2. Guardianship Proceedings and Matters
            Subpart C. Duties and Records of Clerk
                [Empty—Reserved for Expansion]
    Subtitle Z. Texas Probate Code: Additional Guardianship Provisions
        Part 2. Guardianship Proceedings and Matters
            Subpart H. Compensation, Expenses, and Court Costs
                [Empty—Reserved for Expansion][288]

XV. GENERAL ORGANIZATION OF THE ESTATES CODE

As noted previously, the organization of the Estates Code generally follows Professor Featherston's suggestions.[289] Title 1 includes general

282. Tex. H.B. 2380; Tex. H.B. 789.
283. Tex. H.B. 2380; Tex. H.B. 789.
284. *See infra* Part XVII; *see also* 2009 REVISOR'S REPORT, *supra* note 190, at i.
285. *See, e.g.*, TEX. LEGIS. COUNCIL, 83D LEG., SUMMARY OF ENACTMENTS (2013), http://www.tlc.state.tx.us/pubssoe/83soe/83soe.pdf (summarizing all bills enacted by the legislature during the 2013 legislative session).
286. *See* discussion *infra* Part XXI.
287. 2009 REVISOR'S REPORT, *supra* note 190, at 1, 4.
288. TEX. LEGIS. COUNCIL, 82D LEG., REVISOR'S REPORT: A NONSUBSTANTIVE REVISION OF THE TEXAS PROBATE CODE – STATUTES RELATING TO DURABLE POWERS OF ATTORNEY, GUARDIANSHIPS, AND ALTERNATIVES TO GUARDIANSHIP, DOC. NO. 83C65 ATP–D, at 1, 3 (2011) [hereinafter 2011 REVISOR'S REPORT], http://www.tlc.state.tx.us/legal/estatescode/82nd_revisors_report.pdf.

provisions, such as the purpose and construction of the code and definitions.[290] Title 2 includes provisions dealing with both decedents' estates and powers of attorney; Title 2 is organized according to the following subtitles: (A) Scope, Jurisdiction, Venue, and Courts; (B) Procedural Matters; (C) Passage of Title and Distribution of Decedents' Property in General; (D) Proceedings Before Administration of Estate; (F) Wills; (G) Initial Appointment of Personal Representative and Opening of Administration; (H) Continuation of Administration; (I) Independent Administration; (J) Additional Matters Relating to the Administration of Certain Estates; (K) Foreign Wills, Other Testamentary Instruments, and Fiduciaries; (L) Payment of Estates Into Treasury; and (P) Durable Powers of Attorney.[291] Title 3 contains the guardianship provisions previously found in Chapter XIII of the Probate Code.[292] Because the guardianship provisions were essentially "recodified" when they were moved to the new Chapter XIII of the Probate Code in 1993, they required less revision and reorganization on the part of the Legislative Council than the decedents' estates provisions.[293]

XVI. INTENTIONAL AMBIGUITIES

An interesting aspect of the nonsubstantive nature of the statutory revision program is that if the Legislative Council determines that an existing statute contains an ambiguity, the revised law attempts to preserve that ambiguity.[294]

For example, in 2005, Probate Code § 248, which deals with the appointment of appraisers in decedents' estates, was revised by two different bills.[295] "The two versions [were] essentially identical except that [one] authorize[d] an 'interested person' to move for the appointment of appraisers[,]" while the other "authorize[d] an 'interested party.'"[296] The Legislative Council determined that the legislative intent was ambiguous, so the revised law, § 309.001, preserved the ambiguity by including virtually identical subsections.[297]

Probate Code § 243, dealing with an allowance for defending a will, provides in its "first sentence that an administrator with the will or alleged will annexed 'shall be allowed' out of the estate the administrator's necessary expenses and disbursements in certain proceedings" defending the will.[298] However, the second sentence provides that the same representative "may be

289. *See supra* Part VII.
290. TEX. ESTATES CODE ANN. tit. 1 (West 2014).
291. TEX. ESTATES CODE ANN. tit. 2.
292. TEX. ESTATES CODE ANN. tit. 3.
293. *See* discussion *supra* Part IV.
294. *See* 2009 REVISOR'S REPORT, *supra* note 190, at ii; 2011 REVISOR'S REPORT, *supra* note 288, at ii.
295. 2009 REVISOR'S REPORT, *supra* note 191, at 448–49.
296. *Id.* at 449.
297. *Id.*
298. *Id.* at 499.

allowed" those expenses in the same type of proceedings—this ambiguity is preserved in Estates Code §§ 352.052(a) and (b).[299]

Probate Code § 763, dealing with successor guardians, allows the successor to settle with the predecessor and provide a receipt for the portion of the estate remaining in the hands of the successor guardian.[300] "It is probable that the reference to the estate remaining in the possession of the 'successor' is erroneous and" instead, should have referred to the predecessor guardian.[301] Nevertheless, the ambiguity is preserved in Estates Code § 1203.202.[302]

And, if one is interested, Estates Code § 1052.001, dealing with guardianship dockets, preserves an ambiguity with respect to the use of the word "estate" in its source law, from Probate Code § 623.[303] However, the explanation of the nature of the ambiguity is too convoluted to be included here.

XVII. BUT YOU HAVEN'T EXPLAINED WHY THE ESTATES CODE BEGINS WITH CHAPTER 21

Section 21.001, Purpose of Code, is the very first section in our new Estates Code.[304] One might ask: Why does the code not begin at § 1.001? This is a good question, and it has come up numerous times during discussions and presentations about the Texas Estates Code; until recently, there was not an answer to this question.[305]

When the Estates Code was enacted in H.B. 2502 (in 2009) and H.B. 2759 (in 2011), certain portions of the Probate Code were transferred to the Estates Code, without revision, as part of the Legislative Council's continuing statutory revision program.[306] In some cases, this was due to anticipated substantive revisions to be undertaken by REPTL; for example, in 2009, the general provisions, including jurisdiction and venue, found in §§ 2, 4, 5, 5A through 5C, 6, and 8 found in Chapter I of the Probate Code were transferred to Chapter I, Subtitle X, Title 2, of the Estates Code (with the same section numbers), in anticipation of future substantive revision by REPTL.[307]

Moreover, the independent administration provisions found in §§ 145 through 154A were transferred, without renumbering, to Part 4, Chapter VI,

299. *Id.* at 498–99.
300. 2011 REVISOR'S REPORT, *supra* note 288, at 542–43.
301. *Id.* at 543.
302. *Id.* at 542–43.
303. *Id.* at 99–101.
304. TEX. ESTATES CODE ANN. § 21.001 (West 2014).
305. Letter from Anne Peters, Chief Revisor, Tex. Legis. Council, to author (Dec. 10, 2013) (on file with author) (noting that the answers were provided by Anne Peters in communications on December 10, 2013).
306. *See* Tex. H.B. 2502, 81st Leg., R.S. (2009) (enrolled version); Tex. H.B. 2759, 82d Leg., R.S. (2011) (enrolled version).
307. Tex. H.B. 2502.

Subtitle Y, Title 2, of the Estates Code, in anticipation of the unsuccessful 2009 substantive revision by REPTL that passed in 2011.[308]

In addition, the Durable Power of Attorney Act, found in Chapter XII, was transferred, without renumbering, to Subtitle Z, Title 2, of the Estates Code, in anticipation of the anticipated 2011 substantive revision by REPTL, based on the 2006 Uniform Power of Attorney Act.[309] Furthermore, all of the guardianship provisions found in Chapter XIII were transferred, without renumbering, to Chapter XIII of the Estates Code, in anticipation of the 2011 nonsubstantive revision by the Legislative Council.[310]

Because of the transfer of certain portions of the Probate Code to new chapters of the Estates Code, up to and including Chapter XIII, the Legislative Council chose to begin the portions of the Estates Code that were codified pursuant to the continuing statutory revision program with something that would follow "Chapter 13," but the Legislative Council did not start it with Chapter 14.[311] Because the Legislative Council's general preference is to begin with chapter numbers that have the numeral "1" in the ones' column, the first unused chapter number that fit this description was Chapter 21.[312]

XVIII. WHAT ABOUT ISSUES "OVERLAPPING" JANUARY 1ST?

The Probate Code was repealed, effective January 1, 2014.[313] Imagine a client with an estate administration pending at the end of 2013. Does that mean that on January 1st, the Probate Code no longer applies? As a general rule, the answer is "yes"—the Estates Code applies in such situations.[314] All of the bills related to the Probate Code during the last three sessions, taken together, repealed every section of the Probate Code on January 1, 2014, and all of the bills relating to the Estates Code became effective that same day.[315] As noted

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308. *Id*

309. *See id.*; *see also* Tex. H.B. 2759 (referring to the codification of the Durable Power of Attorney Act after REPTL was unsuccessful in its 2011 attempt to make substantive revisions to the power of attorney statutes).

310. Tex. H.B. 2502. While it was anticipated that the guardianship provisions would be codified pursuant to the continuing statutory revision program in 2011, they were moved "as is" in 2009 to the Estates Code, so that even if the anticipated codification failed to take place, the entire old Probate Code could be repealed, effective January 1, 2014. *See generally* 2009 REVISOR'S REPORT, *supra* note 190.

311. *See generally* TEX. ESTATES CODE ANN. § 21.001 (West 2014) (noting that this is the first section of the Texas Estates Code). 1–3 (West 2014).

312. *See id.*

313. *See* TEX. PROB. CODE ANN. §§ 1–904, *repealed by* Act of June 19, 2009, 81st Leg., R.S., ch. 680, § 10(a), 2009 Tex. Gen. Laws 1512, 1731 (effective Jan. 1, 2014), *and* Act of June 17, 2011, 82d Leg., R.S., ch. 823, § 3.02(a), 2011 Tex. Gen. Laws 1901, 2094–95 (effective Jan. 1, 2014).

314. TEX. ESTATES CODE ANN. § 21.006; *see also* Glenn M. Karisch, *The Estates Code*, TEXASPROBATE.COM (Aug. 28, 2013) [hereinafter Karisch, *The Estates Code*], http://texasprobate.com/2013-legislation/the-estates-code.html.

315. *See* Tex. S.B. 1093, 83d Leg., R.S. (2013) (enrolled version); Tex H.B. 2759, 82d Leg., R.S. (2011) (enrolled version); Tex H.B. 2502, 81st Leg., R.S. (2009) (enrolled version); *see also Estates Code*, *supra* note 172.

above, while the only two bills that revised the Probate Code in 2013 had an effective date of September 1, 2013, the revised sections were repealed four months later—both bills made identical changes to the corresponding Estates Code provisions, which went into effect on January 1, 2014.[316]

The Estates Code applies to pending estates.[317] There is nothing in the nonsubstantive Estates Code bills that makes the provisions inapplicable to estates still pending on January 1, 2014.[318] There was no need to deal with pending estates separately in the nonsubstantive bills; while the code name and the section numbers may have changed, the rules did not, as they were nonsubstantive revisions.[319]

Even though the Probate Code was repealed in its entirety on January 1st of this year, the Probate Code will still remain somewhat relevant.[320] For example, the 2013 REPTL decedents' estates bill, House Bill 2912 (H.B. 2912), made a number of substantive changes that went into effect on January 1st.[321] Some of the changes apply to estate administrations pending or commenced on or after January 1st.[322] Section 62 of the bill contained special transitional rules applicable to some of the changes made by the bill:

(1) A change prohibiting the use of unsworn declarations in self-proving affidavits "applies only to a will executed on or after [January 1st]. A will executed before [January 1st] is governed by the law in effect on the date the will was executed, and the former law is continued in effect for that purpose";

(2) Changes relating to genetic testing and gestational agreements apply only to heirships commenced on or after January 1st; an heirship commenced before January 1st "is governed by the law in effect on the date the proceeding was commenced, and the former law is continued in effect for that purpose";

(3) A change relating to competing applications for letters testamentary filed by persons equally entitled to them applies only to applications filed on or after January 1st; a competing application filed before January 1st "is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose";

(4) A number of changes apply only to actions filed or other proceedings commenced on or after January 1st, but "[a]n action filed or other proceeding commenced before [January 1st] is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose"; and

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316. Tex. H.B. 2380, 83d Leg., R.S. (2013) (enrolled version) (relating to forfeiture clauses in wills); Tex. H.B. 789, 83d Leg., R.S. (2013) (enrolled version) (increasing allowances in lieu of homestead and exempt property).

317. *See* TEX. ESTATES CODE ANN. ch. 21; *see also* Karisch, *The Estates Code*, *supra* note 314.

318. Tex H.B. 2759; Tex H.B. 2502.

319. Tex H.B. 2759; Tex H.B. 2502.

320. *See* discussion *supra* notes 322–25.

321. Tex. H.B. 2912, 83d Leg., R.S. (2013) (enrolled version).

322. *Id.*

(5) A number of other changes apply only to the estates of decedents dying on or after January 1st, but for purposes of those specific changes, the estate of a decedent dying "before [January 1st] is governed by the law in effect on the date of the decedent's death, and the former law is continued in effect for that purpose."[323]

For these listed categories, the law "in effect" before January 1st and "continued in effect for that purpose" is the corresponding Probate Code provision that was repealed, since the corresponding, unamended Estates Code provision was not yet in effect.[324]

Should live pleadings be "repealed" with updated references to the Estates Code after January 1st? Hopefully not![325] But, as a practical matter, that depends on the judge you are before. Certainly, Probate Code references should be converted to the corresponding Estates Code provisions in any amended or new pleadings filed after January 1st.[326] And, statutory references in any orders should definitely refer to the Estates Code.[327]

XIX. CONSTRUCTION ISSUES

One of the purposes of the Legislative Council's general code update bills is to revise other statutes that refer to repealed sections of the Probate Code so that they now refer to the corresponding Estates Code provision.[328] But just in case the Legislative Council overlooks anything, Estates Code § 21.003(a) provides a catch-all solution:

> § 21.003 STATUTORY REFERENCES
> (a) A reference in a law other than in this code to a statute or a part of a statute revised by, or redesignated as part of, this code is considered to be a reference to the part of this code that revises that statute or part of that statute or contains the redesignated statute or part of the statute, as applicable.[329]

In addition to this specific provision in the Estates Code, the Code Construction Act—Chapter 311 of the Texas Government Code—which applies to all of the codifications made pursuant to S.B. 367, covers this same situation: "Unless expressly provided otherwise, a reference to any portion of a statute or rule applies to all reenactments, revisions, or amendments of the statute or rule."[330]

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323. *Id.*
324. *Id.*
325. Every judge with probate jurisdiction with whom I have consulted has agreed with this conclusion.
326. Tex. H.B. 2912; *see also* Karisch, *The Estates Code*, *supra* note 314.
327. Tex. H.B. 2912; *see also* Karisch, *The Estates Code*, *supra* note 314.
328. *See General Code Update Bill*, *supra* note 268.
329. TEX. ESTATES CODE ANN. § 21.003(a) (West 2014).
330. TEX. GOV'T CODE ANN. § 311.027 (West 2013).

It is not clear whether Government Code § 311.027 applies only to references in other statutes, or to any reference, whether in a statute, agreement, or other instrument.[331] It would have been nice if the Estates Code would have included a provision similar to Trust Code § 111.002:

> § 111.002. CONSTRUCTION OF SUBTITLE
> This subtitle and the Texas Trust Act, as amended (Articles 7425b-1 through 7425b-48, Vernon's Texas Civil Statutes), shall be considered one continuous statute, and for the purposes of any statute or of any instrument creating a trust that refers to the Texas Trust Act, this subtitle shall be considered an amendment to the Texas Trust Act.[332]

However, the Estates Code does not include this provision; part of the reason may be that, for the most part, the Estates Code truly is a nonsubstantive codification of the Probate Code.[333] The Trust Code, on the other hand, while enacted as part of the nonsubstantive codification of the Property Code, was drafted as part of a ten-year REPTL project that began in 1973.[334] While much of the Texas Trust Code is a nonsubstantive codification of the Texas Trust Act, REPTL intentionally also included new provisions related to contemporary trust practice that were left unaddressed by the Trust Act, along with provisions relating to trusts that were not a part of the Trust Act but could be logically integrated into the Trust Code.[335] REPTL is considering proposing the addition of language similar to that found in Trust Code § 111.002 to the Estates Code in 2015.[336]

XX. LEGISLATIVE COUNCIL'S BILLS ARE INTENDED AS NONSUBSTANTIVE REVISIONS, BUT . . .

Pursuant to its mandate to craft a purely nonsubstantive revision, § 11 of H.B. 2502 and § 4.01 of H.B. 2759 both provide that the respective acts are "intended as a recodification only, and no substantive change in law is intended by" either bill.[337] However, that does not mean that the actual language of the Estates Code will be treated as a nonsubstantive revision if the actual language used by the Legislative Council inadvertently introduces a substantive change.[338]

331. *See id*.
332. *See* TEX. PROP. CODE ANN. § 111.002 (West 2007).
333. *See Estates Code*, *supra* note 172.
334. *See Trust Code*, REPTL, ST. B. TEX, http://www.reptl.org/DrawCommittees.aspx?GroupCommitteeID=63&PageID=33 (last visited June 5, 2014); *see* BEYER, TEXAS TRUST LAW, *supra* note 31, at 8.
335. *See Trust Code*, *supra* note 334.
336. *See id.*
337. Tex. H.B. 2759, 82d Leg., R.S. (2011) (enrolled version); Tex. H.B. 2502, 81st Leg., R.S. (2009) (enrolled version).
338. *See* Karisch, *The Estates Code*, *supra* note 314.

The 1999 Supreme Court of Texas case of *Fleming Foods of Texas, Inc., v. Rylander* addressed the issue of whether a taxpayer (Fleming) who paid sales tax to a vendor could seek a refund from the state, without receiving an assignment of refund rights from the vendor.[339] Texas Tax Code § 111.104(b) provided "that '[a] tax refund claim may be filed with the comptroller by the person who paid the tax.'"[340] "There [was] no question that Fleming [was] the 'person who paid the tax.'"[341] However, the source law that preceded this 1981 Tax Code provision, which was enacted pursuant to the continuing statutory revision program—"former Article 1.11A, provided that a refund claim could be filed by any person who paid sales taxes "'directly to the state.'"[342] The bill enacting the Tax Code contained the a provision stating that it did not intend to may any substantive revisions, and based upon that intent, and notwithstanding the clear language of Tax Code § 111.104(b), the appellate court determined that the taxpayer lacked standing to seek a refund by not paying taxes directly to the state.[343]

The Supreme Court of Texas overturned the court of appeals, rejecting the notion that prior law and legislative history can "be used to alter or disregard the express terms of a code provision when its meaning is clear [and unambiguous] . . . when considered in its entirety."[344] Therefore, all we can conclude is that, while no substantive change was intended by the Legislative Council in drafting the nonsubstantive bills, should someone discover a substantive change in the clear, unambiguous language of a new Estates Code provision, that change will likely carry the day.[345]

XXI. INADVERTENTLY REVISED APPLICABILITY DATES

In early January, I began receiving numerous questions about different provisions of the Estates Code from practicing attorneys. This was puzzling, since most of the questions were about provisions that the legislature enacted in 2009 or 2011. Obviously, none of these attorneys had ever even bothered to look at the Estates Code until it went into effect on January 1, 2014—given their positions, it was quite understandable why they had not yet looked at the Estates Code until then.

One inquiry concerned the 2011 change to Probate Code § 84, which recognized self-proving affidavits executed in a non-Texas form but that complied with the self-proving affidavit "laws of the state of the testator's domicile at the time of execution."[346] Section 1.17 of REPTL's 2011

339. Fleming Foods of Tex., Inc., v. Rylander, 6 S.W.3d 278, 279 (Tex. 1999) [hereinafter *Fleming Foods*] (quoting TEX. TAX CODE ANN. § 111.104(b) (West 2012)).

340. *Id.* at 280.

341. *Id.* at 281.

342. *Id.* at 281 (citations omitted).

343. *Id.*

344. *Id.* at 284.

345. *See generally id.* (drawing this conclusion from the court's treatment of the Texas Tax Code).

substantive decedents' estates bill, S.B 1198, made this change.[347] Section 1.43(c) of S.B. 1198 provided that "[t]he changes in law made by [§ 84,] . . . Texas Probate Code, as amended by this article, . . . apply only to the estate of a decedent who dies on or after the effective date of this Act."[348] Section 3.02 of S.B. 1198 provided that "[e]xcept as otherwise provided by this Act, this Act takes effect September 1, 2011."[349] So the changes in law due to § 84 only applied to the estates of decedents dying on or after September 1st.[350]

In anticipation of the replacement of the Probate Code with the Estates Code on January 1, 2014, S.B. 1198 was also double-billed.[351] Article 1 of the bill made a number of changes to the Probate Code.[352] Then, Article 2 made the same changes to the corresponding provisions of the Estates Code.[353] For example, § 2.32 of S.B. 1198 made the same changes to § 256.152 of the Estates Code as § 1.17 of S.B. 1198 made to § 84 of the Probate Code.[354] Section 2.54(b)(1) of the bill repealed Probate Code § 84.[355] Additionally, § 2.55 of the bill made all of the changes contained in Article 2, including both the amendment of Estates Code § 256.152 and the repeal of Probate Code § 84, effective on January 1, 2014.[356] But Article 2 did not contain any language limiting the application of the change to Estates Code § 256.152 to decedents dying on or after September 1, 2011, or on any other date, for that matter.[357] It appears that the September 1, 2011 applicability limitation only applied to a statute that is no longer the law (Probate Code § 84), and the current law (Estates Code § 256.152) should be interpreted to allow the foreign will of a 2010 decedent to be considered self-proved.[358]

This should not offend anyone with a strong sense that the Estates Code should be an exact reflection of the Probate Code, as it existed on December 31, 2013—without any substantive changes. That restriction only applied to bills that the Legislative Council prepared as a part of the ongoing statutory revision program, which began over five decades ago.[359] Estates Code § 256.152 was originally enacted in 2009, by H.B. 2502, as part of the nonsubstantive decedents' estates provisions, which were prepared by the Legislative Council—this version was identical, in all respects, to the pertinent

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346. Tex. S.B. 1198, 82d Leg., R.S. (2011) (enrolled version).
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *See id.*
359. *See* TEX. GOV'T CODE ANN. § 323.007 (West 2013) (discussing the statutory revision program); *see also* 2012 DRAFTING MANUAL, *supra* note 16.

portion of Probate Code § 84.[360] However, the 2011 amendment to both was due to a REPTL bill that was never intended to be nonsubstantive.[361]

Due to this oddity, I began wondering about all of the other changes being made to the Probate Code, while the Estates Code was undergoing its enactment process, and how many changes might be subject to a similar applicable date analysis. In reviewing 2009, 2011, and 2013 amendments to the Probate Code, the changes appear to fall into the following categories:

(1) Bills that merely stated that the changes made by the take effect on a particular date, without any further explanation regarding their applicability to situations taking place before or after that effective date. To the extent that these bills created any confusion regarding their applicability, that confusion did not arise as a result of the replacement of a Probate Code provision with an Estates Code provision on January 1, 2014. Therefore, no attempt will be made to identify these changes.

(2) Bills that only made changes to the Estates Code provisions. Most of the 2013 probate and guardianship-related changes fall into this category. Since no change was ever made to the corresponding Probate Code provision before it was repealed on January 1, 2014, there was not any opportunity to have different effective dates for the Estates Code provisions. Similarly, no attempt will be made to identify these changes.

(3) Bills that contained the applicability provision in the language of the statute itself, in which case a nonsubstantive revision to the corresponding Estates Code provision would contain the same applicability provision.

(4) Bills that made changes to Estates Code provisions that correspond with previous changes to Probate Code provisions and that carried forward the provisions relating to the applicability of the Probate Code changes.

(5) Bills that transferred Probate Code provisions to the Estates Code and re-designated those transferred provisions as Estates Code provisions (as opposed to the more common method of enacting an Estates Code provision effective the same date as the corresponding Probate Code provision was repealed).

(6) Bills that enacted Estates Code provisions that reflected existing Probate Code provisions that had not recently been amended but without carrying forward any provisions regarding the applicability of prior changes to the Probate Code provisions.

(7) Finally, bills that made changes to Probate Code provisions *with* specific applicability language that also made changes to corresponding Estates Code provisions *without* specific applicability language.[362]

Because there is no need to discuss bills that fall into either of the first two categories, this discussion will be of those bills that fall into category 3. In

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360. Tex. H.B. 2502, 81st Leg., R.S. (2009) (enrolled version).

361. Tex. S.B. 1198 (containing the amendments resulting from the REPTL bill).

362. *See, e.g.*, *id.* (containing the changes to Probate Code § 84 and Estates Code § 256.152 resulting from S.B. 1198 in 2011).

2011, in response to the federal tax bill that Congress passed at the end of 2010 and its extension of the deadline for making certain qualified disclaimers, S.B. 1198 added Subsection (p) to Probate Code § 37A.[363] The language of Subsection (p) made it applicable only to disclaimers of property passing from "a decedent dying after December 31, 2009, but before December 17, 2010" (the enactment of the federal tax bill).[364] S.B. 1198 also incorporated similar language into new Estates Code § 122.057.[365]

This category is not limited to Probate Code provisions that have been amended in recent years. There are other statutes that have not been changed in recent years that fall within this category. Probate Code § 59A states that a contract to make, or not revoke, a will entered into on or after September 1, 2009, can only be established by a will, or beginning in 2003, by written agreement.[366] That same language was carried forward into Estates Code § 254.004, when it was enacted by the Legislative Council's 2009 nonsubstantive Estates Code bill, H.B. 2502.[367] Going even further back, because the Probate Code enacted new, simplified procedures relating to mineral leases or pooling and unitization agreements, Probate Code § 370 was enacted to allow execution of instruments ancillary to those leases or agreements without court order—division orders—where the leases or agreements were executed prior to January 1, 1956, the effective date of the Probate Code.[368] When the corresponding Estates Code provision, Estates Code § 358.201, was enacted by H.B. 2502, it also applied only to leases or agreements executed prior to January 1, 1956.[369] A similar provision applicable to guardianships, Probate Code § 850, which applied only to leases or agreements executed prior to September 1, 1993, the effective date of Chapter XIII of the Probate Code—what some of us unofficially refer to as the Guardianship Code—was carried forward into Estates Code § 1160.201 by the Legislative Council's 2011 nonsubstantive Estates Code bill, H.B. 2759.[370]

As previously noted, each year, the Legislative Council prepares a general code update bill that enacts changes made in a prior legislative session to a statute that needs to be carried forward into a new code to keep the latter a nonsubstantive revision.[371] For example, in 2011, S.B. 1303 made changes to a

363. *Id.*

364. *Id.*

365. *Id.* And since, by 2013, the extended disclaimer deadline had already passed, the REPTL 2013 decedents' estates bill, H.B. 2912, repealed the now-unnecessary § 122.057 of the Estates Code. Tex. H.B. 2912, 83d Leg., R.S. (2013) (enrolled version).

366. TEX. PROB. CODE ANN. § 59A, *repealed by* Act of June 19, 2009, 81st Leg., R.S., ch. 680, § 10(a), 2009 Tex. Gen. Laws 1512, 1731 (effective Jan. 1, 2014).

367. Tex. H.B. 2502, 81st Leg., R.S. (2009) (enrolled version).

368. TEX. PROB. CODE ANN. § 370, *repealed by* Act of June 19, 2009, 81st Leg., R.S., ch. 680, § 10(a), 2009 Tex. Gen. Laws 1512, 1731 (effective Jan. 1, 2014).

369. Tex. H.B. 2502

370. TEX. PROB. CODE ANN. § 850, *repealed by* Act of June 17, 2011, 82d Leg., R.S., ch. 823, § 3.02(a), 2011 Tex. Gen. Laws 1901, 2094–95 (effective Jan. 1, 2014).

371. *See* discussion *supra* Part XIV.

number of Estates Code provisions to reflect 2009 amendments to corresponding Probate Code provisions that were not double-billed.[372] In 2013, S.B. 1093 served the same purpose, reflecting non-double-billed 2011 changes to Probate Code provisions.[373] Section 1.003, which was identical in both of those bills, contained the following language:

> SECTION 1.003.
> (a) A transition or saving provision of a law codified by this Act applies to the codified law to the same extent as it applied to the original law.
> (b) The repeal of a transition or saving provision by this Act does not affect the application of the provision to the codified law.
> (c) In this section, "transition provision" includes any temporary provision providing for a special situation in the transition period between the existing law and the establishment or implementation of the new law.[374]

The following Probate Code changes fit into category 4:

(1) *Section 64*. In 2009, House Bill 1969 enacted statutory criteria for the enforcement of forfeiture provisions; this change was applicable to the estates of decedents dying on or after June 19, 2009.[375] In 2011, S.B. 1303 carried this change forward into Estates Code § 254.005.[376]

(2) *Section 81(a)*. In 2009, House Bill 1460 limited the description of marriages in probate applications to those dissolving after date of will.[377] The change only applied to an application filed on or after September 1, 2009.[378] In 2011, S.B. 1303 carried this change forward into Estates Code § 256.052(a).[379]

(3) *Section 89A(a)*. In 2009, House Bill 1461 made the same change to muniment of title applications.[380] In 2011, S.B. 1303 carried this change forward into Estates Code § 257.051(a).[381]

(4) *Sections 438B, 439A*. In 2009, House Bill 3075 added Probate Code § 438B and amended §§ 439A(a) and (b) to authorize the addition of convenience signers to accounts, other than "convenience accounts."[382] This change applied to an account, regardless of whether it was established, or the convenience signer was designated, before, on, or after

372. Tex. S.B. 1303, 82d Leg., R.S. (2011) (enrolled version).
373. Tex. S.B. 1093, 83d Leg., R.S. (2013) (enrolled version).
374. *Id.*; Tex. S.B. 1303.
375. Tex. H.B. 1969, 81st Leg., R.S. (2009) (enrolled version).
376. Tex. S.B. 1303.
377. Tex. H.B. 1969.
378. *Id.*
379. Tex. S.B. 1303.
380. Tex. H.B. 1461, 81st Leg., R.S. (2009) (enrolled version).
381. Tex. S.B. 1303.
382. Tex. H.B. 3075, 81st Leg., R.S. (2009) (enrolled version).

September 1, 2009.[383] In 2011, S.B. 1303 carried this change forward into Estates Code §§ 113.051(a), 113.052, 113.106, and 113.1541.[384]

(5) *Sections 605–09*. In 2011, the REPTL guardianship bill, Senate Bill 1196 (S.B. 1196), amended the jurisdiction provisions found in Probate Code §§ 605 through 609; this change was applicable to proceedings commenced on or after September 1, 2011.[385] In 2013, S.B. 1093 carried these changes forward into Chapter 1022 of the newly-enacted Estates Code.[386]

(6) *Sections 612–19*. In 2011, Senate Bill 1 (S.B. 1) amended the venue provisions found in Probate Code §§ 612 through 619; this change was applicable to an application for transfer of a proceeding filed on or after September 28, 2011.[387] In 2013, S.B. 1093 carried these changes forward into Chapter 1023 of the newly-enacted Estates Code.[388]

(7) *Sections 633, 682*. In 2011, Senate Bill 229 amended Probate Code § 633 to require a clear and conspicuous statement regarding the recipient's right to notice in the citation upon application for guardianship.[389] It also amended Probate Code § 682 to require notice of a guardianship application to living relatives within the third degree of consanguinity.[390] These changes applied only to a guardianship application filed on or after September 1, 2011.[391] In 2013, S.B. 1093 carried these changes forward into Estates Code §§ 1051.101 through 1051.106 and § 1101.001.[392]

(8) *Section 652*. In 2011, S.B. 1196 amended Probate Code § 652 to allow a guardianship hearing to be held at any suitable place within the county; this change was applicable to a guardianship matter pending or commenced on or after September 1, 2011.[393] In 2013, S.B. 1093 carried this change forward into Estates Code § 1055.053.[394]

(9) *Section 761*. In 2011, Senate Bill 220 amended Probate Code § 761 to add abusive, negligent, or exploitative conduct with respect to an elderly or disabled ward as a ground for removal; this change was applicable to a removal proceeding commenced on or after September 1, 2011.[395] In 2013, S.B. 1093 carried these changes forward into Estates Code §§ 1203.051 through 1203.056 and § 1203.102.[396]

383. *Id.*
384. Tex. S.B. 1303.
385. Tex. S.B. 1196, 82d Leg., R.S. (2011) (enrolled version).
386. Tex. S.B. 1093, 83d Leg., R.S. (2013) (enrolled version).
387. Tex. S.B. 1, 82d Leg., R.S. (2011) (introduced version).
388. Tex. S.B. 1093.
389. Tex. S.B. 229, 82d Leg., R.S. (2011) (enrolled version).
390. *Id.*
391. *Id.*
392. Tex. S.B. 1093.
393. Tex. S.B. 1196, 82d Leg., R.S. (2011) (enrolled version).
394. Tex. S.B. 1093.
395. Tex. S.B. 220, 82d Leg., R.S. (2011) (enrolled version).
396. Tex. S.B. 1093.

(10) *Sections 761–62*. In 2011, Senate Bill 481 amended Probate Code §§ 761 and 762 to add notice provisions following the removal of a guardian and following the reinstatement of a guardian under certain circumstances.[397] These changes applied only to removal of a guardian ordered by a court on or after September 1, 2011.[398] In 2013, S.B. 1093 carried these changes forward into Estates Code §§ 1203.051 through 1203.056 and § 1203.102.[399]

(11) *Sections 867–73*. In 2011, S.B. 1196 amended Probate Code §§ 867 through 873 to allow the creation of a management trust for a person with physical disabilities only; this change was applicable to an application filed on or after September 1, 2011.[400] In 2013, S.B. 1093 carried these changes forward into Estates Code §§ 1301.051 through 1301.204.[401]

(12) *Sections 910–11*. In 2011, S.B. 1196 amended Probate Code §§ 910 and 911 to allow the creation of a sub-account in a pooled trust, only for a person with physical disabilities; this change was applicable to an application filed on or after September 1, 2011.[402] In 2013, S.B. 1093 carried these changes forward into Estates Code §§ 1302.001 through 1302.002.[403]

In 2009, House Bill 587 amended the attorney's fees provisions found in Probate Code § 665B to allow the court to look to other sources of compensation for an attorney; this change was applicable to the payment of attorney's fees, pursuant to an application for the appointment of a guardian filed on or after September 1, 2009.[404] In the same session, the REPTL guardianship bill, House Bill 3080 (H.B. 3080), amended Probate Code § 665B to authorize payment of attorney's fees for an application seeking creation of a management trust only; this change was applicable to compensation for services performed on or after September 1, 2009.[405] In 2011, the Legislative Council's nonsubstantive Estates Code bill relating to decedents' estates, H.B. 2759, transferred Probate Code § 665B, as amended by both 2009 bills, to Subpart H, Part 2, Subtitle Z, Title 3, and re-designated it as Estates Code § 665B, effective January 1, 2014.[406] Then, in 2013, the REPTL guardianship bill, House Bill 2080 (H.B. 2080), retransferred Probate Code § 665B to Subchapter B, Chapter 1155, and re-designated it as Estates Code § 1115.054, effective January 1, 2014.[407] Since the original

397. Tex. S.B. 481, 82d Leg., R.S. (2011) (enrolled version).
398. *Id.*
399. Tex. S.B. 1093.
400. Tex. S.B. 1196, 82d Leg., R.S. (2011) (enrolled version).
401. Tex. S.B. 1093.
402. Tex. S.B. 1196.
403. Tex. S.B. 1093.
404. Tex. H.B. 587, 81st Leg., R.S. (2009) (enrolled version).
405. Tex. H.B. 3080, 81st Leg., R.S. (2009) (enrolled version).
406. Tex. H.B. 2759, 82d Leg., R.S. (2011) (enrolled version).
407. Tex. H.B. 2080, 83d Leg., R.S. (2013) (enrolled version).

section of the Probate Code was never repealed, but rather, it was just amended renumbered and transferred to the Estates Code, as Estates Code § 1155.054, the applicability dates in the prior bills amending Probate Code § 665B should continue to apply.[408]

While applicability problems could arise with respect to earlier amendments to the Probate Code, this discussion will focus on the 2009, 2011, and 2013 amendments to the Probate Code.[409] For example, Probate Code § 58b voids a testamentary gift to an attorney, relative of the attorney, or employee of the attorney if the attorney prepares the will for a testator who is not closely related.[410] It was originally enacted by S.B. 1176 in 1997, and applied only to a will executed on or after September 1st of that year.[411] In 2005, § 58b was further amended by H.B. 1186, and Probate Code § 71A was added to establish a presumption that a specific gift of an asset that served as security for a debt was made subject to the debt, reversing the previous presumption.[412] Both changes applied only to wills executed on or after September 1, 2005.[413] In 2009, H.B. 2502, the nonsubstantive decedents' estates bill prepared by the Legislative Council, enacted Estates Code § 254.003, which repealed Probate Code § 58b, and Estates Code §§ 255.301 through 255.303, which repealed Probate Code § 71A, all effective January 1, 2014; none of the language retained the applicability provisions that applied to the Probate Code amendments.[414] This foregoing discussion not intended as an exhaustive list of all of the Probate Code changes that fit within category 6.

The only real difference between category 6 and category 7 amendments is that the latter amendments were enacted in 2009 or later, once the enactment of the Estates Code commenced—the possible elimination of an applicability date may make very little practical difference. For example, the "one-step" self-proving affidavit was originally authorized for Texas wills executed on or after September 1, 2011.[415] The fact that this limitation may have been removed probably has no effect: What Texas lawyer would have prepared a "one-step" will prior to September 1, 2011? The following Probate Code changes fit into Category 7:

(1) *Section 4A–H*. In 2009, REPTL's jurisdiction provisions related to decedents' estates were added to S.B. 408, at the end of the session.[416] They replaced Probate Code §§ 4, 5, and 5A with new Probate Code §§ 4A through

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408. *See id.*
409. *See infra* notes 410–58 and accompanying text.
410. *See* TEX. PROB. CODE ANN. § 58b, *repealed by* Act of June 19, 2009, 81st Leg., R.S., ch. 680, § 10(a), 2009 Tex. Gen. Laws 1512, 1731 (effective Jan. 1, 2014).
411. Tex. S.B. 1176, 75th Leg., R.S. (1997) (enrolled version).
412. Tex. H.B. 1186, 79th Leg., R.S. (2005) (enrolled version).
413. *Id.*
414. Tex. H.B. 2502, 81st Leg., R.S. (2009) (enrolled version).
415. *See infra* notes 424–25 and accompanying text.
416. Tex. S.B. 408, 81st Leg., R.S. (2009) (enrolled version).

4H, applicable proceedings commenced on or after September 1, 2009.[417] The same bill was enacted Estates Code Chapters 31 and 32, which repealed Probate Code §§ 4A through 4 H, effective January 1, 2014; there was not any language retaining the applicability provisions that applied to the earlier Probate Code amendments.[418]

(2) *Sections 4D, 4H, 6–8B*. In 2011, S.B. 1196 amended the jurisdiction and venue provisions found in Probate Code §§ 4D, 4H, and 6 through 8B, applicable to a proceeding commenced on or after September 1, 2011.[419] The bill made the same changes in Estates Code §§ 32.003 and 32.007 as made to Probate Code §§ 4D and 4H, and the same changes to Estates Code Chapter 33 as made to Probate Code §§ 6 through 8B.[420] The changes to the Estates Code provisions, and the repeal of the amended Probate Code provisions, went into effect January 1, 2014, without any reference to the September 1, 2011 applicability date.[421]

(3) *Section 11B*. In 2011, S.B. 2492 added Probate Code § 11B to exempt estates of certain law enforcement officers, firefighters, and others who died on or after September 1, 2011, from probate fees.[422] The bill made the same changes by adding Estates Code § 53.054, repealing Probate Code § 11B, effective January 1, 2014, without any reference to the September 1, 2011 applicability date.[423]

(4) *Section 59*. In 2011, S.B. 1196 amended Probate Code § 59 to authorize the "one-step" self-proving affidavit, effective for wills executed on or after September 1, 2011.[424] The bill made the same changes to Estates Code §§ 251.101, 251.102, 251.104, and 251.1045, which repealed Probate Code § 59, effective January 1, 2014; there was no reference to the September 1, 2011 applicability date.[425]

(5) *Sections 64, 67, 84, 128A, 143, 145, 145A–C, 146, 149C, 227, 250, 256, 260, 271, 286, 293, 385, 471–73*. In 2011, S.B. 1196 amended the following additional provisions: "probable cause" was changed to "just cause" in § 64 (relating to the enforcement of forfeiture provisions); the share of a pretermitted child under § 67 was changed if the pretermitted child's other parent is not the surviving spouse of the testator; § 84 was amended to recognize the self-proved nature of a will executed in accordance with the laws of the state or foreign country of the testator's domicile at the time of the execution, or executed with the formalities required by the Uniform Probate Code self-proving affidavit—the change that inspired this entire discussion;

417. *Id.*
418. *Id.*
419. Tex. S.B. 1196, 82d Leg., R.S. (2011) (enrolled version).
420. *Id.*
421. *Id.*
422. Tex. S.B. 2492, 82d Leg., R.S. (2011) (introduced version).
423. *Id.*
424. Tex. S.B. 1196.
425. *Id.*

§ 128A amended which beneficiaries are, and are not, entitled to notice of a probate proceeding; §§ 143, 145, 149C, 227, 250, 256, 260, 271, 286, 293, and 385 were amended to authorize the new affidavit in lieu of inventory; § 145 was amended to require a determination of heirship for independent administration by agreement in intestacies and authorize natural guardians of minors and trustees for incapacitated beneficiaries to consent; new §§ 145A, 145B, and 145C allowed granting a power of sale by consent; § 146 was amended to clarify claims procedures in independent administrations; § 149C was amended to allow removal of an independent executor who "becomes incapable of properly performing the independent executor's fiduciary duties due to a material conflict of interest"; and §§ 471 through 473 (relating to provisions in revocable trusts in favor of ex-spouses) were amended to conform with prior amendments relating to provisions in wills relating to ex-spouses.[426] All of the changes made to these Probate Code Provisions applied only to the estate of a decedent dying on or after September 1, 2011.[427] The bill made the same changes to the following corresponding provisions of the Estates Code: §§ 123.051 through 123.055; § 254.005; §§ 255.053 through 255.054 and § 255.056 (new); § 256.152; §§ 308.001 through 308.004 and new § 308.0015; § 354.001; new Chapters 401 through 404; § 361.155; § 309.051, §§ 309.055 through 309.056 (new), and § 309.101; § 353.051, §§ 353.101 through 353.107; and § 360.253.[428] The changes to the Estates Code provisions, and the repeal of the amended Probate Code provisions, went into effect January 1, 2014, without any reference to the September 1, 2011 applicability date.[429]

(6) *Section 93*. In 2011, S.B. 1196 amended Probate Code § 83(a) to prohibit the severance or bifurcation of a proceeding where two wills are being offered for probate, applicable to an application for probate pending or filed on or after September 1, 2011.[430] The bill made the same changes to Estates Code § 256.101, which repealed Probate Code § 83, effective January 1, 2014, without any reference to the September 1, 2011 applicability date.[431]

(7) *Sections 139–40, 143, 271(a)–(b), 272–76, 286–92*. In 2011, H.B. 2492 amended Probate Code §§ 139, 140, 143, 271(a) and (b), 272 through 276, and 286 through 292 to add adult incapacitated children to the list of persons entitled to receive a family allowance and set-aside of exempt property, applicable only to the estate of a decedent dying on or after September 1, 2011.[432] The bill made the same changes to the following corresponding provisions of the Estates Code: §§ 353.051(a) and (b), 353.052(b) through (d), 353.053(b), 353.054(b) through (d), 353.055(a), 353.056(a), 353.101,

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426. *Id.*
427. *Id.*
428. *Id.*
429. *Id*
430. *Id.*
431. *Id.*
432. Tex. H.B. 2492, 82d Leg., R.S. (2011) (enrolled version).

353.102(a), 353.104, 353.105(b) through (e), 353.106(a) and 353.107(a); § 354.001(a); and §§ 451.001(a) and (d) and 451.002(b).[433] The changes to the Estates Code provisions, and the repeal of the amended Probate Code provisions, went into effect January 1, 2014, without any reference to the September 1, 2011 applicability date.[434]

(8) *Section 149B*. In 2011, S.B. 1196 amended Probate Code § 149B to allow a petition for accounting and distribution to be brought two years from initial grant of letters, applicable to a petition filed on or after September 1, 2011.[435] The bill made the same changes to Estates Code § 405.001, which repealed Probate Code § 149B, effective January 1, 2014, without any reference to the September 1, 2011 applicability date.[436]

(9) *Section 151.* In 2011, S.B. 1196 amended Probate Code § 151 to authorize filing a notice of closing an estate in lieu of a full closing report in independent administrations, applicable to a closing report or notice of closing filed on or after September 1, 2011.[437] The bill made the same changes to Estates Code §§ 405.002 and 405.004 through 405.007, which repealed Probate Code § 151, effective January 1, 2014, without any reference to the September 1, 2011 applicability date.[438]

(10) *Section 273*. In 2013, H.B. 789 increased the allowances in lieu of homestead and other exempt property found in Probate Code § 273, effective for the estates of decedents dying on or after September 1, 2013.[439] The same bill made similar changes to Estates Code § 353.053(b), which repealed Probate Code § 273, effective January 1, 2014, without any reference to the September 1, 2013 applicability date.[440]

(11) *Sections 436, 439*. In 2011, S.B. 1196 amended Probate Code § 436 to allow a charity to be a POD beneficiary of an account and Probate Code § 439 to prohibit inferring a survivorship agreement on a multi-party account from the mere fact that the account is designated as JT TEN, Joint Tenancy, or joint, or other similar language, applicable to multiparty accounts created or existing on or after September 1, 2011.[441] The bill made the same changes to Estates Code §§ 113.001 through 113.004, which repealed Probate Code § 436, and Estates Code §§ 113.151 through 113.153 and § 153.155, which repealed Probate Code § 439, effective January 1, 2014, without any reference to the September 1, 2011 applicability date.[442]

433. *Id.*
434. *Id.*
435. Tex. S.B. 1196.
436. *Id.*
437. *Id.*
438. *Id.*
439. Tex. H.B. 789, 83d Leg., R.S. (2013) (enrolled version).
440. *Id.*
441. Tex. S.B. 1196.
442. *Id.*

(12) *Section 452*. In 2011, S.B. 1196 amended Probate Code § 452 to prohibit inferring a community property survivorship agreement from the mere fact that the account is designated as JT TEN, Joint Tenancy, or joint, or other similar language, applicable to agreements created or existing on or after September 1, 2011.[443] The bill made the same changes to Estates Code § 112.052, which repealed Probate Code § 452, effective January 1, 2014, without any reference to the September 1, 2011 applicability date.[444]

(13) *Sections 665, 665D, 868*. In 2009, S.B. 1196 amended Probate Code § 665 to authorize quarterly payment of guardian compensation; added § 665D to limit the compensation of an attorney serving as guardian; and amended § 868 to incorporate provisions reducing or eliminating the compensation of a trustee of a management trust.[445] These changes were applicable to the payment, reduction, or elimination of compensation for services performed on or after September 1, 2009.[446] In 2011, H.B. 2759, the nonsubstantive guardianship bill prepared by the Legislative Council, enacted Estates Code Chapter 1155, which repealed Probate Code §§ 665 and 665D, and Estates Code § 1301.058, §§ 1301.101 through 1301.103, and § 1301.153, which repealed Probate Code § 868, all effective January 1, 2014, with no language retaining the applicability provisions that applied to the earlier Probate Code amendments.[447]

(14) *Section 687*. In 2009, S.B. 2344 amended the requirements for a physician's certificate in a guardianship proceeding found in Probate Code § 687, applicable to an application for creation of a guardianship filed on or after September 1, 2009.[448] In 2011, H.B. 2759, the nonsubstantive guardianship bill prepared by the Legislative Council, enacted Estates Code §§ 1101.103 through 1101.104, which repealed Probate Code § 687, all effective January 1, 2014, with no language retaining the applicability provisions that applied to the earlier Probate Code amendments.[449]

(15) *Sections 867, 868C, 870*. In 2009, S.B. 1196 amended Probate Code §§ 867 and 870 to require an attorney ad litem in a proceeding to establish a management trust and expand ability to appoint a non-corporate trustee and added Probate Code § 868C to authorize the transfer of management trust assets to a pooled trust.[450] These changes were applicable to an application for creation, modification, or termination of a management trust filed on or after September 1, 2009.[451] In 2011, H.B. 2759, the nonsubstantive guardianship

443. *Id.*
444. *Id.*
445. *Id.*
446. *Id.*
447. Tex. H.B. 2759, 82d Leg., R.S. (2011) (enrolled version).
448. Tex. S.B. 2344, 81st Leg., R.S. (2009) (enrolled version).
449. Tex. H.B. 2759.
450. Tex. S.B. 1196.
451. *Id.*

bill prepared by the Legislative Council, enacted Estates Code §§ 1301.051 through 1301.058, which repealed Probate Code § 867, Estates Code § 1301.202, which repealed Probate Code § 868C, and Estates Code § 1301.203, which repealed Probate Code § 870, all effective January 1, 2014, with no language retaining the applicability provisions that applied to the earlier Probate Code amendments.[452]

(16) *Sections 892–93*. In 2011, S.B. 1 amended the provisions relating to the transfer of a foreign guardianship into this state found in Probate Code § 892 (and repealed § 893), applicable to an application for receipt and acceptance of a foreign guardianship filed on or after September 28, 2011.[453] The same bill made similar changes to Estates Code §§ 1253.051 and 1253.053 (and repealed Estates Code § 1253.051), effective January 1, 2014, without any reference to the September 28, 2011 applicability date.[454]

(17) *Sections 894–95*. In 2011, S.B. 1 amended the provisions relating to the criteria for determining the most appropriate forum for a guardianship found in Probate Code § 894 and new § 895, applicable to a guardianship proceeding filed on or after September 28, 2011.[455] The same bill made similar changes to Estates Code § 1253.102, which repealed Probate Code § 894, and Estates Code §§ 1253.151 and 1253.152, which repealed Probate Code § 895, effective January 1, 2014, without any reference to the September 28, 2011 applicability date.[456]

(18) *Sections 910–16*. In 2009, S.B. 1196 added Probate Code §§ 910 through 916, providing for court establishment of a pooled account subaccount for an incapacitated person, applicable to an application filed on or after September 1, 2009.[457] In 2011, H.B. 2759, the nonsubstantive guardianship bill prepared by the Legislative Council, enacted Estates Code Chapter 1302, which repealed Probate Code §§ 910 through 916, effective January 1, 2014, with no language retaining the applicability provisions that applied to the earlier Probate Code amendments.[458]

XXII. OTHER FREE RESOURCES

The Legislative Council prepared and posted two revisor's reports online—the first, an 882-page report indicating the derivation of each section of the nonsubstantive Estates Code passed in 2009 and the second, a 715-page report indicating the derivation of each section of the nonsubstantive Estates

452. Tex. H.B. 2759.
453. Tex. S.B. 1, 82d Leg., R.S. (2011) (introduced version).
454. *Id.*
455. *Id.*
456. *Id.*
457. Tex. S.B. 1196, 82d Leg., R.S. (2011) (enrolled version).
458. Tex. H.B. 2759, 82d Leg., R.S. (2011) (enrolled version).

Code passed in 2011.[459] A link to both of these reports is available on the Texas Legislative Council's website.[460]

Professor Gerry W. Beyer of the Texas Tech University School of Law has prepared and posted online a helpful compilation of the entire Estates Code, through the 2013 session; Professor Beyer has also posted derivation and disposition tables to help with locating where each of the Probate Code sections went (or where the different Estates Code sections came from).[461] The online versions of the Texas Constitution and the state statutes now include the Texas Estates Code.[462] These items, and specifically the Estates Code, can be found on Professor Beyer's website.[463]

XXIII. POSTSCRIPT ON ESTATES CODE SECTION 352.003

Was § 352.003 inadvertently repealed? No! However, you may have a publication incorrectly indicating that it was repealed.

Estates Code § 352.003 was enacted in 2009 as part of the Legislative Council nonsubstantive Estates Code bill, effective January 1, 2014, enacting decedents' estates provisions, and it incorporates Probate Code § 241(a), the portion of the Probate Code that allows a court to award additional compensation to personal representatives if they manage a farm, ranch, factory or other business or if the compensation produced by the five-plus-five formula is unreasonably low.[464]

In 2011, REPTL proposed changing a representative's standard compensation from the five-plus-five formula to "reasonable compensation."[465] In the bill that REPTL introduced, H.B. 2046, these changes were to Estates Code §§ 352.001 and 352.002—these can be found in § 2.36 of S.B. 1198, on page 81.[466] In addition, § 352.003 was repealed because it would no longer be needed if the standard compensation was reasonable; this repeal was included at the end of H.B. 2046.[467]

However, H.B. 2046 was not the final bill passed.[468] Opposition to the compensation change arose, so REPTL agreed to drop the proposed changes to §§ 352.001 and 352.002; thus, because there was still a need for § 352.003,

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459. *See Estates Code*, *supra* note 172.

460. *Id.*

461. *See* Gerry W. Beyer, *Texas Estates Code*, PROFESSORBEYER.COM (last visited June 5, 2014) [Beyer, *Texas Estates Code*], http://www.professorbeyer.com/Estates_Code/Texas_Estates_Code.html.

462. *Texas Constitution and Statutes*, TEX. CONST. AND STAT. (last visited June 5, 2014), www.statutes.legis.state.tx.us/?link=ES.

463. *See* Beyer, *Texas Estates Code*, *supra* note 461.

464. Tex. H.B. 2502, 81st Leg., R.S. (2009) (enrolled version).

465. *See* Glenn M. Karisch, *REPTL Decedents' Estates Bill is Worth a Closer Look*, TEXASPROBATE.COM (Mar. 3, 2011), http://texasprobate.com/index/2011/3/3/reptl-decedents-estates-bill-is-worth-a-closer-look.html.

466. Tex. H.B. 2046, 82d Leg., R.S. (2011) (introduced version).

467. *Id.*

468. *Id.*

there was no desire to repeal it.[469] In § 2.54(a)—the successor to § 2.51(a)—of the enrolled version, S.B. 1198, two sections of the Estates Code are repealed.[470]

Here's where the problem arises: § 2.54(a) of S.B. 1198, as reflected in Chapter 1338 of the 2011 session laws (which is not the bill itself), incorrectly states that § 352.003 is one of the two sections that were repealed.[471] This would have been correct had the introduced version, H.B. 2046, passed, but the enrolled version, which actually passed, was S.B. 1198.[472]

Since Thomson Reuters (West) publishes the session laws, this accounts for its carrying forward this mistake on page 1400 of the 2013 edition of Johanson's Texas Probate Code.[473] The 2013–2014 edition of O'Connor's Estates Code Plus, published by Jones-McClure, does not contain this same mistake.[474]

West was promptly notified of the error, and by Monday, January 13, 2014, it had corrected § 352.003 on Westlaw.[475] West is planning to send corrections to those who purchased hard copies of the Estates Code.

If you do not have the text of the unrepealed Estates Code § 352.003 handy, the original (and current) version is as follows:

> § 352.003. ALTERNATE COMPENSATION
> (a) The court may allow an executor, administrator, or temporary administrator reasonable compensation for the executor's or administrator's services, including unusual efforts to collect funds or life insurance, if:
> (1) the executor or administrator manages a farm, ranch, factory, or other business of the estate; or
> (2) the compensation calculated under Section 352.002 is unreasonably low.
> (b) The county court has jurisdiction to receive, consider, and act on applications from independent executors for purposes of this section.[476]

469. Tex. S.B. 1198, 82d Leg., R.S. (enrolled version).

470. *Id.* (noting that Probate Code § 352.003 is not one of the repealed sections).\

471. *See* Act of June 17, 2011, 82d Leg., R.S., ch. 1338, § 2.54(a), 2011 Tex. Gen. Laws 3882, 3933 (effective Jan. 1, 2014).

472. *See id.*; *see also* Tex. H.B. 2046 (noting that H.B. 2046 was merely introduced—it was not the version of the bill that the legislature passed); Tex. S.B. 1198 (noting that S.B. 1198 was the enrolled version of the bill, as enacted by the legislature).

473. *See* STANLEY JOHANSON, JOHANSON'S TEXAS PROBATE CODE ANNOTATED 1400 (2013 ed.) (noting that West's other printed versions of the Estates Code leave it "blank," rather than repealed, because it was repealed in 2011, before its effective date of 2014).

474. KENNETH J. FAIR ET AL., O'CONNOR'S ESTATES CODE PLUS (2013–2014 ed.).

475. *See generally* TEX. ESTATES CODE ANN. § 352.003 (West 2014) (noting that the Westlaw version of the Estates code, which is accessible online, no longer contains the error).

476. *Id.*